Saskatchewan
Labour

Decisions

of the Saskatchewan Labour Relations Board and Court Cases Arising Therefrom

Volume III
1965-1974

A full, official text of reasons
for decisions rendered by the
Saskatchewan Labour Relations Board,
and of Court Cases arising therefrom,
with Case Tables and Topical Index.

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Hon. Lorne McLaren
Minister

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A/Deputy Minister

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FOREWORD

This report is an official text of all written decisions reached by the Saskatchewan Labour Relations Board and of the court cases arising therefrom. It is designed to provide lawyers, legislators, trade unionists, and other concerned parties with a general authoritative coverage of Board decisions and judicial interpretations relating to the provisions of The Saskatchewan Trade Union Act from 1965 to 1974.

The Report has been produced in three sections. Section I consists of the decisions of the Labour Relations Board, Section II consists of reports of court judgments arising from the decisions of the Board, and the concluding Section III comprises *The Trade Union Act*, as amended within the period.

Each decision appears in chronological order of the date it was reached, with the cases being numerically noted. Preceding every decision is a summarized paragraph stating the full name of the case, the date of the decision, hyphenated headnotes emphasizing main issues and statutes cited in the course of judgment.

This volume constitutes an authoritative work, being compiled from original and complete reports of the decisions handed down by the Saskatchewan Labour Relations Board and the courts. The material was gathered for the Saskatchewan Department of Labour during the summer months of 1973 and 1974 by Kola Adeniji, LL.M., Lise Taylor and Leslie Sullivan. The assistance of G. J. D. Taylor, Q.C. in reviewing the original manuscript is gratefully acknowledged.

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Policy Planning and Research Division,
Saskatchewan Department of Labour,
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1953 - 1974

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PART I

REASONS FOR DECISIONS

of the

LABOUR RELATIONS BOARD

made under

The Trade Union Act

1965 - 1974

SASKATCHEWAN LABOUR RELATIONS BOARD

3.001 January 4, 1965

Maple Creek Garage Employees' Union No. 1607

v.

Maple Creek Motors Ltd.

Application to restrain employer from Unfair Labour Practice — Failure to negotiate in good faith — Definition of collective bargaining — Application granted.

R.S.S. 1953. The Trade Union Act, C. 259,
s.s. 2 (1); 5 (d) (e); 8 (1) (c).
The Labour Relations Act.

The Board consisted of Judge R. H. King, Chairman, and Mr. C. R. Wyatt, Vice-Chairman and Messrs. J. R. Ingram, R. S. Champ, V. C. Hession, S. E. Williams, members.

APPLICATION

The applicant has alleged an unfair labour practice within the meaning of section 8(1)(c) of *The Trade Union Act*, R.S.S. 1953, against the respondent employer. It is alleged that they failed to bargain collectively with representatives of the applicant, who represented the majority of the employees of the said respondent and who were certified as the bargaining agent on the 17th day of September, A.D., 1963.

BREAKDOWN OF NEGOTIATIONS

Considerable negotiation was carried on by the applicant and the respondent and three other employers who had similar businesses in Maple Creek, Saskatchewan and for whom the applicant had been certified as the bargaining agent. It was the Board opinion that the applicant made every effort to negotiate and complete a collective bargaining agreement with this respondent. The evidence disclosed that the respondent, in conjunction with the above mentioned employers in Maple Creek, Saskatchewan, were anything but anxious to negotiate an agreement.

Finally when no agreement could be agreed upon, a conciliation board was set up under the terms as set out in *The Labour Relations Act.* This conciliation board met on the 20th day of May, A.D., 1964, at which time an agreement as set out and introduced in evidence as exhibit P. 13 was signed by the respondent and by the union representatives. This agreement recites in part that, "Whereas the employer and the union

have reached an agreement in principle to execute a collective bargaining agreement on terms drafted by the employer's solicitor, M. A. MacPherson, Jr. with the exception of the following four points;

No. 1, Wage rates
No. 2, Seniority
No. 3, Hours of Work
No. 4, Arbitration."

Section 1 of the said agreement reads as follows: "The employer and the union will execute an agreement to remain in force for one year from today and thereafter until a new agreement is agreed to and executed on the terms and conditions drafted by M. A. MacPherson with the amendment agreed to by both parties prior to this date". The agreement then went on and dealt with the four above mentioned points.

The union, sometime later, requested the respondent's solicitor to submit the agreed upon collective bargaining agreement for execution. This was never done. The solicitor, during a telephone conversation, suggested that they, the applicant, prepare the agreement and this they did. Upon presentation of this collective bargaining agreement, the respondent and his fellow employers questioned some of the clauses and the agreement was never signed. This unfair labour practice application is the result of the failure to execute the collective bargaining agreement.

S. 2(1) OF THE TRADE UNION ACT CONSIDERED

Subsection (1) of section 2 of *The Trade Union Act* reads as follows:

> "'Bargaining collectively' means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a collective bargaining agreement, the embodiment in writing of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such written agreement and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in a unit of employees appropriate for the purpose of so negotiating."

DECISION

In view of the definition of bargaining collectively as set out above, the Board is of the opinion that the respondent, by failing or refusing to embody in writing and sign the agreement as arrived at through negotiation, has failed to bargain collectively and is thus committing an unfair labour practice within the meaning of section 8 (1) (c) of *The Trade Union Act*.

(Sgd.) "R. H. KING,"
Chairman.

January 4, 1965.

3.002 January 4, 1965

Maple Creek Garage Employees' Union No. 1607

v.

A. E. Harrigan and R. E. Harrigan,
and
Link Farm Equipment, Maple Creek.

Application to restrain employer from Unfair Labour Practice — Failure to negotiate in good faith — Definition of collective bargaining — Application granted.

R.S.S. 1953. The Trade Union Act, C. 259,
s.s. 2 (1); 5 (d) (e); 8 (1) (c).
The Labour Relations Act.

The Board consisted of Judge R. H. King, Chairman, and Mr. C. R. Wyatt, Vice-Chairman and Messrs. J. R. Ingram, R. S. Champ, V. C. Hession, S. E. Williams, members.

APPLICATION

The applicant has alleged an unfair labour practice within the meaning of section 8(1)(c) of *The Trade Union Act*, R.S.S. 1953, against the respondent employer. It is alleged that they failed to bargain collectively with representatives of the applicant, who represented the majority of the employees of the said respondent and who were certified as the bargaining agent on the 17th day of September, A.D., 1963.

BREAKDOWN OF NEGOTIATIONS

Considerable negotiation was carried on by the applicant and the respondent and three other employers who had similar businesses in Maple Creek, Saskatchewan and for whom the applicant had been certified as the bargaining agent. It was the Board opinion that the applicant made every effort to negotiate and complete a collective bargaining agreement with this respondent. The evidence disclosed that the respondent, in conjunction with the above mentioned employers in Maple Creek, Saskatchewan, were anything but anxious to negotiate an agreement.

Finally when no agreement could be agreed upon, a conciliation board was set up under the terms as set out in *The Labour Relations Act*. This conciliation board met on the 20th of May, A.D., 1964, at which

time an agreement as set out and introduced in evidence as exhibit P. 13 was signed by the respondent and by the union representatives. This agreement recites in part that, "Whereas the employer and the union have reached an agreement in principle to execute a collective bargaining agreement on terms drafted by the employer's solicitor, M. A. MacPherson, Jr. with the exception of the following four points;

No. 1, Wage rates
No. 2, Seniority
No. 3, Hours of Work
No. 4, Arbitration."

Section 1 of the said agreement reads as follows: "The employer and the union will execute an agreement to remain in force for one year from today and thereafter until a new agreement is agreed to and executed on the terms and conditions drafted by M. A. MacPherson with the amendment agreed to by both parties prior to this date". The agreement then went on and dealt with the four above mentioned points.

The union, sometime later, requested the respondent's solicitor to submit the agreed upon collective bargaining agreement for execution. This was never done. The solicitor, during a telephone conversation, suggested that they, the applicant, prepare the agreement and this they did. Upon presentation of this collective bargaining agreement, the respondent and his fellow employers questioned some of the clauses and the agreement was never signed. This unfair labour practice application is the result of the failure to execute the collective bargaining agreement.

S. 2(1) OF THE TRADE UNION ACT CONSIDERED

Subsection (1) of section 2 of *The Trade Union Act* reads as follows:

> "'Bargaining collectively' means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a collective bargaining agreement, the embodiment in writing of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such written agreement and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in a unit of employees appropriate for the purpose of so negotiating."

DECISION

In view of the definition of bargaining collectively as set out above, the Board is of the opinion that the respondent, by failing or refusing to embody in writing and sign the agreement as arrived at through negotiation, has failed to bargain collectively and is thus committing an unfair labour practice within the meaning of section 8(1)(c) of *The Trade Union Act.*

(Sgd.) "R. H. KING,"
Chairman.

January 4, 1965.

3.003 January 4, 1965

Maple Creek Garage Employees' Union No. 1607

v.

George E. Simpson
and
Simpson's Garage, Maple Creek.

Application to restrain employer from Unfair Labour Practice — Failure to negotiate in good faith — Definition of collective bargaining — Application granted.

R.S.S. 1953. The Trade Union Act, C. 259,
s.s. 2 (1); 5 (d) (e); 8 (1) (c).
The Labour Relations Act.

The Board consisted of Judge R. H. King, Chairman, and Mr. C. R. Wyatt, Vice-Chairman and Messrs. J. R. Ingram, R. S. Champ, V. C. Hession, S. E. Williams, members.

APPLICATION

The applicant has alleged an unfair labour practice within the meaning of section 8(1)(c) of *The Trade Union Act*, R.S.S. 1953 against the respondent employer. It is alleged that they failed to bargain collectively with representatives of the applicant, who represented the majority of the employees of the said respondent and who were certified as the bargaining agent on the 17th day of September, A.D., 1963.

BREAKDOWN OF NEGOTIATIONS

Considerable negotiation was carried on by the applicant and the respondent and three other employers who had similar businesses in Maple Creek, Saskatchewan and for whom the applicant had been certified as the bargaining agent. It was the Board opinion that the applicant made every effort to negotiate and complete a collective bargaining agreement with this respondent. The evidence disclosed that the respondent, in conjunction with the above mentioned employers in Maple Creek, Saskatchewan, were anything but anxious to negotiate an agreement.

Finally when no agreement could be agreed upon, a conciliation board was set up under the terms as set out in *The Labour Relations Act.* This conciliation board met on the 20th day of May, A.D., 1964, at which

time and agreement as set out and introduced in evidence as exhibit P. 13 was signed by the respondent and by the union representatives. This agreement recites in part that, "Whereas the employer and the union have reached an agreement in principle to execute a collective bargaining agreement on terms drafted by the employer's solicitor, M. A. MacPherson, Jr. with the exception of the following four points;

No. 1, Wage rates
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No. 3, Hours of Work
No. 4, Arbitration."

Section 1 of the said agreement reads as follows: "The employer and the union will execute an agreement to remain in force for one year from today and thereafter until a new agreement is agreed to and executed on the terms and conditions drafted by M. A. MacPherson with the amendment agreed to by both parties prior to this date". The agreement then went on and dealt with the four above mentioned points.

The union, sometime later, requested the respondent's solicitor to submit the agreed upon collective bargaining agreement for execution. This was never done. The solicitor, during a telephone conversation, suggested that they, the applicant, prepare the agreement and this they did. Upon presentation of this collective bargaining agreement, the respondent and his fellow employers questioned some of the clauses and the agreement was never signed. This unfair labour practice application is the result of the failure to execute the collective bargaining agreement.

S. 2(1) OF THE TRADE UNION ACT CONSIDERED

Subsection (1) of section 2 of *The Trade Union Act* reads as follows:

> "'Bargaining collectively' means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a collective bargaining agreement, the embodiment in writing of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such written agreement and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in a unit of employees appropriate for the purpose of so negotiating."

DECISION

In view of the definition of bargaining collectively as set out above, the Board is of the opinion that the respondent, by failing or refusing to embody in writing and sign the agreement as arrived at through negotiation, has failed to bargain collectively and is thus committing an unfair labour practice within the meaning of section 8 (1) (c) of *The Trade Union Act.*

(Sgd.) "R. H. KING,"
Chairman.

January 4, 1965.

3.004 March 19,1965

Canadian Union of Public Employees', Local Union 935

v.

Government of Saskatchewan at the Psychiatric Centre, Yorkton

Application for determination of an appropriate unit — Certification — Definition of employee — Interpretation of "acting on behalf of Management in a confidential capacity" — Application granted but unit modified.

R.S.S. 1953. The Trade Union Act, C. 259, s.s. 2 (5); 5 (a) (b) (c).

The Board consisted of Judge R. H. King, Esq., Chairman, and Messrs. R. S. Champ, H. L. Saunders, V. C. Hession and M. Upton, members.

The decision of the Board was delivered by the chairman.

APPLICATION

This application is for an order under section 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1953. The applicant and the respondent stated there was only one area of disagreement insofar as the application was concerned and that was whether ward supervisors are employees within the meaning of section 2, subsection 5, of the said Act.

Section 2, subsection 5, of *The Trade Union Act* reads in part as follows:

> "'employee' means any person in the employment of an employer, except any person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, . . ."

STATUS OF WARD SUPERVISORS

The first question that the Board considered was if the evidence established that ward supervisors were persons who regularly exercise authority to employ or discharge employees within the meaning of the Act. The Board, in considering this question, was cognizant of the procedure regarding the employment and discharge of employees that applies to the respondent. This is controlled to a large degree by the Public Service Commission. It was the Board's opinion, however, that, even taking this into consideration, the ward supervisors' participation

in either the employment or discharge of employees was of such a remote nature and of such a limited degree that they are not persons who regularly exercise the authority to employ or discharge employees within the meaning of the Act.

The next question to be considered is as to whether ward supervisors at the respondent centre regularly act on behalf of management in a confidential capacity within the meaning of the said Act. Evidence was led concerning, not only the actual services performed by ward supervisors at the respondent centre, but also at other like institutions throughout the province. The evidence clearly disclosed that in actual practice, ward supervisors in the different institutions were performing their supervising duties with varying degrees of responsibility. It is not necessary for our purpose to recite the Board's opinion as to the reasons for this other than to say that as advancement was made in the treatment technique for patients and the training of student nurses in these institutions, a different approach, both as to supervisory methods and physical layout, was deemed necessary by the authorities responsible for the operation of these institutions.

The question as to when a person regularly acts on behalf of management in a confidential capacity was considered by a predecessor Saskatchewan Labour Relations Board in the *Johnson Dairies Limited* case, 1 S.L.R.B. 77. The interpretation has since been followed in several cases. The chairman, in the reported reasons, at page 79 wrote as follows:

> "A person who regularly acts on behalf of management in a confidential capacity is one who is regularly taken into confidence of management (and can exercise discretion) in the formulation, interpretation and/or execution of company policy, and in particular (since the subject matter of *The Trade Union Act* pertains to labour relations) in the formulation, interpretation and/or execution of company policy relating to personnel matters. That is, he must be a person who, to some significant degree, exercises managerial functions on behalf of management."

This Board concurs with this statement.

BOARD'S CONCLUSIONS

In the present case, it was the Board's opinion that on the evidence before us concerning the duties actually performed by the ward supervisors at the respondent centre that they are persons regularly acting on behalf of management in a confidential capacity. These ward supervisors are regularly taken into the confidence of the superintendent of nurses and other people charged with the responsibility of operating the respondent centre and they can and do assist in the formulation, interpretation and execution of the respondent centre's policy. They are in charge of the overall operation of the ward over which they are supervisor. They have and are expected to accept

considerable responsibility concerning the control of the employees and patients in their wards. The ward supervisors at the respondent centre also have a considerable discretion concerning personnel matters as they are the person responsible for rating, not only students, but more importantly, employees who are on their probationary period. This rating is important as it is, to a large degree, on this rating that the Public Service Commission bases its decision as to whether the probationary employee becomes a permanent employee.

DECISION

For these reason, the Board finds that the ward supervisors at the respondent centre are not employees within the meaning of section 2, subsection 5 of the said Act.

The Board grants the application with ward supervisors being excluded from the bargaining unit along with the other exclusions as agreed upon by the applicant and respondent.

(Sgd.) "R. H. KING,"
March 19, 1965. Chairman.

3.005 March 27, 1965

Peter L. Herrem
and
Burns & Co. Limited

v.

United Packinghouse, Food and Allied Workers,
Local Union No. 234

Application for rescission of certification order — Board's Power to rescind its own orders under s. 5(i) — Vote ordered to determine majority support —

Dissenting opinion — by

(a) Mr. J. R. Ingram (member)

(b) Mr. C. R. Wyatt (vice chairman)

R.S.S. 1953. The Trade Union Act, C. 259,
s.s. 5 (a) (b) (c) (i); 6 (1).

APPLICATION FOR RESCISSION

This is an application to rescind an order of the Labour Relations Board, pursuant to section 5 (i) of *The Trade Union Act*, R.S.S. 1953 and amendments thereto. The order of the Labour Relations Board to which this application applied was one dated the 20th day of February, A.D., 1964 in which the respondent was determined as the representative for the purpose of bargaining collectively for the office employees of the employer, Burns and Company Limited, Prince Albert, Saskatchewan. The applicant was one of the employees affected by the order.

Negotiations were carried out by the respondent with the employer and this application was filed before a bargaining agreement was signed by the employer and respondent.

The Board heard long and protracted evidence on this matter. It is not necessary to review the evidence here as the Board was satisfied on the evidence that it could not determine whether the respondent did or did not represent a majority of the employees in the bargaining unit.

S. 5 CONSIDERED

Section 5 of the said Act states in part as follows:

"The Board shall have power to make orders:

(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;

(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;

(c) requiring an employer to bargain collectively;

(i) rescinding or amending an order or decision of the Board made under clause (d), (e), (f), (g) or (h) or under clause (a), (b) or (c) in a case where no collective bargaining agreement is in existence, notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court".

ALLEGATIONS OF LACK OF MAJORITY SUPPORT

This application for rescission was based solely on the allegation that the respondent did not represent a majority of the employees. By virtue of section 5(i), this Board is entitled to hear applications of this nature and to make an order for rescission where no collective bargaining agreement is in existence.

VOTE ORDERED

It is the Board's opinion, therefore, that having this power of rescission, which is directly applicable to section 5(b) of the said Act, that if the evidence does not disclose, to the satisfaction of the Board, that the respondent represents a majority of the employees, then section 6(1) of the said Act applies and a vote should be taken by secret ballot to determine this question.

The Board, therefore ordered that a vote be taken by secret ballot to determine if the respondent represents a majority of the employees in the bargaining unit applicable to this application.

(Sgd.) "R. H. KING,"
March 27, 1965. Chairman.

DISSENTING OPINION

The Labour Relations Board heard extensive evidence and argument by counsel for the applicant and the respondent and decided by majority decision to order a vote of the employees.

I dissent from the majority decision for the following reasons:

I believe the Board failed to consider the length of time spent in actual collective bargaining and looked instead at the number of months that had elapsed from the date of the original order of certification and the date of the application that was before them.

Approximately eighteen hours had been spent in meetings between the parties and a considerable portion of this time was spent by management representatives challenging the rights of the union to bargain for the office employees. As most of the delays were caused by the company representatives I feel that a reasonable time had not elapsed for the parties to negotiate in good faith.

EVIDENCE OF EMPLOYER'S INTERFERENCE

In my opinion, the evidence showed that there was at least some assistance given to the applicant in his efforts to get signatures and support, by individuals who were acting as agents, or who could be supposed to be acting as agents, of the company, and this should have been enough to reject the application. Employees who were supporting the application were allowed to approach their fellow workers without restriction, while at least one union supporter was told to stay at his desk except for a very restricted coffee break.

I am of the opinion that in applications for decertification, the applicant should prove that the majority of the employees support the applications, and this was not done. Therefore, the union is put in the position of having to prove that they still represent the majority of the employees.

For these reasons I believe the application should have been dismissed.

(Sgd.) "J. R. INGRAM,"
Member.

I concur in the above dissenting opinion.

(Sgd.) "C. R. WYATT,"
Vice-Chairman.

April 23, 1965.

3.006 March 27, 1965

United Packinghouse, Food and Allied Workers,
Local Union No. 234

v.

Burns & Co. Limited

Application for determination of Unfair Labour Practices — Protracted negotiation does not amount to failure to bargain in good faith — No evidence of employer's contravention of s. 8(1) of The Trade Union Act — Application dismissed.

Dissenting opinion — by

(a) Mr. J. R. Ingram (member)

(b) Mr. C. R. Wyatt (vice chairman)

R.S.S. 1953. The Trade Union Act, C. 259,
s.s. 2 (7) (a) (b); 5 (d) (e); 8 (1) (a) (b) (c) (e) (g).

APPLICATION

The applicant alleged unfair labour practices against the respondent company within the meaning of section 8 (1) (a), (c), (e) and (g) of *The Trade Union Act*, R.S.S. 1953 and asked for an order determining whether such practices are being or have been engaged in by the said respondent company and if so, requiring the said respondent company to refrain from the said practice.

S. 8 (1) CONSIDERED

In view of the allegations, the evidence had to be considered in the light of each part of section 8 (1) referred to in the application and if, on any part, the evidence established the allegation an unfair labour practice had been proven.

Section 8 (1) of *The Trade Union Act* and applicable parts read as follows:

> "It shall be an unfair labour practice for any employer or employer's agent:
>
> (a) to interfere with, restrain or coerce any employee in the exercise of any right conferred by this Act;
>
> (b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; provided that an employer shall not be prohibited from permitting the bargaining

committee or officers of a trade union representing his employees in any unit to confer with him for the purpose of bargaining collectively or attending to the business of a trade union without deductions from wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purpose of such trade union;

(c) to fail or refuse to bargain collectively with representatives elected or appointed (not necessarily being the employees of the employer) by a trade union representing the majority of the employees in an appropriate unit;

(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or threat of discharge of an employee, with a view to encouraging or discouraging membership in or activity in or for a labour organization or participation of any kind in a proceeding under this Act, and if an employer or employer's agent discharges an employee from his employment and it is alleged by a trade union that such employer or employer's agent has thereby committed an unfair labour practice within the meaning of this clause, it shall be presumed, unless the contrary is proved, that such employer or employer's agent has discriminated against such employee in regard to tenure of employment with a view to discouraging membership in or activity in or for a labour organization or participation in a proceeding under this Act; provided that nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in such trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if such trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;

(g) to interfere in the selection of a trade union as a representative of employees for the purpose of bargaining collectively."

The said Act defines employer's agent in section 2 (7) as follows:

"'employer's agent' means:

(a) any person or association acting on behalf of an employer;

(b) any officer, official, foreman or other representative or employee of an employer acting in any way on behalf of an employer in respect to hiring or discharging or any of the terms or conditions of employment of the employees of such employer."

NO EVIDENCE OF COERCION

Referring particularly to section 8 (1) (a), the Board was of the opinion that the evidence did not establish that the employer or an employer's agent interfered with or restrained or coerced any employee in the exercise of any right conferred by the Act. The evidence disclosed that there was a good deal of talk going on concerning the application for certification and that certain petitions were signed and approaches were made to several employees. The pros and cons were discussed, both before and after the certification order of February 20, 1964.

It was clear from the evidence that both before and after certification, many employees did not want the applicant as their bargaining

agent and that some employees took steps, not only to prevent the certification, but also to have the certification order rescinded. They had discussions among themselves and signed documents authorizing a lawyer to act on their behalf. It was the Board's opinion that no person who could be classed as an employer's agent contravened section 8 (1) (a) of the said Act.

NO EVIDENCE OF DISCRIMINATION

There was no evidence that any employer's agent attempted to discriminate or interfere with the formation or administration of any labour organization or contributed any financial support pursuant to section 8 (1) (b).

NO EVIDENCE OF FAILURE TO BARGAIN IN GOOD FAITH

The next part concerns failure to bargain collectively pursuant to section 8 (1) (c). The evidence disclosed that on February 20, 1964, the applicant was certified as the bargaining agent for the office employees of the respondent company. After much correspondence, a meeting date was set for May 5, 1964 and in all six meetings were held between May 5, 1964 and September 22, 1964. No agreement was reached and meetings broke off as a result of advice being received by the respondent that an application had been filed with the Labour Relations Board for rescission of the order certifying the applicant as bargaining agent. There were actions after negotiations started on the part of Mr. McKenzie, the general manager of the respondent's operation at Prince Albert that were, to say the least, not commensurate with the bargaining in good faith. However, the respondent, through a Mr. Parkhurst from the respondent company's head office at Calgary, advised representatives of the applicant, at the first negotiating meeting, that he was going to do the negotiating and not Mr. McKenzie. Mr. McKenzie's role, from that point on, was a very minor one and amounted to what appeared to be only that of a message passer. The respondent is a national company which has been negotiating contracts for its plant people with the applicant for many, many years. Mr. Lynch and Mr. Lyons, representatives of the applicant, knew this and there is no doubt from their evidence that they fully expected to negotiate with people from the head office in Calgary, Alberta, rather than with local management.

During the period of the negotiations, the respondent company changed owners and Mr. Parkhurst left the company and the final meeting on September 22, 1964 was attended by another man from head office in Calgary, a Mr. Hayes.

It was the Board's opinion that, while the negotiations had been long and drawn out, in view of all the circumstances during the period of the negotiations, the evidence did not establish that the agent of the respondent charged with the responsibility of bargaining collectively

failed to bargain in good faith within the meaning of the Act. The fact that negotiations broke off at the September 22, 1964 meeting was not, in the Board's opinion, a failure to bargain in good faith on the part of the respondent but rather, a logical step in view of the type of application that had been made to the Labour Relations Board. The Board, therefore, finds that the respondent did not contravene section 8 (1) (c) of the Act.

There was no evidence that any employer's agent discriminated against any employee with regard to tenure of employment or to hiring within the meaning of section 8 (1) (e). The sales manager did have some discussions about a temporary sales job with certain members of the applicant union but this was, in the Board's opinion, quite a normal procedure and did not in any way amount to a contravention of this particular part of the said Act.

NO INTERFERENCE IN TRADE UNION FORMATION

Finally there was no evidence that the respondent attempted to interfere in the selection of a trade union for the purpose of bargaining collectively within the meaning of section 8 (1) (e). The evidence clearly indicated there was only one trade union involved, namely, the applicant.

MAJORITY DECISION

For the above mentioned reasons, the application was dismissed.

(Sgd.) "R. H. KING,"
March 27, 1965. Chairman.

DISSENTING OPINION

I dissent from the majority decision for the following reasons:

Section 8 (1) (a) reads in part — "It shall be an unfair labour practice for any employer or employer's agent to interfere with any employee in the exercise of any right conferred by this Act." And as the word "interfere" is defined in the dictionary to mean "to enter into, or take part in, the concerns of others —" it is my opinion that the evidence showed that the respondent was guilty of breaking this section of the Act, as there were no restrictions placed on employees who were going among the office workers to get support and signatures for the decertification application, while at the same time at least one supporter of the union was told he was not to leave his desk except for a very restricted coffee break.

In respect to section 8 (1) (c) it is my opinion that the evidence showed that Mr. McKenzie's actions were not commensurate with "negotiating in good faith with a view to the conclusion of a bargaining agree-

ment," and that at no time did the respondent offer any counter proposals to the union during their meetings, other that a rejection of the union proposals.

Section 8 (1) (e) says in part "It shall be an unfair labour practice for any employer or employer's agent to discriminate in regard to hiring or tenure of employment or any term or condition of employment — etc.," and it is my opinion that the evidence showed that Mr. Cowburn, while acting on behalf of management, interfered with Lloyd Pylypiuk and Doug Hewitt when he asked them to sign the papers that Mr. Herrem was circulating among the office employees in support of the decertification application. The evidence showed that Mr. Cowburn asked these two employees to sign the papers and gave them to understand that if they did not sign they would not get the promotion to relief salesman.

For these reasons I think the application should have been granted.

(Sgd.) "J. R. INGRAM,"
Member.

I concur in the above dissenting opinion.

(Sgd.) "C. R. WYATT,"
Vice-Chairman.

April 23, 1965.

3.007 May 6, 1965

Construction and General Labourers' Local Union No. 890

v.

Pine Lumber Co. Ltd., Saskatoon

Unfair Labour Practice alleged — No evidence of employer's contravention of s. 8 (1) (a) (b) of The Trade Union Act — Application dismissed.

R.S.S. 1953. The Trade Union Act, C. 259,
s.s. 5 (d) (e); 8 (1) (a) (b).

ALLEGATION OF UNFAIR LABOUR PRACTICE

The applicant alleged an unfair labour practice within the meaning of section 8 (1) (a) and (b) of *The Trade Union Act*, R.S.S. 1953.

BOARD'S CONCLUSION

It was the Board's opinion that the evidence did not disclose that the president of the respondent company or any of the respondent's agents interfered with or coerced any employee in connection with his rights conferred by *The Trade Union Act*. The evidence disclosed the president of the respondent company did talk to one employee about the matter but nothing in the evidence, either of the president of the company or that of the employee interviewed, could be interpreted as a contravention of section 8 (1) (a) or (b) of the said Act.

The application was therefore dismissed.

(Sgd.) "R. H. KING,"
May 6, 1965. Chairman.

3.008 May 6, 1965

International Brotherhood of Electrical Workers,
Local Union No. 529

v.

Sisters of Charity of the North West Territories
and
Building Service Employees' Local Union No. 333

Application for certification — Helpers inappropriate to be included in unit — Previous certification varied — Application granted.

R.S.S. 1953. The Trade Union Act, C. 259,
s. 5 (a) (b) (c) (i).

APPLICATION

The applicant applied to become the bargaining agent for all journeymen electricians, apprentice electricians and helpers employed by the respondent.

The facts disclosed that, in this particular case, the person helping the electrician was employed in many other duties not in the least connected with work generally done by electricians and apprentices.

APPROPRIATENESS OF UNIT

The Board was of the opinion that on these facts, helpers should not be included in the bargaining unit but that all journeymen electricians and apprentice electricians were an appropriate unit and that the former certification, which included them in the bargaining unit as it applied to the certification order in connection with Building Service Employees' Local Union No. 333 should be varied and a certification order covering all journeymen electricians and apprentice electricians should be granted the applicant.

(Sgd.) "R. H. KING,"
May 6, 1965. Chairman.

3.009 June 3, 1965

Dairy and Produce Workers Local Union No. 834

v.

Palm Dairies Limited

Allegation of Unfair Labour Practice under s. 29 of The Trade Union Act — Breach of bargaining agreement does not amount to unfair labour practice under s. 8 of the Act — Application dismissed.

R.S.S. 1953. The Trade Union Act, C. 259,
s.s. 5 (d) (e); 29.

ALLEGATION OF UNFAIR LABOUR PRACTICE

The applicant alleges an unfair labour practice pursuant to section 29 of *The Trade Union Act*, R.S.S. 1953, and asks for an order under section 5, subsection (d) and (e) of the said Act.

FACTS

There was no dispute on the facts. The respondent was introducing a new type of milk container and deliveries were made to certain stores by employees who were not within the scope of the bargaining unit on a day designated as a non-delivery day by the current bargaining agreement in effect between the applicant and respondent. It was on these facts that the allegation of an unfair labour practice was made by the applicant.

S. 29 OF THE TRADE UNION ACT CONSIDERED

The pertinent part of section 29 of the said Act reads as follows:

> "Where an employer has by an order of the Board been required to bargain collectively, he shall, while the order remains in force, continue to be subject to the order and to any collective bargaining agreement entered into pursuant thereto notwithstanding that after the making of the order and while a collective bargaining agreement remains in force he at any time or from time to time ceases to be an employer within the meaning of this Act and the collective bargaining agreement shall while it remains in force continue to apply at all times during which he is an employer within the meaning of this Act."

BOARD'S CONCLUSION

It was the Board's opinion that this section of the Act does not make a breach of the bargaining agreement an unfair labour practice. The Act sets out, in section 8 and other specific sections of the Act, what consti-

tutes an unfair labour practice within the meaning of the Act. Breach of a bargaining agreement is nowhere in the Act designated as an unfair labour practice.

For these reasons, the Board dismissed the application.

(Sgd.) "R. H. KING,
Chairman.

June 3, 1965.

3.010 July 5, 1965

Oil, Chemical and Atomic Workers International Union
Local 9-609

v.

Empire Oil Limited, Saskatoon

Application charging employer with violation of s. 25 of The Trade Union Act — Definition of the term "Employee," s. 25 applicable only where the person concerned is an employee within s. 2 (5) of The Trade Union Act — Application dismissed.

R.S.S. 1953. The Trade Union Act, C. 259,
s.s. 2(5); 5(d) (e); 25.

S.S. The Trade Union Act, 1944, C. 69, s. 23; 1951, C. 93, s. 6.

APPLICATION

This is an application under section 25 of *The Trade Union Act.*

FACTS

The facts, as established by the evidence, disclosed that Donald W. Spence was employed by the respondent for some time after certification as a gas pump attendant. The respondent company, due to being purchased by another company, had some re-organization take place early in January of this year. As a result of this re-organization, the then manager of the respondent company was promoted to a position in the parent company and the sales manager of the respondent company assumed the duties of manager as well as sales manager. It also resulted in the accounting functions of the respondent company being transferred to the parent company's office in Calgary and two department heads being appointed in the respondent company, one to handle, in the main, the bulk sales of gasoline delivered by company trucks and the other to handle the service station facilities, along with certain bulk sales made in connection with the gas pumps themselves. The employee, Donald W. Spence, was promoted on January 20, 1965, to the position of assistant bulk petroleum manager and the evidence disclosed that his duties were mainly in connection with the operation of the service station area.

TERMS OF THE ORIGINAL CERTIFICATION

The original certification order in regard to the bargaining unit read in part as follows: ". . . All employees employed by Empire Oil Limited, in the city of Saskatoon, Saskatchewan, except the manager, the manager's private secretary and the sales manager . . ."

It is clear that the certification order excluded only three positions, namely, that of manager, manager's private secretary and sales manager. In the bargaining agreement completed as a result of this certification, the position of bulk petroleum manager was also considered to be out of scope and negotiations have been carried on and a bargaining agreement completed on this basis. Counsel for the applicant argued that because the original certification order made no mention of the classification of assistant bulk petroleum manager, that the respondent company by naming this as a position and appointing Spence to this position were unilaterally changing the bargaining agreement.

DEFINITION OF EMPLOYEE

It was the Board's opinion that this argument is not tenable. The Act clearly sets out in section 2, subsection 5, the definition of an employee within the meaning of the said Act. It is the Board's opinion that neither the employer nor the union can include in a bargaining unit a person who, by very definition in the Act, is excluded. The Statute clearly sets out that unless a person is an employee within the meaning of the Act, then the Act is not applicable to him. It was the Board's opinion that naming positions as exclusions in the certification order is a matter of convenience for all parties concerned and in no way can be considered as limiting only those positions named as being out of scope.

APPLICATION OF S. 25

Having reached this conclusion then, in turning specifically to section 25, the section of the Act under which this application is made, it was the Board's opinion that this section deals specifically with an employee within the meaning of this Act. The section reads as follows: "Upon the request in writing of any employee, and upon request of a trade union representing the majority of employees in any bargaining unit of his employees, the employer shall deduct and pay in periodic payments out of the wages due to such employee, to the person designated by the trade union to receive the same, the union dues of such employee, and the employer shall furnish to such trade union the names of the employees who have given such authority. Failure to make payments and furnish information required by this section shall be an unfair labour practice. 1944 (2nd Sess.) c. 69, s. 23; 1951, c. 93, s.6." Therefore, it was the Board's opinion that if an employee ceased to be an employee within the meaning of the Act as set out in section 2, subsection 5, then this section of the Act is not applicable. The Board, after having considered all the evidence, came to the conclusion that when Spence was

promoted on January 20th, 1965, he ceased to be an employee within the meaning of *The Trade Union Act* and therefore, the fact that the respondent company failed to check off was not a contravention of the section 25 of the Act and the application was dismissed.

BOARD'S OPINION

The Board, however, were of the opinion that the respondent company acted in a very arbitrary manner and certainly not in keeping with the general intent that could be expected from a party to a bargaining agreement. In other words, the Board was of the opinion that the company could very well have negotiated this matter with the union and avoided the necessity of coming before this Board to have this matter determined.

(Sgd.) "R. H. KING,"
Chairman.

July 5, 1965.

3.011 July 5, 1965

United Steelworkers of America, CLC

v.

Crown Implement Manufacturers Ltd., Regina

Application for Reimbursement for monetary loss — Employer's Unfair Labour Practice committed — Failure to discharge onus of proof imposed by s. 8 (1) (e) of The Trade Union Act — Application granted.

R.S.S. 1953. The Trade Union Act, C. 259,
s.s. 5 (g); 8 (1) (e).

APPLICATION FOR REIMBURSEMENT OF MONETARY LOSS

This is an application under section 5 (g) of *The Trade Union Act*, R.S.S. 1953, C. 259, for payment of monetary loss, the allegation being that the respondent committed an unfair labour practice pursuant to section 8 (1) (e) of the said Act in connection with the discharge of one Frank Perron.

Section 8 (1) (e) of the said Act reads in part as follows:

> "(1) It shall be an unfair labour practice for any employer or employer's agent:
>
> (e) . . . to use coercion or intimidation of any kind, including discharge or threat of discharge of an employee, with a view to encouraging or discouraging membership in or activity in or for a labour organization or participation of any kind in a proceeding under this Act, and if an employer or employer's agent discharges an employee from his employment and it is alleged by a trade union that such employer or employer's agent has thereby committed an unfair labour practice within the meaning of this clause, it shall be presumed, unless the contrary is proved, that such employer or employer's agent has discriminated against such employee in regard to tenure of employment with a view to discouraging membership in or activity in or for a labour organization or participation in a proceeding under this Act; . . ."

FACTS

The facts are that Perron had worked for the respondent for some time and was a skilled welder. Through a previous application to the Board, the respondent was well aware of Perron's participation in having the applicant certified as the bargaining agent for the employees of the respondent. The applicant was certified by the Board on September

1, 1964. For reasons not necessary to go into here, Perron and one Laliberte were the only two employees left who had participated in the application for certification.

Some negotiations towards a bargaining agreement were entered into between the applicant and the respondent. A proposed bargaining agreement was forwarded to the respondent and the evidence of Mr. Armstrong, an agent of the employer, was that they questioned the security clause included in the proposed bargaining agreement. There was no effort to discuss this with the applicant but rather, the respondent elected to conduct his own vote to determine if the then employees of the respondent still wanted to be represented by the applicant. The vote was proceeded with and the results indicated a tie.

It should be noted here that the Board found no unfairness in the method of taking the vote.

The vote took place on October 28, 1965 (sic), and on October 30, 1965 (sic), without any forewarning, Perron was laid off by the respondent and paid a week's wages in lieu of notice.

The Board carefully considered the evidence concerning the lack of work and the fact another employee was laid off at the same time as Perron, as well as the circumstances surrounding the vote.

However, the conducting of a vote among its employees during negotiations with a recently certified bargaining agent and the discharging of a known supporter of the applicant two days after a tie vote is indicative of the respondent's attitude.

BOARD'S CONCLUSION

The Board is of the opinion, on the whole evidence, that the respondent did not meet the onus cast upon it by section 8 (1) (e) of *The Trade Union Act* and finds that an unfair labour practice within the meaning of section 8 (1) (e) was committed by the respondnet.

DECISION

The Board accordingly ordered that the respondent pay Perron the monetary loss in the amount of $239.68, which was determined by the Board to be the amount of monetary loss suffered by Perron as a result of his discharge.

(Sgd.) "R. H. KING,"
Chairman.

July 5, 1965.

3.012 July 5, 1965

United Steelworkers of America, CLC

V.

Crown Implement Manufacturers Ltd., Regina

Application for Reimbursement for Monetary Loss — Unfair Labour Practice committed — Application granted.

R.S.S. 1953. The Trade Union Act, C. 259,
s.s 5 (g); 8 (1) (e).

For the same reasons as those in the Perron matter, the Board found that an unfair labour practice had been committed by the respondent pursuant to section 8 (1) (e) of *The Trade Union Act*, R.S.S. 1953, C. 259 and determined that the monetary loss suffered by Pete Beebe was $487.75 and ordered the respondent to pay Pete Beebe the said amount.

(Sgd.) "R. H. KING,"
July 5, 1965. Chairman.

3.013 July 5, 1965

United Steelworkers of America, CLC

v.

Crown Implement Manufacturers Ltd., Regina

Application for Reinstatement — Unfair Labour Practice committed Board has discretion to refuse or order reinstatement of an employee dismissed contrary to s. 8 (1) (e) of The Trade Union Act — Application denied.

R.S.S. 1953. The Trade Union Act, C. 259,
s. 8(1) (e) (f).

APPLICATION DENIED

The applications of Frank Perron and Pete Beebe for reinstatement under section 5 (f) were not granted by the Board.

UNFAIR LABOUR PRACTICE COMMITTED

Although the Board found an unfair labour practice had been committed by the respondent, the Board was of the opinion that it had the discretion not to order reinstatement even though an unfair labour practice had been established.

The Board was of the opinion that in view of the fact that Pete Beebe and Frank Perron were, at the time of the application, employed otherwise and the fact that work with the respondent was apparently seasonal that reinstatement orders would serve no useful purpose in these particular cases.

The applications were, therefore, refused.

(Sgd.) "R. H. KING,"
July 5, 1965. Chairman.

3.014 July 7, 1965

United Steelworkers of America, CLC

v.

Crown Implement Manufacturers Ltd., Regina

Application for reinstatement — Reimbursement for monetary loss — Employer discharged the onus of proof imposed by s. 8(1) (e) of The Trade Union Act — Application dismissed.

R.S.S. 1953. The Trade Union Act, C. 259,
s.s. 5 (f) (g); 8 (1) (e).

APPLICATION FOR REINSTATEMENT

The Board considered the applications for reinstatement and payment of monetary loss respecting one, Paul Laliberte.

DECISION

It was the Board's opinion that in view of the evidence concerning Mr. Laliberte's activities in connection with this whole matter and the fact that his lay-off took place some two weeks after the vote and he was not given pay in lieu of notice, that the respondent had satisfied the onus in respect of section 8 (1) (e) of *The Trade Union Act*, R.S.S. 1953, C. 259. The Board therefore, found that an unfair labour practice had not been committed in respect of the lay-off of Mr. Laliberte and the applications for reinstatement and payment of monetary loss were dismissed.

(Sgd.) "C. R. WYATT,"
July 7, 1965. Vice-Chairman.

3.015 July 7, 1965

George Siegel, Lanigan

v.

Lanigan Union Hospital Board
and
Building Service Employees' Local Union No. 333.

Application for rescission and amendment of certification order — Board lack power to rescind certification order during the life of a collective agreement — Amendment can only be granted during currency of collective agreement with the consent of both parties — Application dismissed.

R.S.S. 1953. The Trade Union Act, C. 259; s. 5.

BOARD'S POWER OF RESCISSION

Previous to 1961 the Board under section 5 (i) of *The Trade Union Act*, R.S.S. 1953, C. 259, had the power to make orders "rescinding or amending any order or decision of the Board." The decision of Mr. Justice Disberry in *Fey et al* v. *United Stone and Allied Product Workers et al*, (1961), 35 WWR 577, was based on that subsection of the Act. However, in 1961 the legislature repealed subsections 5 (i) of the Act and substituted subsection 5 (i) and 5 (j).

S. 5 CONSIDERED

In dealing with the Board's powers under section 5 of *The Trade Union Act* the present subsection 5 (i) reads as follows: "rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or under clause (a), (b) or (c) in a case where no collective bargaining agreement is in existence, notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court." This subsection covers only the case where there is no collective bargaining agreement in existence. In the present case there is a collective bargaining agreement in existence and therefore this new subsection does not apply.

Section 5 (j) reads "The Board has power of amending an order of the Board made under clause (a), (b) or (c), in a case where a collective bargaining agreement is in existence if the employer and the trade union agree to the amendment or the amendment is considered by the Board to be necessary for the purpose of clarifying or correcting the order." This

subsection, of course, is not applicable here because it deals with amendment and not rescission and that only by agreement of the two parties to the actual bargaining agreement or for the purpose of correcting or clarifying the order.

S. 26(2) CONSIDERED

Section 26 (2) of *The Trade Union Act* deals with the time when a bargaining agreement may be terminated. Until such time as the bargaining agreement is terminated the Board has no power to rescind the original certification order.

There is no restriction as to time when an application for rescission may be made when no bargaining agreement is in existence.

DECISION

For these reasons the Board in the present application having found there was a bargaining agreement in existence dismissed the application.

(Sgd.) "C. R. WYATT,"
Vice-Chairman.

July 7, 1965.

3.016 August 23, 1965

Gertrude Blanche Bechtold, Mary Lenora Atkinson,
Ross John Buchanan and Mary Ann Hill.

v.

Moose Jaw Credit Union, Limited
and
Retail, Wholesale and Department Store Union

Application for rescission of a certification order — Application appropriate under s. 5 (i) of The Trade Union Act — Application granted.

R.S.S. 1953. The Trade Union Act, C. 259,
s.s. 5 (i); 26 (2).

APPLICATION FOR RESCISSION

This is an application for rescission under section 5 (i) of *The Trade Union Act*, R.S.S. 1953, C. 259. The applicants are four employees of the Moose Jaw Credit Union, Limited, the employer. The Retail, Wholesale and Department Store Union, hereinafter called the union, was certified as the bargaining agent for the employees of the above mentioned employer on May 14, 1962. As a result of this certification, bargaining agreements were entered into by the certified union and the employer. At the time of this application the Board was of the opinion that pursuant to section 26, subsection 2 of *The Trade Union Act* and on the evidence adduced, section 5 (i) of the said Act was applicable.

The Statement of Employment established that the four applicant employees represent a majority of the employees who come within the scope of the bargaining unit for which the said union was certified as bargaining agent.

Some question was raised regarding the propriety of a former signator to the original bargaining agreement, who signed as an officer, now acting as solicitor for the employees making this application.

The Board was of the opinion that there was no impropriety whatsoever in the applicants' solicitor representing them in connection with the application.

DECISION

Therefore on the basis of the evidence presented, the order for rescission is granted.

(Sgd.) "R. H. KING,"
August 23, 1965. Chairman.

3.017 September 13, 1965

Dairy and Produce Workers Local Union No. 834

v.

Palm Dairies Limited

Unfair Labour Practice — Unilateral alteration in terms of employment covered by collective agreement does not amount to Unfair Labour Practice — Parties bound to follow Grievance Procedure Clause — Application dismissed.

R.S.S. 1953. The Trade Union Act, C. 259,
s.s. 2 (1); 5 (d) (e); 8 (1) (a) (c); 18; 20.

ALLEGATION OF UNFAIR LABOUR PRACTICE

The applicant alleged an unfair labour practice pursuant to section 8, subsection (1) (a) and (c) of *The Trade Union Act*, R.S.S. 1953, C. 259, and asked for an order under section 5, subsection (d) and (e) of the said Act.

FACTS

The facts are as follows: The applicant is certified as bargaining agent for several dairies in the city of Regina, including the respondent. The applicant and respondent are parties to a current collective bargaining agreement. One of the terms of the said agreement sets out Sundays and Wednesdays as being non-delivery days.

The applicant and the respondent, along with the other dairies which have collective agreements with the applicant, had some meetings concerning the proposed date that a new type milk container was to be introduced in the city of Regina. The respondent did not wait for the proposed date but had milk deliveries made in the new container to certain retail outlets by out-of-scope employees on a non-delivery day. The regular milk salesmen, on whose particular routes the deliveries were made, received credit for the said deliveries and were paid accordingly. The agreed facts disclosed that at times, out-of-scope employees had made deliveries on non-delivery days to outlets who were short of milk and credit and payment was given to the particular milk salesman on whose route the delivery was made. The applicant had apparently not objected to this type of delivery, although no term in the collective agreement made provision for such a situation.

GRIEVANCE PROCEDURE CLAUSE

The collective agreement in question has a grievance procedure clause that makes provision for final settlement of any dispute or grievance.

S. 8(1)(a) NOT APPLICABLE

The Board was of the opinion that, on the evidence in this particular case, that section 8, subsection (1) (a) of the said Act was not applicable and thus, found no unfair labour practice had been committed by the respondent in respect thereto.

Learned counsel for the applicant argued that when a collective bargaining agreement is in effect a unilateral change in the terms or conditions of employment constitutes an unfair labour practice under *The Trade Union Act* of this province.

As was pointed out, *The Trade Union Act* has no like section to that found in most other similar statutes in the other provinces, namely, that the collective agreement must include a clause providing for final settlement of disputes and grievances.

STATUTORY METHOD OF DISPUTE SETTLEMENT

The Trade Union Act provides two methods of settling disputes of parties to a collective agreement, namely, section 18 which provides for boards of conciliation and section 20 which provides for this Board settling disputes upon request of both parties.

The Board was of the opinion, in view of the two above mentioned specific procedures, that the omission of a statutory requirement to include a final settlement procedure in a collective agreement did not warrant the conclusion that the said Act should be interpreted on the basis it was the legislature's intention that a unilateral change in the terms or conditions of employment by an employer, was an unfair labour practice. Furthermore in this particular case, where a procedure for final settlement is included in the collective agreement, it would seem a strange interpretation indeed when the parties themselves have agreed on a method of dealing with such matters.

FAILURE TO BARGAIN WITH CERTIFIED UNION

We now turn to the particular section under which this allegation is made. Section 8, subsection (1) (c) states it is an unfair labour practice for an employer "to fail or refuse to bargain collectively with representatives elected or appointed (not necessarily being the employees of the employer) by a trade union representing the majority of the employees in an appropriate unit".

Bargaining collectively is defined in section 2, subsection (1) of the said Act and the pertinent part applicable here reads as follows:

". . . and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement".

It was the Board's opinion that the clear meaning of the words "and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement" does not make a unilateral change in the terms or conditions of employment covered by a collective agreement an unfair labour practice but rather, does make a failure or refusal to negotiate the settlement of same an unfair labour practice.

In this case, no steps were taken by the applicant under section 18 or 20 of the said Act or under the settlement procedures provided in the agreement itself.

For the reasons as stated above, the application was dismissed.

(Sgd.) "R. H. KING,"
Chairman.

September 13, 1965.

3.018 September 24, 1965

Yorkton Fire Fighters Local No. 1527

v.

The City of Yorkton

Unfair Labour Practice — Implementation of new shift schedule while negotiation is in progress does not constitute Unfair Labour Practice — Application dismissed.

R.S.S. 1953. The Trade Union Act, C. 259,
s.s. 2 (1); 5 (d) (e); 8 (1) (c); 20.

R.S.S. 1953. The Fire Departments Platoon Act, C. 158.

ALLEGATION OF UNFAIR LABOUR PRACTICE

The applicant alleged an unfair labour practice pursuant to section 8(1) (c) of The Trade Union Act, R.S.S. 1953, C. 259.

FACTS

The evidence disclosed the following facts: the applicant was certified by this Board as the bargaining agent for the unit of employees involved in this application on December 3, 1964.

Subsequent to that date, meetings were set up for the purpose of bargaining collectively. Several meetings were held but a collective agreement was not completed. There was disagreement on certain points in the proposed agreement and the applicant on or about the 21st day of May, A.D. 1965, gave notice that every item in the proposed bargaining agreement be referred to a board of arbitration established pursuant to *The Fire Departments Platoon Act*, R.S.S. 1953, C. 158.

The respondent did not accept this as the proper forum and suggested that the matters should be determined pursuant to section 20 of *The Trade Union Act.*

No agreement was reached between the parties respecting the method of settling their dispute.

During the negotiations, it had come to the attention of the respondent that the employees within the bargaining unit, were working slightly less than 44 hours per week on the shift schedule then in effect. There was no disagreement between the applicant and the respondent

that the work week was 44 hours. The negotiation committee became aware of this fact as early as April 15, 1965. The fire chief, on their direction, drew up a new shift schedule incorporating a 44 hour week. This new shift schedule was not put into effect at this time as they were in the midst of negotiating and the respondent wished in no way to place any obstacles in the way of concluding a bargaining agreement.

The respondent had a council meeting on June 1, 1965, and it was decided that in view of the position being taken by the applicant regarding the procedure through which a bargaining agreement might be concluded, some considerable time might elapse before this was achieved. They felt they were entitled to have these employees work a full 44 hour week, and instructed the fire chief to post and implement a shift schedule incorporating this change. This he did on June 2, 1965.

It is a result of the posting and implementation of the said shift schedule that this application was made.

NEGOTIATING IN GOOD FAITH

Section 2, clause (1) of *The Trade Union Act* defines bargaining collectively in part as "negotiating in good faith with a view to the conclusion of a collective bargaining agreement."

It was the Board's opinion that the respondent did negotiate in good faith and that their whole endeavour was with a view to concluding a collective bargaining agreement. They tried to continue the negotiations but the applicant requested an arbitration procedure pursuant to *The Fire Departments Platoon Act*. The respondent did not agree that this was the proper procedure to follow and was willing to use the procedures as set up by *The Trade Union Act* to settle the dispute. This, the applicant refused to do.

The implementation of the new shift schedule on June 2, 1965, by the respondent in view of all the circumstances in this particular case does not, in the Board's opinion, constitute an unfair labour practice within the meaning of section 8(1) of *The Trade Union Act*.

The application was, therefore, dismissed.

(Sgd.) "R. H. KING,"
Chairman.

September 24, 1965.

3.019 November 10, 1965

Construction and General Labourers' Local Union No. 180

v.

Graham Construction Ltd.

Unfair Labour Practice — Failure to comply with the Union Security Clause — Employees have the option to elect to join Union or not. Application dismissed.

Dissenting Opinion:

(a) Mr. J. R. Ingram

R.S.S. 1953. The Trade Union Act, C. 259,
s.s. 5 (d) (e); 27 (1).

ALLEGATION OF UNFAIR LABOUR PRACTICE

This is an application alleging an unfair labour practice pursuant to section 27, subsection (2) of *The Trade Union Act*, R.S.S. 1953, C. 259.

FACTS

The applicant was certified as the representative for the purpose of bargaining collectively for the employees of the respondent employed in Moose Jaw, Saskatchewan, and within a 20 mile radius thereof, on September 1, 1964, by the Labour Relations Board. Subsequently, on December 16, 1964, a collective bargaining agreement was entered into by the applicant and respondent with respect to the employees within the said bargaining unit.

UNION SECURITY CLAUSE

Pursuant to section 27, subsection (1) of *The Trade Union Act* the applicant requested, and, a term known as a "union security clause", was included in the bargaining agreement. It read as follows:

> "In accordance with *The Trade Union Act* every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within thirty days after the commencement of his employment, apply for and maintain membership in the union as a condition of his employment;"

This gives non-union employees employed by the employer at the time of certification and after the request for the union security clause the right to maintain their employment without joining the union if they so desire.

There was some question about the present name of the respondent company but for the purposes here there is no doubt that the respondent is one and the same as was certified and that the respondent had been carrying on business for some time prior to certification under a name other than that set out in this application. There was no evidence before this Board, however, that the said names indicated any separate entities.

The evidence establishes that on the date of certification one F. Polster and N. Korall were employees of the respondent and had been for some time before the certification order was made.

The respondent is in the construction business and much of the work it performs is done outside the area as set out in the bargaining unit. At the time the application for certification was made the two above mentioned employees were working on construction sites some distance from Moose Jaw. Their names were not included on the Statement of Employment filed by the respondent with the Labour Relations Board. There is no evidence before the Board that they knew the application for certification was being made.

These two employees are now working on projects of the respondent within the area as set out in the bargaining unit. They have declined to join the union and the respondent has refused to dismiss them and as a result, this unfair labour practice application has come before the Board.

OMISSION ON STATEMENT OF EMPLOYMENT

There is no doubt the said employees' names should have been included on the Statement of Employment as filed by the respondent at the time the application for certification was made. This omission on the part of the respondent, however, cannot abrogate the rights or change the status of the employees. The evidence clearly establishes that these two men were employees of the respondent at the time the applicant made the request about the union security clause pursuant to section 27, subsection (1) of *The Trade Union Act*. The fact that at the time they happened to be employed outside the area as set out in the bargaining unit should not now militate against them, insofar as their employment is concerned. Had they been working at the time the union security clause went into effect within the area of the bargaining unit, they would then have had the right to choose whether they wished to join the union or not. It was the Board's opinion they have not, through the circumstances in this particular case, lost that right. They both gave evidence before the Board that they did not wish to join the union.

DECISION

The Board, therefore, finds that the said employees were employees of the said respondent at the time the union security clause went into effect and that the respondent in failing to dismiss them has not committed an unfair labour practice pursuant to section 27, subsection (1) of *The Trade Union Act*. The application is therefore dismissed.

(Sgd.) "R. H. KING,
November 10, 1965. Chairman.

DISSENTING OPINION

This was an application alleging an unfair labour practice under the section of *The Trade Union Act*, R.S.S. 1953, C. 259, dealing with union security, and, after hearing evidence, the Board decided by majority decision to dismiss the application.

I dissent from the majority decision for the following reasons:

At the time of the application for certification and at the time of the taking of the Statement of Employment, Mr. F. Polster and Mr. N. Korall were working for the respondent company at jobs which were outside the area that the union asked for in their application for certification.

In my opinion F. Polster and N. Korall could not have been included in the Statement of Employment as at that time they were not covered by the application before the Board. To say that they should have been included, implies that all employees of the respondent company in the province should have been on the Statement of Employment, and I don't think this is the intention when a Statement of Employment is asked for.

It is my opinion that F. Polster and N. Korall only became employees within the meaning of the Act when they returned to the area of the certification order. For the purposes of the Act, they should have been considered to be new employees, and required to join the union, within 30 days of the time they started work in the area covered by the certification order.

For these reasons I believe the unfair labour practice application should have been granted.

(Sgd.) "J. R. INGRAM,"
Member.

3.020 December 9, 1965

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Imperial Lodge No. 532.

v.

Saskatchewan Steel Fabricators Ltd.

Unfair Labour Practice — Failure to deduct employees union dues — Meaning of employee — Application granted.

R.S.S. 1953. The Trade Union Act, C. 259, s.s. 2 (5); 5 (d) (e); 25.

ALLEGATION OF UNFAIR LABOUR PRACTICE

The evidence disclosed that the applicant was certified as the bargaining agent in respect to certain employees of the respondent as set out in the bargaining unit. The three people named in this unfair labour practice application had been employees within the meaning of *The Trade Union Act*, R.S.S. 1953, C. 259, as well as being within the bargaining unit.

UNION DUES

The applicant, pursuant to section 25 of *The Trade Union Act*, having a written request of the three employees so to do, had requested the respondent to deduct dues from the pay of the said employees. The respondent did make such deductions until such time as through promotions and transfers of positions, they felt they were no longer obligated to make deductions and ceased doing so. As a result of this failure to deduct the said dues, this unfair labour practice application was filed.

RESPONDENT'S CONTENTION

The evidence disclosed that two people named in the application, namely, Ast and Polano, were no longer employees within the meaning of *The Trade Union Act.* They had, through promotions, ceased to be employees as defined in section 2, subsection (5) of the said Act and, therefore, section 25 of the Act is not applicable to them and the failure of the respondent to deduct the said dues did not constitute an unfair labour practice.

The other employee, Mack, however, had been transferred to a position that took him out of the original bargaining unit, but he was still an employee within the meaning of section 2, subsection (5) at the time the application was made.

In the Board's opinion, section 25 refers to any employee of the said respondent whether within or without the bargaining unit.

DECISION

Therefore, it was the Board's opinion that insofar as the employee Mack was concerned the respondent by failing to continue to deduct the said dues, was in contravention of section 25 of *The Trade Union Act* and committed an unfair labour practice.

(Sgd.) "R. H. KING,"
Chairman.

December 9, 1965.

3.021 December 9, 1965

International Union of Operating Engineers, Hoisting and Portable Local Union No. 870.

v.

Redi-Mix Concrete Ltd.

Unfair Labour Practice — Employer's attendance of union meeting — Interference in Union Affairs.

R.S.S. 1953. The Trade Union Act, C. 259, s.s. 5(d) (e); 8 (1) (a) (b) (g)

ALLEGATION OF UNFAIR LABOUR PRACTICE

The applicant alleges an unfair labour practice pursuant to section 8(1) (a), (b) and (g) of *The Trade Union Act*, R.S.S. 1953, C. 259.

The said subsections read as follows:

"Section 8 (a) to interfere with, restrain or coerce any employee in the exercise of any right conferred by this Act;

(b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; provided that an employer shall not be prohibited from permitting the bargaining committee or officers of a trade union representing his employees in any unit to confer with him for the purpose of bargaining collectively or attending to the business of a trade union without deductions from wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purpose of such trade union;

(g) to interfere with the selection of a trade union as a representative of employees for the purpose of bargaining collectively;"

The respondent is an incorporated company in the province of Saskatchewan who operates a branch in the city of Moose Jaw. On or about the 10th day of August, 1965, the applicant commenced efforts to organize the employees and did succeed in having several employees of the Moose Jaw branch sign applications for membership.

The evidence discloses that the local manager, Mr. Murray, became aware of this, and advised Mr. Stephenson, who is located in head office in Regina but is in overall charge of the Moose Jaw branch, of this fact.

ATTENDANCE AT UNION MEETING BY MANAGER

As a result of this information a general meeting of all employees was set up by Mr. Murray on the instructions of Mr. Stephenson. The meeting was held the evening of August 24th, 1965, and both Mr. Murray and Mr. Stephenson attended this meeting.

There was considerable discussion of the pros and cons of the advantages or disadvantages of the employees having the applicant represent the employees as the bargaining agent as well as a discussion pertaining to having an employees' association to represent the employees.

Mr. Stephenson was present for a considerable period of time at the meeting, during the said discussion, and answered questions which were put to him by the employees. He did, however, along with other management people retire from the meeting to allow a much more detailed discussion to take place among the employees themselves.

DECISION

It was the majority of the Board's opinion that Mr. Stephenson, by the participation he took in the meeting, did interfere in the selection of a trade union within the meaning of section 8(1) (g) of *The Trade Union Act.* This was not a case of an employer who had had no experience with matters coming under *The Trade Union Act.* The respondent has had considerable experience in these matters as they have for sometime dealt with the applicant who is the certified bargaining agent in the Saskatoon branch of the respondent.

For these reasons the application is granted.

(Sgd.) "R. H. KING,"
Chairman.

December 9, 1965.

3.022 February 8, 1966

Saskatoon Printing Pressmen and Assistants' Union
No. 206

v.

Craft Litho Ltd.

Application for determination of an appropriate unit — Certification — Withdrawal of membership support — No evidence of employer's interference — Application dismissed.

R.S.S. 1953. The Trade Union Act, C. 259,
s. 5 (a) (b) (c).

WITHDRAWAL OF MEMBERSHIP

On the hearing of the application, evidence was placed before the Labour Relations Board that all the employees in the proposed bargaining unit who had originally indicated support of the application wished to withdraw their support. There was no evidence of any interference by the respondent and the Board therefore dismissed the application.

(Sgd.) "R. H. KING,"
February 8, 1966. Chairman.

3.023 March 2, 1966

Gary Cook, Saskatoon

v.

Empire Oil Limited
and
Oil, Chemical and Atomic Workers' International Union,
Local 9-609

Application for decertification — Notice to negotiate a new collective bargaining agreement does not mean notice to terminate existing agreement — Board has no jurisdiction under s. 5 (i) of The Trade Union Act — Application dismissed.

R.S.S. 1953. The Trade Union Act, C. 259,
s.s. 5 (i); 26 (1) (2).

FACTS

The facts in this particular case are quite clear cut. There was a bargaining agreement signed between the employer and the certified union to run from June 1, 1963, to May 31, 1965. Prior to date of termination as set out in the agreement, written notice to negotiate certain revisions in the bargaining agreement was given by the certified union to the employer. As of the date of this application, no new agreement has been negotiated.

APPLICATION FOR DECERTIFICATION

This application is made by an employee of the employer on behalf of a majority of the employees to have the certified union decertified as the bargaining agent. The application is made under section 5 (i) of *The Trade Union Act*, R.S.S. 1953, C. 259. The applicant argued no bargaining agreement is in existence within the meaning of section 5 (i) of *The Trade Union Act* as notice to negotiate had been given within the time limit required by section 26 (2) of the said Act. The certified union argued that there is a bargaining agreement in existence, as a notice to negotiate does not terminate the previous existing agreement and the Board has no jurisdiction to hear the application under section 5 (i).

QUESTION FOR DETERMINATION

The question the Board therfore had to determine was if the original bargaining agreement was in existence pursuant to *The Trade Union Act.*

Section 26 (1) of the said Act reads as follows:

> "(1) Except as hereinafter provided, every collective bargaining agreement, whether heretofore or hereafter entered into, shall, notwithstanding anything contained therein, remain in force for a period of one year from its effective date and thereafter from year to year."

Section 26 (2) of the said Act reads as follows:

> "(2) Either party to a collective bargaining agreement may, not less than thirty days nor more than sixty days before the expiry date of such agreement, give notice in writing to the other party to terminate such agreement or to negotiate a revision thereof, and thereupon, subject to subsection (3), the parties shall forthwith bargain collectively with a view to the renewal or revision of such agreement or the conclusion of a new agreement."

No notice to terminate was given by either party to the agreement — only a notice to negotiate. This notice was given within the time limit provided by the Act. The negotiations were apparently unsuccessful as no new contract has been signed.

BOARD'S CONCLUSION

It was the Board's opinion however that pursuant to section 26 (1), the bargaining agreement entered into in 1963 was, within the meaning of *The Trade Union Act*, in existence as it had not been terminated as provided for in the Act or superceded by a new agreement. Therefore, in view of what section 5 and 5 (i) state which in part is as follows:

> "5. The Board shall have the power to make orders; 5 (i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or under clause (a), (b) or (c) in a case where no collective bargaining agreement is in existence, notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;"

the Board has no jurisdiction to hear this application, as there was at the time the application was made, a bargaining agreement in existence within the meaning of *The Trade Union Act.*

(Sgd.) "R. H. KING,"
Chairman.

March 2, 1966.

3.024 March 3, 1966

Sheet Metal Workers International Association, Local Union No. 577

v.

Home Ease Heating Limited

Unfair Labour Practice — Employer failed to deduct union dues on employees instruction — Employer acted in good faith — Application dismissed.

R.S.S. 1953. The Trade Union Act, C. 259 s. 25.

ALLEGATION OF UNFAIR LABOUR PRACTICE

The applicant alleges an unfair labour practice pursuant to section 25 of *The Trade Union Act*, R.S.S. 1953, C. 259. The said section of the Act reads as follows:

> "25. Upon the request in writing of any employee, and upon request of a trade union representing the majority of employees in any bargaining unit of his employees, the employer shall deduct and pay in periodic payments out of the wages due to such employee, to the person designated by the trade union to receive the same, the union dues of such employee, and the employer shall furnish to such trade union the names of the employees who have given such authority. Failure to make payments and furnish information required by this section shall be an unfair labour practice. 1944 (2nd. Sess.) c. 69, s. 23; 1951, c. 93, s. 6."

The evidence disclosed that William P. Zerr was an employee of the respondent and was a member of the applicant union, and had authorized the respondent to deduct union dues from his wages and forward same to the applicant.

Two of the three employees in the bargaining unit advised the respondent in July 1965, one of them being the said Zerr, that they were taking steps to have the applicant decertified as their bargaining agent and Zerr instructed the respondent, through its president, Mr. Koseruba, that he did not want any further dues deducted and forwarded to the applicant.

DECERTIFICATION APPLICATION

The respondent company complied with the request of the said Zerr. The decertification application however, was not in fact received by this

Board until October 15, 1965, and was in fact not heard by the Board until January 4, 1966. I would point out here that hearing was delayed through an adjournment agreed to by counsel for the applicant and respondent.

The respondent when he became aware that an application had been filed with the Board by the applicant, resumed deducting dues and forwarding them to the applicant.

BOARD'S CONCLUSION

The Board found that Zerr had in fact instructed the respondent not to deduct dues and forward same to the applicant, that the respondent acted in all good faith and that the applicant was informed of the said instructions. The Board therefore was of the opinion that the said Zerr had revoked the authority previously given to the applicant to request the respondent to deduct dues and forward same and therefore the respondent was not guilty of an unfair labour practice pursuant to section 25 of *The Trade Union Act*.

The Board therefore dismissed the application.

(Sgd.) "R. H. KING,"
Chairman.

March 3, 1966.

3.025 March 3, 1966

Hudson Bay and District Forestry Employees Union

v.

Simpson Timber Company Limited
and
International Woodworkers of America

Application for determination of an appropriate unit — Certification — Application failed to meet board's requirements — Company dominated organization — Vote ordered to determine counter application.

R.S.S. 1953. The Trade Union Act, C. 259
s.s. 5 (a) (b) (c); 6 (1)

ORDER OF THE BOARD

The reasons for the dismissal of this application were included in the order of the Board dated December 11, 1965. The Board, as stated in the order, considered that the material filed in support of the application did not meet the requirements of the Board. The Board furthermore, on the evidence, found that the applicant was a company dominated organization and therefore not a trade union within the meaning of *The Trade Union Act*, R.S.S. 1953, C. 259.

COUNTER APPLICATION FOR CERTIFICATION

The intervener applied for certification by a counter application pursuant to section 8 (4) of the rules and regulations of the Labour Relations Board. After hearing the evidence, the Board was of the opinion that it should order a vote pursuant to section 6 (1) of *The Trade Union Act*.

VOTE ORDERED

The Board was also of the opinion that the only name that should appear on the ballot was that of the intervener in view of its earlier finding that the applicant was not a trade union within the meaning of *The Trade Union Act.*

(Sgd.) "R. H. KING,"
March 3, 1966. Chairman.

3.026 April 6, 1966

Construction and General Labourers' Local Union No. 890

v.

Saskatchewan Federated Co-operatives Limited
and
Retail, Wholesale and Department Store Union, Local 542

Application for amendment of certification order — Bargaining agreement in force — Board lack power to amend under s. 5 (i) of Trade Union Act — s. 26(3) of the Act refers to "bargaining unit" not "contents of collective agreement" — Application dismissed.

R.S.S. 1953. The Trade Union Act, C. 259, as amended by C. 48, 1961, s.s. 5 (a) (b) (c) (i) (j); 26(3)

APPLICATION FOR CERTIFICATION

The applicant applied under section 5, clause (a), (b) and (c) to be certified as the bargaining agent for a certain portion of the employees of the respondent company.

The certified union was certified on May 11, 1949, with certain later necessary amendments to make corrections regarding changes of name being made by the Board, as the bargaining agent for the following bargaining unit:

"The employees employed by the Saskatchewan Federated Co-operatives Limited in or in connection with its place of business located in the city of Saskatoon, except the following, namely: . . . " There follows a long list of exclusions, none of which are involved in this application before the Board.

The evidence disclosed that there was a bargaining agreement entered into by the certified union and the respondent in existence at the time this application was made and whose expiry date is October 31st, 1966. The facts disclose that the respondent, a large co-operative wholesale organization, had expanded its operation to include a construction department. This department's function was to construct buildings required by the respondent or local co-operatives throughout the trading area in Saskatchewan of the said respondent. This department apparently grew in proportions through the years and men were employed on construction sites by the respondent in many communities in northern Saskatchewan. It was the policy of the respondent insofar as possible to

use local labor at the different sites but these men were all paid by the respondent from its office in Saskatoon. The current bargaining agreement as entered into between the certified union and the respondent made no provision for this type of employee and the union security clause was neither enforced by the respondent nor was it so requested to do by the certified union. There were apparently some employees who are included in this application who were in fact not included in the bargaining process nor covered in the bargaining agreement.

The Board was of the opinion that it had no power to grant the application. The Board considered that the wording of the original certification order clearly included the employees named in the application. No area limitation was placed in the certification order and the employees were employed "In connection with the place of business located in the city of Saskatoon".

S. 5 (i) (j) CONSIDERED

The Board, to grant the application, would have had to amend the original Board order. Sections 5 (i) and 5 (j) of *The Trade Union Act*, R.S.S. 1953, C. 259, set out the Board's powers insofar as amending an order is concerned. It reads in part as follows:

> 5 (i) "Rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or under clause (a), (b), or (c) in a case where no collective bargaining agreement is in existence . . ."
>
> 5 (j) "Amending an order of the board made under clause (a), (b) or (c) in a case where a collective bargaining agreement is in existence, if the employer and the trade union agree to the amendment or the amendment is considered by the board to be necessary for the purpose of clarifying or correcting the order".

S. 5(i) clearly sets out the Board may amend only in the case where no collective bargaining agreement is in existence. There was a collective bargaining agreement in existence at the time of this application. The Board was of the opinion that this precluded it from amending the order as at the date of the applicaton. The fact that the agreement did not cover all the employees for which the certified union was certified as bargaining agent did not in the Board's opinion give it the jurisdiction to amend the order in the light of section 5(i). Section 5(j) gives the Board power to amend for the purpose of clarifying or correcting an order even when there is a bargaining agreement is existence. The type of amendment required here to grant the application is not one the Board considered came in the category of being necessary for clarifying or correcting an order as envisaged by the legislature.

The Board therefore came to the conclusion that they could not consider the application as it was out of time.

S. 26(3) CONSIDERED

Section 26(3) of the said Act which refers to "employees or any part thereof to which any collective bargaining agreement applies" may

apply within a 60-30 day period of the expiry date of an agreement to the Board for certification. This however is not the wording in Section 5 (i) and the Board was therefore of the opinion that had the legislature so intended it they would have so worded the section. The Board therefore was of the opinion that the term "to which any bargaining agreement applies" as used in section 26 (3) could only be interpreted as referring to the bargaining unit and not to the contents of the bargaining agreement itself.

For these reasons the Board dismissed the application.

(Sgd.) "R. H. KING,"
Chairman.

April 6, 1966.

3.027 April 7, 1966

International Union of Operating Engineers, Hoisting
and Portable Local Union No. 870

v.

Redi-Mix Limited, Moose Jaw
and
The Redi-Mix Concrete Ltd. Employees Association of Moose Jaw
(No affil.)

Application for rescission of a vote order — The Board has discretionary power to rehear or not to rehear the application — Application denied hearing.

R.S.S. 1965. The Trade Union Act, C. 287,
s.s. 5(i); 20.

APPLICATION FOR RESCISSION

This is an application for rescission of a direction for vote order of this Board dated January 7, 1966. Counsel for the applicant, Mr. Taylor, in the application cited the reasons why the applicant submits that the direction for the vote order ought to be rescinded as follows:

(a) The Redi-Mix Concrete Ltd. Employees Association is not a trade union;

(b) That in making the said order the Board failed to consider or failed to give proper consideration to the evidence of K. M. Stephenson and Gordon Murray;

(c) That the Board ought not to have ordered any vote, but ought to have certified International Union of Operating Engineers, Hoisting and Portable Local Union No. 870, the applicant herein.

Counsel for the applicant, Mr. Taylor, quite clearly and fairly expressed yesterday that he did not intend to call any new evidence, and in fact there was agreement between counsel that the evidence would apply. His submission was that it was a new application and we were bound to hear it.

POWER OF THE BOARD UNDER S. 20 AND S. 5.

I must say that this has given us a good deal of concern and we are certainly not unmindful of section 20 of *The Trade Union Act*, R.S.S.

1965, C. 287, and we are also not unmindful of section 5, which sets out the powers that are conferred on us, and also Rule 6 in the Board's Rules and Regulations, which states "That any trade union, any employer or any person directly concerned may apply to the Board for an order rescinding or amending any order or decision of the Board".

BOARD'S DISCRETION IN REHEARING APPLICATION

The Board, however, did feel that they did have a discretion re hearing this application. This Board did, previously rule specifically on the two points set out in the application. First, on the question as to whether Redi-Mix Concrete Ltd. Employees' Association was or was not a trade union. The Board came to the conclusion that it was a trade union, on the evidence it had before it on a previous application. There is no new evidence for the board to now consider. Secondly, the Board did consider the evidence of Stephenson and Murray in the same application and were of the opinion it gave it proper consideration.

The Board felt they did have the right to exercise some discretion re the hearing of this application, as, if they did not have this right there would be no finality and this type of application could go on and on. We are also not unmindful of the fact, and we had great concern about this, that there is no right of appeal. This, however, is not the case in the full sense, as by us declining to hear this application, there is still a right to have this order reviewed by a superior court. We have come to the conclusion that we have a right to exercise discretion in hearing this application and we are, therefore, for the reasons as stated above, not going to hear this application.

(Sgd.) "R. H. KING,"
Chairman.

April 7, 1966.

3.028 July 5, 1966

Oil, Chemical and Atomic Workers International Union
Local 9-609

v.

Empire Oil Limited

Unfair Labour Practice — Employer's failure to deduct Union dues — s. 29 of The Trade Union Act violated — Application granted.

R.S.S. 1965. The Trade Union Act, C. 287,
s. 29.

ALLEGATION OF UNFAIR LABOUR PRACTICE

The applicant alleges an unfair labour practice pursuant to section 29 of The Trade Union Act, R.S.S. 1965. Section 29 of *The Trade Union Act* reads as follows:

> "Upon the request in writing of an employee, and upon request of a trade union representing the majority of employees in any bargaining unit of his employees, the employer shall deduct and pay in periodic payments out of the wages due to the employee, to the person designated by the trade union to receive the same, the union dues of the employee, and the employer shall furnish to that trade union the names of the employees who have given such authority. Failure to make payments and furnish information required by this section shall be an unfair labour practice".

DEDUCTION OF UNION DUES

The facts disclose that the applicant was certified as the bargaining agent, insofar as the employees of the respondent company were concerned, on the 15th of February, 1963. The three employees around which this application revolves all signed dues deduction authorization cards and the applicant trade union duly made the request of the respondent to deduct and pay to the applicant their union dues. Some time later the three employees advised the respondent in writing that they no longer wished the respondent to deduct their union dues and forward same to the applicant. The applicant advised the respondent, after they ceased to forward the said dues, that they required the same to be forwarded to them, but the respondent failed to meet their request. It is as a result of the respondent's failure to forward the said dues to the applicant that this application is made.

The Board was of the opinion that unless the facts in a particular case show, that once the requirements of section 29 to *The Trade Union*

Act have been met by the employee and the certified union, there are some very extenuating circumstances as there was in the *Sheet Metal Workers International Association Union No. 577 v. Home Ease Heating Limited* case, then a written revocation of the dues deduction authorization by the employee to the employer does not relieve the employer pursuant to section 29 of his obligation to deduct the dues.

DECISION

The Board was of the opinion that on the facts of this particular case the respondent did commit an unfair labour practice within the meaning of section 29 of *The Trade Union Act*. The respondent was fully aware of the difficult situation with respect to the negotiating of a new contract. In spite of this they chose to accept the written authority of the employees made directly to them as authorization to cease deducting dues. They ignored the request of the applicant to continue to forward the said dues.

There were no circumstances in this case that relieved the respondent of his stated obligation as set out in section 29 of *The Trade Union Act*.

(Sgd.) "R. H. KING,"
July 5, 1966 Chairman.

3.029 July 5, 1966

Oil, Chemical and Atomic Workers International Union
Local 9-609

v.

Empire Oil Limited

Unfair Labour Practice — Collective bargaining agreement terminated before the alleged Unfair Labour Practice — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287,
s. 9 (1) (c).

ALLEGATION OF UNFAIR LABOUR PRACTICE

The applicant alleges an unfair labour practice pursuant to section 9 (1) (c) of *The Trade Union Act*, R.S.S. 1965.

Section 9 (1) (c) reads as follows:

> "9.—(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
>
> (c) to fail or refuse to bargain collectively with representatives elected or appointed (not necessarily being the employees of the employer) by a trade union representing the majority of the employees in an appropriate unit;"

TERMINATION OF BARGAINING AGREEMENT

There was an involved situation that existed with respect to the negotiations for a new collective bargaining agreement as between the applicant and the respondent. A prolonged period of time had elapsed between the termination date of the previous bargaining agreement and the time at which the unfair labour practice is alleged to have taken place. During this period some serious labour problems had erupted that involved the applicant with not only the respondent, but also other operations of the respondent's parent company throughout Canada.

The Board was of the opinion that on all the evidence it was not established that the respondent had committed an unfair labour practice pursuant to the above mentioned section.

The application was therefore dismissed.

(Sgd.) "R. H. KING,"
July 5, 1966. Chairman.

3.030 July 5, 1966

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 395

v.

Evans Construction Company Limited

Application for determination of appropriate unit — Certification — No majority support — Certification denied.

R.S.S. 1965. The Trade Union Act. C. 287, as amended by C. 83, 1966, s. 5(a) (b) (c).

REASONS FOR DECISION

The evidence clearly disclosed in this application that at the time of the hearing before the Board that the applicant no longer had the necessary employee support to warrant certification.

(Sgd.) "R. H. KING,"
Chairman.

July 5, 1966.

3.031 July 15, 1966

International Union of Operating Engineers, Hoisting and Portable
Local Union No. 870
v.
Inspiration Limited

Application for determination of an appropriate unit — Certification — Specialized skilled workers granted province-wide certification — Application granted.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 2 (f) (ii); 5 (a) (b) (c).

APPLICATION

This application for certification was granted pursuant to the evidence filed by the applicant. It was found on the evidence that the respondent was an employer within the meaning of Section 2 (f) (ii) of *The Trade Union Act*, R.S.S. 1965, C. 287, in that they were employing less than three employees in the proposed bargaining unit but one of these employees was a member of the applicant union at the date of the application.

PROVINCE-WIDE CERTIFICATION

We granted province-wide certification in view of the fact that the work performed by the employees in the proposed bargaining unit is of a specialized nature and they can be quickly moved from job to job throughout the province.

(Sgd.) "R. S. CHAMP,"
July 15, 1966. Vice-Chairman.

3.032 August 2, 1966

United Brotherhood of Carpenters and Joiners of America,
Local 1805

v.

W. C. Wells Construction Company Limited.

Unfair Labour Practice — Evidence showed the employee concerned is not an employee within The Trade Union Act — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287,
s.s. 25; 27.

ALLEGATION OF UNFAIR LABOUR PRACTICE

The Board after hearing the evidence on this application are of the opinion that Donald Asher, the person named in the application, is not an employee within the meaning of *The Trade Union Act*, R.S.S. 1965.

The evidence established that Asher was acting in a supervisory capacity and had been exercising authority insofar as the hiring and firing of employees on the jobs that he was in charge of.

Having come to this conclusion, the unfair labour practice application was therefore dismissed.

(Sgd.) "R. H. KING,"
August 2, 1966. Chairman.

3.033 August 2, 1966

Martin Schafer and William P. Zerr

v.

Home Ease Heating Limited
and
Sheet Metals Workers' International Association, Local Union No. 577

Application for recission of certification order — Evidence of lack of majority support — Application complied with the statutory time requirement — Application granted.

R.S.S. 1965. The Trade Union Act, C. 287
s. 5(i).

REASONS FOR DECISION

This application was made by two of the three employees in the bargaining unit for which the certified union had been certified as bargaining agent. The Board was of the opinion that the application was timely, and that clearly, the evidence disclosed that the certified union did not represent a majority of the employees in the bargaining unit.

The Board therefore granted the application for rescission.

(Sgd.) "R. H. KING,"
Chairman.

August 2, 1966.

3.034 August 2, 1966

Oil, Chemical and Atomic Workers' International Union,
Saskatchewan Power and Gas, Local 9-649

v.

The Saskatchewan Power Corporation
and
International Brotherhood of Electrical Workers, Local
Union No. 2067

Application for certification — Attempt to decertify the existing Union — Refusal to order a vote to determine majority support — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287,
s.s. 5(a) (b) (c) (i); 7(2).

APPLICATION

The applicant applied for certification of certain employees of the employer who comprised a bargaining unit made up of persons who formerly were employed in the electrical generating plant and distribution system of the city of Regina which was purchased by the said employer. The intervener had been certified as the bargaining agent for some period of time and had bargained collectively for the said bargaining unit and has an agreement with the employer with the effective date of January 1, 1965, and termination date of December 31, 1965.

BOARD'S DISCRETION UNDER S. 7 (2)

The Board considered the evidence placed before it and came to the conclusion that in view of the support shown for the intervener that it should exercise its discretion pursuant to section 7, subsection 2 of *The Trade Union Act*, R.S.S. 1965, and refuse to direct a vote. The Board was satisfied that the intervener represented a clear majority of the employees in the applied for bargaining unit.

DECISION

The Board therefore dismissed the application of the applicant and granted the application of the intervener for the amendment of the original certification order. The bargaining unit to be further amended as agreed upon by the employer and intervener at the hearing.

(Sgd.) "R. H. KING,"
August 2, 1966. Chairman.

3.035 August 3, 1966

Dorothy Drever

v.

Government of Saskatchewan
and
Saskatchewan Government Employees' Association

Application under s. 5(i) — Refusal to join union due to religious belief — Application granted.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (i).

APPLICATIONS UNDER S. 5(i)

This was an application pursuant to section 5, clause (i) of *The Trade Union Act*, R.S.S. 1965, as amended. The evidence presented to the Board by the father of the applicant, Mr. Drever, clearly indicated that this family, based on their religious beliefs, felt that they could not belong, not only to a trade union, but to any type of association within the community. It would perhaps have been better had the applicant herself given evidence, but the Board was of the opinion there was sufficient evidence on which they could find that this application should be granted.

(Sgd.) "R. H. KING,"
August 3, 1966. Chairman.

3.036 August 3, 1966

International Union of Operating Engineers, Hoisting and Portable and Stationary Local Union No. 870

v.

Stearns-Roger Canada Ltd.
and
Construction and General Labourers' Local Union No. 180

Application for determination of an appropriate unit — Certification — Transfer of obligation to respondent — No collective bargaining agreement between respondent and intervener — Application untimely — Board has no jurisdiction.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s.5 (a) (b) (c) (k); 33; 28.

APPLICATION

The applicant applied for certification as bargaining agent for the following bargaining unit:

> "All employees employed by Stearns-Roger Canada Ltd. in the province of Saskatchewan engaged as field survey engineers (field and office), including all employees engaged in the classifications of chief of party, assistant chief of party, draftsmen, instrument men, chainmen, rodmen, signalmen, gradesetters, soil testers, field equipment service men and apprentices."

There are several certification orders with respect to different bargaining units of employees of the respondent. There is one that relates specifically to this proposed bargaining unit — namely a certification order naming the intervener as bargaining agent dated June 24, 1963, for the following bargaining unit:

> "All labourers, labour foremen, power buggy operators, jackhammermen operators, assistant instrument men and rod and chainmen employed by Stearns-Roger Engineering Company Ltd. between the boundaries of the 49th and 51st parallels in the province of Saskatchewan."

TRANSFER OF OBLIGATION UNDER S. 33

The above certification order refers to Stearns-Roger Engineering Company Ltd. and while no amendment has been applied for to have the

name changed to the present name of the respondent, the Board was satisfied that the respondent is the successor company to Stearns-Roger Engineering Company Ltd., and, therefore, pursuant to section 33 of *The Trade Union Act*, R.S.S. 1965, there was a transfer of obligations and the intervener is the certified bargaining agent for the aforementioned bargaining unit.

Clearly several of the classifications in the applicant's proposed bargaining unit — namely — "assistant instrument men, chainmen and rodmen", are one and the same as those for which the intervener is certified as the bargaining agent.

The Board could find no collective bargaining agreement that had been entered into by the respondent and intervener. No such agreement had been filed with the Department of Labour pursuant to section 28 of *The Trade Union Act*.

S. 5(k) CONSIDERED

In view of this fact, for the board to grant this application it would require an amendment to the certification order dated June 24, 1963. *The Trade Union Act* states: "5. The board shall have power to make orders: (k) rescinding or amending an order or decision of the board made under clause (a), (b), or (c) where:

> "(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than thirty days nor more than sixty days before the anniversary date of the order to be rescinded or amended."

This clearly limits the Board's power to amend an order when no bargaining agreement is in existence to within the 30-60 day period prior to the anniversary date of the order.

The anniversary date of the order in question is June 24, 1963, and this application was filed on July 14, 1966.

DECISION

This application was therefore out of time and the Board had no jurisdiction to consider same.

For these reasons the application was dismissed.

(Sgd.) "R. H. KING,"
Chairman.

August 3, 1966.

3.037 September 10, 1966

"Subordinate" Local Union No. 442 Plasterers & Cement Masons.

v.

The Builders Service Co. Ltd.

Application for determination of an appropriate unit — Certification — Unit classification amended by Board — Evidence of majority support — Application granted.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c).

APPROPRIATENESS OF UNIT

On the hearing of this application for bargaining rights by the "Subordinate" Local Union No. 442, Operative Plasterers and Cement Masons International Association the Board after hearing the evidence amended the classifications set out in the proposed bargaining unit to set out two classifications only, namely, cement masons' charge hands and cement masons. The Board was of the opinion that they formed an appropriate unit in this particular case and the evidence disclosed that the applicant did have the necessary support for this unit. It was for this reason that the application for certification was granted on the amended bargaining unit.

(Sgd.) "R. H. KING,"
Chairman.

September 10, 1966.

3.038 September 10, 1966

Construction and General Labourers' Local Union No. 180

v.

Graco Masonry Ltd.

Application for determination of an appropriate unit — Certification — Company has no employees — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c).

APPLICATION

The applicant applied for certification in respect of Graco Masonry Ltd. pursuant to section 5 (a), (b) and (c) of *The Trade Union Act*, R.S.S. 1965, C. 287, as amended.

The evidence disclosed that the respondent company was a wholly owned subsidiary of Graham Construction Ltd. The Board was satisfied on the evidence that the respondent was a new company set up by Graham Construction Ltd. During the inaugural period there was some apparent confusion as to just which company certain employees were employed by. The accounting and payroll operations for both companies were looked after by one and the same person or persons.

BOARD'S OPINION

The Board, on the whole of the evidence, were of the opinion that at the time of the application there were in fact no employees employed by the respondent company who fell into the classifications as set out in the proposed bargaining unit. It appeared from the evidence that the confusion concerning who in fact was employing these employees, that is to say, the respondent or the parent company, arose from one of the clerks not being sufficiently instructed by management as to just how they proposed to operate the respondent company. The Board could well see how the applicant came to the conclusion that employees who fell into the classifications of the proposed bargaining unit were employees of the respondent. It is to be regretted that the applicant and respondent could not have clarified this position without having to appear before this Board.

It was for the reasons as stated above that the application was dismissed.

(Sgd.) "R. H. KING,"
Chairman.

September 10, 1966.

3.039 September 10, 1966

International Brotherhood of Electrical Workers,
Local Union No. 2038

v.

ITT Canada Limited

Application for determination of an appropriate unit — Certification — Trainee employees inappropriate in unit — Request premature because of prospective build up of plant of the employer — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c).

APPLICATION

The applicant applied for certification as bargaining agent for all employees of the respondent company except the plant manager. This application was filed with the Board on August 17, 1966.

The evidence disclosed that late in 1965 the respondent opened a branch in Regina, Saskatchewan, with very few employees. The respondent manufactures electronic equipment and its intention is to train local persons in the skills necessary to carry out the process of manufacturing.

FACTS

The respondent apparently determined that a twenty-two week training period was necessary for a person to acquire the requisite skills. It was arranged with certain government departments that persons taking this training course would be paid, in part by the respondent and in part by the government, what was called a living allowance. There were certain other sharing arrangements concerning the instructors. The idea being that the persons taking the training course, upon successful completion of the course, would then become employees of the respondent company if they so desired.

APPROPRIATENESS OF UNIT

The first training course commenced in mid November of 1965 and was composed of eleven females and one male. This course was completed in June 1966, and of those taking the course six became employees of the respondent and were so employed at the time of the application.

At the time this application was made there was a second training course in progress and eleven of the people listed on the Statement of Employment, out of a total of twenty-one, were persons taking the training course. There was considerable argument as to whether in fact persons taking the training were employees within the meaning of *The Trade Union Act*, R.S.S. 1965, C. 287. The Board did not feel that it was necessary for the purposes of considering this application to decide this point. It was the majority of the Board's opinion that in view of the sharing arrangements as to living allowance and instruction during the training period that the persons in training, irrespective of their status as employees, could not be considered as part of a unit appropriate for the purpose of bargaining collectively. Their special status which existed for such a limited period of time at the outset of their association with the respondent company could not in the majority of the Board's opinion qualify them as a classification that should be included in the bargaining unit applied for by the applicant.

THE BUILD-UP PRINCIPLE

There was further evidence concerning the planned build-up of the processes that would be used in the respondent's plant when all phases of the planned manufacturing operation were complete. The evidence was that there would be numerous additional classifications of work added during the build-up of the operation. The Board fully appreciated that certain of these classifications and the additional numbers of employees to be employed would to some extent be determined by factors outside the control of the respondent company such as the contracts they were able to obtain and their sales volume. The majority of the Board was satisfied that the evidence established it was the respondent company's intention that they would build up the work force in these different classifications within a period of time of a year or less. It was also the majority of the Board's opinion that the number of employees, exclusive of the persons in training at the date of application, did not represent a substantial segment of the employees that would, within a fairly short period of time, be employed by the respondent. The majority of the Board were, therefore, of the opinion that the application was premature. The Board wants it to be quite clear that this decision presupposes an honest effort being made by the respondent to follow through on the proposed phases brought out in the evidence and to increase the number of employees and classifications accordingly. The Board in making this decision was faced with the task of balancing the right of the present employees to be represented by a union for the purposes of bargaining collectively and the rights of future employees to select a bargaining agent.

BOARD'S CONCLUSION

It was a majority of the Board's opinion that on weighing these rights that this application should be dismissed. This decision is in no way to be interpreted as indicating that a unit is not appropriate, insofar

as numbers are concerned, until the total number of proposed employees or classifications are filled. It would, however, seem only reasonable that in an operation such as this, namely, a new plant operation, that a minimum of 50% of the proposed number of employees could be considered as an appropriate unit for the purposes of determining the bargaining agent they wished to represent them.

It was for these reasons the Board dismissed the application.

(Sgd.) "R. H. KING,"
Chairman.

September 10, 1966.

3.040 September 10, 1966

Hotel, Motel, Restaurant Employees and Beverage Dispeners' Union Local 767

v.

Albany Hotel Ltd.

Unfair Labour Practice is alleged in dismissal of employees — No evidence of discriminatory or Unfair dismissal — Employer discharged the onus of proof imposed by 9 (1) (e) of the Trade Union Act — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (d) (e); 9(1) (b) (e).

ALLEGATION OF UNFAIR LABOUR PRACTICE

The applicant alleges the respondent engaged in an unfair labour practice pursuant to section 9 (1) (b), and (e) of *The Trade Union Act*, R.S.S. 1965, C. 287, as amended by S.S. 1966, C. 83.

NO EVIDENCE OF DISCRIMINATORY DISMISSAL

On the evidence the Board was satisfied that some time prior to the date of August 11, 1966, the general manager of the respondent company was aware that there was some indication of union activity with respect to the respondent company. The evidence, however, did not in the majority of the Board's opinion support the allegation that Gerry Hitchinson, Joseph Livingstone or Ann Kirilenko were dismissed by the respondent in an endeavour to discriminate or interefere with the formation of a labour organization pursuant to either section 9 (1) (b) or (e) of *The Trade Union Act.*

DISSATISFACTION WITH EMPLOYEES' WORK

The evidence in the majority of the Board's opinion clearly established that Gerry Hitchinson was a dissatisfactory employee and without doubt he was dismissed for due cause and for no other reason. The majority of the Board was of the opinion that they could not rely on the evidence of Mr Hitchinson.

The employee, Joseph Livingstone, was laid off on August 16, 1966. He was dismissed by Mr. Bowes, the general manager of the respondent company. The evidence disclosed that before any suggestion of union

activity there had been some dissatisfaction with respect to Mr. Livingstone's employment. The evidence of Mr. Livingtone and Mr. Bowes in the majority of the Board's opinion established that Mr. Livingstone's dismissal resulted from a direction of the owner Mr. Nolan and was based on differences between the owner and Mr. Livingstone and was not related to any union activity that was taking place in the respondent company.

The employee Ann Kirilenko was dismissed by Mr. Bowes on August 17, 1966. This employee's work was satisfactory and the reason given for her dismissal was that business had been slow. This was supported by the evidence of Mr. McDonald, a chartered accountant who looks after the respondent company's books. The evidence concerning this employee's dismissal gave the Board the most concern, but the majority of the Board after considering all the evidence were satisfied, having due regard to the onus placed on the respondent pursuant to section 9 (1) (e) of the said Act, that the dismissal was for the reason of slower business and not for the purpose as set out in the above mentioned section and subsection.

DECISION

It was for these reasons the application was dismissed.

(Sgd.) "R. H. KING,"
Chairman.

September 10, 1966.

3.041 September 10, 1966

Hotel, Motel, Restaurant Employees and Beverage Dispeners' Union Local 767

v.

Albany Hotel Ltd.

Application for reinstatement — Monetary loss — Dismissal fair and not discriminatory — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (d) (e) (f) (g).

APPLICATION FOR REINSTATEMENT

The Board considered the applications for reinstatement and payment of monetary loss respecting Gerry Hitchinson, Ann Kirilenko and Joseph Livingstone.

For the reasons as stated in the Board's decision, (p. 73 of this volume) dismissing the unfair labour practice alleged in connection with the dismissal of the said applicants by the respondent, the applications were dismissed.

(Sgd.) "R. H. KING,"
September 10, 1966. Chairman.

3.042 October 4, 1966

United Stone and Allied Products Workers of America
Local No. 189

v.

Potash Company of America, Ltd.

Unfair Labour Practice alleged — Refusal to renegotiate new agreement — Where duration of bargaining agreement is more than three years, parties can renegotiate under s. 30(4) — Application untimely and therefore dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (d) (e); 9 (1) (c); 30 (1) (2) (3) (4).

ALLEGATION OF UNFAIR LABOUR PRACTICE

The applicant alleges an unfair labour practice pursuant to section 9 (1) (c) of *The Trade Union Act*, R.S.S. 1965, C. 287, 1965 as amended

This section and subsection read in part as follows:

> "9(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
>
> (c) to fail or refuse to bargain collectively with representatives elected or appointed (not necessarily being the employees of the employer) by a trade union representing a majority of the employees in an appropriate unit."

The facts disclose that a bargaining agreement was entered into by the applicant and respondent and contained the two following clauses which are pertinent to this application:

> "28(a) This agreement shall become effective on the 21st day of September A.D. 1965, and shall continue in full force and effect until and including September 20, 1968, and from year to year thereafter unless written notice is given as provided by paragraph (b) below.
>
> "(b) On written notice of not less than thirty (30) days nor more than sixty (60) days prior to the expiry date of this agreement, either party to this agreement may require the other party to enter into negotiations for a new agreement."

NOTICE OF INTENTION TO RENEGOTIATE AGREEMENT

The applicant gave notice in writing to the respondent on the 18th day of July, 1966, that they desired to enter into negotiations for a new

agreement and the respondent refused to do so. The applicant argues that notwithstanding the expiry date named in clause 28(a) of the bargaining agreement that the addition of the words "and from year to year thereafter" has the effect of making this bargaining agreement for an unspecified term. They then argue that section 30 (a) (b), R.S.S. 1965, C. 287, as amended by S.S. 1966, C. 83, applies. The expiry date thus becomes the 20th day of September A.D., 1967. They further argued that the notice to negotiate a new agreement having been given in the 30 to 60 day period prior to this date, pursuant to subsection (4) of the above mentioned chapter and section of the said statutes, and the respondent having failed to do so, constitutes the alleged unfair labour practice.

S. 30 CONSIDERED.

Section 30, subsections (1), (2) and (3) of the amended statutes referred to above reads as follows:

> "30(1) Except as hereinafter provided, every collective bargaining agreement, whether heretofor or hereafter entered into, shall remain in force for the term of operation provided therein and thereafter from year to year.
>
> "(2) Where a collective bargaining agreement:
>
> (a) does not provide for its term of operation;
>
> (b) provides for an unspecified term; or
>
> (c) provides for a term of less than one year;
>
> the agreement shall be deemed to provide for its operation for a term of one year from its effective date.
>
> "(3) Where a collective bargaining agreement provides for a term of operation in excess of three years from its effective date its expiry date for the purpose of subsection (4) shall be deemed to be three years from its effective date.
>
> "(4) Either party to a collective bargaining agreement may, not less than thirty days nor more than sixty days before the expiry date of the agreement, give notice in writing to the other party to terminate the agreement or to negotiate a revision of the agreement and where a notice is given the parties shall forthwith bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement."

These subsections clearly indicate that it was the intention of the legislature that a bargaining agreement could not be entered into for a period of more than three years without either party to the agreement having the opportunity to serve notice to renegotiate the agreement within the period prescribed in subsection (4). It is also clear from the above mentioned subsection that if neither party gave the necessary notice to renegotiate the agreement, the agreement would run from year to year thereafter. The true date for notice to renegotiate pursuant to subsection (4) would be the anniversary date of the effective date of the said agreement each succeeding year.

BOARD'S CONCLUSION

The Board was of the opinion that in view of these provisions of *The Trade Union Act*, it could not in any way construe that the bargaining agreement on which this application is based having added the words "and from year to year thereafter" after a specific expiry date of September 20, 1968, which in fact is three years after the effective date of September 21st, 1965, was for an unspecified time as referred to in section 30, subsection 2 (b).

The expiry time of September 20, 1968, was certain, and the addition of the words "and from year to year thereafter" in the bargaining agreement changed nothing as by operation of law pursuant to section 30, subsection (1) of *The Trade Union Act*, if no notice to terminate or negotiate the bargaining agreement was given pursuant to section 30, subsection (4), the agreement would remain in force from year to year thereafter.

For these reasons the Board dismissed the application.

(Sgd.) "R. H. KING,"
Chairman.

October 4, 1966.

3.043 October 7, 1966

The Association of R.G.H. Laboratory Technologists

v.

The City of Regina, Saskatchewan
and
Regina Hospital Employees Union, Local 176

Application for determination of an appropriate unit — Certification — Interim agreement on wages can not supersede existing bargaining agreement. Application untimely and therefore dismissed.

R.S.S. 1965. The Trade Union Act, C. 287,
s. 30 (3).

COLLECTIVE BARGAINING AGREEMENT

The evidence disclosed that there was a bargaining agreement which had been entered into between the respondent and the certified union, Regina Hospital Employees Union, Local 176, whose effective date was January 1, 1964 to December 31, 1965.

The certified union and the respondent entered into negotiations early in 1965 and as negotiations were not progressing as quickly as anticipated an interim agreement for a six month period concerning wage adjustments only was entered into between the respondent and the certified union. This interim agreement expired June 30, 1966.

It was the Board's opinion that this interim agreement being as to wages only did not supersede the original bargaining agreement. The original agreement had not been terminated by either party and therefore was still in effect with an expiry date of December 31, 1966. In view of this the application was out of time as it was not made within the 30-60 day period prior to expiry date as required by *The Trade Union Act*, R.S.S. 1965, C. 287.

It was for these reasons the Board dismissed the application.

(Sgd.) "R. H. KING,"
October 7, 1966. Chairman.

3.044 December 8, 1966

Chauffeurs, Teamsters and Helpers Local Union No. 395

v.

Concrete Mix (Regina) Limited

Application for determination of an appropriate unit — Certification — Original certification and bargaining agreement in force — Evidence of majority support — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287 as amended by C. 83, 1966. s.s. 5 (a) (b) (c); 7 (3) (b) (c).

APPLICATION

The applicant applied to be certified as bargaining agent for the following bargaining unit as amended:

> "All truck drivers, cement mixer truck drivers, front end loader drivers employed by Concrete Mix (Regina) Limited in the city of Regina, Saskatchewan, except a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, constitute an appropriate unit of employees for the purpose of bargaining collectively."

PREVIOUS CERTIFICATION

On December 9, 1959, the Board certified the International Union of Operating Engineers, Hoisting and Portable and Stationary Local Union No. 870, as bargaining agent for the following bargaining unit:

> "All employees of Concrete Mix (Regina) Limited, employed in the province of Saskatchewan, except office staff and except any person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity."

Since date of certification bargaining agreements had been negotiated and as of the date of application there was a bargaining agreement in existence with effective dates January 1, 1965, to December 31, 1966.

EVIDENCE OF MAJORITY SUPPORT

No Statement of Employment was filed by the respondent. However, based on the applicant's estimate of the number of employees in the pro-

posed bargaining unit and on the evidence of support that was considered by the Board at the time the application was heard, it was clear that the certified union represented a clear majority of the employees in the proposed unit. The Board therefore, pursuant to section 7, subsection 3 (b) and (c), dismissed the application.

(Sgd.) "R. H. KING,"
Chairman.

December 8, 1966.

3.045 December 8, 1966

International Union of Operating Engineers, Hoisting and Portable and Stationary Local Union No. 870

v.

AMC-Harrison Ltd.

Application for determination of appropriate unit — Certification — No evidence of homogenous unit — Lack of adequate majority support — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c).

APPLICATION

The applicant applied to be certified as bargaining agent for the following proposed bargaining unit of employees of the respondent:

> "All hoistmen employed by AMC-Harrison Ltd. in the province of Saskatchewan, constitute an appropriate unit of employees for the purpose of bargaining collectively."

The respondent is a mining contractor who is presently in Saskatchewan engaged in sinking shafts for different companies for the purpose of bringing potash mines into production. The Statement of Employment shows that the employees in the proposed bargaining unit are employed at three different locations. These are separate projects as they are located some miles apart and each shaft sinking operation being performed by the respondent is for a different potash mining company.

EVIDENCE OF RESPONDENT

The Board heard extensive evidence from Mr. Bennett, an officer of the respondent. Mr. Bennett is an experienced mining engineer. His evidence was that the sinking hoistman performs a very important type of work. The sinking hoistman is an integral part of a crew known in the trade as a shaft crew. These shaft crew men work at the bottom of the shaft in which a hoist is being operated and must rely heavily on the ability and attentiveness of the hoistman. This, in Mr. Bennett's opinion, makes the sinking hoistman a key man in a highly organized team.

NO EVIDENCE OF HOMOGENEOUS UNIT

The Board heard evidence from several of the employees and it was obvious that the type of individual employed as a sinking hoistman was a very independent type. These men travel all over Canada, and perhaps world wide, to work on large shaft sinking projects. These men did not give the majority of the Board the impression they fell into any homogeneous group. This was further supported by the fact that by the time the application came on for hearing the applicant's support had dwindled to much less than the forty per cent required for a mandatory vote pursuant to *The Trade Union Act*, R.S.S. 1965, C. 287.

DECISION

The majority of the Board was therefore of the opinion that in view of the type of work performed by the sinking hoistman, the separation of the different projects, and the type of individual who works as a sinking hoistman, that the unit applied for was not appropriate for the purpose of bargaining collectively.

It was for these reasons the application was dismissed.

(Sgd.) "R. H. KING,"
Chairman.

December 8, 1966.

3.046 January 6, 1967

International Union of Operating Engineers, Hoisting and Portable and Stationary Local Union No. 870

v.

Certified Concrete Consolidated Ltd.,
and
Chauffeurs, Teamsters and Helpers Local Union No. 395

Application for certification granted — Plant unit — Applicant had necessary support for bargaining unit — Counter-application for certification of Intervener dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c).

REASONS FOR DECISION

The Board in hearing this application determined that in view of the fact this was a plant type operation the bargaining unit applied for was an appropriate unit. The applicant had the necessary support for the bargaining unit determined as appropriate and application for certification was granted. The counter-application for certification of the intervener was therefore dismissed.

(Sgd.) "R. H. KING,"
January 6, 1967. Chairman.

3.047 January 6, 1967

Saskatoon Printing Pressmen and Assistants' Union No. 206

v.

Western Publishers (Prince Albert) Limited.

Application alleging unfair labour practice under s. 9 (1) (a) and (h) The Trade Union Act, 1965 — No evidence supporting allegation — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, 5 (d) (e); 9 (1) (a) (h).

ALLEGED UNFAIR LABOUR PRACTICE

The applicant alleges the respondent committed an unfair labour practice pursuant to section 9 (1) (a) and (h) of *The Trade Union Act*, R.S.S. 1965, C. 287 as amended by C. 83 of the Statutes of 1966.

The above mentioned section and subsections read as follows:

> Section 9 (1) "It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
>
> (a) to interfere with, restrain or coerce an employee in the exercise of any right conferred by this Act, but nothing in this clause shall be deemed to deprive an employer of his freedom to express his views to his employees, as long as in the board's opinion the employer's expression of view does not in itself amount to coercion, a threat, a promise or undue influence;
>
> (h) to maintain a system of industrial espionage or to employ or direct any person to spy upon a member or proceedings of a labour organization or the offices thereof or the exercise by any employee of any right provided by this Act;"

NO EVIDENCE SUPPORTING ALLEGATION

The Board was of the opinion there was not one scintilla of evidence, circumstantial or otherwise, to support the unfair labour practice allegation of the applicant.

APPLICATION DISMISSED

For this reason the Board dismissed the application.

(Sgd.) "R. S. CHAMP,"
Vice-Chairman.

January 6, 1967.

3.048 February 8, 1967

Chauffeurs, Teamsters and Helpers Local Union No. 395

v.

Western Caissons (Sask.) Limited

Application for certification of truck drivers — No persons employed primarily as truck drivers — Unit inappropriate — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

The applicant applied to be certified as bargaining agent for the following bargaining unit:

> "All truck drivers employed by Western Caissons (Sask.) Limited in the province of Saskatchewan, except any person coming within the jurisdiction of the Operating Engineers, except "A" frames, except any person coming within the jurisdiction of the Laborers' Union, and except any person regularly exercising the right to employ or discharge employees, constitute an appropriate unit of employees for the purpose of bargaining collectively."

PREVIOUS CERTIFICATION

On September 7, 1965, the International Union of Operating Engineers, Hoisting and Portable and Stationary Local Union No. 870, was certified by the Board as bargaining agent for the following bargaining unit:

> "All employees employed by Western Caissons (Sask.) Limited (formerly Western Foundation Borings Ltd.) in the province of Saskatchewan, engaged in the operation of boring and drilling machines, "A" frames, all oilers, and operators of any other machines within the jurisdiction of the International Union of Operating Engineers, except any person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, constitute an appropriate unit of employees for the purpose of bargaining collectively."

FACTS

The evidence disclosed that the respondent was engaged in Saskatchewan on a project involving the use of drilling machines. These machines are mounted on trucks and are moved at intervals during the operation. It is also necessary to haul away the material accumulated from the drilling operation and certain other trucks are used for this purpose. The evidence disclosed that the operators of the drilling machine, the helpers or loader operators did this work. It entailed a minor portion of the work performed and no person was formally hired exclusively as a truck driver to perform this operation. The evidence was that there had been one such man hired for a short period but it was not the normal procedure, nor was he going to be employed as such, for a very lengthy period of time.

There is an area in this type of operation involving jurisdictional problems between the applicant and the certified union. This problem however is not one for the Board. The Board's function is to determine, if on the evidence in a particular case, the bargaining unit applied for is an appropriate unit.

APPLICATION DISMISSED

The Board was of the opinion, in this particular case, that in view of the fact that the employees involved were performing as truck drivers for limited periods of time only, the majority of their time being spent on other types of work, and only rarely was an employee hired for truck driving purposes the unit applied for was not appropriate.

It was for these reasons the application was dismissed.

(Sgd.) "R. H. KING,"
Chairman.

February 8, 1967.

3.049 February 8, 1967

Chauffeurs, Teamsters and Helpers Local Union No. 395

v.

Rex Underwood (Saskatoon) Ltd.
and
International Union of Operating Engineers, Hoisting and Portable and Stationary Local Union No. 870
and
The Rex Underwood (Saskatchewan) Employees' Association

Application for certification — Application dismissed — Another trade union represented a clear majority of the employees in the appropriate unit — Vote taken pursuant to s. 7 (3) (b) of The Trade Union Act on basis of intervener's support — Intervener's application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (a) (b) (c); 7 (3) (b) (c).

APPLICATION FOR CERTIFICATION

The applicant applied to be certified as the bargaining agent for the following bargaining unit as amended:

> "All truck drivers, cement mixer truck drivers, front end loader drivers employed by Rex Underwood (Saskatoon) Ltd. (formerly Patrick Ready-Mix Concrete Limited) in the city of Saskatoon, Saskatchewan, except a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, constitute an appropriate unit of employees for the purpose of bargaining collectively."

APPLICATION DISMISSED

The Board after considering the evidence concerning the type of operation of the respondent came to the conclusion that the bargaining unit as applied for did not constitute an appropriate unit for the purpose of bargaining collectively.

FACTS

The Board on June 2, 1960, had certified the International Union of Operating Engineers, Hoisting and Portable and Stationary Local Union No. 870, as bargaining agent for the following bargaining unit:

> "All employees of Patrick Ready-Mix Concrete Limited, employed in the province of Saskatchewan, except the yard man, dispatcher, yard foreman, office staff, and except any person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, constitute an appropriate unit of employees for the purpose of bargaining collectively."

The Board on August 3, 1966, amended this certification order to read "Rex Underwood (Saskatoon) Ltd." wherever "Patrick Ready-Mix Concrete Limited" appeared in the Board's order dated June 2, 1960.

BOARD DETERMINED APPROPRIATE UNIT

After hearing the evidence the Board determined that the appropriate unit for the purpose of bargaining collectively would be as follows:

> "All employees of Rex Underwood (Saskatoon) Ltd., employed in the province of Saskatchewan except office staff, aggregate superintendents, shop foremen, quality control inspectors, dispatchers, assistant dispatchers, and any person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, constitute an appropriate unit of employees for the purpose of bargaining collectively."

The Board determined the support filed by the applicant and pursuant to section 7, subsection (3) (b) and (c) of *The Trade Union Act* were satisfied that another trade union represented a clear majority of the employees in the appropriate unit and dismissed the application.

VOTE TAKEN

There was an intervener in this application and on the basis of the support that was filed by the intervener the Board directed that a vote be taken pursuant to section 7, subsection (3) (b) of *The Trade Union Act*.

The vote was taken and as a result of the vote, the Board dismissed the application of the intervener.

(Sgd.) "R. H. KING,"
Chairman.

February 8, 1967.

3.050 April 7, 1967

Retail, Wholesale and Department Store Union,
AFL-CIO/CLC
v.
Prairie Pacific Distributors Eastern Limited

Application for certification of employees in warehouse — Board found that bargaining unit applied for was not an appropriate unit — Not possible to delineate any one group of workers as a unit — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

The applicant applied for certification as bargaining agent for the following amended bargaining unit:

> "All employees employed by Prairie Pacific Distributors Eastern Limited in its warehouse at 1402 Quebec Avenue in the city of Saskatoon, in the province of Saskatchewan, except the plant manager, service department manager and warehouse foreman."

APPLICATION DISMISSED

The majority of the Board found that the amended bargaining unit applied for was not an appropriate unit for the purpose of bargaining collectively, and the application was dismissed.

REASONS FOR DECISION

On the basis of the evidence submitted it was the feeling of the majority of the Board that the operation carried on at 1402 Quebec Street, in the city of Saskatoon, Saskatchewan, was one engaged in receiving, warehousing and the distribution of goods to retail outlets, and the various functions performed by the employees were extremely interrelated and interdependent. Therefore, pursuant to section 5, clause (a) of *The Trade Union Act*, R.S.S. 1965, . 287, the majority of the Board determined that the Board could not delineate any one section as an appropriate unit.

(Sgd.) "R. S. CHAMP,"
April 7, 1967. Vice-Chairman.

DISSENT

I dissent from the majority opinion of the Board in dismissing the application.

During the hearing the union and the employer agreed upon a drawing of the floor plan of the company's premises at 1402 Quebec Avenue and the employer marked a list of the employees and indicated where each employee worked in relation to the drawing — either in the office section of the building or the warehouse section.

In my opinion this was sufficient evidence on which the Board could have determined that the unit requested by the applicant in its amended application was appropriate and the application should have been granted.

(Sgd.) "J. R. INGRAM,"
Board Member

3.051 November 8, 1967

The Melfort Co-operative Association Limited

v.

Retail, Wholesale and Department Store Union
AFL-CIO/CLC

Application to amend previous Board order — "Employees" under s. 2(e) of The Trade Union Act — Management Trainees excluded.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 2 (e); 5 (k) (i).

APPLICATION TO AMEND PREVIOUS BOARD ORDER

On November 7, 1967, an application came on for hearing before the Board for an amendment to a previous Board Order dated June 2, 1965.

The order which the applicant applied to be amended read as follows:

> "All employees employed by the Melfort Co-operative Association Limited in connection with its places of business located in the Town of Melfort, in the province of Saskatchewan, except the general manager, office manager, grocery department manager, dry goods department manager, lumber department manager, agricultural supply representative, hardware department manager, service station department manager, bulk fuel department manager, meat department manager, and a confidential secretary, constitute an appropriate unit of employees for the purpose of bargaining collectively."

The applicant stated the reason it wished to have the order amended was the fact that the exclusions listed in the prevous order were hampering its development of an increasing business program.

MATTER TO BE NEGOTIATED

The Board made it clear to both the applicant and respondent, at the Board hearing, that they were of the opinion that this was a matter that could, and should, be negotiated. The Act sets out who is, and who is not, an employee within the meaning of the Act in section 2(e). The parties however stated that they could not agree on whether a person filling a particular position was or was not an employee within the meaning of section 2(e), and the Board then heard evidence covering each of the positions named in the applied for amendment.

WHICH POSITIONS NOT "EMPLOYEES"

On the whole of the evidence the majority of the Board were of the opinion that the persons filling the following positions were not employees within the meaning of section 2(e) as the work they did excluded them both on the basis they regularly exercised authority to employ or discharge employees, and also that they, in their positions, were regularly acting on behalf of management in a confidential capacity in that they were regularly involved in policy matters concerning either their own specific responsibility or the overall operation of the applicant: General Manager, Office Manager, Service Centre Manager, Petroleum and Fertilizer Department Manager, Lumber Department Manager, Food Department Manager, Service Station Department Manager, Hardware Department Manager and Meat Department Manager.

The majority of the Board were of the opinion that the Agricultural Supply Representative, in view of the type of work he performed and the assistance he was expected to give management concerning decisions in his professional field, came within the category of regularly acting on behalf of management and therefore was not an employee within the meaning of section 2(e).

The confidential secretary being excluded is self-explanatory.

POSITION OF MANAGEMENT TRAINEES

Management trainees who are under a joint contract with the applicant and Federated Co-operatives Limited were, in the Board's opinion, in a unique position. They were employees who in the opinion of the management of Federated Co-operatives Limited were potential managers. Federated Co-operatives Limited after consultation and approval of management of the applicant entered into a contract concerning the training of the employee with the employee and the applicant. The training period was not restricted to any set time and the pay of the trainee was shared by Federated Co-operatives Limited and the applicant. The employee selected for the training could be from any co-operative not necessarily even in the province of Saskatchewan and upon completion might serve in a management capacity in any co-operative.

The majority of the Board was of the opinion that the method by which these management trainees were trained brought them within the category of not being employees within the meaning of section 2 (e). Certainly at the outset of their training period they would not be excluded but as their training progressed the evidence indicated they assumed more and more responsibilities and could as a very essence of the training itself be involved in policy discussions and matters relating to the applicant's operation that clearly brought them in the category of regularly acting on behalf of management in a confidential capacity. There is of course no magic in a name tag and while there was not evidence to this affect, if a trainee should remain under the contract for

a protracted period of time and not be participating as set out above or performing some other function with the applicant under which he would be excluded as set out in the bargaining agreement, he could very well be an employee within the meaning of section 2(e).

POSITION OF FEED MILL MANAGER NOT EXCLUDED

The evidence placed before the Board concerning the position of accountant and feed mill manager did not in the majority of the Board's opinion place the person filling that position in the exclusions under section 2(e) of the Act. The position of feed mill manager might well in the future be considered for exclusion but as presently constituted should not be excluded.

AMENDMENT

It was for the above stated reasons that the bargaining unit was amended as set out in the Board order dated November 8, 1967.

(Sgd.) "R. H. KING,"
November 8, 1967. Chairman.

DISSENTING OPINION

BOARD MAJORITY DECISION

By a majority decision on November 8, 1967, the Board amended the certification order of Melfort Co-operative Association Limited. The result was to set up a bargaining unit which reads as follows:

> "All employees employed by the Melfort Co-operative Association Limited in connection with its places of business located in the town of Melfort, in the province of Saskatchewan, except the general manager, office manager, service centre manager, agricultural supply representative, petroleum and fertilizer department manager, lumber department manager, service station department manager, food department manager, dry goods department manager, hardware department manager, meat department manager, confidential secretary, and management trainees under a joint contract with Federated Co-operatives Limited for training as managers, and any other person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, constitute an appropriate unit of employees for the purpose of bargaining collectively.

GROUNDS FOR DISSENTING

I dissent from the majority decision of the Board for the following reasons:

In the first place, the evidence given to the Board at the hearing showed that at the time of the application, the employer employed 21 full-time employees, and also had 7 part-time employees. The employer asked for 14 exclusions. This order gives the employer one manager or excluded person for every one and one-half (1½) full-time employees. It does not seem reasonable that any employer should be able to have that many people in its organization who are not employees within the meaning of *The Trade Union Act*. In the Act, the word "employee" means "any person in the employment of an employer except a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity" and this is what the Board has to look for in a case of this kind.

In many instances in the Melfort Co-op, the so-called departments consist of one or two persons in addition to the so-called "manager." In the lumber department, Mr. Hagen's evidence was that there was the person who was called the "manager" and the other full-time person and one part-time person employed. Mr. Hagen also gave evidence that the department "managers" such as the meat and lumber departments could employ and discharge employees, but he gave no evidence that they regularly exercise such authority. Again, in my opinion, no one could seriously accept that the "manager" of a department consisting of himself and one full-time and one part-time person is not an "employee".

As far as regularly acting on behalf of management in a confidential capacity is concerned, the evidence did not establish that these department "managers" did so at all. As I understand it, the policy of the Co-op is set by the Board of Directors, and the department "managers" have to carry out the ordinary clerical and sales duties which everybody knows are necessary in retail business.

In my opinion, employees should not be excluded from collective bargaining rights just because a general manager testifies that certain of them have the authority to hire and discharge or that they receive "confidential" information. The Board members have to look at the facts of the case and make a decision based on the law as set out in *The Trade Union Act* and decide whether an employer needs 14 managers or confidential persons to supervise 21 others in a retail business. It would appear that if we carry this decision to the extreme, it could be possible for an employer to say that all his staff have the authority to hire and discharge or have access to confidential information and they would all be deprived of the right to bargain collectively, whereas the purpose of *The Trade Union Act*, in my understanding, is to give them that right.

The majority of the Board decided to exclude the "agricultural supply representative." My understanding of Mr. Hagen's evidence is that this man goes to farmers and sells them things such as oils and fertilizers and livestock feed. He is supposed to sell them the right kind for their purposes, and is no different than any other sales clerk in the store; he is an employee according to *The Trade Union Act.*

The management trainees are also excluded by the majority of the Board. These are persons who are doing work in a retail store which will give them ability to take over managerial jobs. Mr. Hagen's evidence, in my opinion, showed that what these persons do is not much different from any other employee. In my opinion, until they are in fact in a job which is really managerial according to *The Trade Union Act*, they are employees and should not be excluded just because it may be more convenient to their employer to have them excluded.

(Sgd.) "J. R. INGRAM,"
November 8, 1967. Board Member.

3.052 December 5, 1967

Pioneer Co-operative Association Limited, Swift Current

v.

Albert Tholl and Evelyn Klaudt,
and
Retail, Wholesale and Department Store Union

Application alleging unfair labour practice — Objections under s. 9 (3), s. 9 (2) of The Trade Union Act — Application not void as application to amend certification order was before Board — When a matter is pending before Board, the Board has jurisdiction to hear application.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (d) (e); 9 (2) (b); 9 (3).

APPLICATION ALLEGING UNFAIR LABOUR PRACTICE

The applicant filed an application with this Board dated October 16, 1967, alleging that an unfair labour practice had been engaged in by the two respondents. His allegation in paragraph 3 reads as follows:

> "The applicant filed on the 30th day of May, A.D. 1967, an application with the Labour Relations Board to amend the certification order issued by the said Labour Relations Board on June 4th, 1962, in accordance with section 5 (k) (i) of *The Trade Union Act*. The Labour Relations Board adjourned the application to either the September or October sittings of the Labour Relations Board. On or about the 31st day of August, A.D. 1967, Albert Tholl as business agent for the Retail, Wholesale and Department Store Union affiliated with the Retail, Wholesale and Department Store Union, A.F.L., C.I.O., C.L.C., and Evelyn Klaudt as shop steward and chairman of the negotiating committee of the said union commenced to take part in or attempted to persuade employees to take part in a strike of the said union which commenced on the 31st day of August, A.D. 1967, and lasted until the 13th day of September, A.D. 1967."

PRELIMINARY OBJECTION MADE

Mr. Taylor appearing on behalf of the respondents Tholl and Klaudt and also the certified union made a preliminary objection to the Board hearing this application. In support of his objection he filed a Board

Order dated the 4th day of October, 1967, which in fact dealt with the application referred to in paragraph 3 of the application as set out above.

RESPONDENT'S SUBMISSION

Mr. Taylor made the submission that (a) the application was void as the applicant does not allege in the application that there is any application pending before the Board within the meaning of section 9 (3) of *The Trade Union Act.* (b) That the matter referred to in the application having been heard and determined by the Board there was, as of the date this application was filed, therefore nothing to litigate and that being the case this application cannot be heard by the Board.

We now deal with submission (a). *The Trade Union Act*, section 9 (3) sets out when a matter is pending before the Board. It reads as follows:

> "For the purpose of this Act, an application shall be deemed to be pending before the board on and after the day on which it is first considered by the board at a formally constituted meeting until the day on which the decision of the board is made..."

APPLICATION PENDING BEFORE BOARD

The original application re amendment was filed May 30, 1967. The application was adjourned several times. At the August, 1967, meeting, a regularly constituted meeting of the Board in Regina, evidence was heard on that application. There can therefore be no doubt that this matter had been considered by the Board within the meaning of section 9 (3) above prior to the date of the alleged unfair labour practice. This matter was not determined at the August meeting and was further adjourned to the September and October meeting. As stated above it was determined by the Board at the October, 1967, meeting.

It was the majority of the Board's opinion that though the application did not literally allege that a matter was pending before the Board at the time the alleged unfair labour practice occurred, the applicant clearly infers this as he refers to the application and his whole allegation is based on the fact that the matter referred to was pending before the Board as he makes his application pursuant to section 9 (2) (b) of *The Trade Union Act* which reads in part as follows:

> "It shall be an unfair labour practice for an employee, a person acting on behalf of a labour organization or any other person: (b) to commence to take part in or persuade or attempt to persuade an employee to take part in a strike while an application is pending before the board or any matter is pending before a board of conciliation appointed under this Act."

APPLICATION NOT VOID

Clearly this whole application is based on the amendment referred to in paragraph (3) as a matter pending before the Board. The applicant could in the Board's opinion not be construed to have any other meaning. The Board having found that the matter was in fact pending before the Board it therefore finds the application is not void.

BOARD HAS JURISDICTION TO HEAR APPLICATION

We now deal with submission (b). The application is based on an allegation dealing with a strike between the dates August 31st and September 13th, 1967. This strike as of the date of the application was filed was over. It is the majority of the Board's opinion that the fact the strike was over at the date this application was filed in no way affects this application. The application alleges certain activities of the respondents which resulted in a strike were an unfair labour practice within the meaning of section 9 (2) of *The Trade Union Act* as these activities took place during a period when an application was pending before the Board. It is the Board's majority opinion that the conclusion of the strike in no way relieved the respondents of their obligations under *The Trade Union Act* nor does it remove the applicant's rights to proceed under *The Trade Union Act*. The Board therefore rules it does have jurisdiction to hear this application.

(Sgd.) "R. H. KING,"
December 5, 1967. Chairman.

3.053 February 8, 1968

International Union of Operating Engineers, Hoisting and Portable and Stationary Local Union No. 870

v.

Prince Albert Pulp Company Ltd.,
and
International Brotherhood of Pulp, Sulphite and Paper Mill Workers,
Prince Albert Local No. 403.

Application for certification — At time of hearing, respondent company operating without complete number of employees — Fundamental issue involved appropriate bargaining unit for pulp mill operation — Whether craft unit or plant unit — Few craft certifications granted in other jurisdictions — No Saskatchewan precedent — Application dismissed — Proposed bargaining unit not appropriate for type of operation — Plant unit appropriate unless special circumstances.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, c. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

The applicant applied to be certified as bargaining agent for the following bargaining unit:

> "All employees employed by Prince Albert Pulp Company Ltd. in the province of Saskatchewan engaged in the operating, repairing and servicing of cranes, hoists, tuggers, and similar equipment, all earth moving and road building equipment, all pressure and heating equipment, except a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, constitute an appropriate unit of employees for the purpose of bargaining collectively."

This application was filed with the Board on February 7, 1968.

FACTS

The respondent is a newly organized company that came into Saskatchewan in 1967 for the purpose of establishing a pulp mill operation. The respondent has mainly been involved in building its plant and as at the date of this application had very few employees who would be employed

in the actual operation of the pulp mill itself. In direct conjunction with the operation of the mill is a wood yard. This is the yard into which the wood for processing is brought from its source and in which it is stockpiled until such time as it is needed for processing the mill. This operation was proceeding at the time of this application and all of the employees actually employed in this operation totalled eleven as of the date of the application. On the evidence of the production manager, Mr. McLeod, the respondent anticipated that when the pulp mill was in full operation there would be employed in the classifications applied for the following:

Wood handling department	51
Steam and power plant	32
Mechanical Repairmen	59

This made a total of 142 men in the proposed unit. It was the evidence also of Mr. McLeod, that the respondent estimated its overall employee strength at 219 employees and that it anticipated the respondent would be in production and up to that employee strength by May 15, 1968.

FUNDAMENTAL ISSUE HERE RE: APPROPRIATE BARGAINING UNIT

In view of this evidence, the Board could very well have dismissed the application on the basis that it was premature, as it had done at its December meeting, on an "all employee" application made with respect to being certified as the bargaining agent by the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, Prince Albert Local No. 403. The board, however, felt there was a fundamental issue here concerning the appropriate bargaining unit in a pulp mill operation of this type and considered this application on that basis. The Board felt it was important to consider it on that basis as the respondent's is the first mill operation of this type to come into the province.

CONSIDERATION OF STATUTES AND DECISIONS OF BOARDS IN OTHER JURISDICTIONS

Several of the provincial Labour Relations Statutes and the federal Labour Relations Statutes have specific provisions concerning the certification of craft unions. The Saskatchewan Trade Union Act does not have such a provison and the Saskatchewan Board's jurisdiction is set out in subsection (a) of section 5 which reads as follows:

> "5. The Board shall have power to make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, professional association unit or a subdivison thereof or some other unit;"

In reviewing decisions of Boards of other jurisdictions there is a variation in their decisions. However it does seem that in most jurisdictions, that except in industries where bargaining collectively is traditionally conducted on a craft basis, such as the construction industry, the trend is, that unless there are exceptional requirements both as to craft skills and historical bargaining practices, to grant fewer craft certifications. This is particularly the case with respect to industrial plants.

NO SASKATCHEWAN PRECEDENT

The Board had no previous decisions by a Saskatchewan Board that were analogous to this particular situation.

APPLICATION DISMISSED

The majority of the Board were of the opinion that in the light of all circumstances as set out in the evidence that the unit applied for was not an appropriate unit.

There was no evidence that any of the classifications applied for required any certificates or the undergoing of any type of formal training by the employees to be employed in the said classifications. In fact the evidence was to the contrary, as Mr. McLeod stated that the respondent intended to train employees on the jobs for the classifications applied for. There was no evidence that the people listed in the steam and power plant would require any specific training or licenses to be employed in those classifications. This was similarly the case in connection with the mechanical repairman.

The evidence also was that in this type of mill complex in other jurisdictions that in the more recent years certifications had been on a plant basis rather than on a craft union basis.

It was clear from the evidence of Mr. McLeod this would be a thoroughly integrated operation and that the respondent in the normal operations of the mill could be moving employees from one type of work to another depending on the specific production requirement at the time.

PROPOSED BARGAINING UNIT NOT APPROPRIATE FOR TYPE OF OPERATION

In view of these findings, the majority of the Board were of the opinion that the proposed bargaining unit was not appropriate for the type of operation of the respondent and dismissed the application.

It is to be pointed out also that this plant will be in operation with a full complement of employees in the very near future and that the employees will have every opportunity to apply to be represented by the bargaining agent of their choice.

(Sgd.) "R. H. KING,"
Chairman.

February 8, 1968.

3.054 March 8, 1968

International Union of Operating Engineers, Hoisting and Portable and Stationary Local Union No. 870

v.

Prince Albert Pulp Company Ltd.,
and
International Brotherhood of Pulp, Sulphite and Paper Mill Workers, Prince Albert Local No. 403.

Application for certification — Application dismissed — Board discussed and relied on its February 8, 1968 decision concerning the same parties.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

The applicant applied to be certified as bargaining agent for the following bargaining unit:

> "All crane operators, roto boom operators, fork lift operators, stacker operators, caterpillar operators and front end loader operators employed by Prince Albert Pulp Company Ltd. in connection with the woodhandling and yard, unloading of logs from railway cars and trucks, and piling of same and the moving of chips in the wood yard at the Prince Albert pulp mill site, Prince Albert, Saskatchewan, except a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, constitute an appropriate unit of employees for the purpose of bargaining collectively."

PREVIOUS APPLICATION DISCUSSED

At the February sitting of the Board the applicant applied for certain classifications of employees to cover the whole plant operation of the respondent company. This application was dismissed by the Board as the majority of the Board were of the opinion that in this type of integral operations the unit applied for was not appropriate. The same applicant now applies for certification of certain classfications of employees but limiting it to the "woodhandling and yard, unloading of logs from

railway cars and trucks, and piling of same and the moving of chips in the wood yard" at the respondent company's operation in Prince Albert, Saskatchewan.

The majority of the Board were of the opinion that the severing of the applied for operations from the overall operation of the respondent did not make the unit any more appropriate for the purpose of bargaining collectively.

APPLICATION DISMISSED

For the reasons as stated in the written decision pertaining to the applicant's application with respect to being certified as bargaining agent for certain employees of the respondent made in February of this year, and for the reasons as stated above, the application was dismissed.

(Sgd.) "R. H. KING,"
Chairman.

March 8, 1968.

3.055 April 4, 1968

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 179.

v.

Stearns-Roger Canada Ltd.

Application for certification — Existence of Canadian National Construction agreement which limited local agreements — Unsigned "articles of agreement" which did not refer to National Agreement — Application granted — Local union had not limited its jurisdiction by its actions — Unit had majority support of employees — A collective bargaining agreement in existence is not a bar to certification in Saskatchewan under The Trade Union Act.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 3; 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

The applicant applied to be certified as bargaining agent with respect to certain employees of the respondent. The bargaining unit applied for was as follows:

> All journeymen plumbers, journeymen pipe fitters, journeymen steam fitters, hot water fitters, sprinkler fitters, instrument fitters and apprentices and welders connected with these trades employed by Stearns-Roger Canada Ltd., within the boundaries of the 49th and 51st parallels in the province of Saskatchewan, except in the city of Moose Jaw, constitute an appropriate unit of employees for the purpose of bargaining collectively.

The application was made by Kenneth W. Busch on behalf of the applicant, a local union. Mr. Busch, on the application, is shown as business manager of the applicant.

MINUTES OF INTERNATIONAL CONVENTION, AUGUST 1966

The evidence establishes that Mr. Busch, with two other officers of the applicant, attended an international convention of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of United States and Canada held in August of 1966. At

this convention, the minutes indicate there was considerable discussion concerning national agreements. The following paragraph appears on page 109 of the minutes of the said meeting:

CANADIAN NATIONAL CONSTRUCTION AGREEMENT

"This agreement has been in force since 1956. Since the last convention, the Canadian National Construction Agreement has been re-negotiated two times — on May 4, 1962 and October 5, 1965. On each round of negotiations, the agreement has been improved." From the above, it is obvious that the International Union had for some time negotiated national agreements with the construction industry in Canada.

The minutes of the meeting, to summarize, indicate there were some 32 resolutions endorsing the principle of the national agreement and recommending its continuance as a matter of union policy. The resolutions committee endorsed these said resolutions in strong words of approval and recommended concurrence in these resolutions. After some further discussion, the question was put before the meeting by the general president and it was voted on. The minutes say, after the said vote, at page 174: "The recommendation of the committee was adopted". As was stated above, two other officers of the applicant union and Mr. Busch attended this meeting but there is no indication in the minutes before the Board as to their concurrence or otherwise with the general feeling of the meeting concerning national agreements.

CANADIAN NATIONAL CONSTRUCTION AGREEMENT

There was filed with the Board a copy of a Canadian National Construction Agreement dated the 5th day of October, 1965. This agreement was negotiated by the negotiating committee for the National Operating Construction Contractors and the negotiating committee for the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. Two of the signatures shown on this agreement were George Wilkinson, as chairman for the construction contractors, and by the International Union's General President, Peter T. Schoemann, on behalf of the International Union. The respondent company, by an endorsement attached and signed on December 21st, 1965 became a party to this agreement. The said agreement will hereafter be referred to as the National Agreement.

I would point out here the document filed as the National Agreement was only a copy of the original but no objection was taken by Mr. Busch that it did not, in fact, represent completely the agreement and to avoid any delays, the Board accepted the said copy.

DURATION AND METHOD OF TERMINATION OF AGREEMENT

Article XX (64) of the National Agreement set out the duration and method of termination of the said agreement. This clause set out that the agreement was to remain in force from date of execution to March 31st, 1968. The application was filed with the Board on January 24th, 1968 so, therefore, this National Agreement was in full force and effect at the time of this application.

RE: LOCAL AGREEMENTS

The National Agreement in Article VI refers to local agreements indicating it is anticipated agreements with locals will be entered into. The clauses in this article set out that in certain areas the local agreement will prevail and in certain others, the National Agreement will prevail. It will be necessary to set out only clauses 16, 17, 18 and 19 of the said article VI to indicate how limited was to be the scope of the local agreement.

> *Clause 16* — Wage rates shall be in accordance with the wage rates established in existing agreements negotiated by the local union of the United Association and the historically recognized contractor bargaining group. The wage rate for foremen shall be 25 cents per hour over the wage rate for journeymen. Where the local agreement provides for a higher foreman's rate, the higher foreman's rate shall be paid.
>
> *Clause 17* — Wherever the local union's collective bargaining agreement provides for a lower hourly work day or work week, or for paid statutory holidays or vacations or premium pay on a federal or provincial holiday, the local agreement shall prevail.
>
> *Clause 18* — With respect to all other provisions of a local agreement dealing with the terms and conditions of employment, provisions of the National Agreement shall prevail.
>
> *Clause 19* — Any provisions of a local collective bargaining agreement contrary to, or in conflict with, this contract, or contrary to the intent and meaning of this contract, shall not be enforced as to employees working under this agreement.

It is clear from the tenor of these clauses that the National Agreement was to be the main agreement and that matters left to the local unions to negotiate and incorporate in a local bargaining agreement were limited in scope to matters that would be of a local nature. It is also clear from these clauses that the International Union expected local collective agreements to be reached with a "historically recognized contractor bargaining group". Mr. McDonald, counsel for the respondent, submitted that automatically an employer signator to the National Agreement would, without signature, be bound by any local agreement bargained for by a contractor group of which an employer was a member.

I can see nothing in the agreement that supports this submission and if, in fact, no local bargaining agreement was negotiated and signed, the National Agreement would be of little value to a local union as one of the most important terms of a collective bargaining agreement, namely wages, was not covered by the National Agreement.

"ARTICLES OF AGREEMENT"

An interesting unsigned document headed "Articles of Agreement" was filed with the Board by the respondent. This "Articles of Agreement" stated that it was entered into between:

> The Plumbing and Mechancial Contractors Association, "Certified Shops" Regina Chapter, and such other shops as may become signatories to this agreement as parties of the first part, hereinafter referred to as the employer
>
> **and**
>
> The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local Union 179, Regina, as parties of the second part, hereinafter referred to as the union.

DID NOT REFER TO THE NATIONAL AGREEMENT

This document no where referred to the National Agreement and appeared to set up terms and conditions that were clearly covered by the National Agreement and determined by the National Agreement to be only within its province. The document states its effective date was from March 31st, 1966, to March 31st, 1969, and from year to year thereafter with a provision for termination or amendment after that date.

RESPONDENT HAD NOT SIGNED THIS AGREEMENT

There was no evidence this agreement had ever been signed by the parties negotiating same or that the respondent was a member of the employer group that negotiated the agreement. However, counsel made it quite clear that the respondent considered itself bound by this local union agreement and lived up to the terms of same even though, in fact, they had not signed the agreement.

In view of all these facts as stated above, counsel for the respondent submitted that there was, in fact, a bargaining agreement in effect as of the date of application for certification and that being the case, the applicant was barred from applying to be certified as bargaining agent.

FACTS

Counsel cited a decision of the Alberta Labour Relations Board concerning an application by Local No. 488, a local of the same International Union and Poole Pritchard Canada Limited et al — 2CLLC 16253. The decision was dated September 7, 1962. The facts in this case would

appear to be very similar to the matter before us. Certain factors, however, that existed in that case are not present in the case before us. Officers of the local union attended the international meeting and voted in favour of establishing and negotiating a national agreement. In the present case, accredited officers of the local union attended the meeting but there is no evidence as to whether they supported or did not support the passing of a similar type resolution. There is no evidence before us the local union gave authorization to the international union to negotiate for them. In fact, the national agreement itself clearly contemplates that local unions will negotiate collective bargaining agreements to deal with, among other things, wages. The National Agreement which was before the Alberta Board apparently was a much more comprehensive one than that which is filed with this Board. It apparently established minimum wages for different areas of Canada. As stated above, the present National Agreement by its very terms clearly establishes there must be further negotiating and an additional collective agreement completed by the local union with the signators to the National Agreement. It is also to be noted that the Alberta Board found that in the local union collective agreement before them the local union recognized the binding effect of the National Agreement. The articles of agreement filed with us make no reference whatsoever to the National Agreement.

RESULT OF ALBERTA CASE

These differences are pointed out to indicate that both applications are not on all fours. The Alberta Labour Relations Board ruled that where collective bargaining has taken place, an agreement had been entered into and "where by its own action had limited its jurisdiction or ability to be a bargaining agent" the local union's application for certification was dismissed.

LOCAL UNION HAS NOT LIMITED ITS JURISDICTION

It was this Board's opinion that in the case before it there was no evidence that the local union by its action had limited its jurisdiction or ability to be a bargaining agent. The majority at the international meeting certainly supported the principle of national agreements and the National Agreement clearly contemplates the local unions will in turn negotiate a further agreement with signators to the National Agreement. The articles of agreement filed with us indicated an agreement was drawn up by the local applicant union and a Regina contractor group. However, there is no proof it was ever executed or that the respondent is a member of that group.

A COLLECTIVE BARGAINING AGREEMENT IN EXISTENCE DOES NOT BAR CERTIFICATION

The Board was of the opinion that under our Trade Union Act even if there is a collective bargaining agreement in existence, either on a national basis or a local basis, this was not a bar to certification.

The Trade Union Act states in section three:

> "Employees shall have the right to organize in and to form, join or assist trade unions and to bargain collectively through representatives of their own choosing and the representatives designated or selected for the purpose of bargaining collectively by the majority of employees in a unit appropriate for that purpose shall be the exclusive representatives of all employees in that unit for the purpose of bargaining collectively. R.S.S. 1965, C. 287, s.3."

Section five of the said Act gives power to the Board to determine the appropriate unit, determining what trade union represents the majority of the employees and requiring these parties to bargain collectively.

REASONS FOR DECISION

The evidence before us was that a trade union, namely, the applicant, applied to be certified as bargaining agent for certain employees of the respondent. The Board determined the unit applied for was appropriate and that they had the majority support of the employees in the bargaining unit and the Board granted the application.

It was the Board's opinion that the fact there was or was not a collective bargaining agreement in no way circumscribes the rights of employees in Saskatchewan to bring themselves under the provisions of the said Act. The legislature gave certain rights to employees in Saskatchewan and certainly it was never the intention of the legislature that at meetings held outside the province the rights of these citizens could be abrogated.

There are certain rights that accrue with respect to collective bargaining where collective bargaining takes place after a trade union has been certified under *The Trade Union Act* as the bargaining agent. The majority of employees of the respondent, in the bargaining unit applied for, have clearly indicated they wish their bargaining agent to be certified as such under *The Trade Union Act* as it is their right so to do. The local union, through one of its officers, has applied to be so certified. Should this not coincide with the wishes of the international union that is a matter between the international union and the local union. Until such time as the local union ceases to be a trade union within the meaning of the Saskatchewan Trade Union Act, the Board was of the opinion no bar existed to it being certified as the bargaining agent.

APPLICATION GRANTED

For these reasons the application was granted.

(Sgd.) "R. H. KING,"
Chairman.

April 4, 1968.

3.056 May 7, 1968

Tunnel and Rock Workers' Local Union No. 168 chartered by the Labourers' International Union of North America

v.

Duval Corporation of Canada

Application for certification — Build-up principle discussed as premature — Mine not in full operation — Whether this application premature in view of the few employees that would be selecting the bargaining agent for the proposed large number of employees — Guide of 50% — Application dismissed as premature.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

The applicant applied to be certified as bargaining agent for the following bargaining unit:

> "All hourly rated production and maintenance employees employed by Duval Corporation at the Duval Potash Project Site, Seven miles West of Saskatoon, Saskatchewan on Saskatchewan Highway Number Seven, except stationary engineers and a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, constitute an appropriate unit of employees for the purpose of bargaining collectively."

PREVIOUS APPLICATION DISMISSED

This application was filed with the Board on April 18, 1968, and came on for hearing at the regular May, 1968, sittings of the Board. The Board had heard an identical application made by the applicant re the same respondent, at the previous month's sittings. This application was dismissed. No written reasons for the dismissal were requested or written but the Board's order indicated the application had been dismissed as the majority of the Board were of the opinion it was premature, having regard to the few employees at the time the application was made and the projected number of employees that would be employed at the time the mine went into full production.

FACTS

The respondent is a company who is in the process of bringing into production a newly developed potash mine. At the time the April application was filed, there were eight employees in the proposed bargaining unit. Approximately one month later at the time this application was filed, there were only twenty-two employees in the proposed bargaining unit. The evidence before the Board was that the respondent estimated it would be up to a full complement of approximately one hundred and seventy employees in the proposed bargaining unit by December of 1968. There was no evidence to indicate that the proposed full complement of employees would not be reached by the estimated date or that their reaching this complement depended on forseeable factors outside the control of the respondent that might cause them to not reach their targeted complement of employees by the said date.

THE BUILD-UP PRINCIPLE

The Board, by a majority decision, in the *International Brotherhood of Electrical Workers, Local Union No. 2038 and ITT Canada Limited* application, considered the build-up principle. A written decision was given and is reported in 1967 CLLC Paragraph 16016. This decision set out the Board's opinion concerning this principle and the majority of the Board's opinion has not changed. Both counsel, however, felt that a further clarification by a written decision in this matter might be helpful to avoid premature applications being made in the future.

The Board, in coming to its decision, in the above mentioned ITT Canada Limited case, read and agreed with the build-up principle as enuniciated and followed by the Ontario Labour Relations Board. These principles are set out clearly in the *Emil Frant and Peter Waselovich* case, (1944-1959) 1 C.L.L.C. 18057 and are followed in the *Cochrane Industries Limited* case, 1965 C.L.L.C. Paragraph 16034.

THE RIGHTS OF PRESENT EMPLOYEES AND FUTURE EMPLOYEES

The problem the Board is faced with in this type of application is balancing the right of present employees to be represented by a union for the purposes of bargaining collectively and the rights of future employees to select a bargaining agent as was stated in the *Emil Frant and Peter Waselovich* case and applied by this Board in *ITT Canada Limited, supra.*

THE BOARD'S CONSIDERATIONS

The Board, in coming to its decision, must consider the type of operation, the segment of the employees employed in the proposed bargaining unit at time of application, the total number of employees estimated there will be in the proposed bargaining unit, and the date at which the proposed build-up will be achieved.

Each case will depend on its particular facts. In the present application, we have a new mine being brought into production. At the time of the application there were only twenty-two of an estimated one hundred and seventy employees presently employed in the proposed bargaining unit. The evidence indicated the respondent intended to reach its employee complement objective within eight months of the present application. There was nothing to indicate that this objective was not realistic, both as to numbers and time, or that the respondent was in any way trying to interfere with the employees' right to be represented by a union of their choice. The whole issue was the question as to whether the application was premature in view of the few employees that would be selecting the bargaining agent for the proposed large number of employees.

APPLICATION DISMISSED AS PREMATURE

The majority of the Board, having applied the principles as set out above, were of the opinion that this application was premature and for that reason the application was dismissed.

RECOMMENDATION THAT 50% OF EMPLOYEES BE EMPLOYED IN UNIT

Counsel for the applicant was concerned about the Board's statement in the last paragraph of the written decision given in the *ITT Canada Limited* case, *supra*, which stated, in essence, that a minimum of 50% of the employees should be employed in the proposed bargaining unit before the Board would consider an application. This percentage figure can only be used as a guide if all the factors indicate an honest and achievable intention to complete the employee build-up in the estimated time. This guide figure was indicated to assist applicants in determining the time for applying in these build-up situations. It was not set as an arbitrary figure nor in any way intended to restrict applications being made. Applicants may apply for certification at the time of their choice.

(Sgd.) "R. H. KING,"
Chairman.

May 7, 1968.

3.057 August 8, 1968

Building Service Employees' Local Union No. 333

v.

Wadena Union Hospital

Application for certification of hospital — Majority of nursing assistants wished Saskatchewan Registered Nurses' Association to act on their behalf re: collective bargaining — Nursing Assistants to be excluded from applicant's bargaining unit.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c).
R.S.S. 1965. The Registered Nurses' Act, C. 315, as amended by C. 71, 1967, s. 11 (2) (3).

APPLICATION FOR CERTIFICATION

The applicant applied to be certified as bargaining agent for the following bargaining unit:

> "All employees of the Wadena Union Hospital except the administrator, matron, accountant, all registered nurses, X-ray technicians, lab technicians, chief engineer, dietary supervisor and head housekeeper, also any person having, and regularly exercising, the authority to employ or discharge employees or regularly acting in a confidential capacity on behalf of management."

REGISTERED NURSES ASSOCIATION TO BARGAIN COLLECTIVELY FOR NURSING ASSISTANTS

At the hearing Anne Sutherland of the Saskatchewan Registered Nurses' Association, gave evidence concerning the relationship between their association and that of the Saskatchewan Nursing Assistants' Association. This witness also stated that by a general vote the said Nursing Assistants' Association indicated they wished the Saskatchewan Registered Nurses' Association to act on their behalf with respect to bargaining collectively.

RE: NURSING ASSISTANTS

The Registered Nurses' Act R.S.S. 1965, C.315 as amended by S.S. C. 71, 1967, in section 11, deals with the relationship referred to by this witness. This section is headed 'Nursing Assistants' and subsections 2 and 3 reads as follows:

(2) A nursing assistant when employed in a private home shall, except when performing ordinary household service, work only under the direction of a registered nurse or a duly qualified medical practitioner and when employed elsewhere than in a private home shall work only under the direction of a registered nurse.

(3) The association may pass bylaws not inconsistent with this Act for:

(a) the education, training and supervision of nursing assistants;

(b) the certification of nursing assistants;

(c) the amount of and method of collecting certification fees;

(d) the cancellation of certification."

The association referred to in subsection 3 is that of the Registered Nurses.

FACTS

In view of this legislation and the fact that Miss Sutherland indicated in her evidence that the Registered Nurses' Association was actively participating, in conjunction with the Department of Education, in the training program of the certified nursing assistants, the majority of the Board were of the opinion that certified nursing assistants had a very special relationship with the Registered Nurses' Association.

NURSING ASSISTANTS TO BE EXCLUDED FROM APPLICANT'S BARGAINING UNIT

This being the case and the fact that the Nursing Assistant's Association had, by a vote, indicated they wished the said Registered Nurses' Association to act for them in collective bargaining matters and most importantly in this particular case that the majority of the nursing assistants indicated they wished to be excluded from the bargaining unit, the majority of the Board were of the opinion the certified nursing assistants should be excluded from the applicant's proposed bargaining unit and it was so ordered by the Board.

(Sgd.) "R. H. KING,"
Chairman.

August 8, 1968.

3.058 October 2, 1968

Saskatchewan Insurance Office and Professional Employees Union Local 397

v.

Canadian National Institute for the Blind

Application for certification — Employees employed due to sight impairment excluded from unit — Employer is a non-profit organization — Dissent feels Board denied employees their rights under The Trade Union Act.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 3.

DISSENTING OPINIONS

APPLICATION FOR CERTIFICATION DISMISSED DUE TO LACK OF SUPPORT

The majority of the Board dismissed this application for certification heard on August 6th, 1968, because of lack of evidence of support, after excluding "any employee employed due to a sight impairment".

At the hearing of the board held on October 1st, 1968, a new application was made by the same union for an appropriate bargaining unit, including the blind employees.

BLIND PERSONS EXCLUDED FROM UNIT

The majority of the Board granted the application for certification after "amending" the appropriate bargaining unit by excluding "any employee employed due to sight impairment."

MAJORITY REASONS

The majority of the Board's reasons for excluding these employees from the bargaining unit were,

1. Employed due to a sight impairment.
2. These employees were of such a distinct category that it was not appropriate for them to be included in the bargaining unit.

3. The existence of the employer, being the disabilities of these people.

4. The employer is a non-profit organization, subsidized by many outside sources.

REASONS FOR DISSENT

The majority of the Board did however state "*they are employees in fact*". We in dissenting are of the opinion that the majority of the Board erred in denying these employees the rights extended to employees under *The Trade Union Act*, which gives them as employees the right to join, select and assist trade unions of their own choosing to bargain collectively for them. Section 3 of *The Trade Union Act* is the basis for this opinion.

There is nothing in *The Trade Union Act* that excludes an "employee" from exercising his rights under the Act by reason of mental, physical, or sight impairment and we agree with the Board that "they are employees in fact", and for that reason should have their full rights granted to them.

We disagree with the majority of the Board that those employees employed due to a sight impairment should be denied their rights to bargain collectively because the employer is a non-profit organization which was subsidized by many outside sources. There is nothing to our knowledge in *The Trade Union Act* that excludes certain employees because of the fact that they are employed in a "non-profit organization".

BOARD DENIED RIGHTS

In our opinion the Board in "amending" the bargaining unit to exclude "any employee employed due to sight impairment" and making the order accordingly, did deny certain employees the rights which is theirs under the Act.

APPLICATION SHOULD HAVE BEEN GRANTED

Therefore in our opinion this application should have been granted on the basis of the appropriate bargaining unit applied for in the application for certification filed by the union and should not have been amended in any form.

(Sgd.)"Joseph A. THAIN,"
Member of the Board.

(Sgd.) "J. R. INGRAM,"
Vice-Chairman.

October 2, 1968.

Member of the Board.

3.059 December 7, 1968

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 179.

v.

Canadian General Electric Company Limited.

Application for certification — Use of specialized equipment used at dam sites only — Rarely installed in Saskatchewan — Certification granted but restricted to Boundary Dam Project.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

The applicant applied for certification as bargaining agent for the usual occupational classifications in such an application and also the certification applied for was for the usual area granted this applicant, which is approximately the south one-half of the province of Saskatchewan excluding the city of Moose Jaw, Saskatchewan.

USE OF SPECIALIZED EQUIPMENT

The respondent is a national company that is installing certain equipment, which it manufacturers, at the Boundary Dam Project near Estevan, Saskatchewan. This is a specialized type of equipment used at dam sites only. The majority of the Board were of the opinion that in view of the fact that this type of equipment would rarely, if ever again, be installed in the province it would be improper to grant certification to the applicant for the usual area in this particular instance.

CERTIFICATION GRANTED WITH RESTRICTIONS

For this reason the certification order was granted but restricted to the Boundary Dam Project site near Estevan, Saskatchewan.

(Sgd.) "R. H. KING,"
December 7, 1968. Chairman.

3.060 December 9, 1968

United Steelworkers of America, CLC

v.

United States Borax and Chemical Corporation

Application for certification — Vote ordered — Majority against certification — Application re: objection to the conduct of the vote — Respondent objects to Board's jurisdiction — Board has jurisdiction to act when vote improperly conducted, i.e. voter's freedom of choice violated — Evidence that respondent expressed opinion, but did not interfere with vote — Objections to vote discussed — Original application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, and C. 79, 1968, s.s. 3; 5 (a) (b) (c); 7; 8; 9 (1) (a), (1) (g), (1) (j), (1) (l) (ii)

APPLICATION FOR CERTIFICATION

The herein applicant and the International Brotherhood of Electrical Workers, Local Union No. 529, made applications at the November, 1968, sittings of the Labour Relations Board to be certified as bargaining agents for certain bargaining units specified in their applications, with respect to certain employees of the respondent company.

VOTE ORDERED

The Board dismissed the application of the International Brotherhood of Electrical Workers on the basis that the bargaining unit applied for was not appropriate. The Board ordered that with respect to the applicant, United Steelworkers of America, CLC, that a vote should be conducted pursuant to section 7 of *The Trade Union Act.*

RESULT OF VOTE

A duly appointed agent of the Board conducted the vote ordered, on November 21 and 22, 1968. The result of the vote being 135 against and 83 for the applicant to be certified as the bargaining agent.

APPLICANT'S OBJECTIONS TO THE VOTE

On November 25, 1968, the applicant filed objections to the vote pursuant to clause 16 of the Rules and Regulations of the Board. These

objections to vote were filed prior to the Board meeting and the dismissing of the application as a result of the vote. The objections to vote came on for hearing at the Board's December sittings.

The objections to the vote were set out in the applicant's material filed as follows:

> "(1) The said employer, UNITED STATES BORAX & CHEMICAL CORPORATION, did on the days that the said vote was conducted and on various other days prior thereto interfere with, restrain and coerce its employees in their right to organize and to form, join or assist the objecting trade union and to bargain collectively through the said trade union.
>
> (2) The said employer, UNITED STATES BORAX & CHEMICAL CORPORATION, did on the days that the said vote was conducted and on various other days prior thereto interfere with the selection of the said objecting trade union as a representative of its employees for the purpose of bargaining collectively.
>
> (3) The said employer, UNITED STATES BORAX & CHEMICAL CORPORATION, did on the days that the said vote was conducted and on various other days prior thereto threaten changes in wages, hours, conditions of employment, benefits or privileges while the application of the said objecting union was pending before the said Labour Relations Board.
>
> (4) The said employer, UNITED STATES BORAX & CHEMICAL CORPORATION, did on the days that the said vote was conducted and on various other days prior thereto threaten to deny its employees, by reason of the said employees exercising the right conferred by *The Trade Union Act* to organize in and to form, join or assist the objecting trade union and to bargain collectively through representatives of their own choosing, benefits which the said employees enjoyed prior to the exercising of such rights."

PRELIMINARY OBJECTION BY RESPONDENT RE: BOARD'S JURISDICTION

A preliminary objection was raised by the counsel for the respondent that the Board has no jurisdiction to hear the application on the basis of the above stated objections to vote. The Board at the hearing considered this and ordered that particulars be filed concerning the stated objections to vote so that the Board might better determine the question of its jurisdiction. The particulars were so filed by counsel for the applicant and were as follows:

"PURSUANT TO THE ORDER OF THE BOARD made on the 5th day of December, A.D. 1968, the objecting trade union herewith files particulars with respect to the matters set forth in paragraph 3 of its Statement of Objections to vote, to the extent that it presently has knowledge of same, as follows:

With respect to subparagraphs (1), (2), (3) and (4) of paragraph 3 of the said Statement of Objections, the objecting trade union states that on the 22nd day of February; the 22nd day of April; the 8th day of May; the 21st day of May; the 28th day of August; the 25th day of September; the 25th day of October, and the 19th, 20th, 21st and 22nd days of November, all in the year 1968, the employer produced and circulated or caused to be produced and circulated among its employees letters or pamphlets the contents of which substantiate or establish the allegations set forth in the said subparagraphs; and that these are the dates and documents whereof the said objecting trade union has knowledge at this time but that similar documents may have been produced and circulated on other days not known to the said objecting trade union."

BOARD'S RULING

The Board then heard argument concerning the matter of jurisdiction and gave the following ruling:

"We have before us particulars of objections to the conduct of a vote that was taken pursuant to a Board order made on the 8th of November, 1968, and conducted by a duly appointed agent of the Board on November 21 and 22, 1968. This vote was ordered by the Board with respect to an application for certification filed by the applicant on October 22, 1968, and after the Board hearing of the application at its November sittings at Saskatoon, Saskatchewan. The Board is granted this power to order a vote pursuant to section 7 of *The Trade Union Act* and section 8 of the said Act directs the Board to act on the result of a vote as follows:

> '8. In any such vote a majority of the employees eligible to vote shall constitute a quorum and if a majority of those eligible to vote actually vote, the majority of those voting shall determine the trade union which represents the majority of employees for the purpose of bargaining collectively. R.S.S. 1965, C. 287, s.8.'

Section 3 of *The Trade Union Act* sets out clearly that employees shall have the right to select a bargaining agent of their choice and in the Board's opinion this is an overriding factor that must be considered in every application relating to certification that comes before this Board

That the choice, expressed by a voter by the marking of a secret ballot, is inviolate is such a basic tenet of our democratic system that for this Board to have jurisdiction to in any way go against the wishes of the

majority so expressed, would certainly have to be expressed clearly and without equivocation by *The Trade Union Act* which created the Board and the rules which govern the Board.

Rule 16 is the only reference in either the Act or the rules that pertains to an objection to a vote. This rule reads as follows:

> '16. Any trade union, any employer or any person directly affected having any objection to the conduct of the vote or to the report shall, within three days after the last day on which voting took place or within such greater period as may be prescribed by the chairman, file with the secretary a written statement of his or its objections verified by statutory declaration, and no other objections may be argued before the board except by leave of the board.'

BOARD HAS JURISDICTION TO ACT WHERE VOTE IMPROPERLY CONDUCTED

The Board clearly would have not only the power but also the obligation to act in the event of an improperly conducted vote insofar as any of the mechanics with respect to the taking of a vote were concerned. The only result, if such were the case, would be the taking of another vote and ensuring the improprieties were corrected.

The Board is satisfied however, and in the objections filed no allegations were so made, that the mechanics of this vote were entirely proper.

MEANING OF "CONDUCT OF THE VOTE" IN RULE 16

The allegations made in the material filed would have the Board interpret the term "conduct of the vote" set out in Rule 16 to extend far beyond the mechanics of the conduct of the vote itself. The applicant would extend this to include the conduct of a party extending over a long period of time.

The Board are of the opinion that the conduct of either the applicant or respondent with respect to the taking of the vote might be so improper that it could be included in the term "conduct of the vote" and thus within the Board's jurisdiction. However, the Board are of the opinion the conduct of a party would have to be so improper that it would be tantamount to making it impossible for an employee by secret ballot to freely express his choice to come within this ambit. The Board feels that short of this type of impropriety it would have no jurisdiction to hear such objections and thus in any way abrogate the free choice of the majority of employees as expressed by the vote.

In view of what is stated above we now turn to this particular application.

ALLEGATIONS

This application alleges that on certain dates prior to the holding of the vote and on the days of the vote itself the respondent company circulated letters and pamphlets that interfered with the proper conduct of the vote.

BOARD'S JURISDICTION LIMITED

The Board rules that it does have jurisdiction to hear an application where the material filed alleges the conduct of one of the parties was so improper that it resulted in the voters freedom of choice being violated. Short of such conduct it would not have such jurisdiction.

EVIDENCE THAT WILL BE HEARD

On the basis of the material filed with this application the Board is prepared as a matter of policy at the outset to hear evidence concerning letters and pamphlets circulated by the respondent after the date the application for certification was filed with the Board, to wit October 22nd, 1968, only, and after hearing such evidence the Board may then reconsider this limitation if in the Board's opinion it is warranted. The Board will only hear such evidence that supports an allegation that the improper conduct was such that it restricted the freedom of choice of sufficient voters and thus might alter the outcome of the vote.

The Board would point out that this is not an unfair labour practice application but rather an application with respect to objections to the conduct of the vote and that this application must be so limited.

NATURE OF THE EVIDENCE

The Board after this ruling then heard evidence concerning the objections that came within the ambit of the said ruling. The evidence consisted mainly of newsletters and bulletins to employees sent out by the management of the respondent company prior to the vote taking place. These releases left no doubt to the imagination of the employees as to management's thoughts concerning the question of union or no union with respect to the benefits to both the employer and employee. There was, however, nothing in these releases nor in the viva voce evidence that was adduced that either directly or indirectly would interfere with the employee freely expressing his choice by secret ballot.

ORIGINAL APPLICATION DISMISSED

The majority of the Board having reached this decision, namely, that the evidence did not establish conduct that was so improper that it resulted in the employees' freedom of choice being violated, dismissed the objections to vote. The Board having dismissed the objections to vote then, pursuant to the result of the vote, dismissed the applicant's original application.

(Sgd.) "R. H. KING,"
Chairman.

December 9, 1968.

DISSENTING OPINION

As stated in the reasons for decision the Board ordered a vote among the employees at the Allan Potash Mine.

OBJECTIONS TO VOTE

On November 25, 1968, after the vote was conducted, the union filed a Statement of Objection to vote. This statement said that the union objected to the conduct of the vote on the grounds that on the days the vote was conducted and on various other days before the vote, the employer did certain things which are contrary to sections 9 (1) (a) (g) (j) and (l) (ii) of *The Trade Union Act*. The allegations were set out in general terms and follow the language in the various subsections of the Act I have referred to, but did not set out any particular actions allegedly taken by the employer.

OBJECTION OF RESPONDENT OF LACK OF JURISDICTION IN BOARD

At the hearing, counsel for the respondent objected to the Board hearing the application, contending that the Board did not have jurisdiction on the basis of the above objections. The respondent also objected that the particulars were too vague.

BOARD HAD JURISDICTION

The Board recessed and determined that it did have jurisdiction and also ordered the union to file particulars of its objection, which was done.

ALLEGATIONS OF UNION

The union said it had knowledge of certain letters or pamphlets which the employer had circulated among its employees, commencing in February 1968, and ending on November 22, 1968, the last day of the vote, and that similar documents may have been circulated at other times. Counsel for the respondent again objected that the particulars were still too vague and that there was nothing to show that the employer had done anything that affected the conduct of the vote.

The union replied that the particulars given were statements of acts done by the employer that were unlawful and this was the basis of its objection to the vote. After a further adjournment the Board ruled that it would hear the union's evidence on its statement of objections.

RULING OF BOARD

In giving the ruling the Board said it would only have jurisdiction if the evidence were such as to come within the area of making it impossible for an employee to freely express his choice by secret ballot. The Board put these propositions in writing and are as follows:

"This application alleges that on certain dates prior to the holding of the vote and on the days of the vote itself the respondent company circulated letters and pamphlets that interfered with the proper conduct of the vote.

The Board rules that it does have jurisdiction to hear an application where the material filed alleges the conduct of one of the parties was so improper that it resulted in the voters' freedom of choice being violated. Short of such conduct it would not have such jurisdiction. On the basis of the material filed with this application the Board is prepared as a matter of policy at the outset to hear evidence concerning letters and pamphlets circulated by the respondent after the date the application for certification was filed with the Board, to wit October 22nd, 1968, only, and after hearing such evidence the Board may then reconsider this limitation if in the Board's opinion it is warranted. The Board will only hear such evidence that support an allegation that the improper conduct was such that it restricted the freedom of choice of sufficient voters and thus might alter the outcome of the vote. The Board would point out that this is not an unfair labour practice application but rather an application with respect to objections to the conduct of the vote and that this application must be so limited".

JURISDICTION OF BOARD

At this point counsel for the union pointed out to the Board that there is a difference between the kind of case that the Board can hear, and what kind of evidence the Board can take into account in hearing a case — the first is a question of *jurisdiction* and the second is the question of *proof*.

The Board at one point in the hearing made a ruling that — "To get jurisdiction the union must show to the satisfaction of the Board the conduct of the employer was so gross as to make it impossible for employees to express their views freely; and as examples of such conduct the Board cited — *a direct bribe* ; *a threat to close down* ; *a threat to fire employees* ; and that the evidence would have to be direct evidence.

In my opinion, this would be almost impossible for the union to prove, when you look at section 7A (2) of *The Trade Union Act* which states . . . "an employee who has voted at a vote taken under this Act shall not be competent or compellable to give evidence as to how he voted in any court or any proceedings whatsoever."

I do not believe, as a practical matter, that a union could get employees to come before the Board and say how they had voted, or why they voted in any particular way, — and I don't think the Board should allow them to say how they voted.

In the present case, 218 voted, — 83 voted for the union, and 135 against. What the Board inferred was that the union must have 27 employees swear that they changed their vote because of the improper conduct of the employer.

FACTS

In presenting its case, the union called as witness a Mr. Warner Woodley, who is Industrial Relations Manager of the employer. Mr. Woodley gave evidence that on October 22nd, 1968, he received a rumour that the union had made an application for certification and he telephoned the secretary of the Board and received confirmation of this fact. Then a meeting was held consisting of all management from Mr. Kendall down to shift bosses who supervise as few as 10 men. The purpose of the meeting was to discuss the union's application and what to do about it. Mr. Woodley said that management talked to employees about the union's application and also mailed letters to employees and posted circulars or pamphlets on bulletin boards at various places about the mine and the refinery where they would be seen by employees. Three of these were shown by the union to Mr. Woodley and he identified them. They were dated October 22nd, October 25th and November 19th.

Mr. Woodley, under questioning by counsel for the union, acknowledged that these documents were intended to influence employees to vote against the union. One of these was a sheet which contained a reproduction of the form of ballot to be used in the vote, and marked as a vote against the union. Mr. Woodley admitted that a person reading the first three documents could not understand them unless he knew of other documents and information previously put out by the employer to its employees. He agreed that employees reading these circulars would be affected by previous information circulated by the employer.

DECISION OF MAJORITY OF BOARD

After hearing submissions from both counsel, the Board recessed and subsequently ruled that the union's objections to vote were unfounded, in the light of previous rulings during the hearing, and then dismissed the union's application for certification because of the results of the vote which I have already indicated.

BASIS OF DISSENT

I do not agree with the decision of the Board. In his submission to the Board, counsel for the employer relied on the Board's rulings during the hearing (as was only to be expected) and argued that even if the Board found that the employer had committed an unfair labour practice there was no evidence that it had affected the result of the vote. He also relied on the 1966 amendment to section 9 (1) (a) of *The Trade Union Act*. That now reads (and I have underlined the amendment):

> ". . . It shall be an unfair labour practice for an employer to interfere with, restrain or coerce an employee in the exercise of any right conferred by this act, *but nothing in this clause shall be deemed to deprive an employer of freedom to express his views to his employees, as long as in the Board's opinion the employer's expression of view does not in itself amount to coercion, a threat, a promise or undue influence . . .* "

Whatever may be the effect of the amendment, it is quite clear in my opinion, and as was submitted by the union in this case, that it applies only to that clause. But in conducting the vote the Board was asking the employees to indicate whether or not they wished to select the union as their representative for the purpose of bargaining collectively, and by section 9 (1) (g) of the Act, it is . . .

> ". . . an unfair labour practice for an employer to interfere in the selection of a trade union as a representative of employees for the purpose of bargaining collectively . . . "

which is exactly what this employer did, according to the documents which the Board saw and according to what was said under oath by Mr. Woodley, who was the person best qualified to know both what was done and what was intended.

In my opinion, employees have a right to choose a union or not to choose a union free from unlawful influence of the employer, and therefore, if the employer uses unlawful influence, the freedom of choice of the employees has been violated and if objections are made and such conduct is shown, the vote should not stand.

I believe that in this particular case the Board should have found the union's Statement of Objections to Vote proven, and should have set aside the vote and have allowed the union an opportunity to renew its application for certification after a reasonable time had elapsed to allow the effects of the employer's conduct to wear off.

(Sgd.) "J. R. INGRAM,"
Vice-Chairman.

December 9, 1968.

3.061 January 11, 1969

United Steelworkers of America, CLC

v.

Noranda Mines Limited

Application for certification — Build-up principle — Only 25 employees in unit — Potential of 326 employees — Application dismissed as premature.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

The applicant on November 28, 1968, filed an application to be certified as bargaining agent for the following bargaining unit of employees employed by the respondent company:

> "All employees except: managers, superintendents, supervisors, foremen, office and clerical staff, plant security, and any person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity."

FACTS

The application came on for hearing at the Board's January sitting. The respondent is a company who is in the process of bringing into production a potash mine. The evidence disclosed that the estimated completion of the shaft sinking and on surface construction would be completed sometime in July, 1969. Underground development would be approximately 25% completed by that date and that the mine would be in production and up to the estimated complement of employees by December, 1969.

ONLY 25 OUT OF THE POTENTIAL OF 326 EMPLOYEES PRESENT

As of November 28, 1968, the date of this application, there were 23 employees only in the bargaining unit applied for and as of the date of hearing, namely, January 7, 1969, there were 25 employees in the bargaining unit. The respondent company estimated that the full complement of employees in December, 1969, will number approximately 326. There was no evidence to indicate that the proposed

full complement of employees would not be reached by the estimated date or that their reaching this complement depended on foreseeable factors outside the control of the respondent that might cause them to not reach their targeted complement of employees by the said date.

REFERENCE TO PRECEDENT

This same situation has been considered by this Board on several previous applications. Written reasons were given in an application for certification by *Tunnel and Rock Workers' Local Union No. 168*, and *Duval Corporation of Canada* reported in 68 CLLC 16038. This application is on all fours with the above mentioned application and as the Board's majority decision in this application was based on the same principles, the following quote starting on P 13109 are the reasons in the present application:

> "The Board, by a majority decision, in the *International Brotherhood of Electrical Workers, Local Union No. 2038* and *ITT Canada Limited* application, considered the build-up principle. A written decision was given and is reported in 1967 CLLC Paragraph 16016. This decision set out the Board's opinion concerning this principle and the majority of the Board's opinion has not changed. Both counsel, however, felt that a further clarification by a written decision in this matter might be helpful to avoid premature applications being made in the future.
>
> The Board, in coming to its decision, in the above mentioned *ITT Canada Limited* case, read and agreed with the build-up principle as enunciated and followed by the Ontario Labour Relations Board. These principles are set out clearly in the *Emil Frant and Peter Wasilowich* case, Volume 1 (1944-1959) C.L.L.C. Cases Paragraph 18057 and are followed in the *Cochrance Industries Limited* case, 1965 C.L.L.C. Paragraph 16034.
>
> The problem the Board is faced with in this type of application is balancing the right of present employees to be represented by a union for the purpose of bargaining collectively and the rights of future employees to select a bargaining agent as was stated in the *Emil Frants and Peter Wasilowich* case and applied by this Board in the *ITT Canada Limited, supra.*
>
> The Board, in coming to its decision, must consider the type of operation, the segment of the employees employed in the proposed bargaining unit at time of application, the total number of employees estimated there will be in the proposed bargaining unit, and the date at which the proposed build-up will be achieved."

REASONS FOR DECISION

As was stated in that decision, each application will depend on its particular facts. In the present application there were only 25 of the

estimated 326 employees in the bargaining unit applied for, employed. The evidence indicated the respondent company intended to reach its employee complement of 326 by December, 1969.

I again quote from the *Tunnel and Rock Workers' decision, supra* P. 13110:

> "There was nothing to indicate that this objective was not realistic, both as to numbers and time, or that the respondent was in any way trying to interfere with the employees' right to be represented by a union of their choice. The whole issue was the question as to whether the application was premature in view of the few employees that would be selecting the bargaining agent for the proposed large number of employees.
>
> The majority of the Board, having applied the principles as set out above, were of the opinion that this application was premature and for that reason the application was dismissed.
>
> Counsel for the applicant was concerned about the Board's statement in the last paragraph of the written decision given in the *ITT Canada Limited case, supra*, which stated, in essence, that a minimum of 50% of the employees should be employed in the proposed bargaining unit before the Board would consider an application. This percentage figure can only be used as a guide if all the factors indicate an honest and achievable intention to complete the employee build-up in the estimated time. This guide figure was indicated to assist applicants in determining the time for applying in these build-up situations. It was not set as an arbitrary figure nor in any way intended to restrict applications being made. Applicants may apply for certification at the time of their choice."

APPLICATION DISMISSED

For these reasons this application was dismissed.

(Sgd.) "R. H. KING,"
Chairman.

January 11, 1969

DISSENTING OPINIONS

MAJORITY DECISIONS

The majority of the Board dismissed this application for certification by applying the so-called "build-up" principle which the majority of the Board first applied in *ITT Canada Limited* case and followed in the *Duval*

Corporation of Canada Limited case. We do not need to refer to the evidence submitted since it is summarized in the Reasons for Decision dated January 11th, 1969, signed by Judge R. H. King, Chairman of the Board.

NO LEGAL FOUNDATION FOR "BUILD-UP" PRINCIPLE

We disagree with the majority of the Board in the previous cases and we disagree in this case. In our opinion, there is no legal foundation for the "build-up" principle in *The Trade Union Act*, and indeed the "principle" is in direct contradiction to the provisions of *The Trade Union Act.*

Employees shall have the right to organize in and to form, join or assist trade unions and to bargain collectively through representatives of their own choosing, and the representatives designated or selected for the purpose of bargaining collectively by the majority of employees in a unit appropriate for that purpose shall be the exclusive representatives of all employees in that unit for the purpose of bargaining collectively.

BOARD DENIED PRESENT EMPLOYEES THEIR STATUTORY RIGHT

There is nothing in that section which says that the right of employees declared therein is subject to be denied, delayed or postponed by the "build-up" principle, and in our opinion the Board in dismissing the union's application on this ground is denying the present employees the right which is theirs under the Act.

The majority of the Board cite certain Ontario Labour Relations Board cases in support of their decision. What is done by the Ontario Board (which operates under a Statute considerably different in many respects from our Trade Union Act) may well be helpful as a guide in doubtful situations but cannot, in our opinion, justify the Saskatchewan Labour Relations Board making decisions which contradict the Act. We should point out that in Ontario cases referred to, the Ontario Labour Relations *Board did not dimiss the applications*, but delayed action on these cases. In our view even this would not be justified in Saskatchewan in the light of section 3 of *The Trade Union Act.*

With respect to the rights of persons who may in future become employees of the employer as the work force does "build up", in our opinion the provisions of *The Trade Union Act* respecting the rescission or amendment of certification orders are ample to protect their freedom to choose a trade union to represent them, or to choose not to be represented if that be their wish. If it is thought that this is not sufficient protection, in our opinion it is for the legislature to change the law, not the Board.

BASIC REQUIREMENTS TO OBTAIN CERTIFICATION PRESENT

In this case the basic requirements to obtain certification under *The Trade Union Act* were present.

1. There was an "**E**mployer".
2. There were a number of "**E**mployees".
3. An appropriate bargaining unit had been set out and agreed upon.
4. There was clear cut evidence of support.
5. All forms had been filed in proper order.

Therefore in our opinion this application for certification should have been proceeded with as in all other applications and the "build-up" principle should not have been entertained. The rights of the "employees" under section 3 of *The Trade Union Act* should have been respected to the fullest degree.

(Sgd.) "J. R. INGRAM,"
Vice-Chairman.

(Sgd.) "J. A. THAIN,"
January 11, 1969. Member of the Board.

3.062 January 11, 1969

Building Service Employees' Local Union No. 299

v.

Assiniboia Union Hospital

Application for reinstatement and payment of monetary loss — Unfair labour practice alleged — Employee dismissed after application to amend certification order to include her position among others — Basis of dismissal unrelated to union activity — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (d) (e) (f) (g); 9 (1) (e).

APPLICATION FOR REINSTATEMENT AND PAYMENT OF MONETARY LOSS

The applicant union applied for reinstatement and payment of monetary loss respecting one Betty Ann Watamanuk. To succeed in either application, it must first be established that the respondent was guilty of an unfair labour practice with respect to the discharge of the said Betty Ann Watamanuk.

ALLEGATIONS OF APPLICANT

The applicant, in its application states as follows:

> "The applicant trade union represents certain employees of this employer for the purpose of collective bargaining. In the month of November, 1968, the applicant trade union organized a group of employees of the hospital which it has heretofore not represented, and made application to the Labour Relations Board to amend its certification order so as to include the said employees. Betty Ann Watamanuk is one of the employees who the union now seeks to represent. During the time of the said organizing campaign, and since, the employer acting by and through the administrator of the hospital, C. H. Nelson of Assiniboia, Saskatchewan, attempted to coerce and intimidate the employees concerned in an effort to prevent them from being represented for the purpose of bargaining collectively, and one of the actions which he undertook for this purpose, was to discharge Betty Ann Watamanuk."

The allegation of the unfair labour practice is pursuant to section 9, subsection (1) clause (e) of *The Trade Union Act*, and the part of this subsection that is pertinent to this application reads as follows:

> "9—(1) it shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
>
> (e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or threat of discharge of an employee, with a view to encouraging or discouraging membership in or activity in or for a labour organization or participation of any kind in a proceeding under this Act, and if an employer or employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that an employee exercised a right accorded to him by this Act there shall be a presumption in his favour that he was discharged or suspended because he exercised such right, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer, . . . "

TWO ISSUES

The evidence placed before the Board related to two separate issues. Firstly, there was the evidence relating to Betty Ann Watamanuk's employment and dismissal and secondly, evidence relating to a meeting other members of the staff had with Mr. Nelson, at which Miss Watamanuk did not attend, nor was any question relating to her specifically discussed.

FACTS

We first then deal with the evidence relating directly to Miss Watamanuk.

Miss Watamanuk was appointed to the position of chief laboratory technician of the Assiniboia Union Hospital in a letter dated September 20th, 1965, and sent to her by the then administrator of the hospital. Her appointment was to be effective November 9, 1965. In a letter dated September 24, 1965, to the said administrator, she accepted the appointment. The hospital at that time was a 32 to 36 bed hospital, and she was the only full time laboratory technician employed. She apparently continued in this position until January 1st, 1968, when, after making application, she was granted six months leave of absence to further her qualifications by becoming a registered technician.

The administrators of the hospital changed during the absence of Miss Watamanuk, on the course. The present administrator, Mr. Nelson, was appointed on February 1st, 1968.

ACCREDITATION PROGRAM STARTED IN HOSPITAL

On April 19, 1968, Mr. Nelson in his capacity as administrator, wrote Miss Watamanuk advising her that the hospital had launched an

accreditation program and that the program required a fully qualified registered technician to be in charge of the laboratory and that if she did not obtain this standing, they would have no alternative than to replace her. On June 12, 1968, Mr. Nelson again wrote Miss Watamanuk that they were expanding their laboratory services to include several additional tests and that a laboratory and x-ray consultant from the Swift Current Regional Hospital Council would be in charge of setting up the tests. He requested Miss Watamanuk to advise him as to what date she would be returning to work.

There was no further correspondence and Miss Watamanuk returned and took up her former position at the expiration of her leave of absence, as of July 1st, 1968.

EMPLOYMENT OF MISS WATAMANUK TERMINATED

There was evidence concerning problems in connection with getting some of the additional tests going and the evidence indicated that Miss Watamanuk was not as enthusiastic about those additional tests as Mr. Nelson thought she should be. The accreditation program also apparently required evaluation records on certain employees of which Miss Watamanuk was one. Mr. Nelson, on instructions from the Board at a meeting on November 20, 1968, proceeded to evaluate the employees for which he was responsible and reported to the Board. He did several employees, but did not get around to talking to Miss Watamanuk re this matter until December 12th, 1968. At this meeting, the question was brought up as to whether Miss Watamanuk wanted to take the responsibility of being the chief laboratory technician. They discussed this matter and Miss Watamanuk indicated she did not want to take the responsibility. On December 18th, 1968, she signed a letter stating this. The Board had a meeting that evening, at which the Board discussed this matter, and as a result, the administrator was instructed to advise Miss Watamanuk her employment was terminated as of December 31, 1968, and this he did by a letter dated December 19th, 1968.

At the time of the December 12th meeting of Mr. Nelson with Miss Watamanuk, the hospital board and Mr. Nelson were aware there was an application before the Labour Relations Board to amend a previous certification order to include certain positions one of which being that of laboratory technicians. No distinction was made in the application relating to the position held by Miss Watamanuk, namely, that of chief laboratory technician.

BASIS OF MISS WATAMANUK'S DISMISSAL

The Board heard evidence from both Mr. Nelson and the chairman of the hospital board, who both swore that Miss Watamanuk's dismissal was based solely on her wish not to take the responsibility of chief laboratory technician and had nothing to do with union activity.

The Board also heard evidence concerning the fact the hospital expected to grow, due to its location and the fact smaller hospitals in the area might be closing. There was also evidence the hospital board had made a definite decision, even prior to Mr. Nelson's coming on staff, that it wished to qualify for the accreditation program.

REASONS FOR DECISION

The majority of the Board were of the opinion the evidence established that the hospital board considered it essential that they get accredited and were prepared to take the necessary steps to do so. This determination was clearly formulated months before there was any question of an application being made to the Labour Relations Board for an amendment to the previous certification order which had excluded laboratory technicians from the bargaining unit. It is to be noted that the application for amendment was not filed until November 29th, 1968. The letters Mr. Nelson wrote early in the year while Miss Watamanuk was on her leave of absence clearly indicated they intended to upgrade that department. The majority decision of the Board was therefore, that in view of all the evidence relating to Miss Watamanuk's dismissal that the evidence rebutted the presumption set out in section 9 (1) (e) that Miss Watamanuk's dismissal resulted from a right she exercised under *The Trade Union Act.*

The evidence relating to the confrontation that Mr. Nelson had, with certain members of the staff, to say the least, was disconcerting. Intemperate language was used and emotions apparently ran high on both sides. Here we have a situation where the hospital anticipates an increase in size. The result would be that certain positions would be more clearly defined in the sense that not more than one person would be doing one particular task. The hospital board and the administrator, due to its accreditation program were looking to the people who filled these positions to assume the responsibility they considered went with them. The whole situation was in a state of flux and no one was fully clear as to what the eventual outcome would be.

The majority of the Board were of the opinion that this uncertainty was the main factor in this unfortunate incident and that the references to the union activity were merely incidental to the main concern underlying the whole problem. They were, therefore, of the opinion that Mr. Nelson's actions, while regrettable, did not constitute an unfair labour practice.

The majority of the Board were also of the opinion that in view of the fact this meeting had no relation to Miss Watamanuk's employment, and that none of the employees involved were dismissed, that it should not be considered as a part of this application. They were of the opinion that even if this had constituted an unfair labour practice, that it should

not be considered in relation to these applications which apply specifically to the reinstatement of and monetary loss to Betty Ann Watamanuk.

APPLICATION DISMISSED

No unfair labour practice having been found, the Board therefore dismissed the application for reinstatement and monetary loss.

(Sgd.) "R. H. KING,"
January 11, 1969. Chairman.

3.063 February 8, 1969

Canadian Association of Policemen, Moose Jaw Branch
and
The Board of Police Commissioners, of the City of Moose Jaw,

v.

The Canadian Association of Policemen, CLC.

Joint application for amendment to a Board Order — Disaffiliation with Canadian Labour Congress — Supported by majority of members — Joint application proper procedure — Amendment granted.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (j) (k) (i).

JOINT APPLICATION FOR AMENDMENT

The applicant made a joint application with the respondent, the Board of Police Commissioners, of the City of Moose Jaw, Saskatchewan, to amend a Board order dated March 19, 1945, which had been further amended on August 8, 1960. The amendment applied for was the deletion of the letters "CLC" after the words "The Canadian Association of Policemen" wherever these letters appear in the original or amended Board orders.

The certified union insofar as the Board orders were concerned was The Canadian Association of Policemen, CLC, and they were notified of the application and were represented at the Board hearing.

MAJORITY OF MEMBERS SUPPORTED AMENDMENT

The evidence disclosed that at a meeting held by the membership of the Canadian Association of Policemen, Moose Jaw on the 25th day of January, 1968, a secret ballot was taken respecting the question of disaffiliation from the CLC. There were 23 members present and vote was unanimous in favour of disaffiliation. There was provision for members on duty at the time of the meeting to vote but there was no evidence concerning the overall outcome. There was a special meeting of the members of the said association on October 8th, 1968, at which there were 26 members present and the following motion was passed unanimously:

> "That our union disaffiliate from the Canadian Labour Congress."

At both these meetings a substantial majority of the members of the said association were present.

The Board were of the opinion that in view of this evidence that the application should be granted. The Board were satisfied the applicant was a union within the meaning of *The Trade Union Act* and could find nothing in the constitution of the previously certified union that required any further steps than those taken by the applicant to disaffiliate from the said certified union.

AMENDMENT GRANTED

This being the case at the time of the application the applicant had disaffiliated. The Board were of the opinion a joint application was the proper procedure to follow and granted the amendment as applied for.

(Sgd.) "R. H. KING,"
Chairman.

February 8, 1969.

3.064 February 8, 1969

International Union of Operating Engineers, Hoisting and Portable and Stationary Local Union No. 870.

v.

Redi-Mix Concrete Ltd.
and
International Brotherhood of Teamsters, Chauffeurs, Warehousemen
and
Helpers of America, Local Union No. 395.

Application for certification as bargaining agent — Counter-application by intervener — Applicant already certified for unit for which it was applying — Application to rescind said certification order before Board at time of applicant's application — Rescinding order made January 11, 1969 — Application and counter-application dismissed as being out of time.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c) (k).

APPLICATION FOR CERTIFICATION AND COUNTER-APPLICATION

The applicant applied to be certified as bargaining agent for certain employees of the respondent company. This application was filed with the Board on January 2, 1969. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 395 intervened and made a counter-application to be certified as bargaining agent. This intervention was filed with the Board on January 29, 1969.

APPLICANT ALREADY CERTIFIED AS BARGAINING AGENT

The evidence disclosed that as at the date the original application was filed the applicant was in fact already certified as bargaining agent for the bargaining unit for which he was applying.

CERTIFICATION RESCINDED

An application rescinding this said certification was before the Board at that time but the rescinding order was not made until the 11th day of January, 1969. The rescinding order was made as a result of a vote that was conducted among the employees pursuant to a Board order. The intervener was not involved in this application.

REASONS FOR DECISION

The Board found that pursuant to section 5 (k) the application of the applicant was out of time and was therefore dismissed. The Board were of the opinion that the intervener having filed his intervention on January 29, 1969, was not entitled to have his application heard by the Board at that hearing. The Board was of the opinion that an intervention application could not be used to circumvent the time requirements of the rules and regulations when it was based on an original application which was itself out of time.

BOTH APPLICATIONS DISMISSED

It was for these reasons that both applications were dismissed.

(Sgd.) "R. H. KING,"
Chairman.

January 8, 1969.

3.065 April 8, 1969

Retail, Wholesale and Department Store Union, AFL-CIO/CLC

v.

Brother's Bakery Ltd.

Application for certification — Vote ordered — Applicant filed objections to the vote — Names of employees eligible to vote not on voters' list — Original vote a tie — Held. Another vote ordered.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

The original application in this matter was for certification of the applicant as bargaining agent for employees of the respondent company.

FIRST VOTE ORDERED, OBJECTIONS TO VOTE

The Board ordered a vote and the vote was duly taken. The applicant's agent filed objections to the vote which read as follows:

"(1) That the petition filed with the Board on the hearing of the objecting union's application for certification, allegedly by or on behalf of employees, was made or procured in whole or in part on the advice of, or as a result of influence of or interference or intimidation by the employer or employer's agent, and the same ought not to have been considered by the Board and the Board ought not to have ordered the said vote.

(2) Between the date the Board ordered the said vote and date on which the said vote was conducted, and while the objecting union's application was pending before the Board, the employer made or threatened to make changes in wages, hours, conditions of employment, benefits or privileges of the employees.

(3) That two employees who were eligible to vote were not placed on the voters' list for the said vote and were not permitted to vote."

BOARD HEARD EVIDENCE

After several delays the Board heard evidence from the majority of the employees plus the owner manager of the respondent with respect to the objections to vote application.

ORIGINAL VOTE HELD A NULLITY: ELIGIBLE EMPLOYEES LEFT OFF VOTERS' LIST

The Board on the evidence decided that the original vote held was a nullity. This finding was based on the fact that two full time employees who were eligible to vote had not had their names placed on the voters' list. There was also evidence that certain part-time employees who were eligible to vote had not been included on the Statement of Employment nor were their names included on the voters' list. This all must be considered in the light of the fact there was a tie when the said vote was taken.

EMPLOYER'S CONDUCT NOT MATERIAL

The majority of the Board were of the opinion after hearing the evidence that any misrepresentation made to the Board or that any activities participated in by the employer did not place the employees in a position that a vote would not indicate the employees true wishes.

OBJECTIONS TO VOTE DISMISSED

The Board therefore dismissed these two objections to the vote.

ANOTHER VOTE ORDERED

The majority of the Board were therefore of the opinion that in view of the fact the original vote was a nullity the only fair and proper procedure was to order another vote. This the Board did. The voters' list was set by the Board on the basis of the evidence heard by it and also orders that the employees eligible to vote on the date the original vote was taken would be allowed to vote if they so wished.

(Sgd.) "R. H. KING,"
Chairman.

April 8, 1969.

3.066 April 8, 1969

Steven Werbeniuk
and
Querel Gravel and Lumber Co. Ltd.,

v.

International Woodworkers of America, AFL-CIO/CLC, Region No. 1
Local Union No. 184.

Application for rescission of certification order of union — Certified union alleged lack of jurisdiction in Board and interference by employer — Board had jurisdiction — No interference by employer indicated in evidence — Application for rescission granted.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by
C. 83, 1966, s.s. 5 (k) (ii); 33.

CERTIFICATION

The certified union on April 4, 1968, was certified by this Board as bargaining agent for the following bargaining unit:

> "All employees employed by Querel Gravel & Lumber Co. Ltd., in or in connection with its logging and trucking operations in the Province of Saskatchewan, except office staff, foremen, and a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, are an appropriate unit of employees for the purpose of bargaining collectively.

APPLICATION FOR RESCISSION

On March 3, 1969, the applicant, an employee of the said company, made application for rescission of the said certification order. He filed support for his application from other employees of the employer who worked at classifications within the said bargaining unit.

ALLEGATIONS OF CERTIFIED UNION

The certified union in its reply to this application made the three following allegations:

> "(2) THE TRADE UNION hereby alleges that the said application is made in whole or in part on the advice of, or as a

result of influence and/or interference by the employer or the employer's agent contrary to section 6 of *The Trade Union Act*, aforesaid.

"(3) THE TRADE UNION hereby alleges that it repeatedly made requests of the employer to bargain collectively with the said TRADE UNION as a result of an Order of the Labour Relations Board, dated April 4th, 1968, but that the employer, through one, M. A. QUEREL, refused to so bargain collectively.

"(4) THE TRADE UNION hereby alleges that the said application is not made within the requirement of *The Trade Union Act*, aforesaid, and particularly, section 5 (k) thereof."

FACTS

The employer operates a wood cutting and logging operation and supplies wood under contract to the Simpson Timber Company Limited who operates a saw mill near Hudson Bay, Saskatchewan. The certified union is certified as bargaining agent for certain employees of the Simpson Timber Company Limited, and there is a collective bargaining agreement with respect to that certification order.

RE: JURISDICTION OF BOARD

Allegation number 4 above relates to the jurisdiction of the Board so it will be dealt with first.

Counsel for the certified union argued that section 33 of *The Trade Union Act* applied in this particular case — section 33 reads as follows:

> "Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without restricting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force, the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him."

The Board heard evidence concerning the contractual relationship between the employer and the Simpson Timber Company Limited and were of the opinion that the employer was an independent subcontractor and did not fall within any of the categories as set out in section 33 above. That being the case the collective bargaining agreement as between the certified union and Simpson Timber Company Limited had no bearing on this application.

Section (5)(k) (ii) reads as follows:

> "5. The board shall have power to make orders:
>
> (k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:
>
> (ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than thirty days nor more than sixty days before the anniversary date of the order to be rescinded or amended;"

BOARD HAS JURISDICTION TO HEAR APPLICATION

The anniversary date in this particular case was therefore April 4, 1968. The application was filed with the Board on March 3, 1968. The Board had jurisdiction to hear this application as it was filed within the 30-60 day period as set out in section 5 (k) (ii) above.

RE: EVIDENCE OF EMPLOYER'S INTERFERENCE

Evidence was heard relating to allegation number 2 above concerning employer or employer's agent influence or interference.

NO INTERFERENCE BY EMPLOYER

Michael Querel, as well as the accountant, and Steven Werbeniuk, all gave evidence and were cross-examined closely. The majority of the Board were of the opinion that there was no indication of either influence or interference by either the employer or his agent.

NO COLLECTIVE AGREEMENT IN EXISTENCE AT TIME OF APPLICATION — IRRELEVANT

Allegation number 3 relating to repeated attempts made by the certified union to bargain collectively is of no importance with respect to this application. The fact is that at the time this application was made there was no collective agreement. This is no fault of the applicant or his supporters.

APPLICATION GRANTED

The majority of the Board therefore having found as set out above that the application was in time, that it was a bona fide application and that the applicant had the necessary support, granted the application for rescission and it so ordered.

(Sgd.) "R. H. KING,"
Chairman.

April 8, 1969.

3.067 April 8, 1969

International Union of Operating Engineers, Hoisting and Portable and Stationary Local Union No. 870.

v.

Redi-Mix Concrete Ltd.

Request by applicant for order under s. 5 (c) The Trade Union Act to be included in certification order — Collective agreement already in existence between the parties — Order under s. 5 (c) not included in certification order because the effect would be to re-open the collective bargaining agreement prior to agreed termination date.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (c)

CERTIFICATION OF APPLICANT

The Board certified the applicant as bargaining agent with respect to certain employees of the respondent company.

REQUEST FOR ORDER UNDER S. 5 (C) THE TRADE UNION ACT

The applicant in his application included a request for the usual order under section 5 (c) of *The Trade Union Act* which reads as follows:

> "5(c) Requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively."

COLLECTIVE AGREEMENT IN EXISTENCE

At the hearing both parties agreed that there was in existence a collective bargaining agreement entered into between the applicant and respondent prior to the date of this hearing and that the collective bargaining agreement had some time to run.

REASONS FOR DECISION

The Board was of the opinion that in view of this fact it should not include in its certification order an order pursuant to section 5(c) above. Such an order would have the effect of re-opening a collective bargaining agreement prior to the termination date which was agreed to by both the parties when they entered into the collective bargaining agreement.

ORDER NOT INCLUDED

It was for the above reason that the said order pursuant to section 5(c) of the Act was not included in the certification order.

(Sgd.) "R. H. KING,"
Chairman.

April 8, 1969.

3.068 May 7, 1969

Mrs. Sandra Groshong

v.

Nipawin Union Hospital
and
Building Service Employees' Local Union No. 333

Application to exclude nursing assistants from certified bargaining unit — Application within requirements of s. 5 (k) (ii) The Trade Union Act — No collective agreement in existence — Application granted.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (k) (ii).

CERTIFIED UNION

On May 7th, 1968, the certified union was certified by this Board as bargaining agent for the following bargaining unit:

> "All employees employed by the Nipawin Union Hospital operated by the Nipawin Union Hospital Board in the Town of Nipawin, Saskatchewan, except the administrator, matron, accountant, registered nurses, registered lab. technicians, registered x-ray technicians, chief engineer, head housekeeper, food service supervisor, head laundress, and a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, are an appropriate unit of employees for the purpose of bargaining collectively."

NO COLLECTIVE AGREEMENT

No collective bargaining agreement has been entered into as a result of the certification order.

APPLICATION MEETS REQUIREMENTS OF S. 5(K) (ii) THE TRADE UNION ACT

The applicant applied to have "all nursing assistants" excluded from the said bargaining unit. The application was filed with this Board on March 13th, 1969, and thus came within the 30-60 day period of the anniversary date of the certification order and therefore met the requirements of section 5 (k) (ii) of *The Trade Union Act.*

The evidence established that all persons involved in this application were registered members of the Certified Nurses' Assistants Association.

ORDERED: NURSING ASSISTANTS EXCLUDED FROM BARGAINING UNIT

The majority of the Board were of the opinion that for the same reasons as set out in a written decision dated August 8th, 1968, re *Building Services Employees' Local Union No. 333 chartered by the Service Employees' International Union* (formerly Building Service Employees' International Union of America) and *Wadena Union Hospital*, a body corporate, incorporated under the laws of Saskatchewan, with head office in the town of Wadena, Saskatchewan application, that the said nursing assistants in this application should now be excluded from the bargaining unit and it so ordered.

(Sgd.) "R. H. KING,"
Chairman.

May 7, 1969.

3.069 May 12, 1969

Prairie West Construction Ltd.

v.

International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 771.

Application for amendment of certification order — Application dismissed as out of time — As employees involved are not included in the collective agreement, the effective date pursuant to s. 5 (k) The Trade Union Act is the anniversary of the certification order, not the collective agreement.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (j) (k).

APPLICATION FOR AMENDMENT DISMISSED AS OUT OF TIME

A majority of the Board with respect to Prairie West Construction Ltd. and the International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 771, dismissed the application of the applicant for an amendment of a part of that order with this statement in the order: "The majority of the Board found that the application was out of time pursuant to section 5, clause (k) (ii) of *The Trade Union Act* and it is hereby ordered that the application be dismissed."

FACTS

The facts in this case are that on the seventh day of June, A.D. 1967, the International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 771, were certified as bargaining agents for the following bargaining unit: "All employees employed by Prairie West Construction Ltd. in the province of Saskatchewan engaged in the fabrication, erection, and placing of all structural, ornamental miscellaneous iron, plate and reinforcing iron, and all machinery movers and riggers such as iron workers, welders, burners, sheeting applicators, and all apprentices and foremen to same above and below the ground, except a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity". As a result of that certification order, a bargaining agreement was entered into and this bargaining agreement had an effective date of May, 1967, and pursuant to section 5, (k) (ii)

with that effective date an application for amendment was filed with this Board on March 19, 1969. Therefore, if the effective date of the collective bargaining agreement applied, then the application was in time.

COLLECTIVE BARGAINING AGREEMENT EXCLUDED STRUCTURAL IRON WORKERS

The collective bargaining agreement itself, however, excluded the structural iron workers and only applied to the reinforcing iron workers and in the scope clause of the collective bargaining agreement it states that: "the employer recognizes the union as the sole collective bargaining agent for all employees engaged in the field fabrication, sorting, cutting, bending, hoisting, placing, welding and tying of all materials used to reinforce concrete construction". In the scope clause they specifically referred only to the reinforcing iron workers and made no recognition of the fact that there was a certification order for the structural steel workers. That being the case, the Board ruled that this was a different situation than that in the *Saskatchewan Federated Co-operatives Limited* situation on which we gave a ruling in 1966.

The facts in the *Saskatchewan Federated Co-operatives Limited* situation were that the Retail, Wholesale and Department Store Union, Local 542, was certified for all employees and there was a bargaining agreement entered into. The construction department of the Saskatchewan Federated Co-operatives Limited grew up after the agreement was entered into. None of the people that were in the construction department of the Saskatchewan Federated Co-operatives Limited were bargained for in the collective agreement nor were they covered by the collective agreement. However, in that bargaining agreement it set out that the scope of the bargaining agreement was all employees, all inclusive and so, therefore, we ruled that the effective date with respect to our jurisdiction pursuant to then what was 5 (j), was the effective date of the collective bargaining agreement.

EFFECTIVE DATE IS ANNIVERSARY OF CERTIFICATION ORDER

In this case, the collective bargaining agreement makes no mention whatsoever in its scope clause of the fact of the certification with respect to the structural iron workers and the Board therefore ruled that the effective date so far as this application was concerned was the anniversary date of the certification order. In other words, there was no bargaining agreement respecting the structural workers and therefore the the filing date to give us jurisdiction was within the 30-60 day period running from the anniversary date of the certification order pursuant to section 5 (k) (ii) of *The Trade Union Act.*

(Sgd.) "R. H. KING,"
Chairman.

May 12, 1969.

3.070 May 15, 1969

International Woodworkers of America, AFL-CIO/CLC,
Region 1, Local 184

v.

Waskesiu Holdings Ltd.,
and
Construction and General Workers' Local Union No. 890.

Application for certification — Employees in bargaining unit members of intervening union — Whether Board has jurisdiction to nullify order which should not have been made — Application dismissed — Board should not go behind original certification order — Rights of employees will not be unduly prejudiced by dismissing the application.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c) (k) (i).

FACTS

The facts pertaining to this particular matter are as follows:

APPLICATION FOR CERTIFICATION

The applicant, a trade union, applied for certification as bargaining agent for certain employees of the respondent company presently included in a bargaining unit for which the intervener was certified as bargaining agent on the 6th of September, 1967 — a bargaining agreement pursuant to the said certification order was entered into between the intervener and respondent with effective date September 1, 1967, to end by 1970.

Section 5 (k)(i) states:

> "5. The Board shall have power to make orders:
>
> (k) rescinding or amending an order or decision of the board made under clause (a), (b), or (c), where:
>
> (i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than thirty days nor more than sixty days before the anniversary of the effective date of the agreement;"

The effect of this application is that the Board must rescind or declare a nullity, the previous Board order, if it is to grant this application. If the application was for rescission or amendment, this application is out of time.

BOARD'S JURISDICTION TO DECLARE ORDER A NULLITY WHERE IT SHOULD NOT HAVE BEEN MADE

Counsel for the applicant submits that the Board has the inherent power to declare the previous Board order a nullity, if evidence discloses the original order should not in fact have been made due to improper evidence — thus no time limit is involved.

Counsel for the intervener and respondent submit the Board has no such inherent power. They submit once a Board order is made, that the Board has no power to nullify such an order, and can only rescind or amend such an order in the 30-60 day period as provided in section 5 (k) of the Act.

The Board has reviewed the cases cited and the majority of the Board have come to the conclusion as follows: even if the Board has the inherent jurisdiction, it should only exercise this jurisdiction with real caution.

REASONS FOR DECISION

On the facts of this particular case, the Board does not feel it should go behind the original certification order. The order has been in force since 1967. A bargaining agreement was entered into pursuant to the said order. The applicant was fully aware of this certification order as is evidenced by the exhibits filed by the applicant. The applicant and intervener union have referred their problem to the CANADIAN LABOUR CONGRESS. The applicant had received a ruling from the said CONGRESS in sufficient time to allow it to come to this Board in 1968 within the time limits as set out in the Act.

The rights of the employees with respect to which this application has been made are what this Board is concerned with — not disputes between two unions. The majority of the Board do not feel these rights will be unduly prejudiced by dismissing this application on the basis of the facts before us as they in a very short time can come before the Board with an application which will be within the time limits as set out in the Act.

APPLICATION DISMISSED

For these reasons, the application is dismissed.

(Sgd.) "R. H. KING,"
Chairman.

May 15, 1969.

3.071 May 27, 1969

International Woodworkers of America, AFL-CIO/CLC
Region 1, Local No. 184

v.

Woodlands Enterprises Limited
and
Construction and General Workers' Local Union No. 890.

Application for certification — Application to quash original Board order for fraud — Board has no jurisdiction — Only court of competent jurisdiction can quash Board order obtained by fraud.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c) (k) (i) (ii).

This application came on for hearing at this sitting on May 15 and 16, 1969, and was adjourned to today's date.

APPLICATION FOR CERTIFICATION

This is an application for certification. The Board, after hearing counsel at the earlier hearing, ruled that pursuant to either section 5(k) (i) or (ii) this application was in time.

APPLICATION TO QUASH ORIGINAL BOARD ORDER FOR FRAUD

Counsel for the applicant stated his application was an application for certification and not an application for rescission. He also stated that as he was prepared to adduce evidence to attempt to show the original Board order was procured by fraud and if the evidence established this, the original Board order as well as any collective bargaining agreement flowing from the said order should be quashed or declared a nullity by the Board and that as a result the intervener would have no status before the Board.

The Board has considered this matter during the adjourned period and the majority of the Board have concluded as follows:

BOARD'S JURISDICTION IS AS SET OUT IN THE ACT

The Board being created by statute has no jurisdiction other than that as set out in the Act creating it — namely *The Trade Union Act.*

Nowhere in the said *Trade Union Act* is there any power given to this Board to quash or declare any order made by the Board a nullity. The order, in the Board's opinion, must stand until such time as a court of competent jurisdiction quashes the order.

In a recent unreported case, between Retail, Wholesale and Department Store Union, AFL-CIO/CLC and William G. Gilbey

and

The Labour Relations Board of the Province of Saskatchewan

and

Harold Main, carrying on a business in the City of Saskatoon in the Province of Saskatchewan under the firm name and style of "Brother's Bakery" (pursuant to amendment)

Mr. Justice Disbery at p. 15 states as follows:

> "I have no doubt, buttressed by these decisions, that this court had inherent jurisdiction to quash on *certiorari* proceedings, the orders and decisions of inferior tribunals which were obtained by fraud and thus right the wrong which had been perpetrated upon that tribunal."

COURT OF QUEEN'S BENCH HAS POWER TO QUASH ORDERS OBTAINED BY FRAUD

This clearly indicates that the Court of Queen's Bench has the power to quash orders of this Board obtained by fraud. This being the case, there is a proper forum to redress such an alleged wrong.

BOARD HAS NO JURISDICTION

The Board rules it has no jurisdiction to hear this application based on the submission of counsel for the applicant that he is proceeding on the basis that the Board should quash or declare the original order a nullity.

(Sgd.) "R. H. KING,"
Chairman.

May 27, 1969.

3.072 May 27, 1969

International Woodworkers of America, AFL-CIO/CLC,
Region 1, Local No. 184

v.

Woodlands Enterprises Limited
and
Construction and General Workers' Local Union No. 890.

Application to amend application for rescission of certification order on basis of fraud — Board has no jurisdiction to hear evidence re alleged fraud in existing order — Only material allegations are relevant — s. 3 of The Trade Union Act re rights of employees — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by
C. 83, 1966, s.s.3; 5 (a) (b) (c) (k) (i).

APPLICATION FOR RESCISSION

The applicant, as a result of a ruling made by the Board on today's date, now applies to amend its original application to include an application for rescission, pursuant to section 5 (k) (i) which reads as follows:

> "5. The Board shall have power to make orders:
>
> (k) rescinding or amending an order or decision of the board made under clause (a), (b), (c) where:
>
> (i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than thirty days nor more than sixty days before the anniversary of the effective date of the agreement;"

Counsel for the applicant, in his submission relating to the application to amend, stated emphatically that he intended to rely on an alleged fraud and misrepresentation with respect to the order made on the 3rd day of May, A.D. 1967.

BOARD HAS NO JURISDICTION RE: ALLEGATIONS OF FRAUD

The Board has already ruled that it does not have jurisdiction to quash or declare a nullity an existing certification order subsequently alleged to have been obtained by fraud. For the Board to hear evidence on a rescission application on the basis of an alleged fraud relating to an existing order would only be allowing the applicant to circumvent what the Board has already ruled it has no jurisdiction to determine.

PREVIOUS ALLEGATIONS INADMISSIBLE

The majority of the Board are of the opinion that any allegations of fraud pertaining to the granting of the order dated the 3rd day of May, A.D. 1967, are irrelevant and, therefore, inadmissible. The Board is of the opinion that evidence of any allegations of fraud which are material to the application presently before the Board would be relevant.

APPLICATION DISMISSED

The Trade Union Act sets out in section 3, without equivocation, that employees in Saskatchewan have the right to select a bargaining agent of their own choosing. This Board has always been most concerned with this right of the employees. Had this application been proceeded with on the basis of determining the wishes of the employees as of the date of the application it could have been dealt with expeditiously. However, in view of the position taken by the applicant through its counsel, the Board, for the reasons stated above, cannot grant the application to amend and it is, therefore, dismissed.

(Sgd.) "R. H. KING,"
Chairman.

May 27, 1969.

3.073 June 3, 1969

International Woodworkers of America, AFL-CIO/CLC,
Region 1, Local No. 184

v.

Woodlands Enterprises Limited
and
Construction and General Workers' Local Union No. 890.

Request to lead evidence to show intervener's support should be disregarded — Two previous rulings — Board had no jurisdiction to declare a nullity and to hear evidence re fraud; Board would not allow amendment of application for rescission — Board will not go behind original Board order to hear evidence of fraud — Particulars of applicant's new evidence required.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by
C. 83, 1966, s. 5 (a) (b) (c).

At our last hearing Mr. Taylor posed the following question to this Board —

REQUEST TO INTRODUCE EVIDENCE

Has this Board by its previous rulings in this case ruled that the applicant may not lead evidence to attempt to show the support filed by counsel for the intervener ought to be totally disregarded by the Board in dealing with the applicant's application? Mr. Taylor stated the evidence he wished to lead would deal with the intervention in the sense that he would attempt to show fraud with respect to the original certification order which in his submission would so taint any resulting agreements made or support filed that the Board ought totally to disregard their intervention.

BOARD HAS NO JURISDICTION TO HEAR EVIDENCE RE: FRAUD TO DECLARE A NULLITY

The Board has made two previous rulings in this case. The first ruling being that the Board should not hear evidence relating to fraud or misrepresentation with respect to the original certification order as they had no jurisdiction to quash or declare a nullity the original order. This Board held it was not the proper forum in which such an alleged wrong could be redressed.

BOARD WOULD NOT ALLOW AMENDMENT OF APPLICATION FOR RESCISSION

The second ruling was that the Board would not allow an amendment requested by the applicant. The requested amendment was to add an application for rescission to the original application for certification. The Board ruled that in view of the previous ruling of it having no jurisdiction to quash or nullify a previous order on the basis of evidence of fraud or misrepresentation that such evidence with respect to a rescission application would only be allowing the applicant to circumvent what it had already ruled it has no jurisdiction to determine. For this reason any evidence relating to fraud or misrepresentation with respect to the original certification order would be irrelevant and inadmissible.

BOARD WILL NOT GO BEHIND ORIGINAL BOARD ORDER

Consequently in view of these above rulings, the Board does not intend to go behind the original Board order nor does it intend to hear any evidence relating to fraud or misrepresentation with respect to the obtaining of that order.

REQUIRE PARTICULARS OF APPLICANT'S EVIDENCE

Before the Board can come to any definitive ruling on any other evidence proposed by Mr. Taylor we will require some particulars from him on the evidence he proposes to call.

(Sgd.) "R. H. KING,"
Chairman.

June 3, 1969.

3.074 June 4, 1969

Andrew Nimirowski

v.

Smith-Roles Ltd., Saskatoon
and
United Stone and Allied Products Workers of America, Local No. 200.

Applications pursuant to s. 9 (1) (i) of The Trade Union Act re unfair labour practice — Work load changes in company during labour dispute — Dismissal of handicapped employee due to change in work load — No evidence that respondent threatened to shut down or leave plant — Workload changes did not constitute "moving a part of the plant" — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (d) (e); 9 (1) (i).

APPLICATION RE: UNFAIR LABOUR PRACTICE

The application is made pursuant to section 9 (1) (i) of *The Trade Union Act* which reads as follows:

> "9. (1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
>
> (i) to threaten to shut down or move a plant or any part of the plant in the course of a labour dispute;"

FACTS

The evidence established that the applicant had been an employee of the respondent company for some years. He operated a machine in the respondent's plant. The applicant had a physical handicap but was quite capable of operating this machine very satisfactorily. The respondent company made certain work load changes in the operation of this particular machine which resulted in the applicant, due to his handicap, being unable to perform these new work loads. The respondent company advised the applicant of this in a very terse letter dated May 6, 1969, which read in part as follows:

> "We have changed our steel shearing machinery and our stacking methods. We therefore do not have enough suitable work for you."

The respondent in the same letter enclosed a cheque for the applicant's holiday pay and his Unemployment Insurance book and advised they were making certain arrangements re refund of his portion of company pension fund thus completing in one letter his separation from the respondent company as an employee.

LABOUR DISPUTE IN EXISTENCE

There had been for sometime and still was in existence as of May 6, 1969, the date of discharge, a labour dispute. The applicant was a member of the union that was involved in the labour dispute.

REASONS FOR DECISION — NO UNFAIR LABOUR PRACTICE

The Board was most concerned about the facts relating to this application particularly in view of the handicap of the applicant. The majority of the Board however could not find on the evidence that an unfair labour practice had been committed pursuant to section 9 (1) (i) of *The Trade Union Act*.

The evidence did not establish that the respondent threatened to shut down the plant due to the labour dispute nor to move the plant. The only area that evidence might apply to was "or any part of a plant". The majority of the Board however came to the conclusion that change made to the machine in question and the change made in the work load could not be construed as moving a part of a plant within the meaning of section 9 (1) (i) of the said Act.

It is further pointed out that the unfair labour practice set out in the above section and subsection refers to a threat to do certain things — not the actual doing of same. While it is not necessary to decide this point in this particular case it would appear that where the actuality of a shut down or move of a plant takes place during a labour dispute, rather than merely the threat to do so, no unfair labour practice under this section and subsection is committed.

APPLICATION DISMISSED

It was for the above reasons the application was dismissed.

(Sgd.) "R. H. KING,"
Chairman.

June 4, 1969.

3.075 October 7, 1969

International Woodworkers of America, AFL-CIO/CLC
Region No. 1, Local No. 184

v.

Woodlands Enterprises Limited
and
Construction and General Workers' Local Union No. 890.

Application for certification — Intervening trade union was certified for same bargaining unit — Application of s. 7 (3) The Trade Union Act — Board satisfied that intervener represented a clear majority of the employees in the unit — Board's discretion to refuse to order vote — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 79, 1968, s.s. 5 (a) (b) (c); 7 (3).

APPLICATION FOR CERTIFICATION — INTERVENER ALREADY CERTIFIED

The applicant applied to be certified as bargaining agent of the respondent company. The intervener, a trade union, was certified as bargaining agent for the same bargaining unit as applied for by the applicant on May 3, 1967. The said certification was still in force on the date the application was filed. There was a collective bargaining agreement as between the intervener and respondent as of the date the application was filed.

The Board satisfied itself the application was in time and was properly before the Board. There were lengthy court proceedings pursuant to certain Board rulings. It is not necessary to go into these matters in these written reasons as the request for reasons deals specifically with respect to one paragraph of the Board order that ultimately was made.

PART OF BOARD ORDER IN QUESTION

This paragraph of the order referred to above reads as follows:

> "The Board finds that the above named applicant does not have the required evidence of support to its application for certification and it is hereby ordered that the application be dismissed."

APPLICATION OF SECTION 7 (3) THE TRADE UNION ACT

The Board having found the intervener was certified as bargaining agent for the bargaining unit as applied for by the applicant, section 7, subsection 3 of *The Trade Union Act* then applied with respect to this application.

Section 7, subsection 3, reads in part as follows:

> "Where a Trade Union:
>
> (a) applies for a board order determining it to represent the majority of employees in an appropriate unit for which there is an existing board order determining another trade union to represent the majority of employees in the unit; and
>
> (b) shows that twenty-five per cent or more of the employees in the appropriate unit have, within the six months next preceding the date of the application, indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining;
>
> the board shall, subject to clause (k) of section 5 direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:
>
> (c) is satisfied that another trade union represents a clear majority of the employees in the appropriate unit."

BOARD'S DISCRETION TO REFUSE TO ORDER VOTE

The applicant's application indicated more than twenty-five per cent of the employees had indicated, within six months preceding the date of filing the application, the applicant trade union to be their choice of representative for the purpose of collective bargaining. The Board however exercised its discretion to refuse to direct a vote to be taken as it was satisfied on the evidence placed before it that the intervener represented a clear majority of the employees in the appropriate unit applied for.

APPLICATION DISMISSED

It was for this reason the application was dismissed.

(Sgd.) "R. H. KING,"
Chairman.

October 7, 1969.

3.076 October 8, 1969

United Stone and Allied Products Workers of America,
Local No. 3-200

v.

Smith-Roles Ltd., Saskatoon.

Application under s. 10 A The Trade Unon Act, to conduct a vote — Circumstances of final offer are not within jurisdiction of Board nor are they relevant to an application under s. 10 A of the Act — Voting procedure as set out in Rule 14 — Appointment of an agent of the Board to set up a voters' list.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by
C. 66, 1969, s.s. 7; 10 A (1)(2)(3)(4)(5).
Rule 14 of Rules and Regulations of The Trade Union Act.

The Board are of the opinion that Mr. Dahlem's preliminary objection should be dismissed.

APPLICATION UNDER S. 10 A TO CONDUCT A VOTE

Section 10 A. (1), (2) and (3) reads as follows:

"10A.—(1) Where a strike has continued for thirty days:

(a) the trade union;

(b) the employer; or

(c) any employee of the employer;

involved in the strike, may apply to the board to conduct a vote among the striking employees to determine whether a majority of such employees voting thereon whose ballots are not rejected are in favour of accepting the employer's final offer and returning to work.

"(2) Upon receipt of an application under subsection (1) the board or a person appointed by the board shall forthwith conduct the vote requested by secret ballot.

"(3) Every employee who is involved in the strike and who has not secured permanent employment elsewhere is entitled to vote for the purposes of this section."

The Board is of the opinion that the legislature has clearly directed that in the event of a strike lasting over 30 days, and in the event any of the three parties named in 10A (1) above apply to the Board to conduct a vote the Board is required to do so.

CIRCUMSTANCES OF FINAL OFFER NOT WITHIN JURISDICTION OF BOARD

It is the Board's opinion the question of what the terms of the final offer are or when it was arrived at are not within the jurisdiction of this Board and form no part of the material to be filed or the evidence to be heard pursuant to an application made under section 10A. of the Act.

VOTING PROCEDURE ESTABLISHED

Rule 14 refers specifically to voting procedure pursuant to section 6, now section 7 of the said Act. The Board are of the opinion that the logical method of conducting a vote pursuant to this new section 10A would be that as set out in rule 14 and directions usually sent out pursuant thereto.

DECISIONS

In view of this the Board are prepared to and will immediately name an agent of the Board. He will immediately meet with the parties concerned and if they cannot agree on a voters' list pursuant to the requirements of section 10A (3), the Board will at this hearing set the voters' list if it is so requested to do, and can properly determine same, on evidence that the parties have here and now available to bring before the Board.

If the voters' list can be determined the Board will then at this hearing set the date of the vote.

(Sgd.) "R. H. KING,"
Chairman.

October 8, 1969.

3.077 November 6, 1969

Construction and General Workers' Local Union No. 890

v.

Gifford et al of Batoni-Humford, Saskatoon.

Application for reinstatement and payment of monetary loss — Alleged unfair labour practice — Board found employee discharged for good and sufficient reason — Evidence satisfied onus placed on employer by s. 9 (1) (e) of The Trade Union Act — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (d) (e) (f) (g); 9 (1) (e).

APPLICATION FOR REINSTATEMENT AND PAYMENT OF MONETARY LOSS

The applicant applied for an order requiring the employer to reinstate and pay monetary loss to one Gary Dennis Mossman. It was alleged the said Mossman was discharged by a superintendent of the employer for union activity and thus an unfair labour practice had been committed by the said employer pursuant to section 9 (1) (e) of *The Trade Union Act.*

FACTS

The evidence establishes that Mossman was in fact an employee of the said employer from September 15, 1969, to September 26, 1969, when he was discharged by the superintendent of the employer. He was fully paid for services rendered by the company.

Mossman in evidence swore that when he was fired by the superintendent that he was told by the superintendent that he was being fired for "trying to form a union" or words to that effect. The superintendent in his evidence swore that no such words were spoken by him to Mossman at the time he was fired and that he was fired for not producing on the job and for poor attendance. The foreman on the job, one Bill Devine, also swore that Mossman was discharged for not producing on the job.

ONUS ON EMPLOYER SATISFIED

The majority of the Board were of the opinion that the evidence before it satisfied the onus placed on the employer by section 9 (1) (e)

and that the said Mossman was fired for good and sufficient reason and not because he exercised any right accorded to him by *The Trade Union Act.*

APPLICATION DISMISSED

The Board having found there was no unfair labour practice therefore dismissed the application for reinstatement and monetary loss.

(Sgd.) "R. H. KING,"
Chairman.

November 6, 1969.

3.078 February 13, 1970

International Union of Operating Engineers, Hoisting and Portable and Stationary Local Union No. 870

v.

Gifford et al of Batoni-Humford, Saskatoon

Application for certification — Bargaining unit contained one employee — All requirements of The Trade Union Act pursuant to certification had been met — Application granted.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

The applicant applied to be certified as bargaining agent for employees of the respondent in the following bargaining unit:

> "All employees employed by Gordon Gifford, Peter Batoni, and John Humphrey, carrying on a business under the firm name and style of Batoni-Humford, and by the said Batoni-Humford in the province of Saskatchewan, namely: all employees engaged in the operating, repairing and servicing of cranes, hoists, tuggers and similar equipment, all earth moving and road building equipment, all pressure and heating equipment, except a person having and regularly exercising authority to employe or discharge employees or regularly acting on behalf of management in a confidential capacity, constitute an appropriate unit of employees for the purpose of bargaining collectively."

ONLY ONE EMPLOYEE IN PROPOSED UNIT

The evidence disclosed that as of December 23, 1969, the date of the application, the respondent had one employee in the proposed bargaining unit. The evidence also established that this employee had replaced an employee who had been injured while on the job and was presently receiving Workman's Compensation benefits as a result of the said injury. The evidence also was that the respondent intended to re-employ this employee upon his recovery and would then have to release the present employee as there was only one crane operator required on the particular job involved.

APPLICATION GRANTED

The Board was of the opinion that even in view of these facts, as of the date of the application, there was only one employee in the proposed bargaining unit and that, as all the requirements of *The Trade Union Act* pursuant to certification had been met by the applicant, that the application should be granted.

It was for these above reasons the application was granted.

(Sgd.) "R. H. KING,"
Chairman.

February 13, 1970.

3.079 June 3, 1970

United Stone and Allied Products Workers of America,
Local 3-200

v.

Smith-Roles Ltd., Saskatoon

Application under s. 9 (1) (c) of The Trade Union Act — Alleged unfair labour practice of refusing to bargain collectively — On evidence, Board found no failure on part of employer to bargain collectively — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 66, 1969, s.s. 2 (a); 5 (d) (e); 9 (1) (c); 10A.

ALLEGATION OF UNFAIR LABOUR PRACTICE

The applicant alleges an unfair labour practice pursuant to section 9 (1) (c) of *The Trade Union Act*, which reads as follows:

> "9 (1) it shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
>
> "(c) to fail or refuse to bargain collectively with representatives elected or appointed (not necessarily being the employees of the employer) by a trade union representing the majority of the employees in an appropriate unit."

Mr. Hale appeared for the applicant and Mr. Dahlem for the respondent.

FACTS

There is no dispute on the facts leading up to this application. The parties both agreed the pertinent facts are as follows:

> The employees of the respondent went on strike in 1969. An application was then made pursuant to section 10A of *The Trade Union Act* and a vote was conducted by the Board. The majority of employees voted to accept the employer's final offer and return to work, and as a result of this a collective bargaining agreement was entered into in January, 1970. Certain of the striking employees have not returned to work and the applicant and respondent proceeded to settle the question of their return to work through the grievance and conciliation proceedings provided in the collective bargaining agreement. They could not agree on a chairman for the conciliation board and following the

procedure set out requested the Minister of Labour to appoint said chairman. As of the date of the application no chairman of the board had been appointed but as of the date of hearing the chairman had been appointed and apparently a date of hearing has been set by the appointed chairman.

Section 2(a) reads as follows:

> "2(a) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a collective bargaining agreement, the embodiment in writing of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such written agreement and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in a unit of employees appropriate for the purpose of negotiating;"

APPLICATION DISMISSED

On the facts as set out above, the Board are of the opinion that there has not been a failure to bargain collectively on the part of the respondent. A collective bargaining agreement was entered into and signed and a grievance procedure was proceeded with pursuant to terms set out in the said collective agreement. Therefore, the Board are of the opinion that the employer has not failed to bargain collectively within the meaning of the said Trade Union Act and for this reason dismiss this application.

Having arrived at this decision it was not necessary for the Board to consider Mr. Dahlem's preliminary objection that the application should be dismissed for the reasons put forward in his submission.

(Sgd.) "R. H. KING,"
Chairman.

June 3, 1970.

3.080 June 3, 1970

United Stone and Allied Products Workers of America,
Local 3-200

v.

Smith-Roles Ltd., Saskatoon

Application under s. 9 (1) (e) of The Trade Union Act — Alleged unfair labour practice that employers refusing to let existing workers back — Preliminary objections by respondent that Board should not hear application as conciliation Board set up — This application separate from that being considered by conciliation board — Preliminary objection dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 66, 1969, s.s. 5 (d) (e); 9 (1) (e); 10A.

ALLEGATION OF UNFAIR LABOUR PRACTICE

The applicant alleges an unfair labour practice pursuant to section 9 (1) (e) of *The Trade Union Act*, which reads as follows:

> "9(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
>
> "(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or threat of discharge of an employee, with a view to encouraging or discouraging membership in or activity in or for a labour organization or participation of any kind in a proceeding under this Act,"

Mr. Hale appeared for the applicant and Mr. Dahlem for the respondent.

The applicant's specific allegation is contained in paragraphs (4) and (5) of his application. They read as follows:

> "(4) That the majority of the employees voted to accept the final offer of the employer and return to work but the employer has refused and/or failed to allow the said striking employees to return to work pursuant to section 10A of *The Trade Union Act.*
>
> "(5) That the applicant trade union alleges that the actions of the employer have constituted an unfair labour practice pursuant to section 9 (1) (e) of *The Trade Union Act.*"

FACTS

There is no dispute on the facts leading up to this application. The parties both agreed the pertinent facts are as follows:

The employees of the respondent went on strike in 1969. An application was then made pursuant to section 10A of *The Trade Union Act* and a vote was conducted by the Board. The majority of employees voted to accept the employer's final offer and return to work, and as a result of this a collective bargaining agreement was entered into in January, 1970. Certain of the striking employees have not returned to work and the applicant and respondent proceeded to settle the question of their return to work through grievance and conciliation proceedings provided in the collective bargaining agreement. They could not agree on a chairman for the conciliation board and following the procedure set out requested the Minister of Labour to appoint said chairman. As of the date of the application no chairman of the board had been appointed but as of the date of hearing the chairman had been appointed and apparently a date of hearing has been set by the appointed chairman.

PRELIMINARY OBJECTION OF RESPONDENT

Mr. Dahlem as a preliminary objection submits that this Board should not hear this application.

His submission is based on the fact that grievance and conciliation procedures having been entered into as set out in the said collective bargaining agreement, the Board should not now consider this application as the applicant cannot have two boards adjudicate the same subject matter. He cites as his authority:

— *Jonergin Company Incorporated v. Labour Relations Board (Quebec) and Montreal Printing Specialties and Paper Products Union, Local 521,* 57 CLLC 15150

— *Caven v. Canadian Pacific Railway Company*, (1925) 3WWR32

— *Woods v. Miramachi Hospital*, (1957), 59DLR290

BOARD'S JURISDICTION TO DETERMINE UNFAIR LABOUR PRACTICE ALLEGATION

The Board has read these decisions and with respect are of the opinion they do not apply to this application. This application is based on an altogether different basis than that for which the conciliation board was set up. The conciliation board, in the Board's opinion, was set up for the purpose of determining grievances with respect to the seniority provisions of the collective bargaining agreement.

This application in our opinion is one altogether separate and apart from that determination. This application alleges that the employer has refused and/or failed to allow striking employees to return to work pursuant to an expressed wish as a result of a vote under section 10A of *The Trade Union Act.*

The Board is being asked to determine that matter and that matter only — not to determine their right to continue to work pursuant to any seniority clause of the collective bargaining agreement.

This Board has no jurisdiction with respect to the grievance and conciliation procedure as set out in the collective bargaining agreement. The Board has, however, in its opinion the jurisdiction and duty, to determine by evidence, if the allegation relating to a refusal of the employer to allow striking employees to return to work is in fact an unfair labour practice pursuant to section 9 (1) (e) of *The Trade Union Act.*

PRELIMINARY OBJECTION DISMISSED

It is for these reasons the Board dismissed Mr. Dahlem's preliminary objection.

(Sgd.) "R. H. KING,"
June 3, 1970. Chairman.

3.081 June 5,1970

Bakers Electric Ltd. et al

v.

International Brotherhood of Electrical Workers,
Local Union No. 2038.

Application alleging unfair labour practice — Refusal of employees to bargain collectively alleged — Preliminary objection of respondent that this infraction not covered by The Trade Union Act — Whether failure to execute employer's final offer is failure to bargain collectively must be decided on facts of each case — the allegation is within s. 9(2)(c) Trade Union Act — Preliminary objection dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 66, 1969, s.s. 5 (d) (e); 9 (2) (c); 10A.

PRELIMINARY OBJECTION TO APPLICATION ALLEGING UNFAIR LABOUR PRACTICE

The only thing we have to decide this morning is Mr. Tallis's preliminary objection. His preliminary objection is that the application before us alleges an unfair labour practice that in fact is not set out in *The Trade Union Act* or in other words alleges something that is unknown in law and for this reason the application should be dismissed.

RELEVANT STATUTORY PROVISIONS

The unfair labour practice allegation is based on section 9 (2) (c) of the Act. This section reads as follows:

> "9(2) (c) It shall be an unfair labour practice for an employee, a person acting on behalf of a labour organization or any other person:
>
> "(c) to fail or refuse to bargain collectively with the employer;"

The primary allegation with respect to this application is in paragraph (e) of the application, which reads as follows:

> "4(e) That the said John McLeod, George Flaman and/or Al Jezegou have failed or refused to bargain collectively with the employer in that they have failed or refused to execute the written agreement which is constituted by the employer's said last offer."

Bargaining collectively is defined in paragraph 2 (a) as follows:

"(2)(a) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a collective bargaining agreement, the embodiment in writing of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such written agreement and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in a unit of employees appropriate for the purpose of so negotiating;"

Section 10A subsection 5 says this:

"10A. (5) Where pursuant to this section employees have voted to accept an employer's final offer and to return to work, the employer shall not withdraw that offer."

APPLICATION ALLEGES REFUSAL TO BARGAIN COLLECTIVELY

The application alleges a refusal to bargain collectively with the employer which is in the wording of the Act.

REASONS FOR DECISION

It is the majority of the Board's opinion that the allegation that the above mentioned persons did fail or refuse to bargain collectively in that they failed or refused to execute the written agreement can be an unfair labour practice within the meaning of section 9 (2) (c) of *The Trade Union Act.*

It is the majority of the Board's opinion that the mere failure to execute the final offer as the collective bargaining agreement does not necessarily amount to a failure to bargain collectively within the meaning of section 2 (a) of *The Trade Union Act.* The reasons why, in each particular case, a collective bargaining agreement, in terms of the final offer after a vote pursuant to s. 10A whereby the employees vote to accept the employer's final offer and return to work, is not executed by the bargaining agent are of prime importance in determining whether the bargaining agent is negotiating in good faith within the meaning of section 2 (a) of *The Trade Union Act.*

The only way this can be determined is by hearing the evidence relating to each particular case.

PRELIMINARY OBJECTION DISMISSED

The Board for these reasons dismisses the preliminary objection.

(Sgd.) "R. H. KING,"
Chairman.

June 5, 1970.

3.082 July 10, 1970

United Brotherhood of Carpenters and Joiners of America, Local 1021

v.

Jubilee Ford Sales Ltd., Saskatoon

Allegation of unfair labour practice — Failing to bargain collectively — Transfer of ownership of respondent — s. 33 successor rights apply — Held: Unfair labour practice had been committed — Adjournment to allow parties to commence collective bargaining.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5(d) (e); 33.

ALLEGED UNFAIR LABOUR PRACTICE, FAILURE TO BARGAIN COLLECTIVELY

The applicant alleges an unfair labour practice in that the respondent has failed to bargain collectively with the applicant union with respect to certain employees of the respondent company.

The crux of this application is section 33 of *The Trade Union Act* which deals with transfer of obligations and reads as follows:

> "33. Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without restricting the generality of the foregoing, it before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him. R.S.S. 1965, c. 287, s.33."

FACTS

The facts with respect to this application are as follows: By a Board order dated the 6th day of November A.D. 1969 — the applicant was certified as the bargaining agent for a certain unit of employees of Dominion Motors (Saskatoon) Limited — Saskatoon, Saskatchewan.

The unit determined to be the appropriate unit was "All employees engaged as journeymen motor vehicle mechanics repairmen, apprentice motor vehicle mechanics repairmen and motor vehicle mechanics repairmen helpers at the main depot employed by Dominion Motors (Saskatoon) Limited at 19th Street and Third Avenue, Saskatoon, Saskatchewan, except a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity."

Dominion Motors (Saskatoon) Limited was an automobile dealership franchised by the Ford Motor Company of Canada Limited to sell certain Ford products and parts. Its business consisted of the usual services associated with such franchises, namely — sale of new cars, used cars, a service department and body shop. There were apparently several different locations from which this business was conducted but for our purposes in view of the bargaining unit we are concerned with only the service department located in the main depot at 19th Street and Third Avenue, Saskatoon, Saskatchewan.

This main depot consisted of land and buildings that were owned by Northern Management Limited and Texaco Canada Limited and were leased by Dominion Motors (Saskatoon) Limited on fairly long term leases. Northern Management Limited is controlled by George Dovell, who was also president of Dominion Motors (Saskatoon) Limited.

In 1968 by way of debenture, George Dovell personally, and Dominion Motors (Saskatoon) Limited, borrowed certain monies from Ford Motor Credit Company of Canada. The security in the main consisted of all assets of Dominion Motors (Saskatoon) Limited except accounts receivable. There was apparently in 1969, a default on the obligations under these debentures and Ford Motor Credit Company of Canada exercised its right pursuant to the debentures and appointed a receiver. The receiver then went about the business of realizing on the assets secured in the debenture.

In the meantime a new company was formed called Jubilee Ford Sales Limited and this company commenced business on February 2nd, 1970. This company is a wholly owned subsidiary of Ford Motor Company of Canada Limited.

Jubilee Ford Sales Limited purchased from the receiver appointed by Ford Motor Credit Company of Canada Limited certain fixed assets — mainly consisting of parts, equipment and furniture. No used units were purchased by Jubilee Ford Sales Limited and of course no accounts receivable were taken over as they were secured otherwise than by the debenture.

The property we are concerned with here, namely the main depot, was leased by Jubilee Ford Sales Limited from Northern Management Limited and Texaco Canada Limited. This was achieved by Dominion Motors (Saskatoon) Limited surrendering the leases on the property

owned by Texaco Canada Limited and Northern Management Limited with part of the consideration for the surrender being that the premises covered by the surrender, namely the main depot, would be leased to Jubilee Ford Sales Limited. This is all set out in exhibits P.6 and P.7. On the 17th day of February 1970, a lease was entered into between Northern Management Limited and Jubilee Ford Sales Limited, exhibit P.8, covering the property referred to in exhibit P.6. No lease was filed covering property owned by Texaco Canada Limited but the said property is referred to in paragraph 6 of exhibit 8 as having been leased by Jubilee Ford Sales Limited.

The evidence establishes that all the employees of Dominion Motors (Saskatoon) Limited, including those covered by the bargaining unit in question, were discharged in December of 1969. It also establishes that Jubilee Ford Sales Limited hired employees after commencing business on February 2nd, 1970. There was no direct evidence on this point but the majority of the Board were satisfied on the whole of the evidence that a majority of the employees hired by Jubilee Ford Sales Limited, insofar as it pertains to employees with respect to this application, were former employees of Dominion Motors (Saskatoon) Limited.

The facts in this matter are set out in some detail so that the majority of the Board's reason for decision might be clarified.

SEC. 33 TRADE UNION ACT APPLIES

The majority of the Board were of the opinion that perhaps on paper it did not appear as if Dominion Motors (Saskatoon) Limited was "sold, leased, transferred or otherwise disposed of" to Jubilee Ford Sales Limited as set out in section 33 of *The Trade Union Act*, *supra*, but in actual fact that was what took place. When you reduce the situation to its essence there were only two parties involved here — Ford Motor Company of Canada Limited and Dominion Motors (Saskatoon) Limited. The franchise involved went from Dominion Motors (Saskatoon) Limited to Jubilee Ford Sales Limited, a company wholly owned by a Ford Motor Company Limited subsidiary. The franchise remained in the same main premises through documents executed by or on behalf of George Dovell who owned controlling interest in Northern Management Limited and the same George Dovell who was president of Dominion Motors (Saskatoon) Limited. The majority of the Board were of the opinion that for these reasons the successor rights as set out in section 33, *supra*, apply with respect to the certification order referred to above.

UNFAIR LABOUR PRACTICE HAD BEEN COMMITTED

It was therefore the majority of the Board's opinion that an unfair labour practice had been committed but in view of circumstances here

the Board adjourned the application and instructed the secretary to advise the parties of this finding without, in fact granting the order, so that the parties might if they so desired commence collective bargaining.

(Sgd.) "R. H. KING,"
July 10, 1970. Chairman.

3.083 September 2, 1970

Construction and General Workers' Union, Local Union No. 890

v.

Northern Wood Preservers (Saskatchewan) Limited
and
International Woodworkers of America, AFL-CIO/CLC.

Whether application for rescission had to be made before certification of applicant where there was already a certified trade union — Interpretation of s. 7 of The Trade Union Act — If majority of employees vote for certification Board has power to decertify — No application for rescission necessary.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (a) (b) (c) (k); 7 (3).

RE: NECESSITY OF APPLICATION FOR RESCISSION BEFORE APPLICATION FOR CERTIFICATION WHERE THERE IS ALREADY A CERTIFIED UNION

Mr. Romanow's submission was that before we could certify an applicant trade union, where there was already a trade union certified, that an application for rescission had to be made.

Section 7, clause (3), subsections (a), (b), (c) and (d) reads as follows:

"Where a trade union:

"(a) applies for a board order determining it to represent the majority of employees in an appropriate unit for which there is an existing board order determining another trade union to represent the majority of employees in the unit; and

"(b) shows that twenty-five percent or more of the employees in the appropriate unit have, within the six months next preceding the date of the application, indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining;

"the board shall subject to clause (k) of section 5 direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:

"(c) is satisfied that another trade union represents a clear majority of the employees in the appropriate unit; or

"(d) if the board has, within the six months next preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit."

EMPLOYEES HAVE RIGHT TO CHANGE UNIONS

The legislature obviously intended that employees in an appropriate unit have a right to change unions if they so desire. The Board must conduct a vote if certain requirements are met, namely,

(1) 25% or more of the employees in the appropriate unit within six months preceding date of application indicate applicant trade union is their choice of bargaining agent.

(2) the application is within the time limits as set out by 5(k), (i) or (ii) of *The Trade Union Act*, whichever is applicable.

The Board by section 7, clause (3), subsections (c) and (d), is given some discretion with respect to the directing of a vote but these do not apply in this particular case.

BOARD HAS POWER TO DECERTIFY

The Board has and does hold, that by virtue of section 7, if a vote is held and the majority of employees vote the applicant trade union to be their choice the Board has the power to, in fact must, decertify the previous trade union and certify the applicant.

APPLICATION FOR RESCISSION NOT NECESSARY

No application for rescission is necessary as the legislature has by section 7 decreed this right to employees and the Board must make whatever order the vote decrees. The legislature in referring to section 5(k) in section 7 was merely setting the precribed time limits as to when this application could be made.

(Sgd.) "R. H. KING,"
Chairman.

September 2, 1970.

3.084 October 20, 1970

Lillian Lackmanec, Saskatoon

v.

Sisters of Charity of the North West Territories
Operating St. Paul's Hospital (Grey Nuns'), Saskatoon.
and
Building Service Employees' Union Local Union No. 333.

Application for amendment to exclude "all nursing assistants employed as nursing assistants" from respondent bargaining unit — Application to certify Saskatchewan Nursing Assistant's Association as bargaining unit for same nursing assistants — Applicant bargaining unit not appropriate — Too loosely knit and subject to many variables as to composition and control — Present bargaining unit had carried on successful collective bargaining — Both applications dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (k) (i).
R.S.S. 1965. The Registered Nurses Act, C. 315, as amended by S.S. 1967, C. 71, s. 11(3).

APPLICATION FOR AN AMENDMENT TO EXCLUDE NURSING ASSISTANTS

The applicant has applied for an amendment to an amended certification order dated February 3rd, 1965 which read as follows:

> "The employees employed by the Sisters of Charity of the North West Territories in the St. Paul's Hospital in the city of Saskatoon, Saskatchewan, except the credit manager, the chief engineer, the nursing staff, secretary of personnel director, all journeyman electricians, and apprentice electricians, constitute an appropriate unit of employees for the purpose of bargaining collectively."

The proposed amendment was for a further exclusion from the above bargaining unit of "all nursing assistants employed as nursing assistants".

The application was in time pursuant to section 5 subsection (k) (i) of *The Trade Union Act.*

APPLICATION FOR CERTIFICATION OF NURSING ASSISTANTS

This application is for amendment only but before the Board was also an application for certification by the Saskatchewan Nursing Assistants' Association as bargaining agent for the amendment applied for, namely "all nursing assistants employed as nursing assistants". Both parties agreed at the outset that these two applications should be considered as one as they are interrelated. It was for this reason that the Board was most concerned about the appropriateness of the bargaining unit.

The Saskatchewan Nursing Assistants' Association by its constitution and bylaws dated 1969 in Article II sets out its objectives. This Article reads in part as follows:

> "1. To elevate the standard of the nursing assistant so as to render the most complete nursing service to the public:
>
> 5. To bargain collectively on behalf of nursing assistants and groups of nursing assistants on matters relating to salaries, employment benefits and working conditions."

Article III relating to membership reads as follows:

> "Every person who is a nursing assistant currently certified in Saskatchewan shall be eligible for membership in the Association."

This constitution also sets forth certain bylaws of the Saskatchewan Registered Nurses Association which deals with eligibility for certification as a nursing assistant, method of certification, and amount of fees. The Saskatchewan Registered Nurses Association pursuant to the Registered Nurses' Act, R.S.S. 1965, C. 315 as amended by S.S. 1967, C. 71, section 11 subsection 3 was given this power to make the said bylaws. It reads as follows:

> "(a) the education, training and supervision of nursing assistants;
>
> (b) the certification of nursing assistants
>
> (c) the amount and method of collecting certification fees
>
> (d) the cancellation of certification."

It is clear from the above the Saskatchewan Registered Nurses' Association controls completely membership in the Saskatchewn Nursing Assistants' Association even as to the amount of fees that must be paid.

FACTS

The applicant, Saskatchewan Nursing Assistants' Association is applying to be the bargaining agent for those nursing assistants who are members of the association, those who are non-members of the association through failure to pay dues, those who fail to meet the eligibility requirements of the Saskatchewan Registered Nurses' Association and may not be certified and become members of the

association. The association does not wish to be bargaining agent for nursing assisants who fall in any of the above categories if they are working in some technical capacity in the hospital such as in the operating room or as orderlies.

The evidence of Miss Lackmanec, the applicant for the amendment, was that certain orderlies in the hospital did practically the same work with respect to male patients that the nursing assistants, certified or otherwise, did with respect to female patients.

The evidence also established that a nursing assistant did not have to be a member of the applicant association to work as a nursing assistant. The hospital management had in fact no way of knowing whether a nursing assistant was or was not a member of the said association and made no differentiation as to work allotment on that basis.

REASONS FOR DECISION — UNIT INAPPROPRIATE

The Board were of the opinion, in view of the factors set out above, that the bargaining unit as applied for was not appropriate for bargaining collectively. The unit was so lossely knit and subject to so many variables both as to composition and control that it would not be in the best interests of either the people concerned or the hospital administration to grant the applied for amendment and thus create an inappropriate bargaining unit. The Board also was not unmindful of the fact that collective bargaining had been successfully carried on for many years with the bargaining unit as presently constituted.

BOTH APPLICATIONS DISMISSED

The Board therefore dismissed both applications.

(Sgd.) "R. H. KING,"
Chairman.

October 20, 1970.

3.085 November 4, 1970

United Brotherhood of Carpenters and Joiners of America, Local 1990

v.

Dashchuk Lumber Ltd.,

Application under s. 9 (1) (c) The Trade Union Act — Alleged unfair labour practice — Failure of respondent to bargain collectively — Respondent refused to bargain collectively because the workers in the classifications for which applicant was certified as bargaining agent were not "employees" within the meaning of The Trade Union Act — Board found these workers to be in fact "employees" — Held: Respondent had committed unfair labour practice pursuant to s. 9 (1) (c) The Trade Union Act.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (d) (e); 9 (1) (c).

CERTIFICATION AS BARGAINING UNIT

The applicant was certified as the bargaining agent on July 10, 1970, for the following bargaining unit:

> "(a) All carpenters, carpenter apprentices, and carpenter foremen employed by Dashchuk Lumber Ltd. in the city of Prince Albert, Saskatchewan and West to the East boundary of 107° parallel, South to North boundary of Township 41, East to the Manitoba border, and North to the Northwest Territories boundary, except a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, are an appropriate unit of employees for the purpose of bargaining collectively."

REFUSAL BY RESPONDENT TO BARGAIN COLLECTIVELY

The evidence established that the applicant trade union went through all the necessary procedures to set up a meeting for the purpose of collective bargaining on the 14th day of August, 1970, and that no meeting was held. A meeting was held on September 22, 1970, and Mr. John Dashchuk refused to negotiate a new collective bargaining agreement or refused to execute a collective bargaining agreement respecting the employees set out in the above certification order.

Mr. Dashchuk's refusal was based on the promise that the people working for the said company which were in the classifications for which the applicant was certified as bargaining agent, were not employees within the meaning of *The Trade Union Act.*

UNFAIR LABOUR PRACTICE HAD BEEN COMMITTED

The Board found that these people were in fact employees within the meaning of the Act as they were neither independent contractors or were excluded from being employees under *The Trade Union Act* by virtue of the fact that they were shareholders. Therefore, the Board found the respondent had committed an unfair labour practice within the meaning of section 9 (1) (c) of *The Trade Union Act*.

(Sgd.) "R. H. KING,"
November 4, 1970. Chairman.

3.086 November 4, 1970

United Brotherhood of Carpenters and Joiners of America, Local 1990

v.

Dashchuk Lumber Ltd.

Application under s. 32 (2) The Trade Union Act — Alleged unfair labour practice — Respondent refused to comply alleging the people covered by the certification order were not "employees" within meaning of The Trade Union Act — Shareholders can be employees within meaning of the Act — Held: Respondent had committed an unfair labour practice pursuant to s. 32 (2) of the Act.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. s. 5 (d) (e); 32 (2)

CERTIFIED BARGAINING UNIT

The applicant was certified as the bargaining agent on July 10, 1970, for the following bargaining unit;

> "(a) All carpenters, carpenter apprentices, and carpenter foremen employed by Dashchuk Lumber Ltd. in the City of Prince Albert, Saskatchewan and West to the East boundary of 107° parallel, South to North boundary of Township 41, East to the Manitoba border, and North to the Northwest Territories boundary, except a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, are an appropriate unit of employees for the purpose of bargaining collectively."

REQUEST OF APPLICANT UNDER S. 32 TRADE UNION ACT

Pursuant to section 32 of *The Trade Union Act*, the applicant requested the employer to carry out the provisions of the said Act and on the 22nd day of July, A.D. 1970, served the following notice to the employer:

> "Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within thirty days after the commencement of his employment, apply for and maintain membership in the union as a condition of his employment."

RESPONDENT REFUSED TO COMPLY

The respondent's position was that he did not have to comply with the requirements of the above mentioned notice and section 32 of *The Trade Union Act* as those people covered by the certification order were independent contractors and were shareholders in the company and not employees within the meaning of *The Trade Union Act.*

RESPONDENT FOUND TO HAVE COMMITTED UNFAIR LABOUR PRACTICE

It was the Board's opinion that these people were not independent contractors and even if they were shareholders in the company they were still employees within the meaning of *The Trade Union Act.* Therefore, the Board found the respondent had committed an unfair labour practice pursuant to section 32, subsection 2 of *The Trade Union Act.*

(Sgd.) "R. H. KING,"
November 4, 1970. Chairman.

3.087 December 5, 1970

Retail, Wholesale and Department Store Union, Local 455

v.

Moose Jaw Co-operative Association Ltd.

Alleged unfair labour practice pursuant to s. 9 (1) (l) (i) (ii) The Trade Union Act — Employee absent from work when strike commenced — When able to return to work, went on strike — Respondent's refusal to pay employee sick pay benefits when she had exercised her right under The Trade Union Act amounted to an unfair labour practice within the meaning of the Act.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (d) (e); 9 (1) (l) (i) (ii).

ALLEGED UNFAIR LABOUR PRACTICE UNDER S. 9(1) (l) (i) (ii) TRADE UNION ACT

The applicant alleged that the respondent have committed an unfair labour practice pursuant to section 9, clause (1), subsection (l) (i) (ii) of *The Trade Union Act*, which reads as follows:

> "9.(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
>
> (l) to deny or threaten to deny to any employee:
>
> (i) by reason of the employee ceasing to work as the result of a lock-out or while taking part in a stoppage of work due to a labour dispute where such lock-out or stoppage of work has been enforced by the employer or called in accordance with this Act by the trade union representing the employee, as the case may be; or
>
> (ii) by reason of the employee exercising any right conferred by this Act;
>
> any pension rights or benefits, or any benefit whatever that the employee enjoyed prior to such cessation of work or to his exercising any such right."

FACTS

Mrs. Enid Johnson, an employee of the respondent within the bargaining unit for which the applicant is certified as bargaining agent, was ill and away from work prior to the date the strike commenced. Mrs. Johnson was declared fit to return to work prior to the date of the settlement of the strike. Mrs. Johnson then declined to go back to work and so therefore was on strike.

RESPONDENT REFUSED TO PAY SICK BENEFITS

The Board found that pursuant to the above mentioned section, that Mrs. Johnson had exercised a right under *The Trade Union Act* and the respondent's refusal to pay her sick pay benefits from the date the strike commenced to the date she was declared fit to go back to work was an unfair labour practice within the meaning of section 9, clause (1), subsection (l) (i) and (ii) of the Act.

(Sgd.) "R. H. KING,"
December 5, 1970. Chairman.

3.088 December 5, 1970

Retail, Wholesale and Department Store Union, Local 455

v.

Moose Jaw Co-operative Association Ltd.

Alleged unfair labour practice pursuant to s. 9 (1) (l) (i) (ii) The Trade Union Act — Employee absent from work at commencement of strike — Returned to work while strike still in progress — No evidence that employee had exercised any right re: strike under The Trade Union Act — Respondent's refusal to pay employee sick pay benefits did not amount to an unfair labour practice under the Act.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (d) (e); 9 (1) (l) (i) (ii).

ALLEGED UNFAIR LABOUR PRACTICE

The applicant alleged that the respondent had committed an unfair labour practice pursuant to section 9, clause (1), subsection (l) (i) and (ii) of *The Trade Union Act*, which reads as follows:

> "9. (1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
>
> (l) to deny or threaten to deny to any employee:
>
> (i) by reason of the employee ceasing to work as the result of a lock-out or while taking part in a stoppage of work due to a labour dispute where such lock-out or stoppage of work has been enforced by the employer or called in accordance with this Act by the trade union representing the employee, as the case may be; or
>
> (ii) by reason of the employee exercising any right conferred by this Act;
>
> any pension rights or benefits, or any benefit whatever that the employee enjoyed prior to such cessation of work or to his exercising any such right."

FACTS

Garnet MacNevin, an employee of the respondent within the bargaining unit for which the applicant is certified as bargaining agent, was off work due to ill health on August 22, 1970, the day that a legal strike commenced at the respondent's store. Mr. MacNevin returned to work on November 2, 1970, while the strike was still in progress. The

applicant alleges that he was entitled to sick pay for the period from the date the strike commenced until the date he returned to work, pursuant to the section set out above.

REASON FOR DECISION

There was no evidence before the Board that Mr. MacNevin exercised any right insofar as the strike was concerned under *The Trade Union Act*. That being the case the Board were of the opinion that as he had not exercised his right pursuant to section 9, clause (1), subsection (l) (i) and (ii) of *The Trade Union Act*, that the respondent had not committed an unfair labour practice by failing to pay Mr. MacNevin sick pay during the period mentioned above.

The Board in making this ruling was only ruling in connection with an unfair labour practice insofar as paying sick pay and was not dealing with any other obligation the respondent might have.

(Sgd.) "R. H. KING,"
December 5, 1970. Chairman.

3.089 January 19, 1971

Mrs. Agnes A. Pratchler

v.

Sisters of St. Elizabeth Hospital (Humboldt)
and
Canadian Union of Public Employees, Local 88

Application for amendment to exclude "all nursing assistants employed as nursing assistants" from bargaining unit — Board must determine if presently constituted bargaining unit is no longer appropriate — Qualifications and duties of 'nursing assistants employed as such' do not vary materially from those of orderlies employed by respondent — Good policy not to fragment a hospital bargaining unit — Present bargaining unit is still appropriate — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by
C. 83, 1966, s. 5 (k) (i).
R.S.S. 1965. The Registered Nurses' Act, C. 315 as amended by
S.S. 1967, C. 71, s. 11(3).

APPLICATION FOR AMENDMENT TO EXCLUDE NURSING ASSISTANTS

The applicant, a certified nursing assistant, employed by the respondent, applied, pursuant to section 5, clause (k) (i) of *The Trade Union Act*, for an amendment to a Board order dated June 10, 1959. The certified union was named in that order and was certified as bargaining agent for the following bargaining unit:

> "(1) All employees of the Sisters of St. Elizabeth's Hospital at Humboldt, Saskatchewan, except the Administrator, Assistant Administrator, Secretary to the Administration, Business Manager, Accountant, Registered and Graduate Nurses, Student Nurses and Students of Recognized Training Schools, Registered X-ray Technician, Registered Laboratory Technician, Pharmacist, Physiotherapist, Radiologist, Medical Record Librarian, Supervisor of Housekeeping, Dietitian, Plant Superintendent, Purchasing Agent, House Mother, Secretary to the School of Nursing, Boiler Room Staff, Personnel Officer, Supervisor of Laundry, constitute an appropriate unit of employees for the purpose of bargaining collectively;"

The application for amendment is to exclude the following classification from the bargaining unit in the above mentioned order:

"all nursing assistants employed as nursing assistants".

The material filed showed support for the application and the application was within the time period required by *The Trade Union Act.*

FACTS

Nursing assistants, as the name implies, are involved in the respondent hospital, as in other hospitals in Saskatchewan, with the care of patients. They are limited in the patient care services they can perform. By statute, *The Registered Nurses' Act*, R.S.S. 1965, C. 315, as amended by S.S. 1967, C. 71, section 11, subsection 3, their education, training, supervision and certification is under the control of the Saskatchewan Registered Nurses' Association. There is a Saskatchewan Nursing Assistants' Association to which all nursing assistants who are certified by the Saskatchewan Registered Nurses' Association and have paid the required fee may belong. The said Nursing Assistants' Association, 1969, passed a by-law setting out one of its objectives to be bargaining collectively on behalf of its members. The Board realizes this application is for an exclusion from the present bargaining unit only and not for certification of the said Nursing Assistants' Association as bargaining agent if the amendment is granted, but the Board is of the opinion the relationship of these two associations is one of the factors that should be considered in determining the appropriateness of the presently constituted bargaining unit.

AMENDMENT ONLY FOR "NURSING ASSISTANTS EMPLOYED AS SUCH"

It is also to be noted that the application for amendment is only for "nursing assistants employed as such" and not for "certified" nursing assistants or for nursing assistants, certified or otherwise, who may be employed as technicians in other areas of a hospital or for orderlies who may be performing very similar functions with respect to nursing care that is being performed by the nursing assistant.

It is also to be noted that the qualification requirements with respect to nursing assistants do not meet the standards set out in section 2 (i-A) in *The Trade Union Act.* This subsection defines membership in a professional association.

BOARD MUST DETERMINE IF PRESENT BARGAINING UNIT NO LONGER APPROPRIATE

The Board is fully cognizant of the employees right as set out in section 3 of *The Trade Union Act.* However, as was pointed out above, this is an application for an exclusion from a bargaining unit that has been deemed by an earlier Board order as being appropriate. It is, therefore,

the Board's obligation to determine if through changing circumstances the presently constituted bargaining unit is no longer appropriate.

PRESENT BARGAINING UNIT STILL IS APPROPRIATE

It is the Board's opinion that, taking all relevant factors into consideration, the presently constituted bargaining unit was and still is the appropriate unit. The qualifications of, and duties performed by, "nursing assistants employed as such" are not of a nature that they differ materially from abilities and skills required of orderlies by the respondent hospital. Furthermore, if, as is the case in other hospitals, the respondent should decide because of the nursing assistant's qualifications they should wish to use them as technicians in other areas of the hospital they would no longer be excluded from the present bargaining unit on the basis of the proposed amendment.

SHOULD NOT FRAGMENT A HOSPITAL BARGAINING UNIT

There is also a further important point that the Board considered in arriving at its decision. Hospitals perform a most important function in a community. The very nature of this function requires it to be performed, if at all possible, on an uninterrupted basis. It was the Board's opinion that very cogent reasons indeed should prevail to warrant fragmenting a hospital bargaining unit, and thus increasing a hospital administration's bargaining processes.

Furthermore, there was no evidence to indicate the present bargaining unit, as so constituted, was detrimental to the respondent hospital or the nursing assistants employed therein insofar as the collective bargaining process was concerned.

APPLICATION DISMISSED

For these reasons the Board dismissed this application.

(Sgd.) "R. H. KING,"
Chairman.

January 19, 1971.

3.090 July 7, 1971

The Mechanical Workers Trade Union

v.

Saskatoon Mechanical Maintenance and Service Ltd.
and
United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 264
and
Sheet Metal Workers' International Association Local Union No. 577

Application for amendment of certification order to exclude employees of previous company now employed by successor company — Application for certification as bargaining agent for employees of successor company (respondent) — Previous company (and therefore successor company) covered by proclamation under Essential Services Emergency Act — Held: Board does not have jurisdiction to hear applications.

R.S.S. 1965. The Trade Union Act. C. 287, as amended by C. 83, 1966, s. 5 (a) (b) (c) (k) (i).
s.s. 1966. The Essential Services Emergency Act, 1966, C. 2, 2nd session.

RESPONDENT IS SUCCESSOR COMPANY

This Board, on January 9, 1971, issued an order finding the herein respondent as a successor company to M. E. Cook & Son Limited.

APPLICATION FOR AMENDMENT AND CERTIFICATION

The applicant now applies for an amendment to a certification order issued by this Board dated March 14, 1945, in which the said order certified the United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 264, as bargaining agent for certain employees of M. E. Cook & Son Limited. The amendment asks to have those classifications of employees of M. E. Cook & Son Limited who are now employed by the successor company excluded from the terms of the order. The applicant then applies, if the amendment is granted, for certification.

RESPONDENT COVERED BY ESSENTIAL SERVICES EMERGENCY ACT

On the 10th of July, 1970, the Lieutenant Governor in Council issued a proclamation under *The Essential Services Emergency Act* declar-

ing the emergency procedures under the said Act to apply to certain companies in the construction service industry and specifically named M. E. Cook & Son Limited. Under the said emergency procedure an Arbitration Board was set up, and an award was made, that was declared to be final and binding to March 31, 1972.

BOARD DOES NOT HAVE JURISDICTION TO HEAR APPLICATIONS

The Board are of the opinion that in view of this emergency procedure having been implemented under *The Essential Services Emergency Act,* and an arbitration award having been made that is binding until March 31, 1972, and in the light of Mr. Justice MacDonald's judgment dated the 21st day of September, 1970, with respect to *John McLeod, George Flaman and Al Jezegou, and Labour Relations Board of the province of Saskatchewan,* and *Bakers Electric Ltd., Cameron Electric Ltd., Mars Electric, Stetner Electric Ltd., Ortman Electric Ltd., Lakeview Electric Ltd., J. K. Electrical Contractors Ltd., and Anthony Electric Ltd.,* 16 DLR (3d) 695, that it does not have jurisdiction to hear either of these applications.

(Sgd.) "R. H. KING,"
Chairman.

July 19, 1971.

3.091 July 8, 1971

Construction and General Workers' Local Union No. 890

v.

Revelstoke Building Materials Ltd.

Application alleging unfair labour practice pursuant to s. 32 (1) and (2) of The Trade Union Act — Applicant is certified bargaining agent for employees of respondent — Alleged certain employees had not maintained membership in accordance with s. 32 — Employment history showed seven of employees had not been employed for a period of 30 days prior to filing of application and one employee was exercising a right under the Act — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (d) (e); 32 (1) (2).

APPLICATION ALLEGING UNFAIR LABOUR PRACTICE

The applicant filed an application alleging an unfair labour practice pursuant to section 32 (1) and (2) of *The Trade Union Act*.

Section 32 (1) and (2) of the said Act reads as follows:

> "32. (1) Upon the request of a trade union representing a majority of employees in any appropriate bargaining unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, whether or not any collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with that trade union:
>
> > Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within thirty days after the commencement of his employment, apply for and maintain membership in the union as a condition of his employment;
>
> and the expression "the union" in the said clause shall mean the trade union making such request.
>
> (2) Subject to any law or any regulation applicable thereto passed by authority of the Parliament of Canada, failure on the part of any employer to carry out the provisions of subsection (1) shall be an unfair labour practice."

APPLICANT IS CERTIFIED BARGAINING AGENT

The evidence establishes that the applicant was certified by this Board as bargaining agent for the following bargaining unit on October 30, 1964:

> "(1) All employees employed by Revelstoke Building Materials Limited in the city of Saskatoon, Saskatchewan, except the office staff and those regularly employed in a confidential capacity, constitute an appropriate unit of employees for the purpose of bargaining collectively;"

The respondent company and applicant had negotiated bargaining agreements since that date and the last bargaining agreement expired March 31, 1971. A strike commenced on April 16, 1971, and was still in progress as of May 21, 1971, the date of the filing of this application.

NOTICE TO RESPONDENT

On May 17, 1971, exhibit P2 was mailed to the respondent by registered mail. It reads as follows:

> "May 17, 1971
> Revelstoke Building Materials Limited
> P.O. Box 2501
> 508-24th Avenue S.W.
> Calgary, Alberta
>
> Dear Sir:
> *Re: Section 32 of The Trade Union Act.*
> On November the 13th, 1964, you were served notice to have your employees maintain membership until you were no longer required to bargain collectively with this union. You have now failed to carry out this provision.
>
> "Please be advised that K. Pointer and all your other employees have not maintained membership in accordance with Section 32, although they have worked over thirty days as a laborer or a truck driver. Therefore we are requesting that you dismiss them in accordance with Section 32, within 24 hours of the receipt of this letter.
>
> Yours truly,
> A. Neumann
> Business Manager
> AN/mb
> c.c. — Mr. O. Frey
> Revelstoke Building Materials Limited"

Paragraph 4 of the present application reads as follows:

> "Although the required notice for employees to maintain membership was served, the company has refused to discharge

employees that have not maintained membership after thirty (30) days employment."

DISCUSSION OF INDIVIDUAL EMPLOYEES

The Board heard several witnesses and as no specific employee was named in the application in these reasons each employee who might be involved will be dealt with separately so that the reasons for the majority of the Board's decision in each individual employees situation will be clear cut. For reasons of brevity it is pointed out here that the Board can only deal with allegations with respect to circumstances relating to employment prior to the filing date of said application — namely May 21, 1971.

The evidence established that Mr. K. Pointer had been an employee of the respondent for several years and was in fact manager of the respondent company yard in Saskatoon, Saskatchewan. He regularly exercised the right to employ or discharge employees and therefore pursuant to section 2 (e) (i) of *The Trade Union Act* was not an employee within the meaning of the said Act and therefore could not be involved in this application.

The employment history with the respondent company of several employees is as follows:

Mr. A. Hubert	— employed on May 20th, 1971.
Mr. James Hovde	— employed approximately 9 months prior to filing date of application. This employee went on strike on April 16th, 1971, and as of May 21st, 1971, was still on strike.
Mr. R. McCallum	— was employed by respondent company in its Rosetown yard, but was transferred to the Saskatoon yard and became an employee, to which the certification order applies, on May 17th, 1971.
Mr. Marvin Wieler	— was employed in Saskatoon yard of respondent as of April 22nd, 1971, and was transferred out as of May 14th, 1971, and was not employed by the said Saskatoon yard as of May 21st, 1971.
Mr. Larry Wieler	— commenced employment with Saskatoon yard as of May 3rd, 1971, and left employment May 8th, 1971, and was re-hired in Saskatoon yard as of May 21st, 1971.

Mr. J. Smith	—	employed as of June 15th, 1971, and was dismissed June 19th, 1971.
Mr. Art Klippenstein	—	transferred into Saskatoon yard from Hanley, Saskatchewan, and transferred to Luseland, Saskatchewan, as manager of yard on May 20th, 1971.
Mr. K. Clark	—	hired on May 29th, 1971, and transferred to Prince Albert yard June 26th, 1971.

REASONS FOR DECISION

The above employment history of all persons employed by the respondent company with respect to the Saskatoon yard clearly shows that none of the persons named had been employed in the said yard for a period of 30 days prior to the filing date of this application except James Hovde. Mr. Hovde, as of the filing date, was excercising a right under the said Act and it is clear the applicant is not in any way alleging the demand for discharge could or should apply to him.

APPLICATION DISMISSED

From the above facts the majority of the Board were of the opinion that section 32 (1) of the said Act had not been contravened and therefore, dismissed the application.

(Sgd.) "R. H.KING,"
Chairman.

July 8, 1971.

3.092 July 8, 1971

Construction and General Workers' Local Union No. 890

v.

Revelstoke Building Materials Ltd.,

Application alleging unfair labour practice pursuant to s. 32 (1) of The Trade Union Act — Employment history showed none of employees in question had been employed for over 30 days in Saskatoon — Application dismissed — If the re-hiring or transfers were to avoid the maintenance of membership requirements of s. 32 of the Act, Board would rule there was an unfair labour practice on basis that it was tantamount to continuous employment.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (d) (e); 32 (1).

APPLICATION ALLEGING UNFAIR LABOUR PRACTICE

The applicant alleges an unfair labour practice pursuant to section 32 (1) of *The Trade Union Act* with respect to the respondent company in its Saskatoon yard in that in paragraph 4 of the said application they state as follows:

> "Although the required notice for employees to maintain membership was served, the company has rehired employees that have been employed by them for over thirty (30) days."

The evidence in this application is the same as that with respect to the application of the applicant alleging an unfair labour practice for failure to discharge certain employees pursuant to section 32 (1) of *The Trade Union Act.*

FILED JUNE 22, 1971

One significant difference with respect to this application is the filing date which is June 22, 1971. It will therefore be necessary to deal with the employment history to this date of certain of the employees to that date.

For the sake of brevity and as is set out in the written reasons with respect to the application mentioned above, this application does not apply to Mr. K. Pointer.

EMPLOYMENT HISTORIES

Mr. James Hovde left the employment of the respondent company on May 23rd, 1971. Mr. Marvin Wieler transferred out May 14th, 1971, and was not re-employed by the Saskatoon yard of the respondent company. Mr. J. Smith was only employed from June 15th to 17th, 1971. Mr. Art Klippenstein transferred to Luseland May 20th, 1971. Mr. Ken Clark was employed on May 29th, 1971, and was transferred June 26th, 1971, to Prince Albert, Saskatchewan.

From above it is clear this application does not apply to these employees as none of them were rehired by the respondent company's Saskatoon yard as of the filing date of the application, namely June 22, 1971.

We now go to the employment history of the three employees who could be involved in this application.

Mr. Albert Hubert employed in Saskatoon yard of respondent company on May 20th, 1971, quit his employment on June 12th, 1971, and was rehired by the Saskatoon yard on June 19th, 1971, and he is still working in the Saskatoon yard. The evidence clearly established Mr. Hubert quit of his own volition on June 12, 1971, and therefore could not be considered as an employee from his original employment date of May 20th, 1971. He therefore was not employed for 30 days prior to his re-employment on June 19th, 1971.

Mr. Randy McCallum became an employee of the Saskatoon yard of the respondent company by reason of his transfer from the Rosetown yard on May 20, 1971. On June 12th, 1971, he was transferred to the Melfort yard to replace an employee who was transferred due to a promotion. He remained there until June 22, 1971, when he was transferred back to the Saskatoon yard. This employment history of this employee gave the Board the most concern but on the evidence the Board were satisfied his transfer out of the Saskatoon yard on June 12th, 1971 to June 22, 1971, was for reasons unrelated to the situation with respect to the strike in the Saskatoon yard. In view of this he was not employed by the Saskatoon yard for a period of 30 days prior to June 22nd, 1971.

Mr. Larry Wieler was employed in the Saskatoon yard of the respondent company as of May 3, 1971, and voluntarily left the employment of the respondent company on May 8th, 1971. He reapplied for employment and was rehired May 21st, 1971, by the Saskatoon yard. He worked there until June 16th, 1971, when he was transferred for personal reasons and as of the date of application, June 22nd, 1971, was not in the employ of the Saskatoon yard. The evidence established that the said transfer out was for personal reasons relating to the said employee and was not in any way related to the fact there was a strike in progress.

APPLICATION DISMISSED

For the reasons as set out above the application was dismissed.

The Board dealt with this application on a factual basis without deciding the question as to whether there is such an unfair labour practice as alleged. Nowhere in section 32 of the said Act does it refer to the rehiring of persons who have been previously employed for a period of more than 30 days as an unfair labour practice. The majority of the Board were of the opinion, however, that had the evidence disclosed that rehires or transfers in and out of the Saskatoon yard were in any way related to an effort on the part of the respondent company to avoid the maintenance of membership requirements of section 32 of the Act, the Board could quite properly rule that an unfair labour practice had been committed on the basis that it was tantamount to continuous employment.

(Sgd.) "R. H. KING,"
Chairman.

July 8, 1971.

3.093 July 8, 1971

Service Employees' Local Union 333

v.

Peter Shinkaruk, Mr. Klean Enterprises, Saskatoon

Applications for reinstatement and payment of monetary loss — Payment to employee made in name of employee's husband — Husband never considered an employee — Held: Husband could not be considered an employee under The Trade Union Act.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s. 5 (d) (e) (f) (g).

REASONS FOR DECISION

The majority of the Board were of the opinion that in view of the working arrangements agreed to between Mrs. Mary Mukanik, wife of the said Demytro Mukanik, and Peter Shinkaruk, owner of respondent company, that Mr. Demytro Mukanik could not be considered to be an employee within the meaning of *The Trade Union Act.* It was the majority of the Board's opinion that the actual arrangement was that Mrs. Mukanik was going to do the work for so much per month and that how she intended to do it was up to her. The employer never considered Mr. Demytro Mukanik as an employee and he and his foreman dealt only with Mrs. Mukanik. It was the majority of the Board's opinion, the fact payment was made in the name of Mr. Mukanik, was an administrative matter that did not in fact represent the true situation with respect to Mr. Mukanik.

For these reasons the applications were dismissed.

(Sgd.) "R. H. KING,"
July 8, 1971. Chairman.

3.094 October 15, 1971

Retail, Wholesale and Department Store Union, Local 568

v.

Hospital Laundry Services of Regina
and
Regina Hospital Employees Association No. 176 (CUPE)
and
Regina Grey Nuns' Hospital Employees' Association

Application for certification — Employees of respondent were recruited from two hospital certified unions — Decided these employees would remain members of their respective unions until the respondent would be completely integrated operationally and administratively — Held: There was a transfer of obligations pursuant to s. 33 of The Trade Union Act — Application dismissed as not within the 30-60 day period required by the Act.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (a) (b) (c); 33.

APPLICATION FOR CERTIFICATION

The applicant trade union applied to be certified as bargaining agent for the following unit of employees of the respondent: "All employees of the Hospital Laundry Services of Regina except the General Manager, Production Manager and Engineer".

For the purposes of clarifying the issues involved it is necessary to, in some detail, set forth the circumstances surrounding the formation and method used of putting the respondent into operation.

FACTS

In the City of Regina there were two hospitals — namely the Regina General Hospital and the Regina Grey Nuns' Hospital — that had individual laundry facilities. There was a third hospital called the Wascana South Saskatchewan Hospital Center whose laundry service was performed on a contractual basis by the Regina Grey Nuns' Hospital.

These three hospitals decided to set up the respondent, Hospital Laundry Services, as a non-profit organization under *The Companies Act* for the purpose of supplying and laundering all articles of wearing apparel and other linen, woolen and cotton goods and clothing and

fabrics of all kinds required by each of the three hospitals. There was some provisions for extending these services to other hospitals but this has not been done and for our purposes it is not necessary to consider this.

The respondent was duly incorporated in 1969. The records indicate that only two shares have been issued — one to the administrator of the Grey Nuns' Hospital and one to the Executive Director of the Regina General Hospital. Mr. Clark, a member of the Board of Managers of the respondent, gave evidence that a share also had been issued to the Administrator of the Wascana Hospital and that these three persons were the directors of the respondent. In turn the directors had set up a Board of Managers consisting of ten people who were responsible for the operation of the respondent. This Board of Managers consisted of three appointees from each of the participating hospitals plus an operating manager.

Among other things it was agreed that the respondent would supply the services set out above, purchase the laundry equipment of the Regina General Hospital and the Regina Grey Nuns' Hospital and provide whatever new equipment was required to operate the service they were set up to perform. There was also provision for the employment of people who were working in the laundry facility of the Regina General and Grey Nuns' Hospital and any fringe benefits that may have occurred to these people as a result of employment with the said hospitals would be protected.

The respondent partially went into operation in May of 1971 and has been progressively phasing in all the services since that date. As of the date of this hearing Mr. Clark's evidence was that the only laundry service not being performed was a specialty laundry service of the Regina General Hospital which it was expected would be completely phased in by October 30, 1971.

Certain employees of the Regina Grey Nuns' Hospital and the Regina General Hospital became employees of the respondent. The Board heard evidence concerning the question as to whether these people were in fact employees of the respondent and ruled that they were in fact employees in a separate ruling made during the progress of the hearing of this application.

Regina Grey Nuns' Hospital Employees' Association (No Affil.) was and is certified as bargaining agent for certain employees of the Regina Grey Nuns' Hospital which certification included employees of the laundry facility of that hospital. There is a bargaining agreement and the effective date of that agreement is January 1st, 1971. The same circumstances, including effective date of collective agreement, exist with respect to the Regina General Hospital except that the certified union is the Regina Hospital Employees Union Local 176 (CUPE).

REASONS FOR DECISION

The respondent, realizing that there were two different unions involved and two bargaining agreements with different conditions, decided for administrative purposes they would leave each of the employees who came from either hospital on the payroll of the said hospital until such time as the complete operation had been integrated and they had been able to work out the fringe benefits respecting the said employees as set out in the above mentioned agreement.

For the purposes of working out these problems the Board of Managers set up a central plant personnel committee part of whose membership were representatives of each of the certified unions. Mr. Clark gave evidence that this committee had met and made recommendations that were approved by the directors of the respondent and that the said recommendations achieved all the conditions with respect to employees required by the agreement. His evidence was that the delay in implementing these as well as other administrative agreements that would make the respondent a completely integrated organization resulted from the fact they had approval from the government with respect to matters covering finances. Mr. Clark's evidence was that such approval had been received verbally and that in his opinion by January 1, 1972, the respondent would be completed integrated both operationally and administratively.

APPLICATION DISMISSED

The Board, on the basis of the facts as set out above, were of the opinion that there was a transfer of obligations pursuant to section 33 of *The Trade Union Act* and did not feel, in view of all the circumstances, that they should exercise their discretion and so otherwise order. In view of this finding the application was not within the 30-60 period as required by the Act and was therefore out of time and the Board dismissed the application.

(Sgd.) "R. H. KING,"
Chairman.

October 15, 1971.

3.095 December 15, 1971

Retail, Wholesale and Department Store Union, Local 568

v.

Hospital Laundry Services of Regina.

Application for certification — Effective dates of existing bargaining agreements January 1 — Application within 30-60 day period — Applicant appropriate bargaining unit, had required support — Certification granted.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.5 (a) (b) (c) (k) (i).

REASONS FOR DECISION

This Board in written reasons dated October 15th, 1971 set out the facts with respect to the operation of the laundry facility of the respondent.

The Board found there was a transfer of obligations pursuant to section 33 of *The Trade Union Act* with respect to the presently certified unions.

The evidence established that each of the certified unions had bargaining agreements whose effective dates were January 1st. This application was filed on November 16th, 1971 which was in the 30-60 day period pursuant to section 5(k) (i) of *The Trade Union Act* and was thus properly before the Board.

APPLICATION FOR CERTIFICATION GRANTED

The Board set what it considered to be an appropriate bargaining unit and found on the evidence, that within the requirements of section 7 subsection 3 of *The Trade Union Act*, the applicant had the required support in the above mentioned bargaining unit and certified same and made the required amendments to the existing orders.

(Sgd.) "R. H. KING,"
Chairman.

December 15, 1971.

3.096 December 15, 1971

Retail, Wholesale and Department Store Union, Local 568

v.

Trans Canada Freezers Division of Interprovincial Freezers Ltd.

Application for certification — Proposed bargaining unit consisted of five employees in Regina and five in Saskatoon — Held: Proposed unit not an appropriate unit — Appropriate unit would consist of employees in one area — Application dismissed.

R.S.S. 1965. The Trade Union Act, C.287, as amended by C. 83, 1966, s. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

The applicant applied to be certified as bargaining agent for the following unit of employees of the respondent.

"All employees employed by Trans Canada Freezers Limited in or in connection with its places of business located in the cities of Regina and Saskatoon, except the Regional Manager, two (2) Branch Managers, two (2) Foremen, two (2) Engineers and two (2) Confidential Secretaries, constitute an appropriate unit of employees for the purpose of bargaining collectively."

The evidence established that the respondent company has two separate operations in Saskatchewan — one in Regina and the other in Saskatoon. There were ten employees in the proposed bargaining unit, five in the Regina operation and five in the Saskatoon operation. The evidence also established that the manager in each operation reported directly to the head office located in Toronto, Ontario.

REASONS FOR DECISION

In view of this evidence the Board was of the opinion the proposed bargaining unit was not an appropriate unit. An appropriate unit would consist of employees of each operation of the respondent company rather than the applied-for amalgamation of the two groups.

APPLICATION DISMISSED

For these reasons, the Board dismissed the application.

(Sgd.) "R. H. KING,"
Chairman.

December 15, 1971.

3.097 January 8, 1972

United Brotherhood of Carpenters and Joiners of America, Local 1805

v.

Norbert Hamm, Saskatoon

Application under s. 5 (d) and s. 5 (e) of The Trade Union Act alleging unfair labour practice — Whether respondent bound by collective agreement between applicant and other contractor — Applicability of s. 33 — No sale, lease, transfer or other disposition to respondent — No transfer of employees — No evidence of reduction of other contractor's bargaining unit — Respondent did not acquire business or any part thereof of other contractor — s. 33 does not apply — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (d) (e); 32 (1) (2); 33.

APPLICATION UNDER S. 5(d) and 5 (e) OF THE TRADE UNION ACT

The applicant applies for an order determining whether an unfair labour practice is being or has been engaged in by the respondent employer and, if so found, for an order requiring the employer to refrain from engaging in the unfair labour practice.

The application was properly made under section 5 (d) and 5 (e) of *The Trade Union Act*, R.S.S. 1965, Chapter 287, as amended and which provides:

> "5. The board shall have power to make orders:
>
> (d) determining whether an unfair labour practice is being or has been engaged in;
>
> (e) requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice;"

FACTS

The facts in this matter are basically not in dispute. An agreed statement of facts was filed by counsel and the Board thanks counsel for their courtesy in this regard.

On August 8, 1960, the applicant was certified as representative for the employees of Boychuk Construction Co. Ltd. and thereafter the applicant under the provisions of section 32 of the Act requested Boychuk

Construction Co. Ltd. to include a "union security" clause in the collective bargaining agreement and such a clause has been in force and effect since July 4, 1970, in a collective bargaining agreement between the said employer and the applicant.

Section 32(1) and 32(2) of the Act states:

> "32.—(1) Upon the request of a trade union representing a majority of employees in any appropriate bargaining unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, whether or not any collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with the trade union:
>
> Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall within thirty days after the commencement of his employment, apply for and maintain membership in the union as a condition of his employment;
>
> 32.—(2) Subject to any law or any regulation applicable thereto passed by authority of the Parliament of Canada, failure on the part of any employer to carry out the provisions of subsection (1) shall be an unfair labour practice."

It is contended by the applicant that there has been a transfer of obligations here from Boychuk Construction Co. Ltd. to the respondent herein, Norbert Hamm, within the meaning of section 33 of the Act which states:

> "33. Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without restricting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had orginally applied to him or the agreement had been signed by him."

S. 33 DOES NOT APPLY

On the special facts of this application the Board has had no difficulty in determining, on the basis of the agreed statement of facts and the facts provided to the Board by counsel at the hearing, that section 33 does not come into play.

In view of the fact that a "successor" employer does have obligations to his employees, however, under section 33, it would appear in order to

briefly review the problem which can be involved in the transfer of obligations envisaged by the section.

DISCUSSION OF APPLICABILITY OF S. 33

The problem is set out by M. A. Hickling, Associate Professor, Faculty of Law, University of British Columbia, in a lengthy and comprehensive review entitled "Employer's Inheritance in Labour Law" published in 9 Les Cahiers de Droit (1967-68) at page 466:

> "The basic issue to be faced in all these situations is whether it is sound policy from the point of view of stable and peaceful industrial relations to permit a union's bargaining status, or the rights and obligations embodied in collective agreements, to be set at naught by decisions on business reorganization on which the union and the employees are unlikely to have been consulted and in which their interest have been only of peripheral concern if they have figured at all in the decision making process."

and he continues, at page 474, after reviewing the jurisdiction conferred upon the various Labour Relations Boards throughout Canada that:

> "The various boards have conferred upon them powers, expressed in the broadest terms, to identify the employer, the parties to a collective agreement and to reconsider and vary any decision or order made by them. The potentialities of these powers in the field of employer succession are obvious. If the board can substitute in the certificate or other order the name of a new employer for that of his predecessor then a ready made instrument exists for effecting practical solutions to successor problems.".

In referring specifically to Saskatchewan, the author refers to section 33 of our Act and refers to the fact that our Act covers not only "sales, leases and transfers" but also a further broad catch-all category, namely, other forms of dispositions.

NO EVIDENCE OF A DISPOSITION TO HAMM

In the present application the evidence does not support any possible finding of either a sale, lease or transfer by Boychuk to Hamm. A sale usually signifies a transaction in which the seller transfers property to a buyer. A lease, on the other hand, would be a contract by which the lessor would confer on the lessee possession of property for a period. The evidence does not suggest either a sale or a lease here, nor does it support any suggestion as to a transfer of assets.

It was argued strenuously by the applicant, however, that the catch-all phrase "or otherwise disposed of" would apply in this instance. Unfortunately for the applicant, however, the evidence does not, in the opinion of the Board, support this submission.

Mr. Hamm operates a business of framing buildings in the city of Saskatoon and surrounding area, holds a business licence from the city of Saskatoon as a contractor, and in the operation of his business, bids and accepts contracts with general contractors in the city of Saskatoon. He supervises and pays his own employees, and deducts unemployment

insurance, pension and other deductions. He and his employees supply their own tools when working on a construction project. He does not operate from the premises of Boychuk, but from his own premises. While he has entered into contracts with Boychuk for the framing of buildings over the last 15 years, it was also established that he bids and accepts contracts from other firms.

REASONS FOR DECISION

The evidence established that on June 28, 1971, Mr. Hamm submitted a tender for carpenter framing work to Boychuk in connection with work to be done on a University of Saskatchewan "dairy barn project" and on July 27, 1971, he was awarded the contract for framing the said "dairy barn project" and a contract was executed by himself and Boychuk Construction (Sask.) Ltd., covering the matter.

In addition, in this application, there was no evidence that framing work had ever been done by Boychuk and there was no evidence that the bargaining unit of Boychuk had in any any way been reduced. There was no evidence of any transfer of employees as between Boychuk and Hamm.

APPLICATION DISMISSED

On all the evidence, therefore, the Board determines and finds that Hamm did not acquire the business, or a part thereof, of Boychuk, and accordingly a transfer of obligations from Boychuk to Hamm did not occur.

The Board accordingly finds that Hamm was an independent contractor and that he did not acquire the business of Boychuk or any part thereof, and accordingly was not bound by the collective bargaining agreement between Boychuk and the applicant.

In concluding, it should also be mentioned that at the hearing the applicant made it clear that it was not suggesting that Boychuk had any intent to subvert the bargaining agreement and that no ulterior motive was to be ascribed to that firm.

(Sgd.) "CLIFFORD H. PEET,
Chairman.

January 8, 1972.

3.098 February 17, 1972

Construction and General Workers' Local Union No. 890

v.

Revelstoke Building Materials Ltd.

Application under s. 9 (1) (c) The Trade Union Act alleging unfair labour practice — That respondent failed to bargain collectively — Negotiations never definite — Affidavit evidence on behalf of respondent — Sworn viva voce evidence on behalf of applicant — Respondent did commit unfair labour practice — Order granted under s. 5(d).

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (d) (e); 9 (1) (c).

APPLICATION UNDER S. 9(1)(c) OF THE TRADE UNION ACT

The applicant union alleges an unfair labour practice within the meaning of section 9(1)(c) of *The Trade Union Act*, R.S.S. 1965, Chapter 287, as amended, and which reads as follows:

> "9.—(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
>
> (c) to fail or refuse to bargain collectively with representatives elected or appointed (not necessarily being the employees of the employer) by a trade union representing the majority of the employees in an appropriate unit;"

and asks for an order under section 5(d) of the Act. This reads:

> "5. The board shall have power to make orders:
>
> (d) determining whether an unfair labour practice is being or has been engaged in;"

The applicant is a trade union certified as the bargaining agent for the employees of the respondent by an order of this Board dated October 30, 1964.

AFFIDAVIT ON BEHALF OF RESPONDENT

In this case a lengthy affidavit sworn to by one, Otto Frey, was filed on behalf of the respondent prior to the hearing. The respondent also indicated that it intended to appear and make oral representations at the hearing.

Unfortunately, however, the respondent was not represented at the hearing nor was the deponent in the affidavit available for cross-examination on his affidavit. This was particularly unfortunate in this case by reason of the fact that *vica voce* evidence was adduced on behalf of the applicant at the hearing which was contrary to certain allegations set out in the filed material.

SWORN VIVA VOCE EVIDENCE ACCEPTED BY BOARD

The majority of the board accepted the *viva voce* evidence presented and while not rejecting the affidavit filed in all particulars were constrained not to attach too much weight to portions of the affidavit in view of the sworn *viva voce* evidence which was accepted by the Board.

NEGOTIATIONS INDEFINITE

Evidence presented by the applicant, and which was accepted by the Board, was to the effect that Frey, the chief negotiator for the respondent, always had to either go back to or seek instructions from Calgary, and no definite answer could ever be obtained in negotiations or with respect to continuing negotiations.

A matter in dispute was with reference to the status of certain employees, Mohr, Hubert and Townsend. The respondent took the position that it would not negotiate on the status of these parties until a decision was handed down in a *certiorari* application made to the Court of Queen's Bench on January 21, 1972, by the respondent. The application was subsequently dismissed by Mr. Justice A. L. Sirois on February 7, 1972.

RESPONDENT DID COMMIT UNFAIR LABOUR PRACTICE

Under these facts, and on the evidence accepted by the majority of the Board, the Board finds that the respondent did in fact commit an unfair labour practice by failing to bargain collectively with the applicant within the meaning of section 9(1)(c) of *The Trade Union Act* and orders the respondent to refrain from engaging in the said unfair labour practice.

Mr. S. E. Williams dissented from the majority decision of the Board.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

February 17, 1972.

3.099 February 29, 1972

Construction and General Workers' Local Union No. 890

v.

Revelstoke Building Materials Ltd.

Application alleging unfair labour practice under s. 32 of The Trade Union Act — Applicant certified bargaining agent for employees of respondent — Collective agreement expired, but s. 32(1) remains in force — Employee "C" had been employed for an excess of 30 days and had failed to become a member of applicant union — "C" is employee within meaning of s. 2(e) of Act — S. 5 of Act operative during a strike — Respondent guilty of unfair labour practice.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 2 (e); 5(d) (e); 32 (1) (2).
Regulation 3 (1), 3 (2) of Rules and Regulations.

APPLICATION ALLEGING UNFAIR LABOUR PRACTICE

The applicant trade union herein has applied to the Labour Relations Board for an order under sections 5(d) and 5(e) of *The Trade Union Act*, R.S.S. 1965, Chapter 287, which provides:

> "5. The board shall have power to make orders:
>
> (d) determining whether an unfair labour practice is being or has been engaged in;
>
> (e) requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice;"

The application was properly made under regulation 3(1) and 3(2) of the *Rules and Regulations* of the Board which state:

> "3.—(1) Any trade union, any employer or any person directly concerned may apply to the Board for an order requiring any person to refrain from violations of the Act or from engaging in any unfair labour practice.
>
> 3.—(2) The application shall be in writing and to Form B, shall be verified by statutory declaration and two copies thereof shall be filed with the secretary."

and alleged that the respondent had engaged in or was engaged in an unfair labour practice by reason of the following fact:

> The company has failed to dismiss Ken Clark or to place him in his rightful classification, although he has been employed over thirty days.

ALLEGED VIOLATION OF S. 32

The application accordingly alleged a violation by the respondent of the "union security" provisions of *The Trade Union Act* and more particularly sections 32(1) and 32(2), as amended. These sections read as follows:

> "32.—(1) Upon the request of a trade union representing a majority of employees in any appropriate bargaining unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, whether or not any collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with that trade union:
>
> Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within thirty days after the commencement of his employment, apply for and maintain membership in the union as a condition of his employment;
>
> and the expression "the union" in the said clause shall mean the trade union making such request.
>
> 32.—(2) Subject to any law or any regulation applicable thereto passed by authority of the Parliament of Canada, failure on the part of any employer to carry out the provisions of subsection (1) shall be an unfair labour practice."

FACTS

Evidence presented to the Board satisfied the Board that the applicant on October 30, 1964, was certified as the bargaining agent for all employees of the respondent except the office staff and those employees regularly employed in a confidential capacity. The Board also found as a fact, on the evidence, that the applicant served the respondent with the request notice required to bring section 32(1) into play on November 13, 1964.

S. 32 APPLIES EVEN IF NO COLLECTIVE AGREEMENT

The parties in due course entered into a collective bargaining agreement but this expired on April 1, 1971. The effect of the request under section 32(1), however, is not changed by reason of the clear words of the statute which provides that "whether or not any collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with that trade union". The

Board accordingly finds and determines that there was a continuing duty on the part of the respondent to carry out the provisions of the "union security" clause set out in section 32(1) of *The Trade Union Act.*

A considerable amount of evidence was led by both parties as to the work performed by Ken Clark as an employee of the respondent. There was evidence that this employee had been originally hired as a salesman, and that on occasion he had worked in the branch office of the respondent in Saskatoon.

REASONS FOR DECISION

There was no dispute as to the fact that Ken Clark was employed by the respondent and that on the date when the application was verified by statutory declaration, namely, on November 29, 1971, he had been employed for a period in excess of thirty days and that he had failed to become a member of the applicant union.

Evidence accepted by the Board and covering the period from October 15, 1971, to the date when the Statutory Declaration was sworn (November 29, 1971) and to the date when it was filed (December 3, 1971) — clearly in excess of thirty days in either instance — indicated that Ken Clark was not "*regularly*" employed in a confidential capacity during this period nor was he employed as office staff — in fact he was basically performing duties which were in the scope of the certified bargaining unit.

INDIVIDUAL IN QUESTION WAS AN "EMPLOYEE"

During the hearing counsel for the respondent suggested that section 5 of *The Trade Union Act* was not operative during the period of a strike but no ground was advanced for this assertion and the Board rejects this contention, and finds that Ken Clark was an "employee" of the respondent within the meaning of section 2(e) of the Act during the period with which this application is concerned.

BOARD FINDS UNFAIR LABOUR PRACTICE

The Board accordingly finds, on the evidence, and under the power vested in it by section 5(d) of the Act that the respondent at the date of the application had engaged in and was continuing to engage in an unfair labour practice contrary to the provisions of section 32(1) and (2) of *The Trade Union Act* and under the authority conferred upon it by section 5(e) of the Act requires the respondent to refrain from engaging in the said unfair labour practice.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

February 29, 1972.

3.100 March 9, 1972

Retail, Wholesale and Department Store Union, Local 545

v.

Saskatoon Co-operative Association Limited

Application alleging unfair labour practice under s. 9 (1) (c) of The Trade Union Act — That respondent refused to bargain collectively — "Pharmacists" were excluded from the collective agreement between applicant and respondent, but not excluded from bargaining unit by order of the Board — Respondent refused to bargain with respect to 'pharmacists' — Such refusal is a clear violation of s. 9 (1) (c) — Held: Respondent guilty of unfair labour practice — Order under s. 5 (d) and s. 5 (e) granted.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, s.s. 5 (d) (e); 9 (1) (c).

APPLICATION UNDER S. 5(d) (e) and 9 (1) (c) OF THE TRADE UNION ACT

The application herein was made by the applicant, Retail, Wholesale and Department Store Union, Local No. 545, under section 5 (d) of *The Trade Union Act* alleging an unfair labour practice by the respondent, Saskatoon Co-operative Association Limited, under section 9 (1) (c) of the Act and for relief under section 5 (e) of the Act.

The said sections of the Act read as follows:

> "5. The board shall have power to make orders:
>
> (d) determining whether an unfair labour practice is being or has been engaged in;
>
> (e) requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice;"
>
> "9.—(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
>
> (c) to fail or refuse to bargain collectively with representatives elected or appointed (not necessarily being the employees of the employer) by a trade union representing the majority of the employees in an appropriate unit;"

FACTS

The applicant was certified as the bargaining agent for certain employees of the respondent by an order of this Board dated March 4, 1949, which order has been amended from time to time and is still in force.

The original order made on March 4, 1949, provided for the exclusion of certain employees of the respondent from the bargaining unit. Those excluded by the order were "the general manager, grocery department manager and the coal and wood department manager".

This original order was amended by an order of the Board made on December 9, 1959, whereby the "assistant manager of the service station" was also excluded from the bargaining unit.

As a result of a further application to the Board and following a lengthy hearing, the order was further amended on November 26, 1971, to provide that the bargaining unit thereafter should consist of:

> "(1) The employees employed by the Saskatoon Co-operative Association Limited, in the City of Saskatoon, in the Province of Saskatchewan, except the general manager, confidential secretary, personnel and public relations division manager, office manager, 8th St. unit manager, 33rd St. unit manager, builder and farm supply unit manager, service station unit manager, bakery manager, food merchandising manager, hardware merchandising manager, drug merchandising manager, dry goods merchandising manager, accounting department head, credit department head, service department head, 22nd St. food department head, 22nd St. lunch counter department head, 22nd St. hardware department head, 22nd St. furniture department head, 8th St. grocery department head, 8th St. meat department head, 8th St. hardware department head, 8th St. cafeteria department head, 8th St. drug department head, 33rd St. grocery department head, 33rd St. meat department head, 33rd St. hardware department head, 33rd St. dry goods department head, 33rd St. cafeteria department head, 33rd St. drug department head, service station no. 2 department head, service station no. 3 department head, service station no. 4 department head, service station no. 5 department head, assistant department head service station no. 2, assistant department head service station no. 3, assistant department head service station no. 4, assistant department head service station no. 5, builder and farm supply hardware and petrol department head, builder and farm supply building supplies department head, builder and farm supply agriculture supplies department head, and personnel department head, constitute an appropriate unit of employees for the purpose of bargaining collectively."

The order of November 26, 1971, was further amended on January 4, 1972, and by the latter amendment the "finance division manager (treasurer)" was also excluded from the bargaining unit.

PHARMACISTS HAVE NEVER BEEN EXCLUDED BY ORDER OF THE BOARD

In argument before the Board following the hearing in respect of the present application, it was inferred that pharmacists had at one time been excluded from the bargaining unit by the Board. This is not the situation, however. The classification of pharmacists has never been excluded from the bargaining unit by any order of this Board.

IN PRACTICE, PHARMACISTS EXCLUDED FROM COLLECTIVE AGREEMENT

Evidence before the Board, however, did indicate that in practice, and by actual agreement between the parties, pharmacists were in fact excluded. This was evidenced by a collective bargaining agreement between the applicant and the respondent dated September 4, 1970, where by Article 4 — Scope, the classification of "pharmacist" was set out as one of a number of classifications of employees of the respondent not covered by the collective bargaining agreement.

The agreement of September 4, 1970, was for a period of one year (Article 24) and was to remain in force until September 4, 1971, and thereafter from year to year subject to the provision that:

> "either party may, not less than thirty (30) days nor more than sixty (60) days before the expiry date of such agreement, give notice to the other party in writing to terminate such agreement or to negotiate a revision thereof".

NEW NEGOTIATIONS

The applicant union gave notice in accordance with the terms of Article 24 of the termination of the said agreement and a desire to negotiate a revision thereof. As a result of such notice there have been lengthy negotiations between the parties with a view to negotiating a new agreement.

RESPONDENT REFUSED TO BARGAIN RE "PHARMACISTS"

The respondent, however, has refused to bargain with respect to the "pharmacist" classification although it is clear beyond doubt that "pharmacists" are not excluded from the bargaining unit by any order of this Board. While "pharmacists" were excluded by the collective bargaining agreement between the parties dated September 4, 1970, this was as a result of collective bargaining at that time and does not preclude the right of the applicant to bargain in respect of pharmacists during the course of bargaining for a new agreement. The refusal of the respondent to so bargain is clearly a violation of section 9(1)(c) of the Act and the Board unanimously so holds.

REASONS FOR DECISION

One of the reasons advanced by the respondent at the hearing for the refusal to bargain on this classification was the assertion by the respondent that the pharmacists in the employ of the respondent had applied to this Board for exclusion. Even if this were so such a fact would not excuse the respondent from the refusal to bargain as the group certainly would not be excluded until such date as an amending order might be made by the Board.

As a matter of fact, however, the true situation is that the pharmacists have not applied to the Board for exclusion. A number of letters had been written to the Board but no application in accordance with the Rules of the Board for a hearing has ever been filed by the pharmacists or on their behalf, and this in spite of the fact that blank application forms for such an application were furnished by the Board to the pharmacists by letter dated December 29, 1971.

RESPONDENT GUILTY OF UNFAIR LABOUR PRACTICE

Under the circumstances the Board unanimously holds that the respondent has been guilty of an unfair labour practice in refusing to bargain in respect of the pharmacist classification and in respect of wage rates applicable thereto.

(Sgd.) "CLIFFORD H. PEET,
Chairman.

January 8, 1972.

3.101 March 9, 1972

Retail, Wholesale and Department Store Union, Local 545

v.

Saskatoon Co-operative Association Limited

Application alleging unfair labour practice under s. 32 (1) (2) of The Trade Union Act — Pharmacists in question were "employees" within the meaning of s. 2 (e) — Pharmacists in question had failed to apply for and maintain membership in applicant union and had been employed by respondent for more than 30 days — Respondent guilty of unfair labour practice.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966 and C. 66, 1969, s.s. 2 (e); 5 (d) (e); 32 (1) (2).

APPLICANT WAS CERTIFIED BARGAINING AGENT

The evidence established that the applicant union was certified as the bargaining agent for certain employees of the respondent by an order of the Board dated March 4, 1949, as amended.

AMENDED ORDER

As a result of a further application to the Board and following a lengthy hearing, the order was further amended on November 26, 1971, and for correction purposes only, on January 4, 1972, to provide that the bargaining unit thereafter should consist of:

> "(1) The employees employed by the Saskatoon Co-operative Association Limited, in the City of Saskatoon, in the Province of Saskatchewan, except the general manager, confidential secretary, personnel and public relations division manager, finance division manager (treasurer), office manager, 8th St. unit manager, 33rd St. unit manager, builder and farm supply unit manager, service station unit manager, bakery manager, food merchandising manager, hardware merchandising manager, drug merchandising manager, dry goods merchandising manager, accounting department head, credit department head, services department head, 22nd St. food department head, 22nd St. lunch counter department head, 22nd St. hardware department head, 22nd St. furniture department head, 8th St. grocery department head, 8th St. meat department head, 8th St.

hardware department head, 8th St. cafeteria department head, 8th St. drug department head, 33rd St. grocery department head, 33rd St. meat department head, 33rd St. hardware department head, 33rd St. dry goods department head, 33rd St. cafeteria department head, 33rd St. drug department head, service station no. 2 department head, service station no. 3 department head, service station no. 4 department head, service station no. 5 department head, assistant department head service station no. 2, assistant department head service station no. 3, assistant department head service station no. 4, assistant department head service station no. 5, builder and farm supply hardware and petrol department head, builder and farm supply building supplies department head, builder and farm supply agriculture supplies department head, and personnel department head, constitute an appropriate unit of employees for the purpose of bargaining collectively."

PREVIOUS APPLICATION UNDER S. 5(e)

In a previous application to this Board under section 5(e) of the Act the applicant had alleged that the respondent had committed an unfair labour practice under section 9 (1) (c) by refusing to bargain for the pharmacists as required under section 5(c) of the Act.

PHARMACISTS WERE "EMPLOYEES"

After hearing evidence in relation to the aforementioned application the Board unanimously held that the respondent had been guilty of an unfair labour practice in refusing to bargain for the classification of pharmacist. The Board could not have found an unfair labour practice unless the pharmacists were "employees" within the meaning of the Act.

ALLEGED UNFAIR LABOUR PRACTICE UNDER S. 32(1), (2)

In the present applications by the Retail, Wholesale and Department Store Union, Local No. 545, alleging unfair labour practices by the respondent, Saskatoon Co-operative Association Limited under section 32 (1) and (2) of *The Trade Union Act*, evidence was presented that Orville Ranger, Shirley Buzik and Marlene Deptuck had been employed as pharmacists by the respondent for more than 30 days. The applicant union advised the respondent on January 14, 1972, that Orville Ranger, Shirley Buzik and Marlene Deptuck had not joined the union and requested that their employment be terminated under section 32 (1) of the Act which says:

> "32.—(1) Upon the request of a trade union representing a majority of employees in any appropriate bargaining unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, *whether or not any collective bargaining agreement is for the time being in force, the said*

clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with that trade union:

> Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within thirty days after the commencement of his employment, apply for and maintain membership in the union as a condition of his employment;

and the expression "the union" in the said clause shall mean the trade union making such request."

REASON FOR DECISION

In the opinion of the Board, Orville Ranger, Shirley Buzik and Marlene Deptuck were "employees" within the meaning of section 2(e) of the Act and that they were employed within the bargaining unit as determined by the order of the Board of March 4, 1949, as amended.

RESPONDENT GUILTY OF UNFAIR LABOUR PRACTICE

The majority of the Board were of the opinion that Orville Ranger, Shirley Buzik and Marlene Deptuck, could not be excluded from the bargaining unit by the respondent's refusal to bargain for pharmacists, and that as "employees" within the bargaining unit they could not be relieved of their obligation to "apply for and maintain membership in the union as a condition of their employment" as provided for in section 32 (1) of the Act. It therefore followed that the respondent was guilty of the unfair labour practices as alleged, by continuing to employ Orville Ranger, Shirley Buzik and Marlene Deptuck for more than 30 days when the respondent was aware that the said persons had not applied for or maintained their membership in the union.

(Sgd.) "J. R. INGRAM,"
Vice-Chairman.

March 9, 1972.

DISSENTING OPINION

INTRODUCTION

This is an application by the applicant, Retail, Wholesale and Department Store Union, Local No. 545, alleging an unfair labour practice by the respondent, Saskatoon Co-operative Association Limited, under sections 32(1) and 32(2) of *The Trade Union Act*, R.S.S. 1965, Chapter 287, as amended. These sections state:

"32.—(1) Upon the request of a trade union representing a majority of employees in any appropriate bargaining unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, whether or not any collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with that trade union:

> Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within thirty days after the commencement of his employment, apply for and maintain membership in the union as a condition of his employment;

and the expression "the union" in the said clause shall mean the trade union making such request.

(2) Subject to any law or any regulation applicable thereto passed by authority of the Parliament of Canada, failure on the part of any employer to carry out the provisions of subsection (1) shall be an unfair labour practice."

The evidence established the applicant was certified as the bargaining agent for the respondent on March 4, 1949, by an order of this Board. This certification order, although amended from time to time, is still in force. A large category of employees is at present excluded from the appropriate bargaining unit by the said order as amended.

FACTS RE: ORVILLE RANGER

It was not disputed that one, Orville Ranger, had been an employee of the respondent for a period in excess of thirty days. Mr. Ranger was a pharmacist. The applicant union on January 14, 1972, advised the respondent that Mr. Ranger had not joined the union and requested the respondent to terminate his employment under the union security section of the Act, section 32(1). The respondent did not terminate the employment of Mr. Ranger and this application was filed on February 16, 1972.

MAJORITY DECISION OF BOARD

The Board by a majority decision held that the applicant should succeed and the order issued declared:

> "A majority of the Labour Relations Board being satisfied that the applicant union, while representing a majority of the employees in an appropriate bargaining unit of the respondent, duly requested the respondent to make effective the provisions of the "Union Security" clause contained in section 32 of *The Trade Union Act*, and that subsequent thereto, the respondent company continued to employ the said Orville Ranger for a period in

excess of thirty days, notwithstanding his failure to become a member of the applicant union as a condition of his employment, contrary to the provisions of section 32 of the said Trade Union Act;

In virtue of the authority vested in it by section 5, clauses (d) and (e) of *The Trade Union Act*, being Chapter 287 of the R.S.S. 1965, as amended:

Majority of the Labour Relations Board Hereby:

(1) Finds and determines that the respondent, Saskatoon Co-operative Association Limited in the city of Saskatoon, Saskatchewan, has engaged in an unfair labour practice within the meaning of section 32 (1) and (2) of *The Trade Union Act* by continuing to employ one, Orville Ranger, pharmacist, an employee, for a period in excess of thirty days, who failed to become a member of the aforesaid applicant union;"

"PHARMACISTS" EXCLUDED FROM COLLECTIVE AGREEMENT

The parties here, however, had entered into a collective bargaining agreement on September 4, 1970, by which "pharmacists" were excluded. The collective bargaining agreement embodying this exclusion provided by its terms for termination on September 4, 1971.

In fact, however, the applicant union gave notice to the respondent in accordance with section 30(4) of the Act.

Section 30(4) of the Act states:

> "30.—(4) Either party to a collective bargaining agreement may, not less than thirty days nor more than sixty days before the expiry date of the agreement, give notice in writing to the other party to terminate the agreement or to negotiate a revision of the agreement, and where a notice is given the parties shall forthwith bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement."

It is clear that the applicant union gave the indicated notice within the proper time set out in this subsection and accordingly section 30 (6) of the Act is applicable. This section provides:

> "30.—(6) Where in accordance with subsection (4) either party to a collective bargaining agreement gives notice to terminate the agreement or to negotiate a revision of the agreement, the terms of the agreement remain in force until a new agreement is entered into or until a strike vote as set forth in clause (d) of subsection (2) of section 9 has been taken and the employees are in fact on strike."

COLLECTIVE BARGAINING AGREEMENT STILL IN FORCE

By reason of the said subsections the collective bargaining agreement, in the circumstances here, continued in force. Mr. Dennis de

Forest, president of the applicant union, stated in his evidence that the existing contract (that is the bargaining agreement dated September 4, 1970) continued in effect until a new contract was negotiated. In this, he is correct as section 30(6) provided in explicit terms that "the terms of the agreement remain in force until a new agreement is entered into or until a strike vote . . . has been taken and the employees are in fact on strike". No strike vote has been taken and the employees are not on strike. It follows that the agreement of September 4, 1970 is still in force.

RESPONDENT NEED NOT FULFILL S. 32(1) UNTIL TERMINATION OF AGREEMENT

The agreement of September 4, 1970, excluded pharmacists. Therefore until the termination of that contract the respondent is not required to carry out the requirements of section 32(1) of the Act insofar as persons coming within the classification of "pharmacists" are concerned as such persons are excluded from such a requirement by the contract between the parties.

RESPONDENT SHOULD NOT BE GUILTY OF UNFAIR LABOUR PRACTICE

It follows that the respondent should not have been adjudged guilty of an unfair labour practice in continuing the employment of the pharmacist Ranger at this time, and the dissent of the members of the Board who did not agree with the majority decision is based on this view.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

Mr. C. T. Hazen and the Chairman of the Board dissented from the majority decision.

March 9, 1972.

REASONS FOR DISSENT

This is an application by the applicant, Retail, Wholesale and Department Store Union, Local No. 545, alleging an unfair labour practice by the respondent, Saskatoon Co-operative Association Limited, under sections 32(1) and 32(2) of *The Trade Union Act*, R.S.S. 1965, Chapter 287, as amended. These sections state:

> "32.—(1) Upon the request of a trade union representing a majority of employees in any appropriate bargaining unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, whether or not any

collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with that trade union:

> Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within thirty days after the commencement of his employment, apply for and maintain membership in the union as a condition of his employment;

and the expression "the union" in the said clause shall mean the trade union making such request.

(2) Subject to any law or any regulation applicable thereto passed by authority of the Parliament of Canada, failure on the part of any employer to carry out the provisions of subsection (1) shall be an unfair labour practice."

RE: SHIRLEY BUZIK

The majority of the Board held that the respondent had in fact committed an unfair labour practice by continuing to employ Shirley Buzik, a pharmacist, beyond the thirty-day period of limitation set out in the above subsection.

RESPONDENT NOT GUILTY OF UNFAIR LABOUR PRACTICE

The dissenting Members of the Board, Mr. C. T. Hazen, and the writer dissented from this view and held that the respondent should not have been adjudged guilty of an unfair labour practice in continuing to employ the said pharmacist, Buzik, at this time and the reasons for the dissent are the same as those set out in the reasons for dissent with respect to Labour Relations Board Case No. 3.101.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

March 9, 1972.

REASONS FOR DISSENT

This is an application by the applicant, Retail, Wholesle and Department Store Union, Local No. 545, alleging an unfair labour practice by the respondent, Saskatoon Co-operative Association Limited, under sections 32(1) and 32(2) of *The Trade Union Act*, R.S.S. 1965, Chapter 287, as amended. These sections state:

"32.— (1) Upon the request of a trade union representing a majority of employees in any appropriate bargaining unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, whether or not any

collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with that trade union:

> Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within thirty days after the commencement of his employment, apply for and maintain membership in the union as a condition of his employment;

and the expression "the union" in the said clause shall mean the trade union making such request.

(2) Subject to any law or any regulation applicable thereto passed by authority of the Parliament of Canada, failure on the part of any employer to carry out the provisions of subsection (1) shall be an unfair labour practice."

RE: MARLENE DEPTUCK

The majority of the Board held that the respondent had in fact committed an unfair labour practice by continuing to employ Marlene Deptuck, a pharmacist, beyond the thirty-day period of limitation set out in the above subsection.

RESPONDENT NOT GUILTY OF UNFAIR LABOUR PRACTICE

The dissenting Members of the Board, Mr. C. T. Hazen, and the writer dissented from this view and held that the respondent should not have been adjudged guilty of an unfair labour practice in continuing to employ the said pharmacist, Deptuck, at this time and the reasons for the dissent are the same as those set out in the reasons for dissent with respect to Labour Relations Board Case No. 3.101.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

March 9, 1972.

3.102 March 10, 1972

Construction and General Workers' Local Union No. 890

v.

Otto Frey and Revelstoke Building Materials Limited.

Application alleging unfair labour practice under s. 32 (1) and (2) — Subject of application had been in employ of respondent for more than 30 days — Subject was an employee within the meaning of s. 2 (e) (ii) — Respondent guilty of unfair labour practice.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966, and C. 66, 1969, s.s. 2 (e) (ii); 5 (d) (e); 32 (1) (2).

APPLICATION ALLEGING UNFAIR LABOUR PRACTICE UNDER S. 32 (1) (2)

This is an application to the Board alleging an unfair labour practice under section 32(1) and 32(2) of *The Trade Union Act*, R.S.S. 1965, Chapter 287, as amended which states:

> "32.—(1) Upon the request of a trade union representing a majority of employees in any appropriate bargaining unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, whether or not any collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with the trade union:
>
> > Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall within thirty days after the commencement of his employment, apply for and maintain membership in the union as a condition of his employment;
>
> and the expression "the union" in the said clause shall mean the trade union making such request.
>
> (2) Subject to any law or any regulation applicable thereto passed by authority of the Parliament of Canada, failure on the part of any employer to carry out the provisions of subsection (1) shall be an unfair labour practice."

CLARK HAD BEEN WORKING FOR MORE THAN 30 DAYS

It was established in evidence that Ken Clark, the subject of the application, had been in the employ of the respondent for a period in excess of 30 days and that he had failed to become a member of the applicant union although the applicant union was certified as bargaining agent for employees of the respondent.

WAS CLARK AN EMPLOYEE?

The point at issue was whether Clark was in scope. The evidence indicated that he was now in the employ of the respondent as a salesman and that he worked both in the store of the respondent as an indoor salesman and on the road. As an indoor salesman he could "dicker" on price with a customer but in most cases he would check with the assistant manager or the manager. He was paid on salary and not on a commission basis.

On the basis of the evidence, the majority of the Board were satisfied that Clark was not office staff, a classification excluded from the bargaining unit.

It was argued that Clark was "a person regularly acting on behalf of management in a confidential capacity" and was therefore excluded under the definition of "employee" set out in section 2(e)(ii) of the Act. This argument was rejected by the majority of the Board which approved, in this respect, the reasons for decision rendered by this Board on September 4, 1945, and which have been approved by the Board on many occasions since that date, as follows:

> "While recognizing the difficulty in interpreting "regularly acting on behalf of management in a confidential capacity," the majority of the members of the Board were not prepared to accept the employer's submission that this phrase applies to persons who merely have access to information which is not to be revealed to unauthorized persons. Such an interpretation would have the effect of precluding all or almost all office employees in the province from belonging to trade unions and enjoying the benefits of *The Trade Union Act*. Moreover, a large number of workers other than office workers would be similarly emasculated. . . . To hold, therefore, that a person is not an employee within the meaning of the Act merely because he has access to certain information which the employer does not wish to have revealed to all and sundry, would be to render the Act nugatory in respect to what is probably the large bulk of workers in the province.
>
> It appears to the Board that the word "confidential" should not be permitted to obscure the remainder of the clause "regularly acting on behalf of management in a confidential capacity." In the opinion of the Board, an employee, such as an office clerk, who performs a basically routine job requiring the exercise of judgment only on very minor matters, if at all, cannot, in any genuine sense, be regarded as acting on behalf of management in any capacity, confidential or otherwise, whether or not he has access to confidential or semi-confidential information.
>
> A persons who regularly acts on behalf of management in a confidential capacity is one who is regularly taken into the confidence of management (and can exer-

> cise discretion) in the formulation, interpretation and/or execution of company policy and in particular (since the subject matter of *The Trade Union Act* pertains to labour relations) in the formulation, interpretation and/or execution of company policy relating to personnel matters. That is, he must be a person who, in some significant degree exercises managerial functions on behalf of management."

The above is quoted from the reasons for decision in an application for certification by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 395 as applicant and Johnstone Dairies Limited as respondent and was rendered on the indicated date.[1] This decision has been followed many times by this Board throughout the years and the majority of the Board at this time supports the reasons set out therein.

CLARK WAS AN EMPLOYEE WITHIN S. 2(e)

The evidence in this case indicated that Clark was a salesman and that at the time of this application he worked both in the store of the respondent as an indoor salesman and on the road. As a salesman and in the capacity in which Clark was employed at the time of this application, it is clear that he was not "a person having and regularly exercising authority to employ or discharge employees"; he was not "a person regularly acting on behalf of management in a confidential capacity" and he was not "an individual having the status of an independent contractor" and it follows that at the time of this application he was an "employee" within the meaning of section 2(e)(ii) of the Act.

RESPONDENT GUILTY OF UNFAIR LABOUR PRACTICE

Under the circumstances and since Clark was an "employee" of the respondent within the meaning of the Act, and in view of the fact that the applicant trade union had complied with the requirements set out in section 32 of the Act, it was the duty of the respondent to carry out the requirements of section 32(1) of the Act and having failed to carry out such provisions the respondent was guilty of an unfair labour practice.

Mr. P. L. Graham, a Member of the Board, dissented from the decision of the majority herein.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

March 10, 1972.

[1] Reported at (1945) 1 SLRB 77

3.103 June 8, 1972

United Brotherhood of Carpenters and Joiners of America

v.

Rochon Lumber Co. Ltd., Saskatoon

Application for certification — Application stated there were "approximately six employees" in unit — Application filed May 17 — Further evidence of support filed May 25 — Re: Rule 13 of Rules and Regulations, — further evidence of support admissable as it referred to a fact prior to date of application — Certification granted.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by
C. 83, 1966, s. 5 (a) (b) (c).
Rules and Regulations of SLRB, Rule 13.

APPLICATION FOR CERTIFICATION

This was an application for certification under section 5 (a), (b) and (c) of *The Trade Union Act*, R.S.S. 1965, Chapter 287, as amended.

APPLICATION FILED MAY 17, 1972

In the application, the applicant union stated that there were "approximately six employees" in the suggested unit, and submitted evidence of employees support. The application was filed on May 17, 1972.

FURTHER EVIDENCE OF SUPPORT FILED, MAY 25, 1972

On May 25, 1972, the applicant union filed further evidence of employee support. This evidence was in the nature of a Declaration of Membership and covered a person who was employed by the respondent prior to and on the date of the application and who was a member of the applicant union on and prior to the date of the application.

Rule 13 of the Rules and Regulations of the Labour Relations Board stipulates that in an application for certification:

> ". . . no evidence or information shall be submitted to the board concerning any fact, event, matter or thing transpiring, occurring or happening after the date on which such application is filed with the secretary . . ."

EVIDENCE OF ADDITIONAL SUPPORT ADMISSIBLE

In this case the evidence of additional support, although filed on May 25, 1972, was with respect to a fact *prior* to the date on which the application was filed and was accordingly admissible as evidence. While the applicant union in its application had stated that *"approximately"* six employees were in the proposed unit the Statement of Employment revealed ten employees in fact.

It should also be pointed out that evidence of the additional support was not filed subsequent to the Statement of Employment but prior thereto, the evidence of additional support being filed on May 25, 1972, whereas the Statement of Employment was filed on May 29, 1972.

The Statement of Employment filed by the respondent listed ten employees on the date of the application.

CERTIFICATION GRANTED

The Board considered that all employees in the Statement of Employment constituted an appropriate unit and in view of the fact that proof of support by a percentage in excess of sixty per cent had been filed deemed it fit to exercise its discretion to certify without requiring a vote.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

June 8, 1972.

3.104 June 8, 1972

Oil, Chemical and Atomic Workers International Union, Esterhazy, Saskatchewan Local 9-892

v.

International Minerals & Chemical Corporation (Canada) Limited, Esterhazy

Application for certification — Determination of appropriate unit of employees — Issue re: inclusion of office staff — none of office staff objected to inclusion — exclusion of such staff would contribute to industrial friction — Office staff included — Plant-wide unit held to be appropriate unit — Applicant union had more than 60% support of the employees in the unit — Certification granted without a vote.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by C. 83, 1966 and C. 66, 1969 s.s. 2 (e)(ii); 3; 5(a)(b)(c); 7 (1) (2).

APPLICATION FOR CERTIFICATION

This is an application by the applicant Oil, Chemical and Atomic Workers International Union, Esterhazy, Saskatchewan Local 9-892 under section 5, clauses (a), (b) and (c) of *The Trade Union Act*, R.S.S. 1965, Chapter 287. The application was filed on May 19, 1972.

The statutory provisions read as follows:

> "5. The board shall have power to make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, professional association unit or a subdivision thereof or some other unit;
>
> (b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;"

DETERMINATION OF APPROPRIATE UNIT OF EMPLOYEES

The First duty of the Board on the application was to determine, in the words of the statute "*the appropriate unit of employees for the purpose of bargaining collectively*". This was the most difficult task of the Board on this application.

The applicant trade union, in the application, submitted that the appropriate unit should be:

> "All employees of International Minerals and Chemical Corporation (Canada) Limited, except managers, department heads, supervisors, foremen and confidential secretaries, constitute an appropriate unit of employees for the purpose of bargaining collectively."

and estimated that there were approximately 500 employees in the suggested unit.

At the hearing it was submitted by the applicant that a plant-wide unit should be the appropriate unit designation. This general contention was not seriously challenged by the respondent but the respondent did submit that a large category of employees should be excluded and led evidence in support of this submission. The total number of employees on the date of the application was 568 and of this number the respondent submitted that 118 should be excluded.

At the conclusion of the evidence the applicant union accepted the submission for exclusion in respect of categories which represented some 70 employees but strenuously objected to the other exclusions suggested by the respondent.

Upon consideration of the evidence presented to the Board, the majority of the members of the Board were of the opinion that the category of "planners" and "the Senior Key Punch Operator" (a group totalling six persons) should also be excluded but that the other employees should properly be included as part of the "appropriate unit" for bargaining purposes.

The category of "planners" (five persons) was excluded on the basis that the work of these employees was related to cost-planning including not only material costs but *man power* costs. Key punch operators (three) were not excluded but in view of the nature of his work, it was the decision of the majority of the Board that the "*Senior* Key Punch Operator" should properly be excluded.

PLANT-WIDE UNIT APPROPRIATE TYPE OF UNIT

The majority of the Board, on the basis of the evidence presented, were of the opinion that a plant-wide unit, with exclusions as determined, was the appropriate type of unit. In deciding on the exclusions, the Board was of the view that generally speaking, and in the absence of evidence to the contrary acceptable to the Board, it is not desirable to fragment the work force into separate groups for collective bargaining purposes.

RE: INCLUSION OF OFFICE STAFF

It was argued that the office staff should be excluded as a matter of policy. This suggestion was rejected by the majority of the Board. It was the view of the Board that office staff, as such, is not necessarily composed of persons who "are regularly acting on behalf of management in a confidential capacity" and therefore excluded under the definition of "employee" as set out in section 2 (e) (ii) of the Act.

The Board again approved, in this respect, the Reasons for Decision rendered by this Board on September 4, 1945, and which have been approved by the Board on many occasions since that date, as follows:

> "While recognizing the difficulty in interpreting "regularly acting on behalf of management in a confidential capacity," the majority of the members of the Board were not prepared to accept the employer's submission that this phrase applies to persons who merely have access to information which is not to be revealed to unauthorized persons. Such an interpretation would have the effect of precluding all or almost all office employees in the province from belonging to trade unions and enjoying the benefits of *The Trade Union Act*. Moreover, a large number of workers other than office workers would be similarly emasculated . . . To hold, therefore, that a person is not an employee within the meaning of the Act merely because he has access to certain information which the employer does not wish to have revealed to all and sundry would be to render the Act nugatory in respect to what is probably the large bulk of workers in the province.
>
> It appears to the Board that the word "confidential" should not be permitted to obscure the remainder of the clause "regularly acting on behalf of management in a confidential capacity." In the opinion of the Board, an employee, such as an office clerk, who performs a basically routine job requiring the exercise of judgment only on very minor matters, if at all, cannot, in any genuine sense, be regarded as acting on behalf of management in any capacity, confidential or otherwise, whether or not he has access to confidential or semi-confidential information.
>
> A person who regularly acts on behalf of management in a confidential capacity is one who is regularly taken into the confidence of management (and can exercise discretion) in the formulation, interpretation and/or execution of company policy, and in particular (since the subject matter of The Trade Union Act pertains to labour relations) in the formulation, interpretation and/or execution of company policy relating to personnel matters. That is, he must be a person who, in some significant degree exercises managerial functions on behalf of management."

The above is quoted from the reasons for decision in an application for certification by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 395 as applicant and Johnstone Dairies Limited as respondent and was rendered on the indicated date.[1] This decision has been followed many times by this Board throughout the years and the majority of the Board at this time supports the reasons set out therein.

The Saskatchewan Labour Relations Board in the past and as a matter of practice usually has not separated office employees from other

[1] Reported at (1945) 1 SLRB 77

industrial employees. While each certification application must be considered on the basis of evidence presented and accepted by the Board, the Board is of the view that generally speaking if it was to allow office employees to be carved out of industrial units that it would contribute to industrial friction.

OFFICE STAFF INCLUDED

The Board also noted, as the applicant pointed out, that no person purporting to be office staff had appeared before the Board objecting to inclusion — in fact no evidence was put forward in this regard which would indicate that members of the office staff objected in any way to inclusion in the bargaining unit. Under these circumstances, the Board felt that it should not deprive these employees of their right to enjoy the benefits granted to them by the Act — the right to be represented with their fellow employees in an appropriate unit of employees for collective bargaining purposes.

DETERMINATION OF TRADE UNION

The second duty of the Board on this application was to determine the trade union which should represent the employees in the appropriate unit. Here the Act provides, by section 7 (1) and 7 (2) as follows:

> "7.—(1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 16, the board may, in its discretion subject to subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.
>
> (2) Where the board is satisfied that not less than forty per cent and not more than sixty per cent of the employees in an appropriate unit have indicated:
>
> (a) that a named trade union is their choice as representative for the purpose of bargaining collectively on their behalf; or
>
> (b) that they no longer wish to be represented by the trade union representing them;
>
> the board shall direct that a vote be taken by secret ballot of all employees eligible to vote to determine the question as to what trade union, if any, is to represent them."

CERTIFICATION GRANTED WITHOUT A VOTE

The respondent argued that a vote should be held and that the Board should use the discretion given to it by section 7(1) in this regard. In the instant application, however, the applicant union had the support of the employees in the appropriate unit to a degree greatly in excess of sixty per cent and under all the circumstances the Board had no difficulty in determining that certification should be granted without a vote.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

June 8, 1972.

DISSENTING OPINION

This is an application by applicant Oil, Chemical and Atomic Workers International Union, Esterhazy, Saskatchewan Local 9-892 under section 5, clauses (a), (b) and (c) of *The Trade Union Act*, R.S.S. 1965, Chapter 287. The application was filed on May 19, 1972.

The statutory provisions read as follows:

> "5. The board shall have power to make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, professional association unit or a subdivision thereof or some other unit;
>
> (b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;"

The first duty of the Board on the application was to determine, in the words of the statute "*the appropriate unit of employees for the purpose of bargaining collectively*". This was the most difficult task of the Board in this application.

Section 3 states:

> "Employees shall have the right to organize in and to form, join or assist trade unions and to bargain collectively through representatives of their own choosing, and the representatives designated or selected for the purpose of bargaining collectively by the majority of employees in a unit appropriate for that purpose shall be the exclusive representatives of all employees in that unit for the purpose of bargaining collectively". R.S.S. 1965, C. 287, s. 3.

MAJORITY OF EMPLOYEES SUPPORTING UNION NOT OFFICE STAFF

Evidence of union support indicated that it was concentrated in those not employed in the office. The high percentage of employees in total supporting the application were sufficient to exceed 60% of those eligible even if the office member support was not counted.

RE: S. 3 OF THE TRADE UNION ACT

In section 3: Employees shall have the right to organize in and to form, join, or assist trade unions and to bargain collectively through representatives of *their own* choosing, etc. The minority members of the board believed that there was a distinct difference between other classifications of employees and office workers and that due to the lack of support for the application among office workers it would accede to the *right of* the office *employees* if a vote were taken. This motion was put before the board and defeated.

OFFICE STAFF SHOULD BE EXCLUDED

Reference may be made to United Steel Workers of America Cominco Ltd. in its Potash Division Certified April 8, 1969 and also other potash plants where certification orders have been made. In these cases the office staff was excluded from the appropriate unit under previous board orders.

(Sgd) "P. L. GRAHAM,"
June 8, 1972. Board Member.

3.105 August 11, 1972

Oil, Chemical and Atomic Workers International Union,
Esterhazy, Saskatchewan Local 9-892

v.

International Minerals and Chemical Corporation
(Canada) Limited.

Application alleging unfair labour practice under s. 9 (e) of The Trade Union Act — Employee in question dismissed for engaging in union activity rather than carrying out his duties — Board finds behaviour so trivial that it would not merit dismissal — Employee dismissed for union activity — Negotiations should have been attempted before bringing the matter before the Board — Held: unfair labour practice proved — Order to reinstate employee.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by
C. 83, 1966, s. s. 5 (d) (e) (f) (g); 9 (e)
Rules and Regulations of SLRB Rules 3 and 4.

APPLICATION ALLEGING UNFAIR LABOUR PRACTICE

The applications herein were brought before the Board for determination pursuant to powers granted to the Board under section 5(d), 5(e), 5(f) and 5(g) of *The Trade Union Act*, Chapter 287, R.S.S. 1965, as amended. These sections read as follows:

> "5. The board shall have power to make orders:
>
> (d) determining whether an unfair labour practice is being or has been engaged in;
>
> (e) requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice;
>
> (f) requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice, or otherwise contrary to this Act;
>
> (g) fixing and determining the monetary loss suffered by any employee discharged under the circumstances mentioned in clause (f) or otherwise contrary to this Act, and requiring an employer to pay such employee the monetary loss fixed and determined by the board;"

S. 9(e) TRADE UNION ACT

The respondent is alleged to have committed an unfair labour practice in discharging one, Bryan Cook, by reason of section 9(e) of the Act

which declares that it shall be an unfair labour practice for an employer, or employer's agent or any other person acting on behalf of the employer:

> "9(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or threat of discharge of an employee, with a view to encouraging or discouraging membership in or activity in or for a labour organization or participation of any kind in a proceeding under this Act, and if any employer or employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that an employee exercised a right accorded to him by this Act there shall be a presumption in his favour that he was discharged or suspended because he exercised such right, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer . . ."

FACTS

The evidence in this matter was prolonged and voluminous as is often the case in this type of application. There was no dispute, however, as to the fact that on July 19, 1972, Bryan Cook was an employee of the respondent within the meaning of the Act and that he had been discharged on that date.

On the evidence the Board determined as a fact that Cook was a union steward and a member of the union certified for employees of the respondent.

LETTER OF DISMISSAL

A letter of dismissal dated and received by Cook on July 19, 1972, from the respondent stated that:

> "On Wednesday, July 19, 1972, at approximately 10:20 a.m., you were engaging in union activity rather than carrying out your duties. Specifically, you were soliciting and having at least one employee sign a Union Dues Deduction Authorization and a membership card.
>
> As a result of your actions as mentioned above, your services will no longer be required by I.M.C. (Canada) Limited as of this date."

On the evidence it was clear to the Board that at the time in question Cook was not, in fact, soliciting on behalf of the union. The evidence established beyond doubt that the employee, Winfield Sheppard, whom Cook was alleged to have solicited was in fact signed up as a member of the union on the preceding evening and not during company time and that this employee received his union dues deduction authorization forms from Cook prior to the commencement of work on the morning of July 19th.

The evidence established, to the satisfaction of the Board, the fact that at about 10: 20 that morning Cook in the course of his regular duties quite inadvertently met Sheppard in the maintenance shop where Shep-

pard handed Cook the dues authorization form which had already been signed by Sheppard. Cook accepted the document and noted that Sheppard had omitted his post office box number and handed the document back to Sheppard to fill this in. Sheppard wrote the box number in and handed the form back.

COOK NOT NEGLECTING HIS DUTIES

There was some conflicting evidence as to the time involved but it is clear and the Board finds as a fact that only a few seconds were involved. It was, in fact, but a brief and trivial encounter. The Board finds as a fact that Cook was not neglecting his duties.

The Board also finds as a fact that the casual meeting of Cook and Sheppard was not prearranged, it was an accidental meeting and Cook only received the document by reason of the fact that Sheppard stopped him to give him the document, Cook did not ask for the document. When the document was handed to Cook he merely glanced at it and in doing so noted that the box number had not been filled in. It is clear that no reasonable employer should, or would, have objected to the document being handed back for correction, and the more so as the employer desired to have the complete address, including the box number, on forms submitted.

It is not without significance that the employee discharged was Cook, the union steward, and not Sheppard, the employee who stopped Cook — in fact no disciplinary steps were ever taken in so far as Sheppard was concerned. The evidence of Andrew Hallworth, the electrical supervisor superior to Cook, called on behalf of the respondent, was to the effect that there was no doubt but that Cook was discharged for union activity, and he added "This was the only reason".

Cook, a young man 34 years of age, married, and with four children, had been employed by the respondent for eight years prior to this incident. Evidence by Hallworth was to the effect that he was a "good worker". This assessment was not disputed by any witness.

POLICY OF RESPONDENT RE: DISCIPLINARY ACTION

The personnel officer of the respondent, Mr. Stan Williams, agreed that the policy of the respondent with respect to disciplinary action was correctly set out in an "Employee's Handbook" issued by the respondent to employees. This booklet, placed in evidence set out the policy in this respect as follows:

> **ACTS REQUIRING DISCIPLINARY ACTION**
>
> Certain acts, because of their obvious seriousness, require disciplinary action. Action may take the form of a warning letter, suspension or dismissal as outlined

below. A record will be kept of disciplinary actions. To keep this from being a permanant blot on a man's record, we tear it up if he goes a year without any more infractions. Repeated infractions lead to severance.

(a) Written warnings or suspension depending upon the circumstances:

1) occasional unexcused tardiness or absenteeism

2) garnishees (one)

3) entering the time record of another employee

4) gambling on the premises

5) horseplay or violation of a safety rule

6) negligence of duty or care or use of company property

7) loafing, malingering or unauthorized visiting

8) an accumulation of any or all of the above will lead to suspension or dismissal.

(b) Dismissal, unless special circumstances prevail which make the assignment or evaluation invalid:

1) stealing or malicious damage

2) insubordination including refusal or failure to perform work assigned

3) obtaining products, material, tools or equipment fraudulently

4) falsification of records or reports

5) fighting or attempting bodily harm to another on company property

6) being partially or completely intoxicated or carrying or possessing or using intoxicating liquor while on company property

7) sleeping or dozing while on company property

8) leaving a job without proper relief

9) acts against common decency

10) repeated violations of safety rules or endangering the life of a fellow worker

11) intimidation or coersion of other employees

12) borrowing or lending employee identification badge

13) climbing the plant fence or attempting to enter or leave the plant property by other than regular gateways.

DISCHARGE

Discharge will only be invoked as a last resort. Where a violation is highly flagrant it obviously requires immediate dismissal. Otherwise, where discharge may appear necessary, an employee will be suspended pending a full investigation of the facts. The investigation will be carried out immediately and a decision given within three working days.

If an employee is discharged, he will have the earliest possible opportunity of visiting the Employee Relations Department after his dismissal."

Mr. Williams also stated, under cross-examination, that significant matters not covered in the handbook were posted on company bulletin boards, but stated that nothing was ever posted relating to union activities.

COMPANY POLICY NOT FOLLOWED

In this case company policy, if the statements in the handbook are to be accepted at face value as company policy, was not followed. Cook was dismissed in a summary fashion. He was not suspended pending an investigation of the facts.

REASON FOR DISMISSAL WAS UNION ACTIVITY: EMPLOYER DID NOT MEET ONUS

On the evidence the majority of the Board found that Cook was an employee exercising rights accorded to him by the Act. The burden of proof that Cook was dismissed for good and sufficient reason was not met by the employer. The Board does not find that Cook was engaged in any wrongful behaviour vis-a-vis his employer, but even if his behaviour was such it was so trivial, slight and insignificant that it would not merit dismissal. It is clear on the evidence that the actual reason for dismissal was an attempt to discourage membership in and activity for a labour organization.

Mr. William J. Houston, a vice-president of the respondent and general manager at Esterhazy stated that "Generally, it is the policy to issue warnings before dismissal", and added "I don't know of any exceptions". He admitted this was not followed in this case, however, and stated "I accept the responsibility for this". He frankly stated that Cook was dismissed because there had been "a lot of union activity. The union had been granted certification . . . we could not tolerate stewards interfering with our activities".

Houston stated that he gave careful consideration to this situation and decided he would have to take "pretty severe action". This was implemented in the Cook case because "a suspension would be regarded as a sign of weakness. The only deterrent would be to invoke the discharge".

Under the circumstances here the evidence revealed that no investigation of the incident was carried out by the respondent, the Cook file was not even checked to see if Cook was a married man, as the whether he had a family, as to his length of employment or as to whether he was a "good worker". While this consideration was not a factor in the decision reached by the Board, the Board is of the opinion that this is a flagrantly callous attitude and certainly not one to be condoned. It is not the type of attitude by an employer which will assist in the maintenance of industrial peace.

PART OF EVIDENCE OF RESPONDENT NOT ACCEPTABLE

In conclusion, and while it is not necessarily the duty of the Board to comment on evidence tendered, the Board felt that in this case it could not accept a portion of the evidence tendered by the respondent through Mr. Herbert Robinson, Foreman of the K1 Mill. This assessment of the

evidence of Mr. Robinson was based not only on visual observation of this witness during his period on the witness stand but also upon the fact that his evidence did not appear consistent with certain photographs placed in evidence nor did his evidence appear creditable when placed alongside that of Houston. Houston admittedly was ahead of Robinson and according to his evidence did not appear to have seen as much as Robinson claimed to have seen in spite of the fact that Robinson was behind him and that he, in fact, would have partially blocked the vision of this witness.

The Board was unanimously of the opinion that this was a case which should never have required a hearing. The alleged offence, even if established, was of such a picayune nature that negotiations and discussion between the certified union and the company should have resolved the matter.

NEGOTIATIONS SHOULD HAVE BEEN ATTEMPTED

In this instance the union was only recently certified. A collective bargaining agreement had not yet been established between the parties. Such an agreement usually sets up a procedure whereby differences can be negotiated in the hopeful expectation that many such differences can be resolved. In spite of this fact negotiations between the parties should have been attempted.

Unfortunately, no real attempt was made by either party to resolve the matter in this manner. In the event that there is any doubt on the matter, the Board points out that a certification for purposes of collective bargaining envisages not only the actual bargaining required to effect a contract between employer and employees (represented by the certified bargaining agent) but also a continuing duty on the part of both parties to the certification to attempt to resolve differences between the employer and the employees (either collectively or singly) as and when they arise.

TECHNICAL OBJECTION

At the conclusion of the lengthy hearing a technical objection was raised by the respondent to the effect that the application for a declaration as to an unfair labour practice could only be made by the person involved. In this case the applicant is described as "Oil, Chemical & Atomic workers International Union of 108-2505 11th Avenue, in Regina, in the Province of Saskatchewan". The declaration was sworn to by David F. Pretty, described as a "representative". The rules of the Board state:

> "Rule 3(1) Any trade union, any employer or any person directly concerned may apply to the Board for an order requiring any person to refrain from violations of the Act or from engaging in any unfair labour practice.
>
> Rule 4(1) Any trade union or any employee affected may apply to the board for an order requiring an employer to reinstate any employee discharged contrary to the provisions of the Act and to pay such employee the monetary loss suffered by reason of such discharge."

APPLICATION PROPERLY BROUGHT

The Board accordingly holds that the application was properly brought, although it is of the opinion that it would have been better practise for Local 9-892 itself to have formally brought the application. The president of the local gave evidence, however, and it is clear that the application was brought on behalf of the local union. The president of the local union in his evidence stated that he gave the instructions to Pretty. The Board, therefore, under the authority vested in it by section 18 of the Act substituted the name of the local for the name set out in the formal application. This in no way prejudiced the respondent. It would have been out of character with the intent of the Act and of the functions of the Board to accede to the query raised by the respondent that the Board lacked jurisdiction herein by reason of the manner in which the application was brought.

UNFAIR LABOUR PRACTICE PROVED

The board accordingly held that the unfair labour practice has been proved and established by evidence even without calling into play the reverse onus set out in section 9(e) of the Act. In any event, the onus, if called into play, was on the evidence not met by the respondent. The Board further was of the opinion that the respondent should be required to reinstate the employee, Cook, and ordered accordingly.

REINSTATEMENT OF COOK

In the matter of the decision declaring the respondent guilty of an unfair labour practice Mr. Hazen and Mr. Graham dissented. All members of the Board, however, including these dissenting members, agreed that the employee, Cook, should be reinstated.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

August 11, 1972.

3.106 September 8, 1972

Robert C. Myers

v.

University of Saskatchewan
and
The University of Saskatchewan Employees' Union

Application under s. 5 (d) (f) (g) of The Trade Union Act for reinstatement and monetary loss — Whether applicant an "employee" — Applicant regularly exercised authority of a managerial character — Applicant regularly acting in a confidential capacity — Applicant not an "employee" within the meaning of s. 2 (f) — Board lacked jurisdiction to deal with matter — Application dismissed.

R.S.S. 1965. The Trade Union Act, C. 287, as amended by
C. 83, 1966, s.s. 2 (f); 5 (d) (e) (f) (g).
S.S. 1972. The Trade Union Act, 1972, C. 137.

APPLICATION FOR REINSTATEMENT

This is an application by Robert C. Myers under sections 5 (d) and (f) of *The Trade Union Act*, 1972, for reinstatement by an employer of an employee.

The Labour Relations Board under the above sections has power to make orders as follows:

> "5. The board may make orders:
>
> (d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;
>
> (f) requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice or otherwise in violation of this Act;"

An application was also made under section 5 (g) for an order fixing and determining the monetary loss suffered by the employee but in view of the decision herein no action is possible on this aspect of the matter.

WHETHER APPLICANT AN "EMPLOYEE"

If was argued by the employer that the applicant was not an "employee" within the meaning of the Act and that the Board accordingly lacked jurisdiction to deal with the application.

The Board held and determined that section 2 (f) of *The Trade Union Act, 1972*, applied. This is a definition section and is as follows:

> "2. In this Act:
>
> (f) "employee" means:
>
> (i) any person in the employ of an employer except any person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or any person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer;
>
> (ii) any person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining;
>
> (iii) any person designated by the board as an employee for the purpose of this Act notwithstanding that for the purpose of determining whether or not the person to whom he provides his services is vicariously liable for his acts or omissions he may be held to be an independent contractor;
>
> and includes a person on strike or locked out in a current industrial dispute who has not secured permanent employment elsewhere, and any person dismissed from his employment whose dismissal is the subject of any proceedings before the board;"

On the basis of the evidence adduced before the Board, the Board held that the applicant, Myers, was "a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character" and, as well that he was "a person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer".

APPLICANT NOT "EMPLOYEE" WITHIN MEANING OF S. 2(f)(i)

Under section 2(f)(i) of the Act either of the above places the applicant in the exception category thereby removing him from the statutory definition of "employee".

FACTS

The applicant had been the Security Supervisor of the Saskatoon campus of the University of Saskatchewan and had held that post since the year 1967 until the date of his dismissal on May 10, 1972.

Duties of the applicant, Myers, in the service of the University included, among other responsibilities, the following:

1. To supervise the traffic and parking control on University property, including the impounding of vehicles and the operation of the car compound.

2. To supervise the routine and special patrolling, policing and security control within the area of responsibility of the B & G Department.

3. To supervise the operation of a night security service and patrol of University property.

4. To assist in drawing up of the campus security budget, to requisition equipment and supplies and to control their use to keep within the limits of the budget provided, to make maximum use of the manpower and materials allotted and provide a smooth and efficient operation of the campus security group.

5. To supervise the night security staff and special personnel under contract to the University, to carry out the allocation of duties and assignment of area of responsibility and territory of each member of the staff and special personnel in the campus security group.

Persons supervised directly by the applicant included one foreman and two senior patrolmen. The number of persons for whom the applicant was responsible was 27, namely:

1 Foreman
2 Senior Patrolmen
9 Patrolmen II
5 Patrolmen I
1 Parking secretary
2 Parking lot attendants
4 Part-time Commissionaires night parking
3 Part-time parking office staff at registration time

The fact that the applicant performed supervisory duties of a managerial character is, in the opinion of the board, on the evidence presented and accepted by the Board, beyond question.

APPLICANT REGULARLY ACTIVE IN CONFIDENTIAL CAPACITY

The applicant, the evidence shows, is regularly acting in a confidential capacity in respect of the industrial relations of his employer. One regular duty performed each quarter, was to render a confidential personnel evaluation report to his employer in respect of those persons for whom the applicant was responsible to the employer. Some ten of these reports were placed in evidence and clearly evidenced this fact. The reports were all marked "confidential" and included such recommendations to the employer as "a short-term promotion could be considered", "this man could be recommended for promotion but would need training in supervisory capacity . . .", and "due to his unstable attitude I could not recommend him for promotion".

On other occasions recommendations were in fact made for transfer and the issuance of warnings (which under 10.02 of the collective bargaining agreement could lead to suspension and dismissal) in respect of employees for whom he was responsible.

BOARD LACKED JURISDICTION TO DEAL WITH MATTER, APPLICATION DISMISSED

For the reasons set forth herein, among others, the Board felt obliged to find that the applicant, Myers, was not an "employee" within the meaning of section 2 (f) of the Act and accordingly the Board lacked jurisdiction to deal with the matter and was obliged to dismiss the application.

In argument counsel for the applicant also submitted that the former Act should apply in this case, being *The Trade Union Act*, R.S.S. 1965, as amended. The Board held that the new Act namely, S.S. 1972, C. 137, applied but felt that the result would have been the same in any case.

Under the former Act "employee" meant any person in the employment of the employer excepting thereout a number of categories and one of which was the following category, namely:

> "a person regularly acting on behalf of management in a confidential capacity".

The evidence was clear that the applicant did in fact act regularly on behalf of management in a confidential capacity and under the circumstances could not have been held to have been an "employee" even within the meaning of the former definition.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

September 8, 1972.

3.107 October 4, 1972

Canadian Union of Public Employees, Local 600

v.

Government of Saskatchewan Riverside Special Care Home
and
Saskatchewan Government Employees Association

Application for certification — Collective agreement in existence — Application brought in time — Employees of bargaining unit in question were represented by the applicant for 27 years until an administrative alteration placed them in the bargaining unit certified by the respondent union — Majority of employees want to be represented by applicant — Held: unit appropriate, certification granted — Amendment excepting employees from respondent union.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s. 5 (a) (b) (c) (j) (k).

APPLICATION FOR CERTIFICATION

This is an application by Canadian Union of Public Employees Local Union 600, filed on August 31, 1972, under section 5, clauses (a), (b) and (c) of *The Trade Union Act*, 1972.

The above statute reads insofar as relevant to the application, as follows:

> "5. The board may make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit, but no unit shall be found not to be an appropriate unit by reason only that the employer of employees in the unit claims that his complement of employees in the unit is at less than full strength;
>
> (b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer or trade union representing the majority of employees in an appropriate unit to bargain collectively;"

In this case it was necessary, as the finding on facts will make apparent, that the Board also consider section 5 (j) of the Act as the granting of the application herein, if made, would affect another order of the

Board made many years ago, to which in such a case an amendment would be necessary to correct that order. This section, insofar as relevant herein, allows the Board to make an order:

> "5. (j) amending an order of the board made under clause (a), (b), or (c) in a case where a collective bargaining agreement is in existence, if . . . the amendment is considered by the Board to be necessary for the purpose of clarifying or correcting the order;"

Section 5 (k) of the Act sets the time limit within which such an order to amend must be made and reads as follows:

> "5. (k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:
>
> (i) there is a collective bargaining agreement in existence and an application is made to the Board to rescind or amend the order or decision during a period of not less than thirty days or more than sixty days before the anniversary of the effective date of the agreement; or"

COLLECTIVE AGREEMENT IN EXISTENCE; APPLICATION BROUGHT IN TIME

In the present case there was a collective bargaining agreement in existence and the anniversary date of the agreement is October 1st so the application was brought in time.

Viva voce evidence was put before the Board by the applicant, Canadian Union of Public Employees, Local Union 600. The Saskatchewan Government Employees Association did not offer any *viva voce* evidence but did vigorously oppose the application. The Government of Saskatchewan, the employer, was represented at the hearing but did not take position as between the above parties.

WHETHER PROPOSED BARGAINING UNIT APPROPRIATE

The main difference between the parties was the question as to whether the proposed bargaining unit was appropriate.

FACTS

On March 19, 1945, a certification order was made by this Board determining that the following constituted an appropriate unit of employees for the purpose of bargaining collectively, namely:

> ". . . the employees on the staffs of all departments, boards, commissions and other agencies which were under the control or were owned and operated by the Government of Saskatchewan on the 12th day of February, 1945."

but excepting thereout certain groupings of employees, which excepted employees included:

> "all employees employed in the mental hospitals at Weyburn and North Battleford."

Certification to the unit was, on March 19, 1945, granted to The Saskatchewan Civil Service Association which later became The Saskatchewan Government Employees Association.

In 1945, the Board in written reasons for its decision, stated:

> "Clause (a) of section 5 of the Act gives the Board power to make orders "determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit," and it is obvious from this that the possibility is envisaged in the Act of a unit smaller than an employer unit being considered to be appropriate. The Act, however, lays down no rules as to when a unit smaller than an employer unit should be determined as appropriate, and wherever cases of this kind have arisen the Board has attempted to make its decision in the manner which seems to accord best with the circumstances of the individual case."

At that time the Board felt that the employees of the mental hospital at North Battleford should be excepted from the appropriate unit "to accord best with the circumstances of the individual case."

Certification for the employees of the mental hospital in North Battleford, excepted in the above order, has been held, and is now held by the applicant, Canadian Union of Public Employees, Local Union 600, or its predecessor, for a period of some 27 years.

ADMINISTRATION CHANGED

The mental hospital at North Battleford consisted of a number of establishments including the establishment now known as the Riverside Special Care Home. The problem with which we are concerned has arisen by reason of the fact that on July 1, 1972, the administration of the institution now known as Riverside Special Care Home which had formed a part of the Saskatchewan Hospital at North Battleford (referred to in the 1945 order as the "mental hospital") was transferred by the Government of Saskatchewan from the Department of Public Health (which operated the Saskatchewan Hospital) to the Department of Welfare by which it is now administered.

BARGAINING UNIT ALSO CHANGED

The effect of this change in administration took the employees in Riverside Special Care Home out of the bargaining unit of the applicant, Canadian Union of Public Employees, Local Union 600, and placed them in the bargaining unit certified to Saskatchewan Government Employees Association. Thus the administrative change, no doubt implemented for good and sound reasons, resulted in taking the individual employees concerned out of the jurisdiction of the bargaining unit in which they had been for many years to the bargaining unit of Saskatchewan Government Employees Association.

Under the special circumstances here the Board feels it is incumbent upon it to make a decision herein in a manner which will accord best

with the special circumstances of this case which, among others, includes the fact that the persons involved had been (until July 1, 1972) members of the bargaining unit under the jurisdiction of the applicant.

MAJORITY OF EMPLOYEES WISH TO BE REPRESENTED BY THE APPLICANT

The facts are that the indicated employees by a substantial plurality desire to be represented by the applicant which had represented them for some 27 years. The applicant is clearly the "trade union of their own choosing" and if the unit is appropriate, should be the representative of those employees for the purpose of bargaining collectively, as provided by section 3 of the Act. This section reads:

> "3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively."

CERTIFICATION GRANTED UNIT IS APPROPRIATE

Upon due consideration of all the evidence in this case, and taking into account the able representations put forward by both sides, and the special circumstances which exist here, the Board has no hesitation in holding that the unit applied for is an appropriate unit for collective bargaining purposes and that the applicant represents a majority of the employees in the said appropriate unit, and that the applicant should accordingly be certified as the trade union representing the majority of employees in the said appropriate unit for the purpose of bargaining collectively and that certification should be granted accordingly.

AMENDMENT REQUIRED

It follows, as well, that the order of March 19, 1945, as amended should also be further amended by excepting therefrom all employees employed by the Government of Saskatchewan at the Riverside Special Care Home in the town of Battleford, Saskatchewan.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

October 4, 1972.

3.108 October 4, 1972

Retail, Wholesale and Department Store Union, Local 545

v.

Humboldt Co-operative Association Ltd.

Application for certification — Representatives appearing on behalf of respondent, applicant and a group of employees — References made to a petition from a group of employees not wishing to be represented by the applicant — No evidence of this petition tendered — Agreement between applicant and respondent as to composition of appropriate unit — Majority support for application — Certification granted.

S.S. 1972. The Trade Union Act, 1972, C. 137, s.s. 3; 5 (a) (b) (c); 10; 11 (1) (g).

APPLICATION FOR CERTIFICATION

This is an application for certification under section 5 (a), (b) and (c) of *The Trade Union Act*, 1972.

At the hearing before the Board a representative appeared on behalf of the applicant union and a representative also appeared on behalf of the respondent association.

GROUP OF EMPLOYEES REPRESENTED

A solicitor also appeared and stated that he represented a group of employees. No evidence as to the status in this regard was offered but in view of the fact that neither of the two representatives for the union or the association objected, the Board heard this counsel.

AGREEMENT RE: APPROPRIATE UNIT

The representatives of the applicant and the association advised the Board that they had reached agreement as to the "appropriate unit". The Board concurs with the suggested appropriate unit.

REFERENCES TO A PETITION

The position taken by counsel who purported to act for a group of employees was unusual in that while certain references were made by him to a petition during argument, he did not present or attempt to present any evidence whatsoever to the Board in respect of a petition. No evidence whatsoever as to a petition was placed before the Board.

During argument, as indicated, reference was made to a petition. The Board indicated to the parties during the argument that no evidence had been called on the matter one way or the other and also reminded the parties that argument advanced was not based upon evidence. The petition was not in evidence before the Board. Under these circumstances, with no evidence before it, the Board could not, of course, take any cognizance of the purported petition.

Again, during his submission, counsel purporting to act for the indicated group of employees frankly stated that the Board, in any event, would not need to consider a petition filed after the application. He stated, in fact, that the petition of which he spoke was in fact filed after the application. In this reference counsel no doubt had in mind section 10 of the Act which provides:

> "10. Where an application is made to the board for an order under clause (a) or (b) of section 5, the board may, in its absolute discretion, reject any evidence or information tendered or submitted to it concerning any fact, event, matter or thing transpiring, or occurring after the date on which such application is filed with the board in accordance with the rules and regulations of the board."

In this case the application of the above section was, of course, theoretical, in that while the Board under this section could have rejected any evidence "concerning any fact, event, matter or thing transpiring, or occurring after the date on which such application is filed with the Board", such action was not taken. No evidence was in fact tendered.

The Board, may in fact, have been in error in allowing any reference to be made to the purported petition in argument, but if so, it was error on the side of allowing the parties to put forth their position as fully as each desired. It is clear, of course, that the Board must act on evidence only, and no evidence whatsoever was presented, nor was any attempt made to tender any evidence on this matter.

The representative of the respondent association, a Mr. R. L. Duczek, advised the Board, in fact, that while the association had been prepared to put forth evidence indicating that certain employees had indicated to management that they did not wish to be represented by the applicant union, that the association "will not be putting forth any evidence now to this effect." In adopting the latter position the respondent association was certainly adopting a correct position as it well might otherwise have been guilty of an unfair labour practice under section 11 (1) (g) of the Act which declares that it is an unfair labour practice for an employer, employer's agent or any other person acting on behalf of an employer:

> "11.—(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
>
> (g) to interefere in the selection of a trade union as a representative of employees for the purpose of bargaining collectively;"

ONLY EMPLOYEES MUST CHOOSE REPRESENTATIVE

The selection of a representative by employees is a matter for decision of the employees — the employer must not interfere in any way. This basic democratic right is guaranteed by section 3 of our Act:

> "3. Employees have the right to organize and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively."

It cannot be too strongly emphasized that the selection must be a matter insofar as the employees are concerned "of their own choosing" and must be made by the employees only.

ROLE OF EMPLOYER BEFORE BOARD

As to the role of an employer before the Labour Relations Board, the Board agrees with the view expressed in the volume "Proceedings of the Programme on Labour Law", held by The Law Society of Upper Canada in Toronto on June 11th, 1971 where, on page 27 of the Proceedings, it is stated:

> "the role of an employer in front of the Labour Board is a very restricted one and one which is necessarily restricted in that his fundamental burden is to supply the necessary facts from which a proper decision can be made by the Board within the powers given by the legislature.",

and at page 16:

> "it is not up to the employer, however high his motives might be, or what he thinks his role might be, to put himself in a position of helping the employee make his choice."

NO EVIDENCE OF PETITION

As to a petition purporting to be that of a group of employees, such a document will not have any attention paid to it unless evidence is presented to the Board in a form and nature which will provide some reasonable assurance that the document truly and accurately reflects the voluntary wishes of the signatories. This would have to include evidence as to how the petition originated, how it was circulated, and whether or not there was any discussion with management in regard to it. If there was in fact any discussion with management or if management in any way acted or took any steps whatsoever in support of such a petition it would, of course, be ignored, as in such an event one could not say that the document with certainty represented the views of the signatories.

APPLICATION GRANTED

In the present application, there was no actual evidence of a petition presented. At the hearing the applicant and the respondent agreed on the composition of the appropriate unit and with which the Board con-

curs. Majority support for the application was filed in accordance with the rules and regulations of the Board. An Order of Certification accordingly issued.

(Sgd.) "CLIFFORD H. PEET,"
October 4, 1972. Chairman.

3.109 November 16, 1972

United Brotherhood of Carpenters and Joiners of America, Local 1990

v.

Dashchuk Lumber Ltd., Prince Albert

Application under s. 24 of The Trade Union Act, 1972 alleging unfair labour practice — Whether certain persons working for the employer were 'employees' — Board finds on evidence that these persons were 'employees' — Held: respondent employer guilty of unfair labour practice.

S.S. 1972. The Trade Union Act, 1972, C. 137, s. 24.

APPLICATION UNDER S. 24 OF THE TRADE UNION ACT, 1972

This application was brought before the Labour Relations Board under section 24 of *The Trade Union Act, 1972*, pursuant to an agreement dated October 23, 1972, between the applicant (the certified union) and the employer herein.

Section 24 reads as follows:

> "24. A trade union representing the majority of employees in a unit of employees may enter into an agreement with an employer to refer a dispute or disputes or a class of disputes to the board and the board shall hear and determine any dispute referred to it by either party pursuant to such agreement and the finding of the board shall be final and conclusive and shall in regard to all matters within the legislative jurisdiction of the Legislature of Saskatchewan be binding upon the parties and enforceable as an order the board made in accordance with this Act."

WHETHER CERTAIN PERSONS WERE "EMPLOYEES"

The issue which was referred to the Board was whether or not persons working for the employer were or were not employees as of:

1. July 30, 1971,
2. July 30, 1972, and
3. The date of the hearing before the Board.

The date on which this matter was heard by the Board was November 9, 1972, and the third date is accordingly that date.

AGREEMENT BETWEEN PARTIES

In submitting the above issue to the Board, the parties further agreed in writing that:

1. In arriving at its decision the Board shall take into account all changes in working conditions within the First Employer and the Second Employer, after the 4th day of November, A.D. 1970, as the said changes affected those persons working for the said employers, which persons the union claims to be within the scope of the Board certification orders for the said employers;

2. In arriving at its decision the Board shall take into account all persons working for the First Employer or for the Second Employer as of the 4th day of November, A.D. 1970, or at any time up to and including the date of the hearing of this dispute by that Board;

3. The ruling of the Board with regard to conditions surrounding the employment of individuals on the dates cited shall apply to persons working at any time within the period from the 4th day of November, A.D. 1970, up to and including the date of the hearing of this dispute by the Board, regardless of whether such persons were or were not employed on the dates specified above.

Evidence was placed before the Board by both parties to the issue.

CERTICATION ORDER

The Certification Order was issued on July 10, 1970, and by that order the certified union here was certified as the trade union representing the majority of employees of the employer in the following appropriate unit of employees:

> "All carpenters, carpenter apprentices, and carpenter foremen employed by Dashchuk Lumber Ltd. in the city of Prince Albert, Saskatchewan and West to the East boundary of 107° parallel, South to North boundary of Township 41, East to the Manitoba border, and North to the Northwest Territories boundary, except a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, are an appropriate unit of employees for the purpose of bargaining collectively."

REASONS FOR DECISION

Matters raised in evidence of this reference, and in argument, were substantially similar to those raised in an unfair labour practice application on which this Board issued a decision on November 4, 1970.[1] The rea-

[1] Reported at page 189 of this volume. (Case 3.086)

sons for decision issued by the Board on that occasion stated that the employer refused to negotiate a new collective bargaining agreement and refused to execute a collective bargaining agreement respecting employees covered by the certification order, and stated:

> "Mr. Dashchuk's refusal was based on the premise that the people working for the said company which were in the classifications for which the applicant was certified as bargaining agent, were not employees within the meaning of *The Trade Union Act.*
>
> The Board found that these people were in fact employees within the meaning of the Act as they were neither independent contractors or were excluded from being employees under *The Trade Union Act* by virtue of the fact that they were shareholders."

Substantially the same contention has been raised again. The Board finds, on the evidence adduced before it on this reference, that the following persons were in fact employees within the meaning of the Act on the date indicated and were employees within the certified bargaining unit on:

1. July 30, 1971 — Denis Paradis
   Joseph Cools
   John Wolsky
2. July 30, 1972 — Cliff Letendre
   Joseph Cools
   Denis Paradis
3. November 9, 1972 — Joseph Cools

In reaching the decision herein the Board took into account evidence placed before it concerning events since November 4, 1970, as requested.

EMPLOYER DID COMMIT UNFAIR LABOUR PRACTICE

The evidence indicated, however, that the employer throughout has employed every possible device in an attempt to avoid its obligations under the Act. It is to be hoped that the employer will henceforth adopt a better attitude and that the finding of the Board herein will indeed be final and conclusive in respect of the issues raised and determined on this reference.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

November 16, 1972.

3.110 November 16, 1972

United Brotherhood of Carpenters and Joiners of America, Local 1990

v.

Dashchuk Construction Ltd.,

Reference under s. 24 of The Trade Union Act, 1972 — Claim of respondent that it had no 'employees' as all its workers remunerated on a piecework basis — This argument rejected by the Board — Held: the workers in question were 'employees' within the meaning of the Act.

S.S. 1972. The Trade Union Act, 1972, C. 137, s. 24.

REFERENCE UNDER S. 24 OF THE TRADE UNION ACT, 1972

This reference was brought before the Labour Relations Board under section 24 of *The Trade Union Act, 1972* pursuant to an agreement dated October 23, 1972, between the applicant (the certified union) and the employer herein.

The issues referred to the Board were similar to the issues before the Board in L.R.B. File No. 194-72-3 (United Brotherhood of Carpenters and Joiners of America, Local 1990 and Dashchuk Lumber Ltd.).[1]

FACTS

The certified union in the instant reference was certified as the trade union representing the majority of employees of the employer on December 3, 1967. This certification is still in force. The appropriate unit under the Certification Order is described as follows:

> "All carpenters, carpenter apprentices, and carpenter foremen, except superintendent or superintendents, and a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity employed by Dashchuk Construction Ltd. in the city of Prince Albert, Saskatchewan, and West to East boundary of 107° Longitude, South to North Boundary of Township 41, East to the Manitoba Boundary, and North to the Northwest Territories Boundary, constitute an appropriate unit of employees for the purpose of bargaining collectively."

[1] Decision No. 3.109.

The Board considered the evidence adduced before it and on the basis of such evidence determined that the following persons were employees within the meaning of *The Trade Union Act* on the dates set out herein, namely:

1. July 30, 1971, —	F. Dryka Paul Boyko Nick Panchuk Victor Arp Charlie Thompson
2. July 30, 1972, —	Joe Ballion F. Dryka Nick Panchuk Victor Arp Charlie Thompson Peter Reid Nick Chicowski Mike Chicowski
3. November 9, 1972, —	Joe Ballion F. Dryka Nick Panchuk Victor Arp Charlie Thompson Peter Reid Nick Chicowski Mike Chicowski Denis Paradis Walter Merk

In this reference the employer raised arguments similar to those raised in L.R.B. File No. 194-72-3 and for which written reasons have already been handed down.

ARGUMENT OF RESPONDENT — IT HAD NO "EMPLOYEES"

In this reference the employer stated that it had placed all employees on a piecework basis after November 4, 1970, to control costs and also to place itself in a position so that it would not be bothered by unions. The president of the company stated that the company had decided on this step as a result of "experience". Although the company is carrying on an extensive operation, the president stated that the company had no employees because the workers were remunerated on a piecework basis and that each worker was an independent contractor.

HELD: THE WORKERS WERE EMPLOYEES

This argument and submission is rejected by the Board. The purpose of *The Trade Union Act* is to protect employees from the whims of employ-

ers and the Board states and holds that there can be no doubt but that the workers referred to herein were employees within the meaning of the Act on the dates referred to in the reference.

(Sgd.) "CLIFFORD H. PEET,"
November 16, 1972. Chairman.

3.111 November 16, 1972

United Brotherhood of Carpenters and Joiners of America, Local 1990

v.

Dashchuk Lumber Ltd.

Application under s. 5 (d) (e) alleging unfair labour practice of failing to maintain membership in union — Whether persons in question were "employees" — Board found that these persons were "employees" — Unfair labour practice established.

S.S. 1972. The Trade Union Act, 1972, C. 137, s. 5 (d) (e).

APPLICATION UNDER S. 5(d) and (e)

This matter was an application by the applicant herein, United Brotherhood of Carpenters and Joiners of America, Local 1990, under section 5 (d) and 5 (e) of *The Trade Union Act, 1972*, which gives power to the Labour Relations Board to make orders:

> "5.(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;
>
> (e) requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice;"

ALLEGED UNFAIR LABOUR PRACTICE

The applicant alleged that the employer, Dashchuk Lumber Ltd., had committed an unfair labour practice. Particulars of the allegation read as follows:

(1) The applicant was by an Order of the Labour Relations Board dated the 10th day of July, A.D. 1970, determined to be the representative for the purposes of collective bargaining for all employees of the employer named in paragraph 3 as more particularly described in the said Order of Certification.

(2) That pursuant to the provisions of section 30 of *The Trade Union Act*, R.S.S. 1965, the applicant trade union requested the employer to include a union security clause in the collective bargaining agreement in force and effect between the applicant trade union and the employer and the said clause

has been in force and effect since the 10th day of September A.D. 1971 in a collective bargaining agreement between the trade union and the employer herein.

(3) That there has been a number of persons employed by the said employer, the names and the exact number of which are unknown to the applicant trade union, since the 10th day of September, A.D. 1971 and that the said persons have been employed for a period in excess of thirty days with the employer, but have not applied for and/or maintained membership in the applicant trade union pursuant to the following clause contained in the collective bargaining agreement between the parties hereto:

> "Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall within (30) days after commencement of employment, apply for, and maintain membership in the union as a condition of his employment."

(4) That the employer has not made effective the provisions of the clause referred to in paragraph (3) herein with respect to such employees that have been employed with it since the 10th day of September A.D. 1971.

(5) The applicant submits that by reason of the facts hereinbefore set forth, the said employer has engaged and/or is engaging in an unfair labour practice within the meaning of section 35 of *The Trade Union Act*.

WHETHER PERSONS IN QUESTION WERE "EMPLOYEES"

This matter first came before the Board in the month of October, 1972, and at that time it was adjourned with the consent of both parties on a basis suggested by both parties, namely that the parties would prepare a reference of dispute with respect to whether persons employed by the respondent were in fact "employees" within the meaning of the Act and whether such employees were members of the certified bargaining unit.

DISPUTE HEARD

This reference of dispute subsequently came before the Board at its November sittings and was heard by consent prior to this application (LRB File No. 194-72-3)[1].

[1] Decision No. 3.109.

It was agreed by counsel that the findings of the Board on the reference of dispute should apply to the within application and counsel for the respondent conceded that if the Board made a finding in the reference to the effect that there were "employees" within the meaning of the Act in the certified bargaining unit and employed by the respondent, that the allegation of an unfair labour practice would be established.

ALLEGATION ESTABLISHED

The Board accordingly on the basis of the evidence adduced in the reference of dispute, and the finding of the Board therein, held that the unfair labour practice allegation had been established and so held.

(Sgd.) "CLIFFORD H. PEET,"
November 16, 1972. Chairman.

3.112 November 16, 1972

United Brotherhood of Carpenters and Joiners of America
Local 1990

v.

Dashchuk Construction Ltd.

Application under s. 5 (d) (e) of The Trade Union Act, 1972 alleging unfair labour practice.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s. 5 (d) (e).

APPLICATION ALLEGING UNFAIR LABOUR PRACTICE

This is an unfair labour practice application under section 5 (d) and (e) of *The Trade Union Act*, wherein the applicant alleges that the employer, Dashchuk Construction Ltd., had committed an unfair labour practice.

The facts here are similar to the facts in L.R.B. File No. 156-72-3 for which written reasons have already been handed down and the Reasons for Decision in this matter are similar to the written Reasons for Decision with reference to L.R.B. File No. 156-72-3.

(Sgd.) "CLIFFORD H. PEET,"
November 16, 1972. Chairman.

3.113 January 11, 1973

Nipawin District Staff Nurses Association

v.

Nipawin Union Hospital
and
Service Employees' Local Union No. 333

Application for certification — Some of members of proposed unit are represented by respondent union — Application in time — Whether applicant is a trade union — Not necessary that all of members of applicant be "employees" within the meaning of The Trade Union Act — It was found that the applicant is dominated by the Saskatchewan Registered Nurses' Association Council which could be in effect controlled by management or management personnel — Management personnel have dominated the S.R.N.A. Council for many years — Held: the applicant is a company dominated organization — Application dismissed.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s.s. 2 (e) (f) (h) (j) (l); 5 (a) (b) (c); 6.
R.S.S. 1965. The Registered Nurses' Act, C. 315,
as amended by C. 71, 1967, s.s. 4; 5(1); 6(1) (2).

APPLICATION FOR CERTIFICATION

This is an application by an organization known and described as Nipawin District Staff Nurses Association for certification under *The Trade Union Act*, 1972, Chapter 137, for the following proposed bargaining unit, namely:

> "All registered and graduate nurses and head nurses employed by the Nipawin Union Hospital in or in connection with its hospital at Nipawin, except the director of nursing, constitute an appropriate unit of employees for the purpose of bargaining collectively."

At the hearing the applicant abandoned the application in so far as graduate nurses were concerned. A prior order of certification of employees of the Nipawin Union Hospital is held by Service Employees' Local Union No. 333 from which registered nurses are excluded. Graduate nurses, however, are not excluded from this certification, and graduate nurses employed by Nipawin Union Hospital (other than registered

nurses) are accordingly included in the existing certification. The Service Employees' Local Union No. 333 are also the bargaining representative of all employees employed as nursing assistants in the hospital.

Section 5 (a), (b) and (c) so far as applicable provides as follows:

> "5. The board may make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit . . .
>
> (b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;"

CONSIDERATION OF BOARD

On an application of this nature the Board must consider a number of matters including the following:

1. A determination as to whether the applicant is a trade union within the meaning of *The Trade Union Act.*
2. A determination as to whether the application is in time.
3. A determination as to whether the proposed bargaining unit is, under all the circumstances of the particular case, an appropriate unit of employees for the purpose of bargaining collectively.
4. A determination as to whether the applicant (if a trade union within the meaning of the Act) represents a majority of the employees in the unit determined by the Board to be appropriate.

WHETHER APPLICANT A TRADE UNION

The applicant has the responsibility to establish to the Board that it is, in fact, a trade union within the meaning of the Act.

Section 2(1) defines a trade union as:

> "'trade union' means a labour organization that is not a company dominated organization."

Section 2(j) reads:

> "'labour organization' means an organization of employees, not necessarily employees of one employer, that has bargaining collectively among its purposes;"

Section 2 (e) is as follows:

> "'company dominated organization' means a labour organization, the formation or administration of which an employer or employer's agent has dominated or interfered with or to which an employer or employer's agent has contributed financial or other support, except as permitted by this Act;"

The term "employer's agent" is defined by section 2 (h) of the Act:

> "'employer's agent' means:
>
> (i) a person or association acting on behalf of an employer;
>
> (ii) any officer, official, foreman or other representative or employer acting in any way on behalf of an employer with respect to the hiring or discharging or any of the terms or conditions of employment of the employees of the employer;"

It is thus clear that an applicant must establish that it has a right to be certified as the representative of a group of employees for the purpose of bargaining collectively. The organization must qualify, as it were, as a bona fide trade union within the meaning of the Act. The applicant must have an organic structure — it must have such a thing as a constitution containing, among other items, provisions for the election of officers.

In order to satisfy the Board an applicant must file its constitution and bylaws. This is generally necessary to establish that it is an organization "that has bargaining collectively among its purposes". If the applicant is a local or branch of a larger organization it must also establish to the satisfaction of the Board that the local or branch has been established in accordance with the constitutional requirements of the larger or parent organization. The parent organization must, of course, also qualify as a trade union as defined in the Act.

Rule 5 of the regulations of the Board set out these requirements as follows:

> "5. (1) Any trade union may make an application for certification;
>
> (2) The application shall be in Form 1 and shall be verified by statutory declaration.
>
> (3) There shall be filed with the application:
>
> (a) A certified copy of the constitution of the applicant trade union;
>
> (b) If the applicant trade union has been chartered by a national or international organization, a certified copy of the charter granted to the applicant, but in any case where the charter has not been received by the applicant trade union, the applicant may, with the consent of the board, file a statement signed by the president, secretary or similar officer of the national or international organization declaring that the grant of a charter to the applicant trade union has been approved;
>
> provided, however, that if the applicant trade union has previously filed such constitution or charter or statement in lieu of charter, it need not thereafter file additional copies of such document except where it has been materially altered."

In Form 1, which must be completed and filed on an application, and verified by a Statutory Declaration of an officer of the applicant, the applicant applies for an order determining that a given unit of employees is appropriate for the purpose of bargaining collectively and that "the applicant trade union" represents a majority of the employees in the said unit. The applicant is described throughout as "the applicant trade union" but no facts are explicitly set out in the Declaration to establish this status.

This Form 1, verified by Statutory Declaration, is always before the Board on an application — in fact an application will not be scheduled for a hearing by the Board unless this document has been filed. The officer of the applicant verifying the application should be available for examination on the Declaration at the hearing, if any contrary party desires to examine, or, in fact, if the Board should feel that further information is required or desirable.

An applicant must be prepared to establish status if this is questioned either by the Board or by any party to the hearing. An applicant must be prepared to present evidence, if required, as to the manner in which it came into existence. If status is in any manner called into question, and if status is not established to the satisfaction of the Board, then the Board must reject the application. The Board is quite strict in this regard. Each case of necessity must, however, depend on its own circumstances.

WHETHER APPLICATION IS IN TIME

As to the time of an application, this is not usually a problem. Except under special circumstances, an application can be made at any time. The exceptions are basically set out in section 6 of the Act and concern a situation where there is an existing order of the Board determining another trade union to represent the majority of employees in a unit.

WHETHER PROPOSED UNIT IS APPROPRIATE

The appropriateness of a proposed unit is always a matter of great concern to the Board. Many factors must be considered by the Board here and an applicant must always be prepared to justify that the unit proposed is an appropriate unit for bargaining purposes. While each application must be determined on its own facts, the Board is usually quite flexible here. Precedents as to past certifications cannot always be relied upon. It is acknowledged by all that technology is rapidly increasing and therefore a unit which may have been appropriate on a previous occasion is not necessarily appropriate today. Another factor which must be considered is the wisdom or desirability of a multiplicity of bargaining units among the employees of a given employer. Unless the contrary can be shown to be desirable the Board will seek to avoid a multiplicity of bargaining units. The facts of each application and each situation are, of course, paramount in reaching a decision here.

RE: MAJORITY SUPPORT

The question as to majority support, once the facts as to the employees to be included in the appropriate unit are determined, is largely a mathematical determination which must be based upon the facts as found and determined by the Board.

It is necessary for the Board to consider the application here on the basis of the evidence presented before it in the light of the requirements of the Act and the rules and regulations under the Act.

OPPOSITION BY RESPONDENT UNION

The application herein was opposed by Service Employees' Local Union No. 333, a trade union already certified for employees of the employer, Nipawin Union Hospital, save for a number of named exceptions set out therein, by a Certification Order of this Board dated May 7, 1968, and amended on April 9, 1969. On August 3, 1971, certification was also granted to this trade union for all employees employed as nursing assistants.

FACTS

Service Employees' Local Union No. 333 entered into an agreement on June 30, 1972, with the Nipawin Union Hospital which refers to a collective bargaining agreement entered into on March 1, 1971, with effective date from January 1, 1971, and for a period of two years. The signed agreement of June 30, 1972, is on file in the Industrial Relations Office of the Department of Labour of the Province of Saskatchewan. A further signed agreement, also dated June 30, 1972, is on file in respect of the certified nursing assistants referring to a collective bargaining agreement entered into on March 1, 1971, with effective date from January 1, 1971, and also for a period of two years.

The application of the applicant, Nipawin District Staff Nurses Association, set out that an appropriate unit should include "all registered and graduate nurses and head nurses . . . except the Director of Nursing" employed by the Nipawin Union Hospital in or in connection with its hospital at Nipawin.

APPLICATION IS IN TIME

The effective date of the existing collective bargaining agreements are January 1, 1971, and if the application of the applicant as originally filed had been continued without amendment it might well have been argued that it was out of time as far as "graduate nurses" were concerned as the granting of the application would have required an amendment to an existing order in which graduate nurses were already included. The anniversary date of the effective date of the existing agreements are January 1st and this application was filed on September 15, 1972, clearly not a date falling within "a period of not less than thirty days or more than sixty days before the anniversary of the effective date of the agreement" as set out in section 5 (k) (i) of the Act. The applicant during the hearing, however, withdrew its application as to "graduate nurses" and the remaining application, effecting as it did employees who were not members of an existing appropriate unit, is accordingly in time.

WHETHER APPLICANT IS A TRADE UNION

The reply filed by the certified union, Service Employees' Local Union No. 333 alleged that the applicant "is a company dominated organization and is not a trade union" and further alleged:

> "(a) The Nipawin District Staff Nurses Association includes in its membership nurses registered and graduates who are not employees within the meaning of *The Trade Union Act*;
>
> (b) The organization of the Nipawin District Staff Nurses Association was organized, formed and influenced in its administration by the Saskatchewan Registered Nurses Association, which acting other than as employees within the meaning of *The Trade Union Act*, exercising authority and performing functions of a managerial character, or acting in a confidential capacity in respect of labour relations."

The constitution of the applicant, filed and placed in evidence, sets out persons who are entitled to become members of the association, under Article II, section 2.01, as follows:

> "2.01 The Association shall be composed of Registered Nurses and Graduate Nurses and Certified Nursing Assistants in the Nipawin District, in the Province of Saskatchewan."

The Board is of the opinion that the fact that the applicant, Nipawin District Staff Nurses Association, might include among its members persons who are not employees within the meaning of *The Trade Union Act*, as alleged in (a) above, would not necessarily be a bar to certification. In any event, no evidence was presented that such was the case.

The allegation set out in (b) referred to above, however, if established, is of a more serious nature.

RE: SASKATCHEWAN REGISTERED NURSES ASSOCIATION

The Saskatchewan Registered Nurses Association, is a statutory body under *The Registered Nurses Act*, R.S.S. 1965, Chapter 315, as amended by S.S. 1967, Chapter 71. The Act, by section 4, empowers the association to pass bylaws not inconsistent with the Act for:

> "(a) the government and discipline of its members;
>
> (b) the management of its property;
>
> (c) the registration and admission of members;
>
> (d) all other purposes necessary for the management and operation of the association."

The Registered Nurses Act does not specifically define the term "members" but by necessary implication it is clear that the membership will consist of nurses who can become "registered as members of the association" and are thereafter entitled to use the title "registered nurse". The Act by section 8 sets out qualifications for registration.

The affairs of the Saskatchewan Registered Nurses Association (hereinafter called SRNA) are by section 5(1) of the Act under the management of a council composed of seven members.

Section 6 (1) of the Act authorizes this council to make bylaws, rules and regulations relating to:

> "(a) registration and the issue of registration certificates;
>
> (b) the appointment, functions, duties and removal of officers or servants of the association, and their remuneration;
>
> (c) the time at which and place where the annual meetings of the association shall be held;
>
> (d) the amount of and method of collecting the admission fee;
>
> (e) the suspension and expulsion of members;
>
> (f) the conduct in all other particulars of the affairs of the association."

but provides by section 6(2) that such bylaws must in due course be approved by the membership and in default of confirmation shall be null and void.

The bylaws provide for the election of the council of seven who as presently constituted are:

1. a president,
2. a first vice-president,
3. a second vice-president,
4. the chairman of the Standing Committee on Nursing,
5. the chairman of the Standing Committee on Social and Economic Welfare,
6. the chairman of the Standing Committee on Chapters,
7. the chairman of the Standing Committee on Public Relations.

The composition of the council has varied from year to year, but evidence clearly established to the satisfaction of the Board that management personnel has dominated the council over the years and that the majority of the members of the council, or in any event a large proportion of the members of the council, are now and always have been management people such as Directors of Nursing and Superintendants of Public Health Nursing, employed by various hospitals, and others who clearly would not fit the definition of "employee" as set out in section 2(f) of *The Trade Union Act* and many of whom are persons whose primary responsibility in their employment "is to actually exercise authority and actually perform functions that are of a managerial character" and who are "regularly acting in a confidential capacity in respect of the industrial relations of his employer."

THE SRNA IS NOT A TRADE UNION

There was no suggestion placed before the Board to the effect that the SRNA was a trade union and on the evidence the Board finds that it is not a trade union as defined by the Act.

The purpose of the SRNA, basically, is set out in section 4 of *The Registered Nurses Act* (already quoted) and is, in effect, to police the nursing profession and ensure to the public that certain basic educational standards and qualifications are held by persons who desires to practise nursing. The SRNA also has certain authority with respect to nursing assistants. Evidence placed before the Board would indicate that the SRNA in this respect is filling a very necessary and desirable function.

Evidence was placed before the Board to the effect that the SRNA has devoted a considerable amount of energy, time and expense during the past several years in promoting the organization of staff nursing associations throughout the province of Saskatchewan. The membership of such associations are not necessarily confined to persons who are members of the SRNA.

Unfortunately, however, the SRNA appears, on the evidence placed before the Board, to have placed itself in a position where it is attempting to dominate such associations. Considerable evidence on this was placed before the Board at the lengthy hearing on this application and while some of the evidence placed before the Board would have to be "stretched" to support such a conclusion, nevertheless there was some evidence which did in the opinion of the Board support the allegation and this evidence was accepted by the Board.

While the Board has no intention to list such evidence in seriatim, one item to which reference can be made is a memorandum issued by the Employment Relations Officer (ERO) of the SRNA on August 23, 1972, and directed to "Presidents of Staff Nurses Associations" which, in effect, instructed them as to steps to take to ensure that nurses would not become members of what was described as "non-nurse unions". The document read in part:

> "Also, we are aware of new activity of union advisers in the field in an attempt to sign up nurses as members of their unions. SNAs (referring to Staff Nurses Associations) must intensify the consideration of their positions as to forming their own certified associations or, belonging to non-nurse unions. SNA presidents must assure themselves that:
>
> 1. no one nurse in their hospital will take individual action (such as signing a union membership card) that may affect the entire group without prior discussion with the group.

2. the hospital will not take any action that may involve the nurse employees in a non-nurse bargaining unit without prior consultation with the nurses involved."

Another item to which reference can be made is a number of resolutions adopted at a meeting of the Council of the SRNA held on April 6, 1972, including:

Motion 2

"Because of recent developments in the collective bargaining of nurses in Saskatchewan over the past few months and in consideration of future trends that council promote through the E.R.O. the certification of staff nurses' association in Saskatchewan."

Motion 3

"That when Staff Nurses' Association are certified under *The Trade Union Act* a fee of $1 per month per capita be levied to help defray expenses of collective bargaining."

and Motion 7

"That the S.R.N.A. Council agree that the services of the Employment Relations Officer and legal adviser be made available to the registered nurses and psychiatric nurses at the Parkside Nursing Home to become certified under *The Trade Union Act*; and that the services of the Employment Relations Officer and legal adviser be made available to the Wilkie Staff Nurses' Association to become certified under *The Trade Union Act.*"

At the hearing objection was taken by counsel for the applicant to the Board giving any consideration to those portions of the minutes of the indicated SRNA council meeting wherein reference was made to discussions and reports made by the SRNA solicitors to the meeting. The objection was based on solicitor-client privilege.

Section 18 of *The Trade Union Act* provides that:

"The board . . . may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not."

In spite of this very wide discretion the Board has not considered the evidence objected to nor has it been taken into account in reaching the decision herein.

REASONS FOR DECISION

The overall evidence clearly indicated that the prime mover in setting up the Staff Nurses Associations throughout the province was that of the SRNA Council. Evidence accepted by the Board indicated that this was the case in respect of the applicant, Nipawin District Staff Nurses Association. The organization meeting was arranged by Mr. A. W. Shalansky, E.R.O. of SRNA, and was held at the Nipawin Union Hospital on September 13, 1972. Mr. Shalansky had a draft agenda with him and a draft write-in constitution for the new organization. It was admitted that his expenses were paid by the SRNA. The application for certifica-

tion herein was filed on September 15, 1972, (2 days later) and was filed with the Board by a letter from Mr. Shalansky. It was also conceded that counsel representing the applicant at the hearing was engaged by and paid by the SRNA.

The Board is of the view that organization of professional persons, including nurses, in order that they might be in a position to bargain collectively is desirable. Under *The Trade Union Act*, R.S.S. 1965, Chapter 287 and amendments thereto many professional persons could be excluded from the benefits of *The Trade Union Act.* This, however, is no longer the case as all exclusions in this respect were removed by the new *Trade Union Act*, S.S. 1972, Chapter 137, which came into force on August 1, 1972.

It has been held, however, that it is not enough to deck an organization with the outward trappings of unionism for it to meet the requirements of *The Trade Union Act.* The organization applying to the Labour Relations Board must be a genuinely independent body in all respects which serve the purpose of employees who have had conferred upon them the right and the freedom to organize. The very core of unionism is its capacity to act for workers without interference of any kind from employers or their agents. Freedom of workers' organization, and its functions, are integral parts of democracy, they are things precious to the existence of democracy.

It is with extreme regret that the Board feels that it cannot on the facts in evidence in this application certify the applicant.

The Board concurs with the view expressed in a decision of this Board on October 2, 1953, (*United Packinghouse Workers of America Local 518* and *C. T. Gooding*)[1] wherein it was held that:

> "it is the duty of this Board to prevent organizations dominated by employers . . . playing the role of representatives of the employees concerned for the purpose of bargaining collectively with their employers."

APPLICANT UNDER THE DOMINATION OF THE SRNA COUNCIL

The applicant is clearly, at this time, under the domination of the SRNA Council. In the April 1971 issue of the New Bulletin published by the SRNA, Miss Ann Sutherland, then SRNA Employment Relations Officer stated:

> "The SRNA council is almost always made up of management nurses so that approval by the council would in effect be control of the bargaining process by management. However, a more formal relationship of the staff nurses' association within SRNA will need to be established."

[1] Reported at 1SLRB 446

The Board concurs, on the evidence presented to it in this application, with the view expressed by Miss Sutherland in the indicated article and feels that an organization under the domination, or control, of the SRNA Council would, or could, in effect be control of the bargaining process by management or management personnel.

Under these circumstances the fitness of the applicant to represent employees for the purpose of collective bargaining is impaired. It has been stated:

> "Statutory policy is clear that unions should be free of employer influence or domination. The lines separating the policies can present neat cases."

(see Carrothers "Collective Bargaining Law in Canada" 1965, page 207)

APPLICANT IS A COMPANY DOMINATED ORGANIZATION

The present application may well be a "neat" case, but nevertheless on a full consideration of all the evidence presented, the Board feels it has no alternative but to hold that the applicant is a company dominated organization and is accordingly not a trade union within the meaning of the Act.

APPLICATION DISMISSED

The Board accordingly feels obliged to dismiss the application herein.

The Board feels, however, that it should indicate that the dismissal of the present application is made without prejudice to the right of the employees to bring a further application for certification but points out that the applicant should first ensure that it is an organization which is not under the domination or control of the SRNA Council in any manner.

(Sg.) "CLIFFORD H. PEET,"
Chairman.

January 11, 1973.

3.114 February 28, 1973

Regina Pioneer Village Staff Nurses Association

v.

Regina Pioneer Village Ltd.
and
Canadian Union of Public Employees, Local 1138

Application for certification — Previous certification — Application out of time — Registered nurses excluded from previous certification — Registered nurses constitute an appropriate unit — Applicant is Trade Union within meaning of the Act as it stands on its own feet — No dominating organization in this case — Certification granted re: registered nurses.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s. 5 (a) (b) (c) (k) (i).

R.S.S. 1965. The Registered Nurses' Act, C. 315,
as amended by C. 71, 1967, s. 8.

R.S.S. 1965. The Psychiatric Nurses' Act, C. 316,
s.s. 7; 8; 9.

APPLICATION FOR CERTIFICATION

This is an application for certification under *The Trade Union Act*, S.S. 1972, Chapter 137. The original application suggested that an appropriate unit of employees for the purpose of bargaining collectively would be:

> "All Registered, Graduate and Psychiatric Nurses employed by the Regina Pioneer Village Limited at Regina, Saskatchewan, except the Nursing Supervisor and the Assistant Nursing Supervisor, constitute an appropriate unit of employees for the purpose of bargaining collectively."

Under section 5 (a) of the Act the Board may make an Order:

> "5. The board may make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit . . ."

PREVIOUS CERTIFICATION

In this case, however, certain employees of the employer, Regina Pioneer Village Ltd., a nursing home, were already certified under a certification made on April 14, 1968, to Local 1138, Canadian Union of Public Employees. The present application is out of time under section 5(k) (i) of the Act in respect of employees covered by the certification of April 14, 1968, which provides that the Board can only rescind or amend a prior order under section 5(a) where:

> "5. The board may make orders:
>
> (k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:
>
> (i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than thirty days or more than sixty days before the anniversary of the effective date of the agreement; or
>
> (ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than thirty days or more than sixty days before the anniversary date of the order to be rescinded or amended;"

APPLICATION OUT OF TIME

In the instant case evidence was presented to the Board which established that a collective bargaining agreement was in existence and accordingly section 5 (k) (i) is applicable. The anniversary of the effective date of the agreement was April 1st and an application for the amendment or rescission of the prior order therefore could only be made within the 30-60 day period prior to April 1st. The present application was made on December 15, 1972, and is accordingly out of time for all persons included in the prior order.

REGISTERED NURSES EXCLUDED FROM PREVIOUS CERTIFICATION

Under the certification of April 14, 1968, registered nurses were excluded but graduate and psychiatric nurses were not excluded and accordingly, if not registered nurses, are included in that certification.

It was admitted that a graduate nurse was not a registered nurse. As to psychiatric nurses the attention of the Board was called to the fact that persons enjoying the professional status of registered nurses and persons enjoying the professional status of psychiatric nurses could also be quite different. These two professional bodies are governed by two separate Acts of the Legislature of Saskatchewan being *The Registered Nurses Act*, R.S.S. 1965, Chapter 315, as amended by S.S. 1967, Chapter 71, on the one hand, and *The Psychiatric Nurses Act*, R.S.S. 1965, Chapter 316.

With respect to registered nurses, section 71 and section 8 of *The Registered Nurses Act* provides as follows:

> "8. Any of the following persons may become a registered nurse and entitled to practise as a registered nurse in the province:
>
> (a) a graduate of a school of nursing in the province who complies with the bylaws, rules and regulations of the association for registration and has passed the examinations prescribed and conducted by the association;
>
> (b) a person who is a registered nurse in a similar association elsewhere and who produces evidence of such registration and testimonials satisfactory to the council of the association of good character and of good standing in the association of which he is a member, and who complies with the bylaws, rules and regulations of the association for registration;
>
> (c) a person who produces satisfactory evidence of having followed a regular course of preparation in a school of nursing outside the province, who has passed the examinations prescribed and conducted by the association and who complies with the bylaws, rules and regulations of the association for registration."

The relevant section with respect to psychiatric nurses being sections 7, 8 and 9 of *The Psychiatric Nurses Act* reads:

> "7. All persons of good moral character resident in Saskatchewan who on the first day of January, 1948, were graduated psychiatric nurses at a Saskatchewan Hospital or Saskatchewan Training School established under *The Mental Hygiene Act*, Chapter 309 of The Revised Statutes of Saskatchewan, 1953, shall be admitted to the register of psychiatric nurses.
>
> Provided that any such person who has not been admitted to the register prior to the first day of April, 1955, shall, before being admitted, pass a satisfactory examination conducted by a board of examiners appointed by The University of Saskatchewan.
>
> 8. Except as provided by section 7, no person shall be entitled to be registered unless he or she has followed a regular course of training in a school for psychiatric nurses in the branches of the profession prescribed by the Senate of the University of Saskatchewan, and has passed a satisfactory examination conducted by a board of examiners appointed by the university, or has produced certificates of having passed examinations accepted as equivalent thereto by the said board.
>
> 9. Every person registered under this Act shall be known as a psychiatric nurse ..."

Apparently a person who is a psychiatric nurse is not a registered nurse without further training and on the other hand a person could be a registered nurse without being a psychiatric nurse under the legislation.

REGISTERED NURSES CONSTITUTE AN APPROPRIATE UNIT

In spite of the fact, however, that an application on behalf of graduate and psychiatric nurses would be out of time, the Board is nevertheless of the opinion that the registered nurses employed by this employer and consisting of approximately forty persons, in themselves constitute an appropriate unit of employees for collective bargaining purposes,

excepting thereout, however, the nursing supervisor and the assistant nursing supervisor.

The Board has previously expressed the view (Nipawin District Staff Nurses Association and Nipawin Union Hospital and Service Employees' Local Union No. 333 decision dated January 11, 1973 — LRB File No. 146-72-3)[1] as follows:

> "The Board is of the view that organization of professional persons, including nurses, in order that they might be in a position to bargain collectively is desirable. Under *The Trade Union Act*, R.S.S. 1965, Chapter 287 and amendments thereto many professional persons could be excluded from the benefits of *The Trade Union Act.* This, however, is no longer the case as all exclusions in this respect were removed by the new *Trade Union Act*, S.S. 1972, Chapter 137, which came into force on August 1, 1972."

Registered nurses, as professional persons, are entitled to the benefits of collective bargaining under *The Trade Union Act*, and the Board so holds.

WHETHER APPLICANT IS A BONA FIDE TRADE UNION

The applicant must establish, however, that it has a right to be certified as the representative of the registered nurses employed by Regina Pioneer Village Ltd. for the purpose of bargaining collectively. The applicant must qualify as a bona fide trade union within the meaning of the Act.

In order to meet this onus the applicant filed its bylaws and placed before the Board evidence dealing with the constitution of the association.

The Regina Pioneer Village Staff Nurses Association was formed on May 20, 1969, as a direct result of a dispute with the employer herein, Regina Pioneer Village Ltd., in threatening to release certain nurses employed in the nursing home at that time, and the original bylaws of the association were adopted on that date. One of the objects of the association as set out in the bylaws was the following:

> "Article II — Objectives
>
> d) to represent the members of the Association in all matters with their employers on matters relating to wages, employment and working conditions."

Article III, dealing with the membership of the association, provided that active membership would be open to nurses employed by Regina Pioneer Village Ltd. except those who are recognized as executive manager personnel. The following was specifically barred from active membership:

1. Director of Nursing
2. Assistant Director of Nursing Education

[1] Decision No. 3.113.

3. Assistant Director of Nursing Service

4. Supervisors

Nurses who did not meet the requirements for active membership could join as associate members but could not vote on matters related to economic welfare, or hold office or be appointed or elected as members of committees relating to economic welfare. The bylaws also provided that a member would cease to be an active member in the event of being promoted to an excluded category.

The bylaws of May 20, 1969, provided for amendment as follows:

> "*Article XIII — Amendments*
>
> These By-Laws may be added to, repealed, amended or reinacted at any time by a three-quarters vote of those eligible to vote at any general or special meeting of the Association, provided that the notice of any such meeting contains a summary of the proposed amendment or amendments."

RE: CONSTITUTION

In 1972 the association adopted a new constitution. It was argued that this change was not properly effected and therefore not valid.

Evidence was presented to the Board as to the steps taken to comply with the amending requirements. The Board finds as a fact, on the basis of the evidence accepted by it, that the requirements were met.

But, it was argued, this could not resolve the matter. Cases were referred to the Board, which, it was submitted, held that in the case of a fundamental change in the constitution of an unincorporated association which involved the relationship between the individual and such an association, that the unanimous consent of the parties themselves, that is the members, was required and the Board was referred to Carrothers, *Collective Bargaining in Canada*, page 518 and the cases therein referred to (*Free Church of Scotland* v. *Lord Overtoun*, (1904) A.C. 515; *Parker* v. *Toronto Musical Protective Association* (1900), 32 OR 305; and *Provincial Workmen's Association Equity Lodge No. 11* v. *McDonald*, (1910) 8 E.L.R. 421). The Board feels that these cases, however, are not applicable and calls attention to the fact that in the latter case in which it was held that the lodge could be dissolved only by unanimity, that this was only so in the absence of an internal rule or a public law to the contrary. In the present application the Board is of the opinion that Article XIII of the bylaws adopted on May 20, 1969, was, in effect, an internal rule, and as such governed. As has been said:

> "it is the part of equity . . . to look . . . not to the letter of the law but to the purpose of the lawgiver."
>
> (Aristotle, Rhetoric)

It is clear that *The Trade Union Act* is an enactment of the legislators of the Province of Saskatchewan, and that the purpose of the Act is

to provide the machinery whereby employees, as defined by the Act, have conferred upon them the right to bargain collectively through a trade union of their own choosing (Section 3).

On the basis of the argument submitted to it, the Board was unable to come to the conclusion that unanimity was required to amend the bylaws of May 20, 1969, or to adopt a new constitution. The new constitution was in fact adopted on December 13, 1972.

In the new constitution the following was added to the article on objects:

> "(f) To preserve the rights of collective bargaining and to bargain collectively with the Nursing Home in order to obtain or maintain Collective Bargaining Agreements."

Under Article V dealing with membership it is provided by section 5.07 of the new constitution that:

> "(a) Subject to the provisions of Article X, the Association is irrevocably and exclusively designated, authorized and empowered by each member to represent her for the purpose of collective bargaining with her employer in respect of rates of pay, wages, hours of employment and for the negotiation, execution, revision and termination of contracts and agreements with her employer covering all such matters.
>
> (b) The Association is irrevocably and exclusively designated, authorized and empowered by each member to appear, and act for her on her behalf before any Board, Court, Committee or other tribunal in any manner affecting her status as an employee or as a member of the Association and exclusively to act as her agent to represent or bind her in the presentation, prosecution, adjustment or settlement of all grievances, complaints, disputes of any kind or character arising out of the employer and employee relationship as fully and to all intents and purposes as she might or could do if personally present."

Article X, paragraphs 10.01 and 10.02 read:

> *"COLLECTIVE BARGAINING*
>
> 10.01 The right to bargain collectively for the whole membership of the Association shall lie with the Executive Board or Officers designated by it. The result of negotiations and the Agreement shall be subject to ratification by the Association or by the members affected thereby.
>
> 10.02 If ratified by a majority vote of those affected cast in favour of accepting the results of the negotiations, the Contract or Agreement shall be drafted and signed by the proper Officers of the Association and thereupon it shall be binding upon all members in good standing affected thereby."

While the constitution in itself might not necessarily authorize an application for certification on behalf of every individual member, the application for membership confers this authority as follows:

> "I hereby authorize the Association to represent me in making any application under *The Trade Union Act* and for the purpose of bargaining collectively with my employer."

and also provides for a monthly check-off of dues.

APPLICANT IS A TRADE UNION WITHIN THE MEANING OF THE ACT

The Board accordingly finds that the applicant is a trade union within the meaning of *The Trade Union Act.*

In this application the evidence presented to the Board satisfied the Board that the applicant organization stood on its own feet. As one witness put it, "We decided to form our own union totally independent and affiliated to no one."

NO DOMINATING ORGANIZATION

In spite of the similarity in name the Board was of the view that the facts here as far as management control or control by management personnel was concerned were quite different from the facts which the Board found to exist in the *Nipawin District Staff Nurses Association* application previously referred to. The Board finds as a fact that in the present application The Saskatchewan Registered Nurses Association (SRNA) is not the dominating organization and that the applicant is not under the control of that organization and rejects the submission to this effect.

CERTIFICATION GRANTED

The Board holds that the applicant is a trade union within the meaning of the Act, and on the evidence determines that it represents the majority of employees in the appropriate unit and accordingly issues a Certification Order under the Act.

(Sgd.) "CLIFFORD H. PEET,"
February 28, 1973. Chairman.

3.115 March 14, 1973

Retail, Wholesale and Department Store Union, Local 955

v.

Morris Rod Weeder Co. Ltd.

Application for certification — Four preliminary objections by respondent — 1. That application res judicata — held: present application differs from prior application, application not barred by rule of res judicata — 2. That Board has no jurisdiction to hear application — held: Board has jurisdiction as the two applications not before Board at same time — 3. That Board not a balanced Board — argument rejected, but member of Board voluntarily withdrew to balance the Board — 4. That evidence from prior application should not be used on their application — Board agrees — Only evidence considered by Board will be that heard during this hearing — Order that hearing proceed.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s.s. 5 (a) (b) (c); 10; 11 (3).

APPLICATION FOR CERTIFICATION

This is an application for certification under section 5 (a), (b) and (c) of *The Trade Union Act*, S.S. 1972, Chapter 137.

This Statute reads:

> "5. The board may make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit, but no unit shall be found not to be an appropriate unit by reason only that the employer of employees in the unit claims that his complement of employees in the unit is at less than full strength;
>
> (b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;"

OBJECTION OF RESPONDENT

At the commencement of the hearing a number of preliminary objections were raised by the solicitor for the respondent. All of these objections were dealt with in argument presented to the Board by all counsel

including counsel for the respondent, counsel for the applicant and counsel for an intervening group of employees.

Briefly stated, the objections were as follows:

1. that the application was *res judicata.*
2. that the Board had no jurisdiction to hear the application.
3. that the Board was not balanced as between employer and employee representatives.
4. that evidence from a prior application should not be considered on this application.

The Board considered each of these preliminary objections and the submissions tendered by counsel and dealt with each as herein set out.

OBJECTION 1 — THAT APPLICATION RES JUDICATA

1. The argument that the application was *res judicata* was based on the fact that there had been a prior application by the applicant to represent employees of the respondent.

PRIOR APPLICATION

The fact is that the prior application had been made on October 16, 1972. The present application was made on February 3, 1973.

Section 10 of *The Trade Union Act* gives the Board power to treat the date of the application as the only relevant date for the determination of membership for certification purposes. It states:

> "10. Where an application is made to the board for an order under clause (a) or (b) of section 5, the board may, in its absolute discretion, reject any evidence or information tendered or submitted to it concerning any fact, event, matter or thing transpiring, or occurring after the date on which such application is filed with the board in accordance with the rules and regulations of the board."

VOTE TAKEN

In the application made on October 16, 1972, the Board heard extensive and lengthy evidence and ordered a vote. In the vote the employees concerned, in the unit held appropriate, voted almost evenly but against the applicant union. The vote was 71 to 69.

In the vote some 145 employees were eligible to vote and 5 employees abstained from voting. In view of the fact, that a majority of the employees eligible to vote constituted a quorum and a majority of those eligible to vote actually voted the Board dismissed the application filed on October 16, 1972. In the vote, employees entitled to vote were, of course, only employees who had been employed on October 16, 1972, and were at the date of the vote still employees of respondent.

PRESENT APPLICATION DIFFERS FROM PRIOR APPLICATION

The present application differs from the earlier application in that the present application is with reference to employees employed by the respondent on February 3, 1973 — the date of filing of the present application, and not with respect to employees employed on October 16, 1972. It is also noted that in the present application the applicant estimated 200 employees in the proposed bargaining unit as of February 3, 1973. The issue before the Board in the present application accordingly differs in these respects from the issues determined on the prior application.

DOCTRINE OF RES JUDICATA NOT APPLICABLE

If the issues raised were identical, it is possible that *res judicata* could apply. Reference is made to Halsbury's *Laws of England*, Third Edition, Volume 15, at page 181 (paragraph 355) which reads as follows:

> "The most usual manner in which questions of *estoppel* have arisen on judgments *inter partes* has been where the defendant in an action raised a defence of *res judicata*, which he could do where former proceedings for the same cause of action by the same plaintiff had resulted in the defendant's favour, by pleading the former judgment by way of *estoppel*. In order to support that defence it was necessary to show that the subject matter in dispute was the same, that is to say that everything that was in controversy in the second suit as the foundation of the claim for relief was also in controversy or open to controversy in the first suit, that it came in question before a court of competent jurisdiction, and that the result was conclusive so as to bind every other court."

Res judicata normally applies to courts of record. The Labour Relations Board, of course, is not a court but rather an administrative tribunal and there appears to be authority in law by which *res judicata* could apply to decisions of the Board if the matters in issue were identical. Halsbury, again, states at page 212 (paragraphs 396 and 398) of the volume already referred to that:

> "The doctrine of *estoppel* by record has been extended by analogy to the decisions of all tribunals which have jurisdiction, whether by the law of this country, or by the consent of parties, . . . to whose tribunals the parties have . . . submitted themselves.
>
> As respects the many other tribunals which have by statute been given jurisdiction in particular matters, it seems that the general principle that the law has respect not only to courts of record and proceedings in those courts but also to all other proceedings where the person who gives judgment has judicial authority is applicable."

The Board accordingly holds that while *res judicata* could apply in a matter before the Board, that in this application the facts do not bring the doctrine into play.

APPLICATION NOT BARRED BY RULE OF RES JUDICATA

In this determination, the Board is in accord with the position taken by the Ontario Labour Relations Board and set out in a certification application by *Amalgamated Meat Cutters and Butcher Workmen of North America* v. *Arnold Markets Limited* (reported as case No. 16,221 in 62 C.L.L.C.), in which the Ontario Board dealt with the rule of *res judicata* as follows:

> "This case again raises the question as to the evidentiary effect of a previous decision of the Board when relied on as proof of matters in issue in another proceeding before it. The common law courts deal with this question under the rules of *res judicata* or *estoppel*. These rules, of course, are designed to bar relitigation of adjudicated issues on the basis that as a matter of public policy there should be an end to litigation and that a party should not be twice vexed for the same cause or again required to prove a matter already adjudicated in his favour. The general rule at common law is that an existing final judgment rendered upon the merits by a court of competent jurisdiction is binding upon and conclusive evidence for or against the parties and their privies in any subsequent actions involving any matters actually decided and which might have been litigated in respect of those matters in the first action. (see the authorities referred to in *Wright Assemblies Limited*, Board file 966-61-U and Phipson on Evidence, 9th ed. pp. 427-444). The conclusiveness of the judgment includes not only the findings but also the grounds of the decision where these can be clearly discovered from the judgment itself (see Phipson ibid p. 427).
>
> It seems obvious that as a general rule, once a fact or question has been put in issue and directly adjudicated upon in a proceeding before the Board, such adjudication should constitute a final determination of the matter between the same parties and conclusive evidence for or against them in any other proceeding before the Board which involves the same question or fact. It is our opinion that the Board ought, as a general rule, to apply a principle analogous to that of *res judicata* or *estoppel* with the result that it must accept an existing decision made by it on the merits as conclusive evidence for or against the parties or their privies in any subsequent proceeding brought before it by the same parties and involving the same questions or facts decided by it in the first decision."

In the present application, as earlier indicated, the same questions or facts decided by this Board in the first decision are not applicable with

respect to the present application. The Board accordingly holds that the application is not barred by the rule of *res judicata*.

It was argued by counsel for the respondent that the Board should, however, as a matter of policy, decline to deal with the application, that the matter of the prior application should determine the issue for a reasonable period and reference was made to the fact that in Ontario there is a statutory six month waiting period. Whatever the merits of such a provision, it is not a statutory requirement of our Act. Counsel for a group of intervening employees, on the other hand, suggested a 30-60 day period, presumably referring to the 30-60 day period prior to the anniversary date of the original decision.

APPLICATION NOT BARRED ON ANY POLICY BASIS

In this application the difference in the dates of the applications (and it is such dates which govern — not the dates of determination) is substantial — some 3½ months, the number of persons in respect of whom the application is made appears to be substantially increased, and the application is in respect of persons employed on February 3, 1973 — not October 16, 1972. Under the circumstances, and in view of the close vote on the prior application, the Board is not prepared to bar the present application on any policy basis, as was suggested to it.

OBJECTION 2 — THAT BOARD HAD NO JURISDICTION TO HEAR APPLICATION

2. The second submission to the effect that the Board did not have jurisdiction to hear the present application was based on the "time" argument. In presenting this argument, the fact was again overlooked that this was not an identical application. The earlier application was in respect of employees working on October 16, 1972. While the earlier application was not formally dismissed until February 9, 1973, the fact nevertheless remains that it was not an identifical application and accordingly two such applications were not before the Board at the same time. The Board accordingly rejects the argument that it does not have jurisdiction to deal with the present application in respect of employees employed by the respondent on February 3, 1973.

TWO APPLICATIONS ARE NOT BEFORE BOARD AT SAME TIME

In any event the present application first came before this Board as such at the sittings of the Board which commenced on March 7, 1973, and accordingly the submission that two applications are before the Board at the same time is rejected. In this connection, attention is called to section 11 (3) of *The Trade Union Act* which provides:

> "For the purpose of this Act, an application shall be deemed to be pending before the board on and after the day on which it is first considered by the Board at a formally constituted meeting . . ."

OBJECTION 3 — BOARD NOT A BALANCED BOARD

3. The respondent also, in effect, disputed the jurisdiction of the Board to hear the matter on the basis that the Board was not a balanced Board. The Court of Appeal of the province of Saskatchewan rejected this argument as long ago as 1960 in *British American Oil Company Limited* v. *Saskatchewan Labour Relations Board*, 33 WWR (NS) at page 44 when it stated, in the judgment delivered by Mr. Justice Gordon, Acting Chief Justice, as follows:

> "Counsel for the applicant contends that the legislature has so constituted the board that if the representation on the hearing of an application before it is out of balance, the board would have no jurisdiction to hear the application before it. Speaking generally, we are of the opinion that sec. 4 does not support such a contention. It is true that the legislature has directed that the board shall be constituted of certain representatives, but when once appointed they become the labour relations board with quasi-judicial duties and very important administrative duties, which require the exercise of the utmost good faith on the part of all members of the board, and we are of the opinion that when they are so appointed they become members of the board as a whole, and to hold otherwise would be to suggest that they are there to advocate the cause of the faction that they represented when appointed.
>
> Subsec. (2) of sec. 4 provides that a majority of the members of the board shall constitute a quorum and we are of the opinion that this means just what it says."

This matter had been raised on a prior application before the Board and at that time Mr. C. T. Hazen in dealing with the matter, and in reviewing the manner in which the Board functions, stated, in part:

> "The Board was appointed by the Lieutenant Governor in Council according to the provisions of section 4, paragraph 1, of *The Trade Union Act*, which says that the Board is to be composed of five members and members of the Board shall be selected so that employers and organized employees are equally represented. I think a great deal depends here on the purpose of this particular provision. Did the Legislature think when they made this provision that employers and employees should be equally represented, did they think that in that way they would get a balance of voting power that might help resolve issues where there is some contention or did they have some other purpose in mind than that. It is my opinion and I have given it a great deal of thought, that there is some other purpose in mind and I would like to review this in this respect.
>
> If you look at section 4, paragraph 10, you will see that each member of the Board swears that he will faithfully and impar-

tially, to the best of his judgment, skill and ability, execute and perform the office of a member, and there is no doubt or equivocation at all in that oath; and my impression is that any member of the Board who accepts the appointment and takes that oath is therefore bound by it in the same way that anyone else is bound by an oath before a court.

I have observed over many years that people with whom I have talked about Labour Board matters . . . have been quite biased in their assessment of the decisions of the Board as the people talking about it have felt that the Board had a tendency, a strong tendency, to favour employers or employees depending on how it was appointed and how it was selected. Whether or not this was true in the past I haven't any opinion excepting that arising from my own experience I am inclined to think that it isn't true.

When I agreed to let my name be submitted for appointment to the Labour Relations Board, I was nominated by the Retail Merchants' Association, and I was asked to stand as a member of the Board as representing the group of employers. I also received an endorsement from the Saskatchewan Chamber of Commerce and I don't think there would be any doubt on which side of the philosophical fence I sit.

I was quite surprised, in fact, when I was asked to accept the appointment. It really wasn't anything to the surprise and the realization that came to me as I sat with the members of this Board that all members of this Board took their oath of offices seriously and as sincerely as I did. As you may have observed each member of the Board takes many notes of the evidence and proceedings and I have looked at them and there isn't a habitual doodler here. They are not just drawing pictures on paper having made up their minds in advance.

Our chairman guides our considerations, particularly in points of law, and both he and our Secretary are often asked to recall precedents and practices of earlier Boards. Every member is given a full opportunity to ask questions and to express his point of view. Then the Chairman gives ample time to us all so that we may be fully satisfied and hopefully reach agreement and in this I think I may say Mr. Chairman, and I know you have said this to people, that it is not uncommon and, in fact, it is very common, that we reach a unanimous stand on many, many of the decisions that we have to make, and very often I may say that an employee representative may move a decision in favour of an employer and employer representative may move a decision in favour of an employee. This is quite common.

Actually, the suggestion that we should retire on account of some bias in our appointment has hurt all of us. I think there are

> cases where it should be used, and in some instances the suggestion is put, the Board goes out and considers it, and they the Board has a voluntary retirement. This has occurred on some other occasions.
>
> I recently had the privilege of reading a little book, a little treatise on the Supreme Court, and I would like to quote something from this and, although I would not have the temerity to suggest that members of this Board are in the same position as members of the Supreme Court, nevertheless this would be interesting to you.
>
> Honourable Edward Blake was Minister of Justice in 1875 and there was a considerable argument at that time as to whether or not there should be appeals to the Privy Council. The Canadian Government was very much opposed to appeals being taken there, that is some people were on one side and some of the other. The British took the position that because of the particular composition of our racial breakdown and religious breakdown and other prejudices in the new country, that an unbiased court could be very, very difficult to find and Mr. Blake said, "nor can I conceive anything calculated more deeply to wound the feelings of Canadians than an insinuation that impartial decisions are not to be expected from their judges". This is the position that I take and I just thought that this — this has been bothering me for a long time and I wanted to be able to say this publicly. This is the position I take and when we go out to consider such a request, this is the argument that I put.
>
> I come back to the point of the appointment that members of the Board are appointed so that employers and organized employees are equally representative and they also come from different areas. Mr. Graham, the other Management member on the Board, is a construction man and I am a small merchant. He has a great deal of experience with labour problems, labour unions, and I haven't had any. Union or labour representatives and employee representatives are also diversified and I think the object of the Legislature was simply to get as broad a base of opinion as possible in the arguments that go into the Board of making decisions, that we bring down points of view from widely separated fields and in this way we can arrive at more just decisions and fairer decisions."

In general, the members of the Board support the views of Mr. C. T. Hazen in this matter, which, incidentally, are in accord with the view expressed by our own Court of Appeal in the case quoted.

ARGUMENT REJECTED

The argument placed by the respondent in this matter is accordingly rejected.

BOARD BALANCED

Having said that, the Board has decided that in this case it might be desirable to balance the Board and Mr. C. C. Cave is accordingly withdrawing on a voluntary basis. The Board states categorically that this is not to be regarded as a precedent. In this case, however, it appears that there may be some "heat" between the parties and the Board feels, under the special circumstances here that it is not only important that justice be done (which we feel would be the situation in any event) but it is also important that all parties concerned should realize that this is the case.

OBJECTION 4 — RE: EVIDENCE FROM PRIOR APPLICATION

4. The fourth objection, the Board feels, was based on a misapprehension of the facts. It was submitted that evidence from the prior application should not and could not be used on this application. The Board concurs.

The fact of the matter is that authorization cards filed on the first application were not filed on this application — in fact the authorization cards from the first application were still in the possession of the Board when the present application was made and had not at that time been returned to the applicant.

EVIDENCE FROM PRIOR APPLICATION WILL NOT BE HEARD ON NEW APPLICATION

This application is a new application. Evidence heard on the earlier application does not apply to this application. This application will only be considered on evidence presented to the Board during this hearing.

HEARING TO PROCEED

The Board accordingly directs the hearing to proceed.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

March 14, 1973.

3.116 March 15, 1973

Health Sciences Association of Saskatchewan

v.

University Hospital, Saskatoon
and
Service Employees' Union Local 333

Application for certification held premature — No constitution ever adopted — No officers elected in accordance with a constitution — Therefore, application signed by purported president a nullity — No authorization cards submitted with application — Certification denied in this instance.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s.s. 2 (l) (j); 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

This is an application to the Board where the old adage — "more hurry . . . less speed" unfortunately appears to apply — as has been said "he hurries less and usually makes more progress" (Roy L. Smith).

FACTS

The Board finds, on the evidence presented to it, and accepted by the Board, that the following facts have been established:

1. A meeting was held at Bethany Hospital in Saskatoon on October 30, 1972. It is common ground that it was called by one or more Saskatoon City Hospital employees and that it was attended by a group of Saskatoon City Hospital employees. Mr. Molloy, a Saskatoon solicitor, was present.

   Mr. Molloy was introduced to the group. A Mrs. Iverson spoke briefly to the meeting on the new *Trade Union Act* (Saskatchewan) and Mr. Molloy commented on it. A motion was passed to set up a "Para-Medical bargaining unit" and officers were elected — a "Don McRobbie" (who was not present) as chairman, a Marg Webb as vice-chairman, a Marion Iverson, as secretary, and a Sharon Coakwell as treasurer. In her evidence Mrs. Iverson stated that she had asked Mr. McRobbie prior to meeting if he would let his name stand for president and he had stated he would "think it over". In his own evi-

dence, however, Mr. McRobbie stated that his first inkling of the matter was when Mrs. Iverson told him of the fact after the meeting and that he had no idea that he was going to be honoured in this way.

The minutes of the meeting state that "the executive is to meet with Mr. Molloy regarding drawing up a constitution for the organization" but the minutes do not indicate that any motion was adopted nor was any evidence tendered to this effect. Mrs. Iverson stated in her evidence that the minutes accurately reflected what took place. The Board accepts her evidence and finds as a fact that no motion was passed at the meeting authorizing the executive or any group to draw up a constitution.

2. A meeting was held in the office of Mr. Molloy on the following day, October 31st. The evidence is that no documents were signed at this meeting although there was some discussion on a constitution. Apparently a proposed constitution and bylaws were agreed to at the meeting by the small group present. Minutes of the meeting were not recorded.

3. A further meeting was held at Bethany Hospital on November 2nd. Notice of this meeting was given verbally to certain Saskatoon City Hospital employees. It was held after 5 p.m. and apparently some persons were also present who were employees of other hospitals, although basically those present were from Saskatoon City Hospital. Minutes of this meeting were available to the Board.

   The minutes revealed that "Mr. Molloy went through the proposed constitution, explained and discussed same". The minutes clearly show that at this stage the constitution was still only a "proposed" constitution. There is no evidence that it was adopted either at this meeting or on any other subsequent date.

   The minutes of this meeting also show that application forms for membership in the Health Sciences Association of Saskatchewan were distributed and signed.

4. Evidence also established to the satisfaction of the Board, that no general meeting of any kind of the purported Association has been held since the meeting of November 2nd.

WHETHER APPLICANT IS A TRADE UNION

An applicant for bargaining rights has the responsibility to establish to the Board that it is, in fact, a trade union within the meaning of the Act.

Section 2(1) defines a trade union as:

> "'trade union' means a labour organization that is not a company dominated organization."

Section 2(j) reads:

> "'labour organization' means an organization of employees, not necessarily employees of one employer, that has bargaining collectively among its purposes;"

It is clear that an applicant must establish that it has the right to be certified as the representative of a group of employees for the purpose of bargaining collectively. The organization must qualify as a bona fide trade union within the meaning of the Act. The applicant must have an organic structure — it must have such a thing as a constitution containing, among other items, provisions for the election of officers.

APPLICATION PREMATURE

In the present application, there is no evidence that the Health Sciences Association has ever adopted a constitution. The Board accordingly finds that the application for certification is premature.

The Board adopts the views expressed in the *Ontario Canadian Brotherhood of Welders & Burners* case (2 CLLC — Case No. 16, 177) as follows:

> "It is, of course, elementary that the applicant organization could not come into existence until the adoption of its constitution nor could it have officers as such until that time. Any purported election of officers to the applicant organization before the adoption of its constitution would, therefore, be premature. Whatever may have occurred before the adoption of the applicant's constitution, it is abundantly clear from the evidence that no officers have been elected since that date."

The same situation exists in this case. The purported election of officers was on October 30th. The constitution was discussed on October 31st but even on November 2nd was only a "proposed" constitution.

The evidence established that no further meeting was held prior to November 22nd (the date of the application herein), nor has the earlier purported election of officers been approved or new officers elected.

As stated in the Ontario case quoted, how may a trade union perform its functions, achieve its purposes, or exercise its rights, or discharge its obligations, unless it has duly authorized persons by and through whom it may act and be bound? Without officers, or other duly authorized persons, the applicant may only act and be bound through a general convention of its members.

As was said by Harris J. of the New Brunswick Court of Appeal in *The King* v. *The Labour Relations Board* (Canadian Labour Law Reporter (1949-50), Case 15, 038) — a trade union "in the ordinary sense" is "a body with a charter or constitution with properly elected officers".

NO OFFICERS ELECTED IN ACCORDANCE WITH A CONSTITUTION

In the instant case, even if the proposed constitution has been adopted, and the Board has found as a fact that such was not the case, the applicant had no officers elected in accordance with such constitution and has accordingly failed to establish its status as a trade union, a requirement of substance in the application.

APPLICATION A NULLITY

It accordingly follows that the application signed by McRobbie, the purported president, is, in effect, a nullity, and cannot be acted upon by the Board. The objection raised by the certified union (the intervener) goes to the very root of the application for certification by the applicant herein.

NO AUTHORIZATION CARDS SUBMITTED WITH APPLICATION

While the above, in the opinion of the Board, requires that the application be dismissed, the Board feels that it should draw the attention of the applicant, and others who may file applications for certification, that in this case another ground existed which would have required dismissal of the application.

The Rules of the Board require applicants to file:

> "at the same time as you submit your application, also submit your membership cards, authorization cards, check-off cards or other evidence of employee support, together with a sample of the cards submitted . . ."

(see paragraph 5 in form 1 in the Rules)

In this case the applicant filed membership card applications but such applications did not authorize the applicant to represent the individuals signing the applications in collective bargaining. This defect would, in the opinion of the Board, have been a vital bar to the success of the application, as no evidence acceptable to the Board was presented which clearly established that all applicants for such membership desired the applicant to represent them for purposes of collective bargaining with their employer.

In the opinion of the Board the words "authorization cards" clearly require that cards be submitted containing an authorization of the individual members to the applicant to bargain collectively on behalf of such member employees, and particularly in the absence of "other evidence of employee support".

In view of the decision herein, it was not necessary for the Board to deal with the conflicting views advanced as to the appropriateness of the proposed unit and no finding is made on that issue.

CERTIFICATION DENIED

The Trade Union Act, S.S. 1972, Chapter 137, which came into force on August 1, 1972, clearly allows the certification of organizations representing employees, professional or otherwise, in order that such organizations may bargain collectively on behalf of such employees. The Board accordingly wishes to make it very clear that the disposition of this application does not in any way preclude the right of professional persons to apply through properly established organizations which are trade unions within the meaning of the Act for certification.

(Sgd.) "CLIFFORD H. PEET,"
March 15, 1973. Chairman.

3.117 March 15, 1973

Health Sciences Association of Saskatchewan

v.

City Hospital, Saskatoon
and
Service Employees' Union Local 333.

Application for certification — Previous certification of intervening union — Application in time — Possibility of overlap of members of units — Applicant held not a trade union — No constitution — No officers elected according to a constitution — No authorization cards submitted with application — Overlap to be considered if further application made in future.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s.s. 2 (l) (j); 5 (a) (b) (c) (k) (i).

APPLICATION FOR CERTIFICATION

This is an application for certification by the applicant, Health Sciences Association of Saskatchewan, in respect of certain persons employed by City Hospital, Saskatoon.

PREVIOUS CERTIFICATION OF INTERVENING UNION

The intervener, Service Employees' Union Local No. 333, is already certified as bargaining agent for certain employees of the respondent under a certification order dated April 8, 1946, and which has been amended on numerous occasions thereafter, the latest amendment having been granted by the board on December 9, 1971.

APPLICATION BROUGHT IN TIME

The unit applied for by the applicant differs from the unit certified to the intervener but there is the possibility of a certain overlap as the applicant desires to include in the unit applied for a number of employees who may already be certified to the intervener under the order of April 9, 1946, as amended to December 9, 1971. The existing bargaining agreement between the respondent and the intervener, which was placed in evidence and is still in force, was effective from January 1, 1971. The anniversary date of the agreement is accordingly January 1st and under section 5(k) (i) of the Act the present application in respect of such employees was brought in time. The section provides:

"5. The Board may make orders;

(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:

(i) there is a collective bargaining agreement in existence and an application is made to tbe board to rescind or amend the order or decision during a period of not less than thirty days or more than sixty days before the anniversary of the effective date of the agreement;"

It may be that on a further application, if such should be made, the apparent overlap can be cleared up in evidence as it may be that the apparent overlap is only by reason of a difference in job descriptions covering the same job used in the present application and in the existing certification order.

APPLICANT NOT A TRADE UNION — NO CONSTITUTION FORMALLY ADOPTED

The Board finds, on the evidence presented to it in this application, that the applicant has not met the onus on it to satisfy the Board that it is a trade union within the meaning of the Act, nor, in fact, to satisfy the Board that the applicant has been duly constituted as an organized body. The minutes of the meeting held on November 2, 1972, which were filed in evidence, for one thing do not show that the proposed constitution was ever formally adopted. In any event, even if the constitution had been formally adopted, the evidence is to the effect that the officers of the purported association were elected prior to that date, that is prior to the proposed constitution being discussed by the founding members.

An applicant for bargaining rights has the responsibility to establish to the Board that it is, in fact, a trade union within the meaning of the Act.

Section 2 (l) defines a trade union as:

"'trade union' means a labour organization that is not a company dominated organization."

Section 2(j) reads:

"'labour organization' means an organization of employees, not necessarily employees of one employer, that has bargaining collectively among its purposes;"

It is clear that an applicant must establish that it has the right to be certified as the representative of a group of employees for the purpose of bargaining collectively. The organization must qualify as a bona fide trade union within the meaning of the Act. The applicant must have an organic structure — it must have such a thing as a constitution containing, among other items, provisions for the election of officers.

It has been held, and the Board adopts the views expressed in the *Ontario Canadian Brotherhood of Welders & Burners* case (2 CLLC — Case No. 16,177) as follows:

> "It is, of course, elementary that the applicant organization could not come into existence until the adoption of its constitution nor could it have officers as such until that time. Any purported election of officers to the applicant organization before the adoption of its constitution would, therefore, be premature. Whatever may have occurred before the adoption of the applicant's constitution, it is abundantly clear from the evidence that no officers have been elected since that date."

The same situation exists in this case. The purported election of officers was on October 30th but there is no evidence that the proposed constitution was even available to the members until November 2nd. Even if the constitution had been validly adopted there is no evidence that officers were elected following such adoption. The present application was filed with the Board on November 3rd.

As stated in the *Ontario* case quoted, how may a trade union perform its functions, achieve its purposes, or exercise its rights, or discharge its obligations, unless it has duly authorized persons by and through whom it may act and be bound? Without officers, or other duly authorized persons, the applicant may only act and be bound through a general convention of its members.

As was said by Harris J. of the New Brunswick Court of Appeal in *The King* v. *The Labour Relations Board* (Canadian Labour Law Reporter (1949-1954), Case 15, 038) — a trade union "in the ordinary sense" is "a body with a charter or constitution with properly elected officers".

NO OFFICERS ELECTED IN ACCORDANCE WITH A CONSTITUTION

In the instant case, even if the proposed constitution had been adopted, the applicant had no officers elected in accordance with such constitution and has accordingly failed to establish its status as a trade union — a requirement of substance in the application.

APPLICATION A NULLITY

It accordingly follows that the application signed by McRobbie, the purported president, is, in effect, a nullity, and cannot be acted upon by the Board.

While the above, in the opinion of the Board, requires that the application be dismissed, the Board feels that it should draw the attention of the applicant, and others who may file applications for certification, that in this case another ground existed which would have required dismissal of the application.

The Rules of the Board require applicant to file:

> "at the same time as you submit your application, also submit your membership cards, authorization cards, check-off cards or other evidence of employee support, together with a sample of the cards submitted . . ."

(see Paragraph 5 in form 1 in the Rules)

NO AUTHORIZATION CARDS FILED WITH APPLICATION

In this case the applicant filed membership card applications but such applications did not authorize the applicant to represent the individuals signing the applications in collective bargaining. This defect would, in the opinion of the Board, have been a vital bar to the success of the application, as no evidence acceptable to the Board was presented which clearly established that all applicants for such membership desired the applicant to represent them for purposes of collective bargaining with their employer.

In the opinion of the Board the words "authorization cards" clearly require that cards be submitted containing an authorization of the individual members to the applicant to bargain collectiely on behalf of such member employees, and particularly in the absence of "other evidence of employee support".

In view of the decision herein, it was not necessary for the Board to deal with the conflicting views advanced as to the appropriateness of the proposed unit and no finding is made on that issue.

The Trade Union Act, 1972, Chapter 137, which came into force on August 1, 1972, clearly allows the certification of organizations representing employees, professional or otherwise, in order that such organizations may bargain collectively on behalf of such employees. The Board accordingly wishes to make it very clear that the disposition of this application does not in any way preclude the right of professional persons to apply through properly established organizations which are trade unions within the meaning of the Act for certification.

(Sgd.) "CLIFFORD H. PEET",
Chairman.

March 15, 1973.

3.118 March 23, 1973

Retail Clerks International Association

v.

Mid Western News Agency Ltd.

Application for certification — Determination of appropriate unit — Whether certain persons were "employees" within the meaning of The Trade Union Act — None of the persons in question basically management — No power to hire and fire — No primary responsibility to perform functions of a managerial capacity — No confidential capacity in respect of industrial relations — All of employees in question held to be employees within the meaning of s. 2 (f) (ii) of the Act — Certification granted.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s.s. 2 (f) (i) (ii); 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

This is an application for certification under section 5 (a), (b) and (c) of *The Trade Union Act, 1972*, Chapter 137, which reads:

> "5. The board may make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit . . .;
>
> (b) determining what trade union, if any represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;"

DETERMINATION OF APPROPRIATE UNIT

The first question for decision by the Board in this application was the determination of a unit of employees which would be appropriate for the purpose of bargaining collectively. A considerable amount of evidence was led on this item in which the respondent, Mid Western News Agency Ltd., sought to establish that certain employees whom the respondent referred to as shipping foreman, returns foreman, backroom supervisor, office supervisor, accountant, route salesmen and driver salesmen, should be excluded from the unit. It was argued by the respondent that these employees fell on the management side of the fence.

The applicant, on the other hand, argued that all these employees fell within the definition of "employee" in the Act and should be included in the bargaining unit.

An employee, under the Act, is defined, so far as is relevant on this application, as follows:

Section 2. "In this Act:

(f) 'employee' means:

(i) any person in the employ of an employer except any person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or any person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer;

(ii) any person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining;"

NONE OF PERSONS IN QUESTION BASICALLY MANAGEMENT

The evidence clearly established, in the opinion of the Board, that none of the persons involved were basically management.

NO POWER TO HIRE AND FIRE

It was suggested that some of the employees in question had the power to hire and fire. This was apparently unknown, however, even to some of these employees, prior to the hearing. Several of these emplyees gave evidence and indicated in one case that, "I have never fired. I would not hire myself. I do not feel I have this power." Another witness said, "I have never hired but I would recommend. I have recommended firing but I have never done it myself." Anything of a hiring or firing nature, the Board holds, on the evidence accepted by it, was of a very casual nature. There was not real authority vested in any of these employees, in spite of the job descriptions used by the respondent employer.

NO PRIMARY RESPONSIBILITY TO PERFORM MANAGERIAL FUNCTIONS

It should be noted that in the definition of "employee" in the Act by section 2 (f) (i) it is provided that any person in the employ of an employer is an employee except any person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character. It is clear that none of the employees in question here had a "primary responsibility" to exercise authority and that none of them actually performed functions which were of a "managerial character" — certainly not as a "primary responsibility". It is also clear that none of the employees in question were persons who were regularly acting in a confidential capacity in respect of the industrial relations of the employer.

The Board feels that it must be stressed that the *primary* responsibility must be to exercise the authority and the *primary* responsibility must be to perform functions of a managerial character. In this instance some of these employees did exercise some responsibility and may have exercised some functions which were of a managerial character but to a very limited degree and certainly did not exercise a "primary responsibility" in this regard.

NO EMPLOYEES ACTED IN CONFIDENTIAL CAPACITY IN RESPECT OF INDUSTRIAL RELATIONS

It is equally clear that none of the employees with which we were involved acted in a confidential capacity in respect of "industrial relations". It should be noted that the section does not except a person who is acting in a confidential capacity but only those acting in a confidential capacity in respect of industrial relations.

APPLICATION OF S.2(f)(ii)

Attention is also called to the fact that under section 2(f)(ii) of the Act any person engaged by another person — in this instance the employees in question — who performs services for the employer can be the subject of collective bargaining where the Board is of the opinion that "the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining." The Board feels that this is the situation in this case, and even aside from the definition in section 2(f)(i) the Board feels that the persons with whom we are concerned here could be held, in any event, to be employees within the wide discretion given to the Board under section 2(f)(ii).

CERTIFICATION GRANTED

In this application the Board had clear evidence of support from almost the entire staff by which the employees authorized the applicant union "to represent me for the purpose of collective bargaining and handling of grievances", as the authorization cards set it out. There is accordingly no difficulty in determining that the applicant represented a majority of employees in the unit found to be appropriate for collective bargaining purposes and the Order issued accordingly.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

March 23, 1973.

3.119 April 6, 1973

Retail, Wholesale and Department Store Union, Local 955

v.

Morris Rod Weeder Co. Ltd.
and
Certain Employees

Application for certification — Determination of appropriate unit of employees — Applicant held to be trade union within meaning of The Trade Union Act — Whether applicant represents a majority of employees — Board found employer influence in circulation and signing of petition against the applicant — Evidence of petition rejected — Applicant found to have majority support — Certification granted.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s.s. 3; 5 (a) (b) (c); 10; 11.

On March 14, 1973, the Board handed down a decision dealing with certain preliminary objections raised on this application and directed that a hearing proceed on the merits of the application.

APPLICATION FOR CERTIFICATION

This was an application for certification under section 5(a), (b) and (c) of the Act. The application was filed in the month of February but was first formally before the Board in the month of March, 1973.

DETERMINATION OF APPROPRIATE UNIT OF EMPLOYEES

A primary duty of the Board, as in all certification applications, is to determine an appropriate unit of employees for the purpose of bargaining collectively.

The applicant proposed that an appropriate unit should be:

> "All employees employed by Morris Rod Weeder Co. Ltd. in the city of Yorkton in the province of Saskatchewan at its place of business operations located at 85 York Road, Yorkton, Saskatchewan, except any person or employee whose primary function is to actually exercise authority and actually perform functions which are entirely of a managerial capacity, or any person who is regularly acting in a confidential capacity in respect of

the industrial relations of the employer, and excepting all those employees employed in the following departments of the employer: (a) Office; (b) Parts Department; (c) Crating Department (including assemblage of finished parts therein); (d) Loading Department; (e) Experimental Department; (f) Transportation Department; (g) Service Department; (h) Shipping Dock Department, constitute an appropriate unit of employees for the purpose of bargaining collectively."

RESPONDENT COMPANY WANTS UNIT EXPANDED

A great deal of evidence was led both by the applicant and the respondent as to the proper unit which would be appropriate for collective bargaining. The applicant desired to restrict the unit to the employees set out in the unit proposed by it. On the other hand, the respondent company argued, and led evidence, in support of a contention by it that the unit proposed by the applicant was an unduly restricted unit and that a somewhat larger unit was necessary to make a unit truly "appropriate" — in other words the company argued, in effect, that if a unit was to be certified for collective bargaining purposes that a number of deletions proposed by the applicant should be removed and the unit expanded in size.

Evidence was put before the Board to the effect that a substantial addition had been added to the plant of the respondent since the date of an earlier certification application in October 16, 1972. As a result of this addition, and as a result of a number of changes in the place of work of a number of departments, it was submitted that a number of persons who were not included in a unit previously found to be appropriate should now be placed in the unit. While this submission was not fully accepted by the Board, the Board concluded, on the basis of the evidence accepted by it, that the submission was substantially valid and accordingly held that employees in the Crating Department (including assemblage of finished parts therein); the Loading Department and the Shipping Dock Department should be included in the unit. The Board accordingly found and held that the appropriate unit in the plant of the respondent as presently organized was:

> "All employees employed by Morris Rod Weeder Co. Ltd. in the City of Yorkton, in the province of Saskatchewan, at its place of business operations located at 85 York Road, Yorkton, Saskatchewan, excepting all those employees employed in the following departments of the employer:
>
> (a) Office; (b) Research & Development Department; (c) Service Department; (d) Transportation Department; (e) Parts Department."

It should possibly be noted that the "experimental department" and the "research and development department" are actually one and the same department.

Strangely enough, in evidence of support filed by the applicant, were employees employed in all three of the departments which were added to the unit as a result of submissions made by the respondent.

APPLICANT IS TRADE UNION WITHIN MEANING OF THE ACT

The second point for determination was the status of the applicant as a trade union within the meaning of the Act. This was not disputed and the Board found that such was the case.

DID APPLICANT REPRESENT MAJORITY OF EMPLOYEES: INTERVENERS' EVIDENCE

The question then arose — did the applicant represent a majority of the employees in the unit of employees found to be appropriate for collective bargaining purposes?

On the latter point evidence was put before the Board both by the applicant and a group of interveners. The interveners were granted status by the Board to appear by reason of the fact that they were employees within the proposed bargaining unit.

Objection was raised by the applicant when the interveners attempted to lead evidence having to do with matters which arose after the date on which the application was filed by the Board. Under section 10 of the Act, the Board could have refused to hear such evidence. Section 10 of the Act reads:

> "10. Where an application is made to the board for an order under clause (a) or (b) of section 5, the board may, in its absolute discretion, reject any evidence or information tendered or submitted to it concerning any fact, event, matter or thing transpiring, or occurring after the date on which such application is filed with the board in accordance with the rules and regulations of the board."

The section, it should be noted, gives an "absolute discretion" to reject such evidence. In spite of this the Board decided that this was a proper case in which to allow such evidence to be put forward, and the interveners were accordingly allowed to lead such evidence. The evidence, broadly speaking, related to a petition circulated among certain employees.

ROLE OF EMPLOYER RE: PETITION

Counsel for the company participated in the argument on this point. Strictly speaking it is the opinion of the Board, for reasons hereinafter set out, that the company should have had no interest in such a petition, one way or the other. An employer is not entitled to, and should not interfere in the selection of a representative by employees for purposes of collective bargaining. This is strictly a matter for employees to decide themselves.

By the terms of the Act, employees are entitled to the benefit of collective bargaining and section 3 of the Act guarantees to them certain rights in this respect.

> "3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing..."

It must be noted that the statute says "of their own choosing" — in other words it is the prerogative of employees to select the vehicle — the trade union — through which they can enjoy the benefit of collective bargaining. This selection process should not be the concern of the employer in any way whatsoever in so far as the selection of the vehicle — the trade union — is concerned and accordingly counsel for the company should have exercised a "neutral" role on the matter of the petition, which was clearly related to whether the employees desired to have the applicant as the chosen vehicle — the chosen trade union — through which they could receive the benefits of collective bargaining granted to them by the Act.

The employer is very much restricted in what he can do on a certification application. The Act, in fact, sets out the law clearly in section 11 (1) (g), as follows:

> "11. — (1) it shall be an unfair labour practice for an employer, employer's agent or any other person acting, on behalf of the employer:
>
> (g) to interfere in the selection of a trade union as a representative of employees for the purpose of bargaining collectively;"

EMPLOYER INFLUENCE

In view of this legislation it is most unfortunate that this employer sought to influence its employees as to the decision which they alone should make on the matter.

There was uncontradicted evidence that Mr. Lorne McLaren, Manager of the respondent, addressed the employees at a number of meetings in the plant on February 5th. Mr. Bob Stephens, production manager, stated that there were some four meetings and that the meetings were called by Mr. McLaren. The reason for the four meetings was to enable Mr. McLaren to speak to employees in each of the four shifts. Mr. Stephens stated that every member of the staff was at one meeting or the other.

While Mr. McLaren did deal with a number of items in his talk, Mr. Stephens stated that the applicant union was one of the matters dealt with. This was corroborated by a number of other witnesses.

The evidence further revealed that steps were taken to organize a petition in opposition to the union application. It is not without significance that it was on the very next day after these meetings that certain persons got together to launch the petition.

One witness who gave evidence in support of the petition even said "that is what 'they' want us to do." The petition is accordingly suspect from the start.

The names obtained on the petition were obtained during the period between February 6th and February 15th, that is after the meetings held by McLaren.

Under section 10 of the Act, the Board is entitled, in its absolute discretion, to reject any evidence concerning any fact, event, matter or thing transpiring or occurring after the date on which the application was filed. All the activity with respect to the petition took place after that date. Moreoever, all the activity with respect to the petition took place after the employer through its manager, in effect, interfered in the matter of the union application. The evidence in respect of the petition is accordingly rejected.

PETITION DOES NOT REPRESENT VIEWS OF THOSE WHO SIGNED IT

The Board must assure itself that employees have made a free choice untrammelled by employer interference. The Board is not satisfied, under the circumstances in evidence in this case, that the petition, in fact, represents the views of all who signed it. The Board accordingly feels that it should exercise its discretion to reject the evidence proffered in support of the petition.

The necessity for a searching inquiry is pointed up in the *Pigott Motors* case, reported at 63 C.L.L.C., paragraph 16, 264, a decision of the Ontario Labour Relations Board, in the following passage:

> "The Labour Relations Act contains detailed provisions designed to protect the rights of employees to become members of, and to select or reject a particular or any trade union as their collective bargaining agent and to bargain collectively or individually with their employer. It is an important function and duty of this Board under the legislation to be circumspect and vigilant to see that these rights are preserved and not made illusory.
>
> There are certain facts of labour-management relations which this board has, as a result of its experience in such matters been compelled to take cognizance. One of these facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer.
>
> In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an

employee is obviously peculiarly vulnerable to influences obvious or devious, which may operate to impair or destroy the free exercise of his rights under the act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence, in a form and of a nature which will provide some reasonable assurance that a document, such as a petition, signed by employees purporting to express opposition to the certification of a trade union truly and accurately reflects the voluntary wishes of the signatories.

In seeking this assurance, the Board draws no distinction between documents which purport to express a desire on the part of employees to resign from the union and those which purport merely to express opposition to the applicant as their collective bargaining agent. In other words, for this purpose, it does not seek to distinguish between the two matters of membership and representation."

DOES PETITION REFLECT WISHES OF EMPLOYEES?

The question must always be answered — does the petition in the circumstances of a given case truly and voluntarily reflect the wishes of the employees? The Board will always look behind such a document to see whether or not there has been a degree of participation by the employer which would interfere with the fundamental right of the employees to bargain on their own behalf without that participation which might be said to have effected their true desires in the matter.

APPLICANT HAS MAJORITY SUPPORT

The question remains — does the applicant enjoy the majority support of employees in the appropriate unit? This question, on the basis of the authorization cards submitted, is in the affirmative and the Board so holds.

CERTIFICATION GRANTED

The order for certification will accordingly issue.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

April 6, 1973.

3.120 April 6, 1973

United Steelworkers of America, Local 7452

v.

Duval Corporation of Canada

Application alleging unfair labour practice under s. 11 (1) (c) of The Trade Union Act — Employer claimed collective agreement terminated — Employees of respondent on strike — Refusal by company to consider grievances — Unfair labour practice established when respondent failed to follow terms of grievance procedure — Also, duty on respondent to bargain re: grievances under s. 5 (c) of The Trade Union Act.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s.s. 2(b) (f); 5 (d) (e);
11 (1) (c); 33 (1).

APPLICATION ALLEGING UNFAIR LABOUR PRACTICE

The applicant alleged an unfair labour practice by the respondent under section 11 (1) (c) of *The Trade Union Act, 1972*, Chapter 137. This section reads:

> "11.—(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
>
> (c) to fail or refuse to bargain collectively with representatives elected or appointed not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;"

Section 2 (b) of the Act defines the term "bargaining collectively" and included in this definition is the following:

> "and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;"

FACTS

The applicant here is the sole bargaining agent of certain employees of the respondent company, Duval Corporation of Canada, at its mine site known as Duval Corporation Lease No. 1 near Saskatoon, Saskatchewan.

On January 20, 1971 the applicant and the respondent entered into a collective bargaining agreement and this agreement included a procedure for the settlement of grievances which might arise.

On January 2, 1973 the applicant union notified the company that it desired to open up negotiations "in regard to a new C.B.A." The term C.B.A. meant collective bargaining agreement.

By the terms of the collective bargaining agreement dated January 20, 1971, the agreement was effective to February 28, 1973. Section 33(1) of the Act provides, however, that:

> "33.—(1) Except as hereinafter provided, every collective bargaining agreement, whether heretofore or hereafter entered into, shall remain in force for the term of operation provided therein and thereafter from year to year."

By virtue of this section the collective agreement of January 20, 1971 continued to be effective after February 28, 1973 for a period "thereafter from year to year". The Board accordingly holds that it was in effect on March 12, 1973.

DESIRE TO NEGOTIATE DID NOT END PRIOR AGREEMENT

The respondent argued, however, that the letter of January 2, 1973 from the applicant union to the respondent company terminated the prior agreement. The Board rejects this submission. It would indeed be stretching the language of the letter to the breaking point, the Board feels, to suggest that the expressed desire "to open up negotiations in regards to a new C.B.A." terminated the prior agreement. On the other hand, the phrase clearly indicates a desire to negotiate. The negotiations might well result in the termination of the old agreement, or a revision thereof, but the expressed desire to negotiate in itself certainly did not abrogate the prior agreement.

START OF STRIKE

On March 1, 1973 the employees of the respondent went on strike. Under our present Act, however, an employee is defined by section 2(f) to be a person which "includes a person on strike". The strike therefore did not change the status of the employees — they were still employees of the respondent within the meaning of the Act.

REFUSAL BY COMPANY TO CONSIDER GRIEVANCES

The respondent company refused to consider the grievances filed on March 12, 1973 and under date of March 13, 1973 wrote the union as follows:

> "We are returning the enclosed forms . . . to you which were presented to the company on March 12, 1973.
>
> On January 2, 1973, T. Stevens, Staff Representative USWA, wrote to the company "to open up negotiations in regard to a new C.B.A." and the Agreement then in effect expired at the end of the day on February 28, 1973. Since the union is on strike, we

currently have no Agreement nor mechanism to handle the above grievances. This is in accordance with paragraph 4 under the heading "Duration of Agreement" on page 9 of the Saskatchewan Labour Legislation Handbook, dated October, 1971."

The respondent company, unfortunately, appeared to rely for its position on the Saskatchewan Labour Legislation Handbook dated October, 1971 which stated that employment was terminated by a strike. The new *Trade Union Act*, S.S. 1972, Chapter 137, by its definition of "employee" (section 2 (f)), however, repealed this proviso. Apparently the management of the respondent company was not aware of this legislative change.

UNFAIR LABOUR PRACTICE ESTABLISHED

The Board accordingly held that the unfair labour practice had been established by the respondent company failing to follow the terms of the grievance procedure set out in article IX, section 3, of the bargaining agreement in effect which had been duly executed by the parties on January 20, 1971.

DUTY ON RESPONDENT TO BARGAIN COLLECTIVELY

The Board, however, would also have held, on the evidence adduced, even if the above grievance procedure had not been in force, that there was a duty on the respondent company to bargain in respect of the grievances under section 5 (c) of the Act "requiring an employer . . . in an appropriate unit to bargain collectively", the latter term being defined in section 2(b) to include "the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit."

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

April 6, 1973.

3.121 April 12, 1973

International Brotherhood of Electrical Workers, Local 2067
and
The Saskatchewan Power Corporation

v.

Oil, Chemical and Atomic Workers International Union,
Saskatchewan Local 9-649

Reference under s. 24 of The Trade Union Act — Agreement between co-applicants to refer to Labour Relations Board — Clerk stenographers excluded from original certification order — Certification order covering all employees at a certain address — Clerk stenographers at that address should also be excluded — Clerk stenographer position not within jurisdiction of applicant union.

S.S. 1972. The Trade Union Act, 1972, C. 137
s. 24.

REFERENCE UNDER S. 24

This is a reference to the Labour Relations Board under section 24 of *The Trade Union Act, 1972*, Chapter 137. This section provides:

> "24. A trade union representing the majority of employees in a unit of employees may enter into an agreement with an employer to refer a dispute or disputes or a class of disputes to the board and the board shall hear and determine any dispute referred to it by either party pursuant to such agreement and the finding of the board shall be final and conclusive and shall in regard to all matters within the legislative jurisdiction of the Legislature of Saskatchewan be binding upon the parties and enforceable as an order the board made in accordance with this Act."

AGREEMENT OF CO-APPLICANTS

The co-applicants herein, International Brotherhood of Electrical Workers, Local Union No. 2067, and the Saskatchewan Power Corporation, entered into an agreement dated December 27, 1972 as follows:

> "Whereas the applicant is the certified union to bargain collectively with the respondent employer herein, pursuant to a certification order made the 4th day of August, A.D. 1967 and amendments thereto;
>
> And whereas certain employees of the respondent are employed as clerk stenographers at the Regina Meter Repair Shop located

at Lorne Street and Sixth Avenue, in Regina, Saskatchewan, and the parties hereto wish to determine if the said employees come within the jurisdiction of the applicant union;

Now, therefore, the parties hereto agree as follows:

1. To refer to the Labour Relations Board for hearing and determination of the dispute as to whether the employees of the respondent at the Regina Meter Repair Shop located in Regina, Saskatchewan, whose job description is that of clerk stenographer, are within the jurisdiction of the applicant union."

FACTS

The International Brotherhood of Electrical Workers, Local Union No. 2067 was a union certified in respect to certain employees of the said employer, The Saskatchewan Power Corporation.

On June 9, 1966 this Board certified all employees employed by the Saskatchewan Power Corporation, in the province of Saskatchewan, in or in connection with the generating or distribution of electrical power, or work related thereto, and to fall under the general supervision and management of the manager, Electrical System, of Saskatchewan Power Corporation, but excepted thereout certain employees, as set out in the certification order. Among those excluded were clerk stenographers.

The order of June 9, 1966 was amended by this Board on August 4, 1967 and in addition to the persons previously certified to the applicant the following persons, insofar as applicable herein, were added, namely:

"All employees of the Saskatchewan Power Corporation:

(a) Employed in or in connection with the Saskatchewan Power Corporation Electrical Generating Plant at Regina, Saskatchewan, and all employees of the Electrical Distribution system of the Saskatchewan Power Corporation located within the limits of the city of Regina, as such limits existed on the first day of January, 1958, including all employees of the Saskatchewan Power Corporation employed in or in connection with the administration office of the Regina City District of the Saskatchewan Power Corporation located at 1734 Dewdney Avenue, Regina, Saskatchewan . . ."

It should be noted that by the amendment "all employees . . . employed in or in connection with the administration office of the Regina City District of the Saskatchewan Power Corporation at 1734 Dewdney Avenue, Regina, Saskatchewan" were brought within the ambit of the certification order and certified to the applicant, International Brotherhood of Electrical Workers, Local No. 2067.

Evidence advanced on the present hearing indicated that the 1734 Dewdney Avenue location was the administration office of the old

Regina distribution system which was later, in the fall of 1967 or the spring of 1968, changed to a location at 6th Avenue and Lorne Street, Regina. In 1967 three girls were doing secretarial work at the 1734 Dewdney Avenue location. After the move to the location at 6th Avenue and Lorne, however, no clerk stenographers were employed at the new location.

In the month of October, 1971, the Saskatchewan Power Corporation posted by job bulletin No. 134 a position called "Clerk Stenographer II".

The applicant argued that it had jurisdiction in respect of this position by virtue of the addition to its certification order made on August 4, 1967. This argument, however, overlooked the fact that this job classification insofar as the applicant was concerned was, in effect, phased out in the fall of 1967 or the spring of 1968.

When the applicant employer posted the job classification in October, 1971, it took the view that this job classification was excluded from the jurisdiction of the applicant union by the general exclusion of "clerk stenographers" which has been in the certification order of June 9, 1966 and which had been carried over to the amended order of August 4, 1967.

The Saskatchewan Power Corporation was of the further view that the job classification would fall under the jurisdiction of the intervener, Oil, Chemical and Atomic Workers International Union, Saskatchewan Power & Gas Local No. 9-649. While no evidence as to the certification order in this respect was presented to the Board, as should properly have been done, the Board feels that it can take judicial notice of the fact that there is an existing certification order covering certain employees of the Saskatchewan Power Corporation originally made in October, 1948 and amended from time to time to August 4, 1967, and that it can take cognizance of the terms of such existing certification order.

VIEW OF SASKATCHEWAN POWER CORPORATION CORRECT

Taking the factors enumerated herein, and the evidence heard on the reference, the Board is of the opinion that the view taken by the Saskatchewan Power Corporation was correct.

This opinion is strengthened by the fact that there was no acceptable evidence that any new employee taken on as a result of the job posting would be employed at 1734 Dewdney Avenue or would replace the position phased out in the fall of 1967 or the spring of 1968.

CLERK STENOGRAPHERS POSITION NOT WITHIN JURISDICTION OF APPLICANT UNION

The Board accordingly found that any employees taken on under the newly posted clerk stenographer position were not within the jurisdiction of the applicant union.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

April 12, 1973.

3.122 April 12, 1973

Canadian Food and Allied Workers, Local P-234

v.

Agra Industries Ltd., Nipawin

Application alleging unfair labour practice of failing to bargain collectively — Agreed grievance procedure followed up to arbitration stage — Respondent claimed it had not received notice from the applicant union that the applicant wished to set up an arbitration board — held: although respondent had not received such notice it was under an obligation to "negotiate from time to time" — The company failed to bargain collectively — Unfair labour practice established.

S.S. 1972. The Trade Union Act, 1972, C. 137, s.s. 2 (b); 11 (1) (c).

APPLICATION ALLEGING UNFAIR LABOUR PRACTICE

The applicant union claimed that the respondent company failed to bargain collectively and thereby committed an unfair labour practice within the meaning of section 11 (1) (c) of *The Trade Union Act, 1972*, Chapter 137. This section reads:

> "11.—(1) it shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
>
> (c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;

The Act by section 2 (b) defines bargaining collectively thus:

> 2. In this Act:
>
> (b) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;"

FACTS

In this case, the applicant is the certified union through which employees of the respondent bargain collectively. The union and the

respondent are parties to a collective agreement dated October 28, 1971, and effective under the terms thereof for a term of 3½ years from the 1st day of August, 1971. The agreement in article 7 contains a procedure for the settlement of grievances which might arise from time to time.

On October 19, 1972, a grievance was filed by the applicant union in respect of the dismissal by the respondent of an employee, C. V. McLane. The union contended the dismissal was unjust.

RE: GRIEVANCE PROCEDURE

Article 7 of the collective bargaining agreement by section 3 sets out the procedure:

> **"ARTICLE VII – GRIEVANCE PROCEDURE**
>
> Section 3 – The following procedure shall be applicable progressively to the adjustment of disputes and grievances arising from the interpretation and application of this Agreement:
>
> First Step: The aggrieved employee accompanied by a union steward shall meet with his Department foreman. If a settlement is not reached within three (3) working days, the grievance shall automatically move to the Second Step.
>
> Second Step: The Chief Steward of the union shall take the matter up with the local Plant Superintendent. In case of emergency, a meeting can be called by either party. Grievances shall be presented in writing in this step, and should a settlement not be reached within three (3) working days, excluding Saturdays, Sundays and paid holidays, or such longer period as may be mutually agreed, it shall be referred to the Third Step.
>
> Third Step: The Grievance Committee of the union shall take the matter up with management representatives. A bargaining agent of the union may be called in if so desired. If a settlement is not reached within five (5) working days, or such longer period as may be mutually agreed, it shall be referred to the Fourth Step.
>
> Fourth Step: In case settlement is not reached in the Third Step, the matter will be referred immediately to arbitration by a board which will be bound by the terms of this agreement. The board shall consist of one member named by the company, and one named by the union and the third, who shall be chairman, agreed upon by the two parties. In the event of failure to reach agreement upon the third party within two weeks the matter shall be referred to the Dean of Law, University of Saskatchewan, who shall either act as chairman or appoint a chairman."

The grievance was processed through steps 1, 2 and 3 as provided. The third step was carried out on October 26, 1972.

LETTER SENT TO RESPONDENT

The difficulty between the parties arose following the third step. The applicant claimed that it notified the respondent company by letter dated October 27, 1972, that it intended to proceed to Step 4. The letter also named the union nominee to the board of arbitration as provided in Step 4 and requested the company to name a nominee.

The company denied receipt of the letter.

On November 14, 1972, the applicant again wrote to the respondent on the matter and the company replied on November 16, 1972, to the effect that it had not received the letter of October 27, 1972. Subsequently the company advised the union through its solicitors that since the earlier letter had not been received the company was treating the grievance as abandoned. The letter denial read, in part:

> "We must, therefore, respectfully suggest to you that the failure to communicate your intention to carry this matter to the next step of the grievance procedure in conformity with the provisions of the contract means the grievance is abandoned. Our client is under no obligation, legal or moral, to proceed further."

The Board feels that it is not necessary to render any finding as to whether the letter of October 27, 1972, was or was not received by the respondent.

INTERPRETATION OF GRIEVANCE PROCEDURE

The agreed procedure does not contemplate or in any event does not require any notification that a party intends to proceed to Step 4. Step 3 provides, in language which is very plain and very clear, that if a settlement is not reached within five days after the meeting set out as a part of Step 3 that the grievance shall be referred to the fourth step. The word is "shall", in other words if a settlement is not reached by Step 3 the matter proceeds to arbitration by a board, without any other step by either party other than the naming of a nominee to an arbitration board. The method of determining the composition of the board is set out in Step 4. The matter proceeds to arbitration if Step 3 does not lead to a settlement within the period of five working days.

In this case, settlement was not reached within five days of the date of the third step meeting — October 26, 1972. That period would have expired on about November 2nd and from that date on the grievance was subject to review by a board of arbitration to be set up as provided in Step 4. Step 4 provides that the matter of the arbitration was to proceed "immediately". An equal onus existed on each party to name a member to the arbitration board to be established. In the case of the union, it did name a member. Even if the letter of October 27th was not received by the company (and it is not necessary for us to determine this point) the fact is that the name of the union nominee was later communicated to the company. A company nominee has not been named to this date, in fact the company, by the letter from its solicitor, already quoted, in effect declined to do so.

COMPANY FAILED TO BARGAIN COLLECTIVELY

The company thus did not honour its obligation under Step 4 of the procedure set up in the collective bargaining agreement and in doing so has failed to bargain collectively within the meaning of section 11 (1) (c)

of the Act. It must be borne in mind that section 2 (c) of the Act defines bargaining collectively to include "negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement".

In this case, the employee in question, C. V. McLane, is an employee represented by the applicant. The applicant is a trade union certified by this Board to represent the employees of the respondent in an appropriate unit of employees.

The failure of the respondent to carry out collective bargaining in respect of this grievance is a violation of section 11 (1) (c) of the Act, and the more so in view of the terms of Article VII, section 3, of the collective bargaining agreement dated October 28, 1971.

UNFAIR LABOUR PRACTICE ESTABLISHED

The Board accordingly find that the allegation of an unfair labour practice has been established.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

April 12, 1973.

3.123 May 25, 1973

Saskatoon Typographical Union, No. 663

v.

Western Cheque Printers Ltd.

Application alleging unfair labour practice of failing to bargain collectively — Whether s. 36 of The Trade Union Act applied — Respondent was created and owned by Mercury Printers Ltd. — Mercury Ltd. was the "parent" company in an application under the Regional Development Incentives Act — Respondent used facilities of "parent" company — Held: this situation falls within the broad interpretation of s. 36 — respondent therefore under an obligation to bargain collectively with applicant — Respondent bound by certification order.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s.s. 5 (d) (e); 11 (1) (c); 36.

APPLICATION ALLEGING UNFAIR LABOUR PRACTICE

This is an application by the applicant, Saskatoon Typographical Union No. 663 under sections 5 (d), 5 (e), 11 (1) (c), and 36 of *The Trade Union Act, 1972*, Chapter 137.

These sections state:

"5. The board may make orders:

(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;

(e) requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice;

11.—(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of an employer:

(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;

36. Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining

collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him."

In the application as originally made the applicant sought a remedy as against both Mercury Printers Limited, Saskatoon, and as against Western Cheque Printers Limited, Saskatoon.

PRELIMINARY OBJECTION

On preliminary objection by counsel for Mercury Printers Limited that company was struck out as one of the respondents and the matter was heard by the Board on the basis of an application with respect to Western Cheque Printers Limited only.

FACTS

Evidence tendered and accepted by the Board established conclusively that both Mercury Printers Limited (hereinafter called Mercury) and Western Cheque Printers Limited (hereinafter called Western Cheque) were each substantially a family enterprise and with substantially (except one) the same shareholders.

Mercury had carried on a printing business in Saskatoon for many years, including the printing of cheques.

In the spring of 1972 the principal shareholders of Mercury conceived the idea of setting up a new company to engage in the printing of specialized cheques. Western Cheque was accordingly incorporated for this purpose. The conception also included the making of an application for a Development Incentive Grant from the Dominion Government under the *Regional Development Incentives Act.*

The proposed development included the establishment of Western Cheque as a new company to complement the present companies operating under the general control of Mercury.

In the application filed with the Department of Regional Economic Expansion at Ottawa, Mercury was stated to be the "parent" company and Western Cheque was described as "a new company to be formed and owned by the principal shareholders of Mercury". The application further stated:

> "The Management group of Mercury will provide general policy decisions and guidance as well as accounting assistance. In addition, the facilities of Mercury will be used for:
> — design and artwork for cheques
> — conversion of roll stock to sheet stock of cheque material including background printing

— typesetting, engravings and preparation of metal and rubber plates for cheques.

The primary consideration in this expansion is to include further specialty products of the printing industry not presently available from local manufacturers. This diversification makes additional use of existing facilities within Mercury in addition to providing additional jobs for the production of the finished product. As well, it provides an opportunity to better service locally-based industry with a more complete printing facility through Mercury and the associated companies."

In the same application the expanding potential for the personalized cheque business by Mercury was outlined as follows:

"The personalized cheque business has been growing tremendously in the past few years and the increased use of magnetic encoding clearing facilities by all banking institutions will add further to the growth of this market . . .

Through meetings and negotiations, Mercury Printers have been given the opportunity to produce all the cheque requirements for the credit unions and their members. Because of the particular requirements of this type of business, the proposal to form a new company has been made."

In line with this conception Western Cheque was duly incorporated on June 2, 1973.

Evidence established that MICR encoding of cheques with magnetic ink had been in use at Mercury for some time. The new firm was to specialize in the printing of this and related types of specialized cheques.

RESPONDENT USED FACILITIES OF "PARENT" COMPANY

Evidence also established that certain equipment and type-metal previously used for printing cheques at Mercury was moved to the premises of Western Cheque in or about the months of January or February, 1973. It was contended that most of this equipment so moved was on a "loan" basis only. While this may have been correct to an extent, the fact remains that during the period of its initial operation Western Cheque used the office facilities of Mercury. The witness, Rogal, stated, in evidence accepted by the Board, that no payment was made by Western Cheque for the use of these office facilities including secretarial services furnished by Mercury. He stated that Mercury carried the books of Western Cheque for approximately eleven months.

In so far as equipment was concerned certain evidence led in respect of a type-cabinet was not without significance. The type-cabinet found its way from the premises of Mercury to the premises of Western Cheque. It was claimed that an invoice had been issued by Mercury to Western Cheque to cover this chattel. When the invoice was produced

during the hearing on May 3, 1973, it was noted that the invoice was dated April 25, 1973. It would appear that this invoice was an "afterthought". The application herein had been launched on or about February 19, 1973.

Evidence established that Western Cheque had paid no management fee to Mercury. The witness, Rogal, an accountant for Mecury, stated that his services were "probably donated both by me and Mercury".

RE: OBLIGATION OF RESPONDENT TO BARGAIN WITH APPLICANT

The respondent resisted the application throughout and flatly stated that it felt that it did not have any obligation to bargain with the applicant. In any event it claimed that it had never been requested to bargain. It was admitted, however, that a letter had been received by the respondent, Western Cheque, from solicitors, which read:

> "The Saskatoon Typographical Union, Local 663 is the bargaining agent of certain employees of Mercury Printers Limited for the purpose of collective bargaining.
>
> We understand that you have acquired a part of the business of Mercury Printers.
>
> If this is so, then by the provisions of section 36 of *The Trade Union Act, 1972*, the collective bargaining agreement presently in force between the Saskatoon Typographical Union and Mercury Printers Limited applies to you to the same extent as if you had signed it. We enclose a copy of the agreement herewith. Please let us have your assurance in writing on or before February 19, 1973, that you will comply with the terms thereof."

In light of this letter the Board is of the view that at best this is a very technical objection. In any event it is an unfair labour practice "to fail" to bargain, if the obligation exists. If the transfer of obligations exists by virtue of section 36, then the collective bargaining agreement already in effect at Mercury as between Mercury and the applicant union would also apply to Western Cheque. In such an event, there is a continuing duty to bargain. If the successor section (section 36) is applicable there can be a failure to bargain even if there is no demand. The obligation is in the collective agreement already existing.

Collective bargaining is a continuing requirement. This has been well put by Benjamin Aaron, Professor of Law and Director of the Institute of Industrial Relations, University of California in the Foreword to the Volume "Arbitration and Collective Bargaining" as follows:

> "Collective bargaining comprises much more than the periodic and sometimes dramatic negotiations which occur every few years. Collective bargaining is a continuous process, the very heart of which consists of the countless day-to-day adjustments and accommodations made by the parties during the life of their collective agreement."

BROAD INTERPRETATION OF S. 36 OF THE TRADE UNION ACT

Section 36 of our Act is very broad and all inclusive. The Board is of the view that in this case even if it was to be held that no part of the business of Mercury was sold, leased or transferred that on all the facts in evidence the parties are caught by the phrase "or otherwise disposed of". A benefit was certainly transferred from Mercury to Western Cheque. Western Cheque also received the "good-will" built up by Mercury. No payment was made by Western Cheque to Mercury for many of the benefits received.

APPLICATION UNDER REGIONAL DEVELOPMENT INCENTIVES ACT

The facts in evidence substantially corroborate the setup of the two companies as envisaged by the application under the *Regional Development Incentives Act*. By the terms of that application the contention of Mercury and Western Cheque is brought to naught by their own device — the application question — they are hoisted or caught on their own petard.

One witness attempted to brush aside the effect of the application. It was suggested that the application served the purpose for which it was intended — presumably to receive the government grant. The Board, however, does not feel that it can ignore this document. The document is in evidence for all purposes and the facts set out in the application are accepted by the Board and are in accord with the facts otherwise established in evidence.

RESPONDENT BOUND BY CERTIFICATION ORDER

In the result, Western Cheque has a duty to bargain with the applicant union and is bound by the certification order of the Board as between the applicant union and Mercury.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

May 25, 1973.

3.124 June 15, 1973

Canadian Food and Allied Workers

v.

Intercontinental Packers Ltd., Saskatoon
and
Shukin and Heisler

Application for certification — Appropriate unit determined — Petition and letters of withdrawal of support led into evidence — Signatures had been obtained at a meeting with management present — Board found that these documents not all voluntarily signed, and therefore did not attach great weight to them — Collusion established between employees opposing application and the company — Certification granted.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

This is an application for certification under section 5 (a), (b) and (c) of *The Trade Union Act, 1972*, Chapter 137. The applicant union is Canadian Food and Allied Workers, the respondent company being Intercontinental Packers Limited. The application was in respect of certain office and cafeteria employees employed in the city of Saskatoon.

The applicable sections read as follows:

> "5. The board may make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit, but no unit shall be found not to be an appropriate unit by reason only that the employer of employees in the unit claims that his complement of employees in the unit is at less than full strength;
>
> (b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;"

In this application, lengthy evidence was led in respect of a number of matters. The application here was in respect of certain office employees and cafeteria employees. Plant workers have been organized for many years and have had collective bargaining through the applicant union with the respondent for over 25 years.

APPROPRIATE UNIT DETERMINED

The respondent company made representations and presented evidence on the make-up of the "appropriate unit".

A solicitor also appeared for a number of employees, and opposed certification.

As a result of rather extensive evidence on the appropriate unit, and after taking into account the evidence and representations made to it, and also on agreement between the parties on certain aspects of the unit, the Board made a finding that an appropriate unit would be:

> "all office and cafeteria employees employed by Intercontinental Packers Limited in the city of Saskatoon, Saskatchewan, with the following exceptions: Livestock Buyers, Quality Control Laboratory, Payroll Department, Foremen, Salesmen, Health Centre, Security Staff, Industrial Standards Staff, Accounting Department, Provisions Department, Beef, Veal and Lamb Department (but not including any job classifications in the plant bargaining unit covered by the existing collective agreement), printer, purchasing agent-mech., assistant purchasing agent-mech., and the systems and programming planning department, Superintendents, Divisional Superintendent, Assistant Superintendents, Department Managers, Assistant Department Managers, General Manager, and private secretaries."

In reaching the above conclusion the Board determined with respect to points at issue:

(a) that the printer should be excluded from the unit;

(b) that employees employed in the Systems and Programming Planning Department should be excluded;

(c) that the purchasing agent-mech. and the assistant purchasing agent-mech. should be excluded;

(d) that shift supervisors in the order processing department and the supervisors in data processing operations should be included; and

(e) that Roger Blais, a cafeteria employee, be included in the unit.

The respondent company attempted to establish that Blais was the assistant manager of the cafeteria. Evidence established that he was a pastry cook and that he performed a number of duties including assisting in cleanup operations. In giving evidence himself, he stated that he had not known he was the assistant manager and that this designation was news to him. He had never hired and had never fired anyone. While the Board accepted evidence that he on occasion did take charge of the

cafeteria if the manager was sick or on vacation, it did not feel that he was an assistant manager and held that he should properly be a part of the unit.

PETITION AND LETTERS OF WITHDRAWAL LED INTO EVIDENCE

Evidence was led with respect to a petition which had been signed by a number of employees, and also with respect to a number of letters (which for convenience can be referred to as letters of withdrawal) signed by a number of employees. The letters of withdrawal, all prepared on a photostat produced form, stated that the person signing did not wish to be represented by the applicant union for the purpose of collective bargaining and requested return of the support or membership card signed.

The Board heard rather extensive evidence relating to the signing of both the petition and the letters of withdrawal. The bulk of the signatures on both were secured at a meeting of employees from which union representatives were excluded but at which several department managers and assistant department managers were present. Even the confidential secretary to the General Manager was present.

DOCUMENTS NOT FREELY SIGNED

The documents signed at this meeting were, in fact, publicly signed, and it was accordingly public knowledge to management personnel present as to who did and who did not sign. An ordinary employee, in these circumstances, could not help but feel that he was under some pressure to sign. The Board, therefore, did not feel that it could accept these documents as expressive of the free and untrammelled view of those signing them and accordingly held that under the circumstances it could not and should not attach any great weight to the documents.

A very important element in considering the weight to be given to a petition, or, as in this case, to letters of withdrawal, is whether or not those employees signing are in fact expressing their true desire — whether the signing was voluntary in every sense of the term — and in this case, on the evidence, such is not clear.

This is a problem with which Boards such as this Board often have to deal. The Law Society of Upper Canada in a booklet entitled "*Proceedings of the Programme on Labour Law* (June 11, 1971)" expressed the view, in the words of a panel, as follows:

> "In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is, obviously, peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason . . . that the Board has required evidence in the form and of a nature which would provide some reasonable assurances that any document, such as a petition signed by

> employees and purporting to be in express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories. Does the statement of desire in the circumstances of a given case truly and voluntarily reflect the wishes of the employees? That is the question that the Board entertains in any case . . . "
>
> (pages 40 and 41)

and also:

> ". . . the reason for requiring that strictness of proof or origination and circulation is, I suggest, because the document represents a repudiation of documentary evidence previously signed by the same people and put before the Board as proof of their desire to join the trade union. And the Board in its wisdom and experience has reached the conclusion that when a repudiation document appears . . . there is a reason . . . to closely scrutinize the manner in which that document arose to make perfectly sure that it arose in a perfectly free manner, that it represents the voluntary desires of the employees . . . "

There is one other matter to which the Board feels it should draw attention in this application. Evidence established that employees opposing the application consulted the solicitor acting for the respondent company. The company solicitor referred the employees to the solicitor who subsequently acted for these employees both by legal advice and subsequently at the Board hearing.

COLLUSION ESTABLISHED

The Board, while it did not take this factor into account in rendering its decision, is constrained to point out that this constitutes collusion from the start as between the company and those of its employees opposing the application. This is a practice which should not be followed if the activities of employees opposing an application is not to be tainted from the very beginning.

CERTIFICATION GRANTED

The Board accordingly held, on the evidence, that the applicant should be certified as bargaining agent for those employees who are employees in the appropriate unit as determined by the Board.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

June 15, 1973.

3.125 August 9, 1973

Graphic Arts International Union, Local 215

v.

Modern Press Ltd.
and
Saskatoon Typographical Union, Local 663

Application alleging unfair labour practice under s. 11 (1) (c) of The Trade Union Act — applicant certified bargaining agent of some of employees of respondent — Respondent union certified bargaining agent of other of respondent's employees — Respondent company made agreement with respondent union that new categories of employees would be part of respondent union's bargaining unit — held: on evidence that new categories of employees to be included in respondent union — Company not guilty of unfair labour practice.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s.s. 5 (d) (e); 11(1) (c).

APPLICATION ALLEGING UNFAIR LABOUR PRACTICE

The applicant herein, Graphic Arts International Union, Local 215, alleges that the respondent, Modern Press Limited, Saskatoon, has been guilty of an unfair labour practice.

APPLICANT CERTIFIED RE: CERTAIN EMPLOYEES OF RESPONDENT

The applicant is certified in respect of certain employees at the plant of the respondent. Under the certification of the applicant it is the bargaining representative of employees in the following units in the plant of the respondent in Saskatoon:

1. The artists, dot etchers, camera operators, strippers, opaquers, plate makers, plant grainers, whether journeymen or apprentices, employed by Modern Press Limited in its place of business located in the city of Saskatoon, in the province of Saskatchewan;

and

2. All employees of Modern Press, Printing and Publishing Division, Saskatchewan Wheat Pool, employed in its Photo Engraving Department, in the city of Saskatoon, in the province of Saskatchewan.

FACTS

The first unit referred to herein was a certification originally granted by this Board on July 27, 1947 to Amalgamated Lithographers of America, Local No. 65.

The second unit was under a certification order of this Board granted on January 15, 1958 to the Regina-Saskatoon Local Union No. 108, chartered by the International Photo-Engravers Union of North America.

Subsequently on September 4, 1972 the Amalgamated Lithographers of Amercia, Local No. 65 and the Regina-Saskatoon Local Union No. 108, of the International Photo-Engravers Union of North America merged to form the present Graphic Arts International Union, Local 215 — the applicant.

Another certified union in the Saskatoon plant of the company is Saskatoon Typographical Union, Local 663. On November 6, 1947 this union was certified for:

> The composing room employees employed by Modern Press Limited in the city of Saskatoon, in the province of Saskatchewan;

and on a subsequent date, July 8, 1960, it was also certified for:

> All employees employed by Modern Press Limited at Saskatoon, Saskatchewan, in its mailing department (including part time employees), who work on cheshire machines, stencil cutting and listing machines, filing stencils, and all other work pertaining to the mail room operation.

Each of the unions referred to, Graphic Arts International Union, Local 215 and Saskatoon Typographical Union, Local 663, is an agency through which a considerable number of employees enjoy collective bargaining rights with the company.

Evidence was led (this was not disputed) that the respondent company recently installed a Mergenthaler V I P (Variable Input Phototypesetter) a certain type of photo typesetting equipment. The view of the company, as expressed in a letter from the company to the Saskatoon Typograhical Union, Local 663, dated July 6, 1972, was that this new system was being added to their typesetting facilities.

The company quite naturally desired to avoid conflict with any of its employees and made several unsuccessful attempts, when it became apparent that a dispute might arise, as to which union would hold jurisdiction in respect of the employees who would be employed in the operation of the new equipment, to have the matter resolved by agreement between the unions. One such attempt was a letter addressed to all employees in the printing and publishing division of the plant and

to which was appended the earlier letter to Saskatoon Typographical Union, Local 663, dated July 6, 1972, which has been referred to herein. Unfortunately the attempt was not successful.

RESPONDENTS MADE AGREEMENT

Finally the company felt it had to act. On September 17, 1972 it entered into an agreement with Saskatoon Typographical Union, Local 663, by which it agreed that workers employed in the operation of the V I P machine would, in effect, be considered as composing room employees. As such these workers would form part of the appropriate unit for which Saskatoon Typographical Union, Local 663, was certified by this Board on November 6, 1947.

The applicant alleges that in entering into this agreement the respondent company committed an unfair labour practice within the meaning of section 11 (1) (c) of the Act. This section states:

> "11.—(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
>
> (c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;"

The applicant based its allegation on an assertion that the workers involved were in fact covered by the certification granted to it on July 28, 1947 and asserted specifically that 'artists' covered this category of workers, and particularly the paste make-up for the V I P machine.

A great deal of technical evidence was heard by the Board in very lengthy proceedings. With the concurrence, and at the urging, of all parties concerned, the Board spent the greater part of a day at the Modern Press plant. This was very helpful and while the view as such is not evidence it did assist the members of the Board to appreciate and better understand much of the evidence which was produced.

REASONS FOR DECISION

After taking all the evidence presented by all parties into account the Board held that work involved in paste make-up for the V I P machine (the cold metal process) is parallel and analogous to type make-up in the hot metal process in the composing room and is composing room work. The Board is of the view and holds that workers performing this work are not included in the certification order of July 28, 1947, but rather are covered in the certification order of November 6, 1947. In view of this finding it is clear that the unfair labour practice allegation must be dismissed.

During argument a submission was made that this was a jurisdictional dispute in the guise of an unfair labour practice allegation. Paradoxically this argument was put forward by the Saskatoon Typographi-

cal Union. While this argument was not without some merit the Board felt that the matter had been brought before it as an allegation of an unfair labour practice and should be dealt with as such. The Board accordingly held that the application was not a jurisdictional dispute and that it had jurisdiction to deal with the application. On this facet of the matter the Board agreed with the submission of the applicant union, Graphic Arts International Union, Local 215 and the respondent company, both of whom argued that the matter before the Board was an unfair labour allegation and should be dealt with as such.

APPLICATION DISMISSED

In the result the Board held that the application for a declaration that Modern Press had committed an unfair labour practice be dismissed.

(Sgd.) "CLIFFORD H. PEET,"
August 9, 1973. Chairman.

3.126 September 6, 1973

Canadian Union of Public Employees, Local 1594

v.

Regina Public Library Board

Application for certification — Preliminary objection that application out of time — Alleging collective bargaining agreement held not to be valid — No certification order ever made by Board — s. 5 (i) (j) (k) not applicable — Issue of appropriate unit — Respondent maintains department heads and branch librarians are not "employees" within the meaning of The Trade Union Act — Board finds that these categories do fall within the broad definition of "employees" in s. 2 (f) — No Authority exercised — Majority support indicated — Certification order issued.

S.S. 1972. The Trade Union Act, 1972, C. 137, s.s. 2 (d) (f); 5 (a) (b) (c) (i) (j) (k).

APPLICATION FOR CERTIFICATION

This is an application for certification under section 5(a), (b) and (c) of *The Trade Union Act, 1972*, Chapter 137, which states:

> "5. The board may make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit, but no unit shall be found not to be an appropriate unit by reason only that the employer of employees in the unit claims that his complement of employees in the unit is at less than full strength;
>
> (b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively."

PRELIMINARY OBJECTION THAT APPLICATION OUT OF TIME

The employer resisted the application and alleged the following in paragraph 4 of its reply:

> "The employees of the Regina Public Library Board are represented by Regina Public Library Staff Association. From time to time over the years, negotiations have taken place between the

said Board and the said Association resulting in collective bargaining agreements being entered into, the most recent of which was agreed to on or about the 1st day of June, A.D. 1973 with an effective date of January 1st, 1973 and expiry date of December 31, 1973. The said Library Board therefore claims that the applicant union's application is out-of-time."

The employer led some evidence in an attempt to establish that the Regina Public Library Staff Association was a trade union. This Board holds, on the evidence adduced, that this Association is not a trade union within the meaning of *The Trade Union Act.*

The employer also put forth a document which was alleged to be a collective bargaining agreement between the employer and this Association. The term "collective bargaining agreement" is defined in section 2(d) of the Act as follows:

> "2.(d) "collective bargaining agreement" means an agreement in writing or writings between an employer and a trade union setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions of employees."

The finding that the Association is not a trade union under the Act negates the possibility of holding that any agreement between the employer and the Association is a "collective bargaining agreement" within the meaning of the Act. Entirely aside from this facet of the matter, however, the Board would have been obliged to hold, and does hold, that the alleged agreement, called "Scheme of Service" is anything but an agreement in the generally accepted concept. A signed copy was not placed in evidence — in fact no evidence was tendered that the document was ever signed by anybody! The document was a very unilateral "scheme of service". It provided, for example, that it would be in effect "until amended by the Board" (Library Board).

Again, on another point, evidence was adduced during the hearing that certain persons formerly in scope under the "scheme of service" were taken out of scope without negotiation — the fact that these employees were to be taken out of scope of the "scheme of service" was communicated to them as a non-negotiable decision of the library — "they just told us they were out of scope". The Labour Relations Board on this evidence, and other evidence accepted by it holds that the "scheme of service" was not and is not a collective agreement.

NO CERTIFICATION ORDER EVER MADE, S. 5(i),(j),(k) NOT APPLICABLE

In any event, no evidence was produced (nor do the Board records reveal) that any certification order of this Board has ever been made under section 5(a), (b) and (c) of the Act and under these circumstances section 5(i), (j) and (k) as to the timeliness of the application herein are not applicable.

The preliminary objection of the respondent to the effect that the application is out of time is accordingly dismissed.

RE: APPROPRIATE UNIT

The employer also contended that the unit proposed by the applicant was not appropriate and alleged that a group of eleven employees should be excluded as being persons:

> (a) Whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character (eleven persons);

or as being persons:

> (b) Who regularly act in a confidential capacity in respect of the industrial relations of their employer (ten persons, all of whom were included in the above group (a)).

These eleven persons held the following positions:

secretary-personnel officer (1)
department heads (5)
curator of the Dunlop Art Gallery (1)
branch librarians (4)

During presentation of evidence the parties agreed that the secretary-personnel manager should be excluded. The Board concurs.

As to the curator of the Dunlop Art Gallery, it was conceded that this was a rather unique situation and on discussion the Board holds that this position should also be excluded from the appropriate unit.

RE: CATEGORIES OF DEPARTMENT HEADS AND BRANCH LIBRARIANS

The Board holds, however, that persons in the category of department heads and branch librarians should properly be included in the unit appropriate for collective bargaining.

Evidence with respect to these categories indicated the following:

- a department head might recommend hiring but did not hire. The recommendations were made from a list provided by the secretary-personnel officer. A recommendation would be sent in to the secretary-personnel officer and finally to the chief librarian by whom the final decision would be made.
- a department head periodically was requested to complete a supervisory evaluation form and a yearly increment form. The suggestions set out were recommendations only, however. The final decision was always made higher up. The department head did not take any part in this final decision.

— a department head could recommend changes in her department but only recommend, the guidelines were set higher up.

— the branch librarians, too, only recommended in respect to hiring. Their recommendations were screened by the secretary-personnel officer. Branch librarians were not involved in either promotion, demotion, transfer or layoff. They had nothing to do with changing wage rates, did not participate in bargaining or in handling grievances.

The Chief Librarian, in his evidence, stated that he was developing the department heads to the management team with real responsibilities. While he did state that the department heads had authority to hire, he later watered this down when asked if they could hire without his authority — he replied in the negative. He also stated they could suspend but that this had not happened since he had been Chief Librarian, but they could not layoff and could not transfer employees out of a department. He stated that one department head had tried to "fire" an individual about one year ago but admitted that he subsequently did not fire this person.

Counsel for the respondent argued strenuously that both the department heads and the branch librarians should be excluded from any appropriate unit and referred to a decision of this Board (*Robert C. Myers* v. *The University of Saskatchewan* reported in 1973 C.L.L.C., Case 16,075).

In that case the Board held that Myers was "a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character", and, as well that he was "a person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer".

The Board feels that the facts here, however, while they do bear some resemblance to the facts in the Myers case, are somewhat different. It must also be borne in mind that the Myers case was an unfair labour allegation case.

REASONS FOR DECISION

In this connection, one must not forget that the definition of "employee" in section 2(f) of our Act is very wide indeed. It is as follows:

"2.(f) "employee" means:

(i) any person in the employ of an employer except any person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or any person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer;

(ii) any person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining;

(iii) any persons designated by the board as an employee for the purposes of this Act notwithstanding that for the purpose of determining whether or not the person to whom he provides his services is vicariously liable for his acts or omissions he may be held to be an independent contractor;

and includes a person on strike or locked out in a current industrial dispute who has not secured permanent employment elsewhere, and any person dismissed from his employment whose dismissal is the subject of any proceedings before the board;"

If one examines this definition carefully, it is clear that the Board has a wide discretion in that it can adopt either one of three definitions, that is the definition in 2(f)(i); the definition in 2(f)(ii) or the definition of 2(f)(iii). A person need not fall into all three definitions to be an "employee" within the meaning of the Act — if a person falls into any one of the three definitions, he can be an "employee" within the meaning of the Act.

It is for the Board to decide whether any person in question is an "employee" within the meaning of the Act. Normally this question is quite straightforward. At times, however, as in this case, an employer will contend that a person is in effect a foreman whereas the union will contend that he is simply a glorified charge hand. The Board is of the opinion that in this case the latter situation exists.

With regard to the status to hire and fire and the claim that individual employees are in the management group, this Board is of the opinion and holds that if such an employee may simply recommend to a superior that another employee should be discharged or that further staff is required, that this is not either the exercise of "*authority*" nor is it to "*actually perform*" functions of a management character. Recommendation does not connote authority to actually perform or carry out. Further the words "*primary responsibility*" and "*regularly*" do not connote the situation here where the functions exercised are only a very, very small part of the work, and certainly an irregular part of the work, of both the department heads and the branch managers.

Counsel for the employer inferred that if the *Myers* case (*supra*) was not followed that the Board would be reversing itself. In this connection, the recent judgment of the Chief Justice of the Alberta Trial Division is of interest (*Board of Directors of Lethbridge Northern Irrigation District* v. *Board of Industrial Relations for Alberta et al and Canadian Union of Public Employees* (1973) 5 W.W.R. 71 at page 76):

> In this instance the Board certainly reversed its course. However that of itself cannot be grounds for quashing its decision. I am sure that the Board is not bound to follow its own previous conclusions as to the law. It may repent and recant.

In this case, however, this Board does not feel that it has reversed its course. The *Myers* case stood on its own facts, and this decision stands on its own facts as well.

In any event, and even if the Board should be in error as to section 2(f)(i), the Board holds that in this case both department heads and branch managers are persons who are engaged to perform services which, in the opinion of the Board, constitute a relationship vis-a-vis such persons and the employer that the terms of any contract between them can be the subject of collective bargaining and that as such these persons are "employees" within the meaning of section 2(f) (ii) of the Act.

The Board accordingly holds and determines that an appropriate unit of employees for the purpose of bargaining collectively is:

> "all employees of the Regina Public Library Board, operating the Regina Public Library, in the city of Regina, Saskatchewan, except the chief librarian, assistant chief librarian, business manager, secretary-personnel officer and the curator of the Dunlop Art Gallery."

CERTIFICATION ORDER ISSUED

Support for the applicant was indicated from a very substantial majority of the employees in the appropriate unit. An order of certification accordingly issued.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

September 6, 1973.

3.127 December 14, 1973

Health Sciences Association of Saskatchewan

v.

University Hospital, Saskatoon
and
Service Employees' International Union, Local 333

Application for certification — Objections by respondent union — Findings of Board — that applicant a trade union within meaning of The Trade Union Act — That contravention of Lord's Day Act does not affect status of applicant to be classified as a Trade Union — Determination of appropriate unit by Board — Unit to include "professionals" important factor is effectiveness of proposed unit — Support of majority of employees — Certification order issued.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

This is an application by The Health Sciences Association of Saskatchewan for certification under *The Trade Union Act, 1972*, Chapter 137, for the following proposed bargaining unit, namely:

> "All physiotherapists, speech therapists, pharmacists, social workers, electroencephalograph technicians, electrocardiograph technicians, medical record librarians, medical record technicians, occupational therapists, dieticians, medical laboratory technologists, and radiological technicians, excepting all persons whose primary responsibility is to actually exercise authority and actually perform functions that are entirely of a managerial character, or any person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer."

A prior application to the Labour Relations Board made by an organization calling itself The Health Sciences Association of Saskatchewan, but with respect to a different hospital, was dismissed on March 15, 1973, by reason of the fact that the organization was not properly constituted. Lengthy reasons were handed down in that case. Strangely enough the present application is made by an organization of similar name but comprised of persons other than those who made the earlier application.

A reply was filed to the application herein by the respondent University Hospital and also by Service Employees' International Union, Local No. 333, who intervened in the application.

The respondent hospital submitted a rather lengthy list of classifications which it believed actually exercised authority and actually performed functions that were of a managerial character and regularly acted in a confidential capacity in respect of the industrial relations of the respondent employer, and submitted that such classifications should be excluded from any unit found by the Board to be appropriate for collective bargaining purposes. The respondent hospital did not actively oppose the application although some concern was indicated over a possible proliferation of bargaining units within the hospital, and the difficulty which might arise in collective bargaining if such should occur.

OBJECTIONS OF RESPONDENT UNION

The reply filed by Service Employees' International Union, Local No. 333, (hereinafter called the intervener) on the other hand raised matters of substance in opposition to the application which in brief were:

1. It was denied that the applicant was a trade union.
2. It was denied that the person who had signed the application was an officer of the applicant association.
3. It was specifically denied that the persons on behalf of whom the application was made were employees within the meaning of *The Trade Union Act.*
4. It was specifically denied that the unit of employees in respect of which the application was made was an appropriate unit for the purpose of bargaining collectively.
5. The intervener further alleged that it already represented employees covered by the application under existing certification orders.

INTERVENER PREVIOUSLY CERTIFIED

The intervener (Service Employees' International Union) already represents a large number of employees in the respondent hospital for purposes of collective bargaining under a certification order made by the Labour Relations Board on December 15, 1954, and subsequently amended on November 9, 1955; July 9 and 10, 1956; May 31, 1963; July 24, 1963, and January 8, 1965.

Certain employees in this hospital, psychiatric nurses, are represented by The Canadian Union of Public Employees under a certification order made by this Board. This organization, however, did not intervene in the application nor did it take any part in the hearing.

The application was made under section 5(a), (b) and (c) of *The Trade Union Act, 1972*, Chapter 137, which so far as applicable, reads as follows:

> "5. The board may make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit . . .
>
> (b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer or trade union representing the majority of employees in an appropriate unit to bargain collectively;"

MATTERS FOR DETERMINATION BY BOARD

In this application the basic matters for determination by the Board are:

1. A determination as to whether the applicant is a trade union within the meaning of *The Trade Union Act*.
2. A determination as to the appropriate unit for collective bargaining purposes (section 5(a) of the Act).
3. A determination as to whether the applicant (if a trade union within the meaning of the Act) represents the majority of the employees in the unit determined by the Board to be appropriate.

DUTIES OF BOARD

The duty of the Board in this respect was clearly recognized by counsel for the applicant association who stated in argument that the Board had three duties:

1. To make a finding as to what is the appropriate unit and who are the employees in such a unit. Counsel submitted that the Labour Relations Board was the only body which could make a decision on this matter.
2. To make a finding as to the trade union which represents the employees in the unit so found.
3. To make an order requiring the employer to bargain with the above trade union.

It has been judicially held in Ontario, where the certification section in the Ontario Labour Relations Act reads:

> "Upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining . . ."

that:

> ". . . in every case, the Board is called upon to determine the appropriate unit for collective bargaining. If there is no such unit, its task would end there."
>
> (*See Canadian Union of Operating Engineers* v. *Imperial Tobacco Products*, a decision of Ontario High Court of Justice, June 6, 1973, reported in C.L.L.R., Case No. 14, 195 on page 14, 893).

Under our *Trade Union Act* the Saskatchewan Board would appear to have a similar duty. The question of employee support or non-support does not arise at this stage.

APPLICANT A TRADE UNION WITHIN MEANING OF THE ACT

On the evidence presented at the hearing the Board had no difficulty in finding, in spite of able and forceful argument by counsel to the contrary, that the applicant was a trade union within the meaning of the Act.

RE: LORD'S DAY ACT

One argument advanced was to the effect that the applicant was not properly constituted as an organization by reason of the fact that the meeting at which it was set up was on a Sunday. It was argued that this was in contravention of *The Lord's Day Act*, that the agreement of the persons present to set up an association constituted a contract the one with the other, that as a contract the action was prohibited on a Sunday and void, and that accordingly the steps taken had no legal effect and the association did not come into a legal existence.

While the argument and the cases cited in support do appear on the surface to support the view advanced, the Board was of the opinion that in this day and age it should adopt a liberal stance.

In this view the Board was fortified by the recent decision of His Lordship, Mr. Justice Johnson of the Saskatchewan Court of Queen's Bench handed down on November 1, 1973, in the case of *Western Automotive Rebuilders* v. *The Labour Relations Board, the Retail, Wholesale and Department Store Union Local No. 480 and Dennis De Forest* (as yet unreported). In that case it had been argued that since the statutory declaration verifying the initiating application for certification had been sworn to on a Sunday by a union representative whose full time employment was as such representative, that the application was void.

Mr. Justice Johnson stated:

> "As to the applicant's argument that the union representative "worked" on Sunday in executing the initiating application document, it is my view that at worst this "work" was unlawful under section 4 of *The Lord's Day Act*, CL 13, R.S.C. 1970 (and I do not necessarily so find) but the fact of it being unlawful would only subject the union to prosecution under *The Lord's Day Act* and

> would not invalidate the "work" done on that day. Further the act of declaring a statutory declaration on Sunday does not render that declaration nugatory. At common law there was no prohibition against doing anything on Sunday except the doing of judicial acts as distinguished from ministerial acts since Sunday was a *dies non juridicus*. I have been unable to find any authority for the proposition that a statutory declaration declared on Sunday or an affidavit sworn on Sunday are invalid. The reason is obvious. The common law did not prohibit such acts since they are not judicial and no Sunday observance legislation prohibits them."

While certain portions of the constitution of the applicant do somewhat "bother" the Board, the Board is of the view that such concern does not affect the status of the applicant to be classified as a trade union under the Act.

It appears that the executive under the present constitution could be a self perpetuating body. Another provision in the constitution appears to be one which could weaken the bargaining power of the association. However one may view such provisions, these are matters to be dealt with by the membership. Members of the association may in due course find that there is a need to amend their constitution in certain particulars but, as indicated, this is a matter for the members themselves and does not act as bar to the present application.

The Board accordingly holds on the evidence placed before it in this application, that the present applicant is a trade union within the meaning of *The Trade Union Act*.

DETERMINATION OF APPROPRIATE UNIT

A major task before the Board was the determination of an appropriate unit of employees for the purpose of bargaining collectively.

At the hearing the applicant association abandoned the application for the inclusion of two categories for which it had originally applied — namely, speech therapists and medical record technicians. The Board accordingly, in its determination of an appropriate unit for collective bargaining purposes, did not have to deal with these two classifications.

Many views have been expressed from time to time as to possible groupings of hospital employees for collective bargaining purposes. The Board is of the general view that an overall employer unit is a desirable unit in such an institution. Having said that, however, the Board hastens to add that it is also of the opinion that it need not find such a unit to be the only appropriate unit. The Board, in the view which it takes of the matter, does not believe that it is called upon to determine the most appropriate unit — the duty of the Board is to determine a unit which can be appropriate for collective bargaining purposes.

NO SET FORMULA POSSIBLE

The Board is of the view that no cut-and-dried formula can or should be laid down as to appropriate units in hospitals — the determination as to an appropriate unit must be made in each application on the basis of the factual situation in each case. It is on this basis that the Board deals with the present application.

RE: "PROFESSIONALS"

Views were expressed during the hearings to the effect that 'professionals' should not be included in bargaining units with so-called non-professionals. It was suggested, if not directly, then by implication, that a certain group of employees existed which had a particular concern for patient welfare. This suggestion ignores the fact that all employees in a hospital institution are, in effect, health care workers, and should operate as a team to provide health care services. Surely the proper heating, maintenance and care of the institution where patients are housed contributes as much to patient care as the very necessary work performed by other employees! It ill behooves any group to cast slurs, even if by implication, on other members of the health care team. Rather should it not be said:

> "Our family is one — each of us has a duty to his brothers. We are all leaves of a tree, and the tree is humanity."
>
> (Pablo Casals, Spanish cellist, as quoted in a recent CBC radio documentary).

In this hearing some concern was expressed as to a proliferation of bargaining units. While it is not the duty of the Board to reach conclusions on the basis that an employer might find it difficult to bargain with a large number of units, still, it must also be borne in mind that anything that goes to split, dismember and weaken the unity of the employees in any given institution will be a cause for rejoicing by those who would like to prevent effective collective bargaining. On the whole it would appear that it might be advantageous both to an employer and to the employees to avoid a proliferation of bargaining units — to avoid, so far as may be consistent with a given factual situation, the dismemberment of existing units which have been held as "appropriate" for collective bargaining purposes.

RE: EDUCATIONAL REQUIREMENTS OF EMPLOYEES

At the hearing, on this application, much was said of the educational requirements of certain groups of employees. Very little evidence was led on this matter. Counsel for the applicant association, however, did file a brief outlining educational requirements for the classifications listed in the suggested appropriate unit. While this brief did not consist of sworn testimony, it was accepted by the Board in view of the fact that neither the respondent hospital or the intervener objected.

On the basis of this brief, it is apparent that some of the classifications set out require university training (e.g. pharmacists). Other classifications require fairly extensive training. Some classifications, on the other hand, require mainly on-job training.

The Board, in coming to a decision on the matter, is, of course, entitled to rely on its own knowledge as to the existing situation in the hospital collective bargaining field in Saskatchewan. In 1973, for example, the Saskatchewan Hospital Association bargained on behalf of some 19 Saskatchewan hospitals, including the respondent hospital herein, with the Service Employees' International Union. The agreement dated June 22, 1973, was filed as an exhibit in this hearing. The Saskatchewan Hospital Association also bargained on behalf of another large group of hospitals with The Canadian Union of Public Employees. The bargaining, in effect, was virtually a province wide bargaining.

Some of the classifications included in the present application were bargained for in this province wide bargaining, including:

— laboratory technicians RT with ART

— laboratory technicians RT with B.Sc.

— medical records clerks

— medical records transcribers

— technicians (various types including ECG and OR)

A submission was made to the Board to the effect that a hospital was like a construction site. At such a site each craft is usually represented by its own union and it was suggested that possibly such should be the situation in a health care institution. The Board rejects this concept.

CRAFT UNITS INAPPROPRIATE IN HOSPITAL INSTITUTION

The craft form of unionization in the construction industry has been established for many years and techniques have been developed whereby it is effective in the collective bargaining process for the workers involved. The situation is entirely different in a hospital or health care institution. The team or industry or employer approach is much more suitable in this field. The Board is of the view that craft units would not be either effective or appropriate in hospital institutions.

EFFECTIVENESS OF PROPOSED UNIT

Another important factor to be taken into consideration, in the opinion of the Board, is the effectiveness of a proposed bargaining unit. The Board is of the view that an appropriate bargaining unit which could be effective (while not necessarily being the unit which in its opinion would be most appropriate) could be a unit comprised of employees with a uni-

versity or equivalent training background, providing that the number of such employees in any given institution are sufficiently large to form a viable and distinctive group.

APPROPRIATE UNIT DETERMINED

Taking all these factors, and other factors, into consideration the Board is of the view and finds and determines that all registered and professionally qualified employees employed and functioning as physiotherapists, pharmacists, dietitians, social workers and registered occupational therapists, employed by the University Hospital, in the city of Saskatoon, Saskatchewan, are an appropriate unit of employees for the purpose of collective bargaining.

The Board further holds that persons holding the following positions in the above classifications be excluded from the unit, namely: charge occupational therapist, chief therapist — rehabilitation medicine, deputy charge physiotherapist — rehabilitation medicine, charge physiotherapist — rehabilitation medicine, supervisors — social service, assistant director — pharmacy, and assistant director — dietary.

QUESTION OF SUPPORT

Having determined the appropriate unit, the Board is required to determine whether or not the employees in the unit so found desire that the applicant represent them for collective bargaining purposes. The question of support or non-support only arises after a finding as to the appropriate unit.

CERTIFICATION ORDER ISSUED

On the evidence, the Board finds that a majority of the employees in the appropriate unit support the applicant and directs that a certification order issue accordingly.

The Board, in this case, spent many sessions and many hours in deliberation before coming to a final decision. In many respects the decision herein was probably one of the most difficult made by the Board over a long period.

During the deliberations of the Board some ten votes were taken during these in-camera sessions. On six matters, the Board was unanimous, in four matters the Board split in 4-1 decisions but the interesting fact here is that the dissent in these four matters was in each case cast by a different member of the Board (including the Chairman). The final decision is therefore, truly a consensus in every sense of the word and was concurred in by all members of the Board.

It is recognized, of course, that the matter with respect to which the onus of responsibility was thrown upon the Board is not a matter of black and white — it is largely a matter of opinion and the Members of

the Board in coming to the decision which they did adopted the path which it was felt would be the correct decision in establishing an appropriate unit of employees for purposes of collective bargaining and which would be to the benefit of all parties concerned and conducive to the attainment of industrial peace in hospital institutions.

(Sgd.) "C. H. PEET,"
December 14, 1973. Chairman.

3.128 December 14, 1973

Health Sciences Association of Saskatchewan

v.

Saskatoon City Hospital, Saskatoon
and
Service Employees' International Union, Local 333

Application for certification — Appropriate unit and exclusions determined — Certification order issued.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

This is an application by the Health Sciences Association of Saskatchewan for certification under *The Trade Union Act, 1972*, Chapter 137, for the following proposed bargaining unit, namely:

> "All medical technologists, medical record librarians, physiotherapists, pharmacists and physical therapists employed by the City Hospital of the City of Saskatoon, in the province of Saskatchewan, excepting any person whose primary responsibility is to actually exercise authority and actually perform functions that are entirely of a managerial character, or any person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer."

APPROPRIATE UNIT DETERMINED

Following a full hearing on the application the Board determined that an appropriate unit for collective bargaining would be as follows:

> "All registered and professionally qualified employees employed and functioning as physiotherapists, physical therapists and pharmacists employed by the Saskatoon City Hospital."

EXCLUSIONS

The respondent hospital suggested certain exclusions which were not opposed by the applicant, namely, the physiotherapy supervisor,

senior physiotherapist, chief pharmacist and assistant chief pharmacist and the Board accordingly directed that these be excluded from the bargaining unit.

CERTIFICATION ORDER ISSUED

On the basis of support filed the Board determined that the applicant had majority support in the appropriate unit found and directed that an Order of Certification issue.

REASONS FOR DECISION

Many of the issues dealt with in this application were similar to those with which the Board had to deal in LRB File No. 017-73-4 (The Health Sciences Association of Saskatchewan, as applicant, University Hospital, Saskatoon, as respondent, and Service Employees' International Union, Local No. 333, as intervener)[1] and which by agreement had been heard prior to the within application, and for which Reasons for Decision have been handed down. The Board concurs with the Reasons for Decision in the indicated case so far as they may be applicable to the issues dealt with in this case.

(Sgd.) "CLIFFORD H. PEET,"
December 14, 1973. Chairman.

[1] Decision No. 3.127.

3.129 December 14, 1973

Health Sciences Association of Saskatchewan

v.

Swift Current Union Hospital Board
and
Service Employees' International Union, Local 336

Application for certification — Application out of time re: employees covered by respondent union's certification — Determination of appropriate unit — held: in application, the number of persons in possible categories of an appropriate unit was not large enough to form an appropriate unit for the purpose of collective bargaining — Board therefore could not consider matter of support — Application dismissed.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s. 5 (a) (b) (c) (k) (i).

APPLICATION FOR CERTIFICATION

This is an application by The Health Sciences Association of Saskatchewan for certification under *The Trade Union Act, 1972*, Chapter 137, for the following proposed bargaining unit, namely:

> "All radiological technicians, also known as x-ray technicians, medical laboratory technologists, electrocardiograph technicians, dieticians, medical laboratory technologists, combined certified technicians, and pharmacists, excepting department heads and all persons whose primary responsibility is to actually exercise authority and actually perform functions that are entirely of a managerial character."

OBJECTION OF RESPONDENT UNION

A reply was filed by Service Employees' International Union opposing the application on a number of grounds including the following:

> "It is specifically denied that the unit of employees in respect of which this application is made is an appropriate unit for the purpose of bargaining collectively . . . ; and
>
> Service Employees International Union says that it represents employees in the unit of employees described in paragraph 4 of

the application." (Paragraph 4 in the application set out categories of employees in the proposed appropriate unit which the applicant sought to represent).

APPLICATION OUT OF TIME RE: EMPLOYEES BELONGING TO RESPONDENT UNION

Under section 5 (k) (i) of *The Trade Union Act* the application was out of time in respect of employees covered by the prior certification order dated January 16, 1948, as amended on September 1, 1964. The Board accordingly did not have jurisdiction to deal with the application in so far as such employees were concerned.

DETERMINATION OF APPROPRIATE UNIT

The respondent, Swift Current Union Hospital Board, filed a Statement of Employment as required by the Rules of the Board. Unfortunately the job descriptions, however, did not, in many instances coincide with the job categories for which the applicant claimed bargaining rights. No evidence was presented to the Board to clear up this discrepancy. This applied to a number of categories. An example — the applicant applied to represent dieticians. The Statement of Employment did not list a dietician but did list a food service supervisor. The applicant received a copy of the Statement of Employment and probably could have cleared this up by appropriate evidence as the food service supervisor might well have been, but need not necessarily have been, a dietician. A similar state of uncertainty applied to some other suggested categories.

It is suggested that in applications this should be borne in mind. The rules of the Board were amended in 1972 to provide that all parties to an application should receive copies of the Statement of Employment in order that discrepancies such as existed here could, if the parties saw fit, and were in a position to do so, be cleared up by evidence produced at the hearing.

Another matter noted in this application is the fact that a number of persons for whom the applicant filed cards were not listed in the Statement of Employment. No attempt was made to clear this up and it would accordingly appear that the applicant did not dispute the accuracy of the Statement of Employment in this regard.

PETITION SUBMITTED BY EMPLOYER

Another matter of some concern in this application was the fact that the respondent employer submitted a petition signed by certain employees to the Board. This was quite improper. It is not the place of the employer to assist or to oppose an application for certification other than with respect to any submissions which it may desire to make as to the appropriateness of a suggested unit and exclusions therefrom. In any event a petition as such and of itself is of no evidentiary value whatsoever.

UNIT NOT LARGE ENOUGH TO BE APPROPRIATE

The first duty of the Board in this application was to consider the matter of the appropriate unit. Upon consideration of the categories which the Board might have placed in an appropriate unit, and which were not out of time, the Board made a finding that in this application the number of persons in such categories was not sufficiently large to form an appropriate unit for purposes of collective bargaining.

APPLICATION DISMISSED

In view of this finding the Board could not canvas the matter of support and the application was accordingly dismissed.

A number of issues also arose in this application which were dealt with in the Reasons for Decision of the Board with respect to an application by The Health Sciences Association and the University Hospital, Saskatoon, being LRB File No. 017-73-4[1]. These reasons are not repeated here but the parties hereto are referred to the indicated LRB File No. 017-73-4 with respect to such issues.

(Sgd.) "CLIFFORD H. PEET,"
December 14, 1973. Chairman.

[1] Page 348 of this volume (case 3.127)

3.130 December 14, 1973

Health Sciences Association of Saskatchewan

v.

Eatonia Union Hospital

Application for certification — Statement of Employment filed by respondent — held: applicant is a trade union within the meaning of The Trade Union Act — Only one employee was employed by the hospital in the category set out in the proposed unit — held: such a unit is not appropriate — Application dismissed.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s. 5(a) (b) (c).

APPLICATION FOR CERTIFICATION

This is an application by The Health Sciences Association of Saskatchewan for certification under *The Trade Union Act, 1972*, Chapter 137, for the following proposed bargaining unit, namely:

> "All certified combined technicians, excepting all persons whose primary responsibility is to actually perform functions that are entirely of a managerial character, or any person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer."

STATEMENT OF EMPLOYMENT FILED

The respondent hospital did not file any reply in opposition to the application but it did file a Statement of Employment as required by the rules of the Board. The latter document stated that only one employee was employed by the hospital in the category set out in the proposed appropriate unit.

A reply was filed by The Canadian Union of Public Employees which read:

> "We believe the applicant is not a union within the meaning of *The Trade Union Act*, and that the bargaining unit applied for is not appropriate. The applicant should be required to bring forward evidence with respect to these matters."

In actual fact, however, The Canadian Union of Public Employees did not appear in opposition at the hearing.

APPLICANT IS A TRADE UNION

With respect to the suggestion that the applicant was not a union within the meaning of *The Trade Union Act*, the Board holds that the applicant is a union within the meaning of that Act and refers to its written Reasons for Decision in LRB File No. 017-73-4 being a decision with respect to The Health Sciences Association of Saskatchewan as applicant; University Hospital, Saskatoon as respondent; and Service Employees' International Union, Local No. 333, as intervener.[1]

UNIT NOT APPROPRIATE

The fact that there is only one person employed by the respondent hospital in the proposed appropriate unit is not disputed. The Board holds that such a unit in an institution such as this hospital is not appropriate for collective bargaining purposes. In view of this finding, it was not necessary for the Board to consider other facets of the application.

APPLICATION DISMISSED

The application is accordingly dismissed.

(Sgd.) "CLIFFORD H. PEET,"
December 14, 1973. Chairman.

[1] Page 348 of this volume (case 3.127)

3.131 December 14, 1973

Health Sciences Association of Saskatchewan

v.

Shaunavon Union Hospital Board

Application for certification — Statement of Employment filed only two persons employed by respondent hospital in proposed unit — Application dismissed — Also, application out of time re: persons included in an existing certification order — Recommendation by Board that parties clear up possible discrepancies between job descriptions in Statement of Employment and the application.

S.S. 1972. The Trade Union Act, 1972, C. 137, s. 5 (a) (b) (c) (k) (i).

APPLICATION FOR CERTIFICATION

This is an application by The Health Sciences Association of Saskatchewan for certification under *The Trade Union Act, 1972*, Chapter 137, for the following proposed bargaining unit, namely:

> "All medical laboratory technologists and radiological technicians, also known as x-ray technicians, excepting department heads and all persons whose primary responsibility is to actually exercise authority and actually perform functions that are entirely of a managerial character, or any person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer."

STATEMENT OF EMPLOYMENT FILED

The respondent filed a Statement of Employment as required by Board rules. The Statement of Employment was not disputed by the applicant and is accordingly accepted by the Board.

APPLICATION DISMISSED

The Statement of Employment revealed that there were only two persons employed by the respondent hospital in the proposed bargaining unit. The Board held that a unit of this size was not an appropriate unit for purposes of collective bargaining in a hospital institution such as the respondent hospital herein and accordingly dismissed the application.

APPLICATION OUT OF TIME

The intervener filed a copy of the existing certification order which it held in the respondent hospital and argued that the application was out of time under section 5(k) (i) of the Act. It claimed that medical laboratory technologists were already included in the existing certification order dated August 8, 1962 and held by the intervener. This was not disputed by counsel for the applicant.

The application was, in fact, out of time in respect of persons included in the existing certification order.

RE: JOB DESCRIPTIONS

In the application the applicant proposed two categories of employees for the appropriate unit, namely: (1) medical laboratory technologists and (2) radiological technicians, also known as x-ray technicians. The Statement of Employment, on the other hand, listed the two employees as 1 lab. R.T. and 1 x-ray R.T. No evidence was presented to definitely link up these employee job descriptions with the categories suggested for the appropriate unit. Where job classifications or descriptions in the Statement of Employment are other than the categories set out in the suggested appropriate unit, it is essential that any apparent or possible differences be cleared up by evidence. In view of the fact that this was not done, the Board was uncertain as to whether a 'medical laboratory technologist' was another designation of the classficiation 'lab R.T.' and as to whether 'x-ray R.T.' denoted the same category described as 'radiological technician, also known as x-ray technician'. Also, does the abbreviation R.T. refer to Radiological Technician or merely Registered Technician?

In view of the disposition of the matter, the Board did not need to sort out the matter, but it is suggested that applicants and parties should clear up apparent or possible discrepancies between job descriptions in the Statement of Employment and categories listed in a proposed appropriate unit, by evidence at the hearing.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

December 14, 1973.

3.132 December 14, 1973

Health Sciences Association of Saskatchewan

v.

Moosomin Union Hospital Board

Application for certification — Statement of Employment filed — Only six employees were employed by the respondent hospital in the categories set out in the proposed unit — held: proposed unit not appropriate for the purposes of collective bargaining in an institution such as this hospital — Applicant held to be a trade union within the meaning of The Trade Union Act.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

This is an application by The Health Sciences Association of Saskatchewan for certification under *The Trade Union Act, 1972*, Chapter 137, for the following proposed bargaining unit, namely:

> "All combined certified technicians, medical record technologists, medical laboratory technologists, radiological technicians, and physical therapists, excepting department heads and all persons whose primary responsibility is to actually exercise authority and actually perform functions that are entirely of a managerial character, or any person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer."

STATEMENT OF EMPLOYMENT FILED

The respondent hospital did not file any reply in opposition to the application but it did file a Statement of Employment as required by the rules of the Board. The latter document stated that only six employees were employed by the hospital in the categories set out in the proposed appropriate unit.

A reply was filed by The Canadian Union of Public Employees which read:

> "We believe the applicant is not a union within the meaning of *The Trade Union Act* and that the bargaining unit applied for is not appropriate. The applicant should be required to bring forward evidence with respect to these matters."

In actual fact, however, The Canadian Union of Public Employees did not appear in opposition at the hearing.

APPLICANT IS A TRADE UNION WITHIN THE MEANING OF THE ACT

With respect to the suggestion that the applicant was not a union within the meaning of *The Trade Union Act*, the Board holds that the applicant is a union within the meaning of that Act and refers to its written Reasons for Decision in LRB File No. 017-73-4 being a decision with respect to The Health Sciences Association of Saskatchewan, as applicant; University Hospital, Saskatoon as respondent; and Service Employees' International Union, Local No. 333, as intervener.[1]

DETERMINATION OF APPROPRIATE UNIT

In the application, the applicant proposed five categories of employees for the appropriate unit namely: (1) combined certified technicians; (2) medical record technologists; (3) medical laboratory technologist; (4) radiological technicians and (5) physical therapists.

The only category listed in the Statement of Employment in which the job descriptions matched with those set out in the proposed appropriate unit were combined certified technicians of whom two were listed. The other categories listed in the Statement of Employment covered one R.T. x-ray; one R.T. laboratory; one A.R.T. medical records and one physiotherapist.

It is presumed that the physiotherapist might well be the "Physical Therapist" set out in the proposed application but this, of course, is merely a supposition. No evidence was presented to definitely link up these employee job descriptions in the Statement of Employment with the categories suggested for the appropriate unit.

Where job classifications or descriptions in the Statement of Employment are other than the categories set out in the suggested appropriate unit, it is essential that any apparent or possible difference be cleared up by evidence. In view of the fact that this was not done, the Board was rather uncertain as to the tie-up between the job descriptions of the employees as set out in the Statement of Employment and those referred to in the proposed appropriate unit.

APPLICATION DISMISSED

In this case, the Board felt, however, that the proposed appropriate unit was not appropriate for purposes of collective bargaining in an institution such as this hospital. In view of this finding, it was not necessary for the Board to consider other facets of the application and the application was accordingly dismissed.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

December 14, 1973.

[1] Page 348 of this volume (case 3.127)

3.133 December 14, 1973

Health Sciences Association of Saskatchewan

v.

Lloydminster Hospital

Application for certification — Statement of Employment stated that six employees were employed by the hospital in the categories set out in the proposed unit — Uncertainty as to job descriptions as set out in the Statement of Employment and the application — Held: only two persons definitely in proposed unit — Held: unit not appropriate — also held: applicant is a trade union within the meaning of The Trade Union Act.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

This is an application by The Health Sciences Association of Saskatchewan for certification under *The Trade Union Act, 1972*, Chapter 137, for the following proposed bargaining unit, namely:

> "All registered x-ray technologists, also known as radiological technicians, pharmacists, medical record librarians, medical registered laboratory technologists and medical record technologists, excepting all persons whose primary responsibility is to actually exercise authority and actually perform functions that are entirely of a managerial character, or any person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer."

STATEMENT OF EMPLOYMENT FILED

The respondent hospital did not file any reply in opposition to the application but it did file a Statement of Employment as required by the rules of the Board. The latter document stated that six employees were employed by the hospital in the categories set out in the proposed appropriate unit.

A reply was filed by The Canadian Union of Public Employees which read:

> We believe the applicant is not a union within the meaning of *The Trade Union Act*, and that the bargaining unit applied for is

not appropriate. The applicant should be required to bring forward evidence with respect to these matters.

In actual fact, however, The Canadian Union of Public Employees did not appear in opposition at the hearing.

APPLICANT IS A TRADE UNION

With respect to the suggestion that the applicant was not a union within the meaning of *The Trade Union Act*, the Board holds that the applicant is a union within the meaning of that Act and refers to its written Reasons for Decision in LRB File No. 017-73-4 being a decision with respect to The Health Sciences Association of Saskatchewan as applicant; University Hospital, Saskatoon as respondent; and Service Employees' International Union, Local No. 333, as intervener.[1]

DETERMINATION OF APPROPRIATE UNIT

At the hearing the applicant, The Health Sciences Association of Saskatchewan, asked leave to withdraw the category of "medical record technologists" from the application and from the proposed appropriate bargaining unit leaving four categories in the proposed bargaining unit, namely: (1) registered x-ray technologists, also known as radiological technicians; (2) pharmacists; (3) medical record librarians and (4) medical registered laboratory technologists.

SIX PERSONS IN PROPOSED UNIT

The Statement of Employment filed by the respondent hospital, in accordance with the rules of the Board, revealed that there were only six persons employed in the proposed appropriate unit. One of these, however, was a medical record technologist leaving only five persons in the proposed appropriate unit. No pharmacists were listed in the Statement of Employment and so the categories in the final proposed unit consisted of only three categories. The applicant did not dispute the Statement of Employment filed by the hospital and the Board accordingly accepted the Statement of Employment which, as indicated, did not reveal that any pharmacists were in the employ of the hospital.

UNCERTAINTY AS TO JOB DESCRIPTIONS

Again, as in other applications, there is some uncertainty with respect to the job descriptions set out in the Statement of Employment and the categories listed in the proposed appropriate unit with respect to certain of the categories. For example, the proposed appropriate unit includes the category of medical registered laboratory technologists but the Statement of Employment reveals three medical laboratory technologists but did not indicate as to whether they were "registered" medical laboratory technologists.

[1] Page 348 of this volume (case 3.127)

No evidence was presented to definitely link up this employee job description with the category suggested for the proposed appropriate unit. Three of the five persons involved were listed as medical laboratory technologists but there was not an indication as to whether these were in fact medical registered laboratory technologists.

Where job classifications or descriptions in the Statement of Employment are other than the categories set out in the suggested appropriate unit, it is essential that any apparent or possible differences be cleared up by evidence. In view of the fact that this was not done, there was uncertainty with reference to the item referred to.

The end result was that the only persons definitely listed on the Statement of Employment and in the proposed appropriate unit were one radiological technician and one medical record librarian.

APPLICATION DISMISSED

In any event, the Board felt that the proposed appropriate unit was not an appropriate unit for collective bargaining purposes in an institution such as this hospital and in view of this finding it was not necessary for the Board to consider other facets of the application. The application was accordingly dismissed.

(Sgd.) "CLIFFORD H. PEET,"
December 14, 1973. Chairman.

3.134 December 14, 1973.

Topuschak

v.

E. K. Wagner Bus Lines Ltd.

Applications alleging unfair labour practice under s. 5 (d) (e) (f) (g) and s. 11 (1) (a) (e) — Applicant claimed he was discharged for union activity — Reasons for discharge not accepted by Board — Applicant not discharged "for good and sufficient reason" — Unfair labour practice established — Reinstatement and payment of monetary loss ordered.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s.s. 5 (d) (e) (f) (g); 11 (1) (a) (e).

APPLICATIONS ALLEGING UNFAIR LABOUR PRACTICE

The applications herein were brought by Terrance John Topuschak requesting the Labour Relations Board to issue orders under the authority of section 5 (d), (e), (f) and (g) of *The Trade Union Act*, 1972, Chapter 137.

The sections are as follows:

"5. The board may make orders:

(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;

(e) requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice;

(f) requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice or otherwise in violation of this Act;

(g) fixing and determining the monetary loss suffered by any employee discharged under the circumstances mentioned in clause (f) or otherwise in violation of this Act, and requiring an employer to pay such employee the monetary loss fixed and determined by the board;"

Other portions of the Act to which the Board were referred in the applications included the following:

"11.—(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:

(a) to interfere with, restrain or coerce an employee in the exercise of any right conferred by this Act;

(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if any employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer . . .

3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing . . . "

UNDISPUTED FACTS

Facts which did not appear to be disputed and which are held by the Board, include:

1. Topuschak was originally hired by the respondent in March 1973 as a bus driver.

2. Topuschak was in the employ of the respondent in this capacity until the close of the school term on or about June 15, 1973.

3. Topuschak was requested by the respondent to return to work as a bus driver at the commencement of the fall term and worked as a bus driver for the respondent from August 25, 1973, to October 2, 1973.

4. A meeting of employees was called by Mr. Wagner, Manager of the respondent company, on the evening of October 1, 1973. At this meeting, the employer, Wagner, made derogatory remarks about unions and unionization and referred to the bus drivers in the Humboldt area who had joined a union and had gone on strike. The evidence indicated that there was some argument at this meeting and finally Wagner called for a standing vote by all drivers who were satisfied. Six drivers, including Topuschak, did not stand.

5. Topuschak was summarily discharged along with another driver on the next morning, October 2nd.

FACTS ESTABLISHED IN EVIDENCE

On a number of other factual matters there was some difference in evidence. With respect to these matters, the Board after fully considering all the evidence and the proper weight to be given to same, holds that the following facts are established:

1. For some time prior to October 1st small meetings to discuss grievances had been held by some employees and Topuschak had participated in these meetings. This factual finding is based not only on the evidence of Topuschak and Barber (as witness called by Topuschak) but also on the evidence produced from witnesses for the respondent. Mike Flegel, a driver, stated that he had observed three or four meetings, some in the shop and some outside, and stated "I had a notion about what was being discussed. I thought they were probably talking about forming a union." Mike Gabriel, another driver, stated that he was aware that meetings were going on, that the men were getting together, and he said there were 3, 4 or 5 meetings. He further said that "I mentioned to Mr. Wagner about these meetings." Mr. Nickel stated that drivers were complaining about wages and said "Topuschak and a group were discussing wages." This witness said that Wagner asked him about these meetings and the witness said that he then told Mr. Wagner about them.

2. The Board finds that Wagner knew of these meetings, in fact Wagner admitted this. He stated he knew that groups were getting together, the men were talking and little meetings were being held. Wagner stated that he was not aware of anything about organizing a union but contradicted himself on this item later in his testimony when he stated that a former driver, one Turnbull, had told him that Topuschak had asked him (Turnbull) if he would like to be the president of the group if a union was formed. Thus on the evidence of Wagner himself the Board holds not only that Wagner was aware of these gatherings but also that he had cause to believe that the forming of a union was under discussion.

3. The evidence of Topuschak was to the effect that there was some talk among certain drivers as to whether "we" should get together. He stated that he didn't think he should personally get involved but he did discuss union with several drivers. He stated that at first he doubted if there was enough interest but by the middle of September the matter had progressed to the stage when there was discussion as to which union should be approached. He stated that two unions were mentioned — the Teamsters and The Canadian Union of Public Employees.

4. Topuschak in his evidence further stated that Wagner on one occasion said to him "I hear we're going to get a union". Wagner himself admitted that he did ask Topuschak about a union but says that Topuschak denied that he was in favour of a union. Topuschak, in turn, admits the he told Wagner that he did not, on principal, favour unions. Such a reply by Topuschak when queried about a union by his employer could

hardly be held against Topuschak, under all the circumstances. This evidence does reveal, however, and the Board finds as a fact that Wagner was concerned about a possible union.

5. That Wagner was concerned about a possible union was made abundantly clear, in any event, at the meeting of October 1st. The evidence is uncontradicted that at that meeting Wagner made derogatory remarks about unions and unionization and made a personal attack on Topuschak. The Board holds that Wagner was concerned about a possible union and unionization and about the fact, as he believed, that some of his employees were considering the matter. The Board holds that in considering the matter, and in the discussions being held, some of the driver employees, including Topuschak, were exercising or attempting to exercise a right conferred by section 3 of *The Trade Union Act.*

ONUS PLACED ON EMPLOYER

The fact that Topuschak and another driver were dismissed on the very next morning after the meeting of October 1st, under all the circumstances, places a heavy onus indeed upon the employer here, entirely aside from the onus set out in section 11 (e) of the Act.

The section provides that it is an unfair labour practice:

> ". . . to use coercion or intimidation of any kind, including discharge . . . with a view to . . . discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act . . . "

and then states:

> "If an employer or an employer's agent discharges . . . an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer . . . "

REASONS FOR DISCHARGE

In this case the employer attempted to set up reasons for the discharge other than the exercise by Topuschak of his rights under the Act. On the basis of the evidence produced by the respondent and its witnesses (and without taking into account the evidence of Topuschak and Barber) the Board holds that each of the purported reasons for discharge alleged do not hold water, and this on the evidence of the witnesses of the respondent alone! Briefly, what was some of this evidence?

It was alleged that Topuschak tried to change the bus schedule. Barry Neithercut, a driver, stated that Topuschak had asked him if he could not meet him earlier and stated that he tried to do thus but went back to the original schedule when instructed to do so by the company. He stated that Topuschak had requested the change — he did not order it, and he never complained to him when the original schedule was resumed after a day or two. Mrs. Dorothy Harle, another driver, confirmed that the proposed change was only a request.

Another allegation which the respondent attempted to put forward was an allegation that Topuschak used profane language in his bus. The only witness produced by Wagner was a 16 year old high school student. This young lady impressed the Board as a truthful witness. Her evidence was quite contrary to the allegation, in spite of prodding by counsel. She stated that Topuschak gave us "heck" when rules were transgressed, but that he just spoke to the offending person, he did not holler. Her evidence was to the effect that he did not use any offensive language. When counsel pressed her (his own witness) she replied in answer to his direct question "not really" and stated he had probably used the words "damn" and "bloody" but no more. In referring to his treatment of the students, she said "He didn't treat them that bad". She said that she didn't particularly like him. Apparently he had missed her on one occasion. She said she thought this was "a misunderstanding". She said he kept his bus very clean — the seats were well kept — and his time never varied.

As for the allegation that he was an unsatisfactory driver, we have the above evidence of Miss Vicki Simpson. Mike Gabriel, a driver called as a witness by the respondent, described Topuschak as "a good driver". Wagner stated he had complaints but, if so, the evidence was not produced to the Board. In any event, it is not without significance that Topuschak was recalled at the beginning of the fall term after he had been in the employ of the respondent for a number of months during the spring season.

TOPUSCHAK NOT DISCHARGED "FOR GOOD AND SUFFICIENT REASON"

In summary, as to reasons advanced by the respondent company for the discharge, the company did not show that he was discharged, as the Act says "for good and sufficient reason".

This Board held many years ago, in a decision handed down on July 3, 1945, in the case of *Edward Goodnough* v. *Army and Navy Department Store Limited*,[1] that even if there were some other reason for the discharge over and above the discharge for the exercise of a right under the Act, that the unfair labour allegation should be upheld if it was one of the reasons for the discharge. The present Board concurs in this view, but holds in the instant application that no other "good and sufficient reason" of any kind has been proved in evidence.

[1] Reported at 1SLRB 29

Apparently Wagner and Topuschak did not get along well together, but this in itself is not a "good and sufficient reason" sufficient to meet the onus. There is no doubt whatsoever as to the fact that Topuschak was dismissed for exercising or attempting to exercise a right given to him under *The Trade Union Act.* He was discharged, if not wholly, in any event in part for exercising a statutorily conferred right — the discharge was a retaliatory discharge — and this was an unfair labour practice.

UNFAIR LABOUR PRACTICE ESTABLISHED

The Board accordingly holds that unfair labour practices have been committed under sections 11 (a) and 11 (e) of the Act, and orders that the respondent company, E. K. Wagner Bus Lines Ltd., reinstate the employee, Terrance John Topuschak.

With respect to monetary loss suffered by Topuschak by reason of his discharge, the Board further held that if the parties could not reach agreement as to the amount of such loss that the matter could be brought back before the Board for a decision.

(Sgd.) "CLIFFORD H. PEET,"
Chairman.

December 14, 1973.

3.135 February 15, 1974

Construction and General Workers, Local 890

v.

Fluor Utah Ltd.

Specified term s.33(2)(b) — Whether an expiry date must mention a calendar date or only be ascertainable.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s. 33 (1) (2) (3) (4).

ALLEGATION OF UNFAIR LABOUR PRACTICE

This is an unfair labour practice allegation brought by the applicant union against the respondent company alleging failure to bargain.

The union is certified for certain employees of the company. A collective bargaining agreement covering these employees was signed on or about February 9, 1972. Article 29 of the agreement reads as follows:

> This agreement shall be in effect for a term beginning on the _____ day of _____, A.D., 1972 and for a term of four (4) years thereafter of such lesser period as may be required to complete the project. For the purposes of this article, completion of the project means completion to the point where the mill has become operational and has been turned over to the owner.

It was agreed that while section 29 was not filled in as to commencement of the term that the agreement was actually signed on February 9, 1972, and immediately thereafter the parties to the agreement acted upon it. Work commenced on the project shortly after that date and has continued over since.

Fluor Utah Ltd. was served with a notice to terminate or negotiate a revision of the said agreement within the 30-60 day period of the anniversary date of the second year of the said agreement by the union on the ground that the union was entitled to terminate the said agreement under the provisions of section 33(2) of *The Trade Union Act*, in that the agreement "provides for an unspecified term".

Fluor Utah Ltd. acknowledged receipt of the notice to negotiate but refused to do so on the grounds that the said agreement was for a specified term and therefore, still in full force and effect and that the said agreement was accordingly a valid and binding agreement within the meaning of *The Trade Union Act, 1972*, Chapter 137.

S. 33 OF THE TRADE UNION ACT, 1972 CONSIDERED

Sections of *The Trade Union Act, 1972*, Chapter 137, relevant to the problems with which we are concerned read:

> "33.—(1) Except as hereinafter provided, every collective bargaining agreement whether heretofore or hereafter entered into, shall remain in force for the term of operation provided therein and thereafter from year to year.
>
> (2) Where a collective bargaining agreement:
>
> (a) does not provide for its term of operation;
>
> (b) provides for an unspecified term; or
>
> (c) provides for a term of less than one year;
>
> the agreement shall be deemed to provide for its operation for a term of one year from its effective date.
>
> (3) Where a collective bargaining agreement hereafter entered into provides for a term of operation in excess of two years from its effective date, its expiry date for the purpose of subsection (4) shall be deemed to be two years from its effective date.
>
> (4) Either party to a collective bargaining agreement may, not less than thirty days or more than sixty days before the expiry date of the agreement, give notice in writing to the other party to terminate the agreement or to negotiate a revision of the agreement and where a notice is given the parties shall forthwith bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement."

It is clear that section 33(3) does not apply. *The Trade Union Act, 1972*, Chapter 137, came into force on August 1, 1972, and the collective bargaining agreement herein is dated February 9, 1972, which is not "hereafter" in respect of August 1, 1972.

The applicant union argues that the agreement provided for "an unspecified term" by reason of the failure to fill in the blanks. In the light of the evidence, the Board holds that this argument is without merit.

It is then argued that in any event Article 29 reads "for a term of four (4) years thereafter of such lesser period as may be required to complete the project . . . " It is admitted that the project is not completed.

The company says that the word "of" was obviously intended to read "or" and that any other meaning would leave the sentence an absurdity. The union, on the other hand, states that even if the word "or" is inserted in the article in the place of the word "of" that the situation is that the term of the agreement is either:

1. a term of four years, or
2. such lesser period as may be required to complete the project and in view of the fact that the term was not immediately ascertainable on the date of signing that the term is "an unspecified term" and that under section 33 (2) (b) the agreement is effective for a term of one year only from its effective date.

The Board is of the view that it cannot give effect to this contention — that the agreement is for a term which can be determined and is therefore not for an unspecified term.

In this connection the decision of Mr. Justice Lebel of the High Court of Justice in Ontario reported in 1951 O.W.N. 341, and quoting from page 342 is instructive:

> "The defendant contends that the agreement contains no provision that it shall expire "on a date specified", and hence that the transaction is invalid. The argument seems to be that unless the day of the month and the year are expressly stated, there is no date specified . . . So long as the date in question can be ascertained and fixed by reference to the language of a document, it is, in my opinion, a date specified, and that I take to be the view of our Court of Appeal as expressed in the recent case of *Galan* v. *Alekno*, (1950) O.R. 387, (1950) 3 D.L.R.9). With respect to what was there said and to answer the argument addressed to me, I might add a few words:
>
> In Murray's New English Dictionary, vol. 3, one meaning given to the word "date" is "the limit, term, or end of a period of time or the duration of something"; and in vol. 9 of the same learned and exhaustive work "specific", the adjective, is defined as "having a special determining quality . . . exactly named or *indicated or capable of being so* ; precise, particular". (The italics are mine.)
>
> In *Nova Scotia Trust Co.* v. *Mutual Life Ins. Co. of N.Y.*, 58 N.S.R. 27 at 32, (1925) 2 D.L.R. 224 at 225, the following passage from an American authority, *Bement et al* v. *Trenton Locomotive and Machine Manufacturing Company* (1866), 32 N.J. 513 at 515, which appeals to me, was approved: "The primary signification of the word date, is not time in the abstract, nor time taken absolutely, but, as its derivation plainly indicates, *time given or specified, time in some way ascertained and fixed* ; this is the sense in which the word is commonly used." (The italics are mine.)"

It accordingly follows that the collective agreement is still in force.

In an article entitled "The Duty to Bargain Collectively during the Term of an Existing Agreement" in 63 Harvard Law Review: 1097-1133, it is stated:

> "Neither the employer nor the union is obliged to bargain about proposals to change a collective agreement during its term. However, it is both shortsighted and foolish for either party to stand upon its contract rights without considering whether their operation has created unforeseen hardship or complexity . . . "

In the present factual situation and taking into consideration the obvious view of the legislature that a collective agreement should be limited to a two-year term (Section 33 (3) of the Act) and also taking into account the very substantial change in the economic plight of employees since February, 1972, by reason of the drastic decline in purchasing power, the question may well be posed as to whether the respondent company is wise in declining to bargain, even though it may not be required to do so at this time, as suggested in the above quotation.

ALLEGATION OF UNFAIR LABOUR PRACTICE DISMISSED

Be that as it may, however, the Board feels that it cannot do otherwise than find that the agreement of February 9, 1972, is still in full force and effect. The unfair labour practice allegation must therefore be dismissed.

(Sgd.) "C. H. PEET,"
February 15, 1974. Chairman.

3.136 April 5, 1974

Saskatchewan Union of Nurses

v.

Davidson Union Hospital Board

Application for certification — Nurses — Trade union status — Appropriate unit — Size of unit — Application dismissed.

S.S. 1972. The Trade Union Act, 1972, C. 137, s.s. 2, 5.

APPLICATION FOR CERTIFICATION

This is an application by an organization known and described as Saskatchewan Union of Nurses for certification under *The Trade Union Act*, S.S. 1972, Chapter 137, for a proposed bargaining unit in the Davidson Union Hospital, as follows:

> "All registered and graduate nurses employed at or in connection with the Davidson Union Hospital, except the matron."

Section 5(a), (b) and (c) so far as applicable provides as follows:

> "5. The Board may make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit . . .
>
> (b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;"

On this application the Board was obliged to consider the following matters:

1. A determination as to whether the applicant was a trade union within the meaning of *The Trade Union Act.*
2. A determination as to whether the proposed bargaining unit is, under all the circumstances of this particular case, an appropriate unit of employees for the purpose of bargaining collectively.
3. A determination as to whether the applicant (if a trade union within the meaning of the Act) represents a majority of the

employees in the unit determined by the Board to be appropriate.

TRADE UNION STATUS

The applicant has a responsibility to establish to the Board that it is, in fact, a trade union within the meaning of the Act.

Section 2(1) defines a trade union as:

> "trade union" means a labour organization that is not a company dominated organization.

Section 2(j) reads:

> "labour organization" means an organization of employees, not necessarily employees of one employer, that has bargaining collectively among its purposes;

It is clear that an applicant must establish that it has a right to be certified as the representative of a group of employees for the purpose of bargaining collectively. The organization must qualify, as a *bona fide* trade union within the meaning of the Act. The applicant must have an organic structure — it must have such a thing as a constitution containing, among other items, provisions for the election of officers.

In order to satisfy the Board an applicant must file its constitution and bylaws. This is generally necessary to establish that it is an organization "that has bargaining collectively among its purposes". If the applicant is a local or branch of a larger organization it must also establish to the satisfaction of the Board that the local or branch has been established in accordance with the constitutional requirements of the larger or parent organization. The parent organization must, of course, also qualify as a trade union as defined in the Act.

Rule 5 of the regulations of the Board set out these requirements as follows:

> "5. (1) Any trade union may make an application for certification;
>
> (2) The application shall be in Form 1 and shall be verified by statutory declaration.
>
> (3) There shall be filed with the application:
>
> (a) A certified copy of the constitution of the applicant trade union;
>
> (b) If the applicant trade union has been chartered by a national or international organization, a certified copy of the charter granted to the applicant, but in any case where the charter has not been received by the applicant trade union, the applicant may, with the consent of the board, file a statement signed by the president,

> secretary or similar officer of the national or international organization declaring that the grant of a charter to the applicant trade union has been approved;
>
> provided, however, that if the applicant trade union has previously filed such constitution or charter or statement in lieu of charter, it need not thereafter file additional copies of such document except where it has been materially altered."

In Form 1, which must be completed and filed on an application, and verified by a Statutory Declaration of an officer of the applicant, the applicant applies for an order determining that a given unit of employees is appropriate for the purpose of bargaining collectively and that "the applicant trade union" represents a majority of the employees in the said unit. The applicant is described throughout as "the applicant trade union" but no facts are explicitly set out in the Declaration to establish this status.

This Form 1, verified by Statutory Declaration, is always before the Board on an application — in fact an application will not be scheduled for a hearing by the Board unless this document has been filed. The officer of the applicant verifying the application should be available for examination on the Declaration at the hearing, if any contrary party desires to examine, or, in fact, if the Board should feel that further information is required or desirable.

An applicant must be prepared to establish status if this is questioned either by the Board or by any party to the hearing. An applicant must be prepared to present evidence, if required, as to the manner in which it came into existence. If status is in any manner called into question, and if status is not established to the satisfaction of the Board, then the Board must reject the application. The Board is quite strict in this regard. Each case of necessity must, however, depend on its own circumstances.

FIRST APPEARANCE BEFORE BOARD

The applicant in this case led lengthy evidence to establish trade union status. This was the first occasion on which the applicant, Saskatchewan Union of Nurses, has been before the Board and it was accordingly necessary to establish status to the satisfaction of the Board.

The hearing with respect to this aspect of the matter fully established to the satisfaction of the Board that the Saskatchewan Union of Nurses is a trade union within the meaning of *The Trade Union Act.*

Under normal circumstances an applicant for certification does not ordinarily present evidence with respect to status unless the matter of status is questioned either by an intervener, by the respondent, or by the

Board itself. In any case where a first application is made, however, as in this case, it is necessary for an applicant to lead evidence to definitely establish its status before the Board. The organization so applying to the Board to establish status as a trade union must be very frank if presenting evidence as to its organizational set-up. The Board considers that the onus is rather heavy on a new applicant for certification to place full and complete evidence before the Board.

In this instance, in any event, there was no problem as Saskatchewan Union of Nurses presented evidence which definitely in the opinion of the Board, established the necessary status.

APPROPRIATENESS OF UNIT

Having established status, however, the applicant was next met with the problem as to whether the suggested unit was an appropriate unit for collective bargaining purposes. Evidence filed by the respondent hospital through the Statement of Employment, which was not challenged by the applicant, was to the effect that there were four registered nurses and no graduate nurses employed by Davidson Union Hospital.

The Board is of the view that no cut-and-dried formula can or should be laid down as to an appropriate unit in hospitals — the determination as to an appropriate unit must be made on each application on the basis of the factual situation in each case. It is on this basis that the Board deals with the present application.

Unfortunately the applicant in this application did not lead any evidence as to the total number of employees employed by Davidson Union Hospital. Such evidence would have been of assistance to the Board in determining an appropriate unit for bargaining purposes.

While, as has already been indicated, the Board does not feel that any cut-and-dried formula can be laid down, the Board is of the opinion that in smaller hospitals an over-all employee unit would be desirable. A concern of the Board is that any unit established for collective bargaining purposes should be a unit which could be conducive to effective collective bargaining — the Board feels that this is a necessary ingredient to establish an "appropriate" unit for collective bargaining purposes.

On the basis of the evidence presented to it, the Board is not satisfied that four registered nurses in a hospital institution are a sufficient number to constitute an appropriate bargaining unit for purposes of collective bargaining.

APPLICATION DISMISSED

In view of this finding the Board was not obliged to canvass the matter of support and the application was accordingly dismissed.

(Sgd.) "C. H. PEET,"
Chairman.

April 5, 1974

3.137 April 10, 1974

Saskatchewan Government Employees' Association

v.

The Board of Governors of the Plains Health Centre
and
Canadian Union of Public Employees
and
Service Employees' International Union

Build-up principle — s. 5(a), (b), (c) whether certification shall be granted when at less than full staff and no objection received from employers — Whether appropriate unit can be determined when at less than full staff — Application dismissed.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

This is an application for certification by Saskatchewan Government Employees' Association for a proposed appropriate unit described by the applicant as follows:

> "All employees of the said Plains Health Centre in the following occupational categories: Nursing and related services; Therapy Rehabilitation and related services; Social Workers and related services; Laboratory and related services; X-ray Radiology and related services; Pharmacy; Clerical; Accounting and Administrative services; Dietary and Food services; Tradesmen; Maintenance; Housekeeping; Heating Plant; Stores and Supply services; more specifically, all employees of the Plains Health Centre excepting medical Doctors, resident interns and those persons whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or any persons who are regularly acting in a confidential capacity in respect of the industrial relations of the said Plains Health Centre, constitute an appropriate unit of employees for the purpose of bargaining collectively."

The application was filed on November 9, 1973, but first came on for hearing in March, 1974, having in the meantime been adjourned on several occasions with the consent of all parties.

At the March sittings the applicant asked for leave to amend its proposed bargaining unit to:

> "All employees of the Board of Governors of the South Saskatchewan Hospital Centre at the Plains Health Centre except those whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character and excepting those who regularly act in a confidential capacity in respect of the industrial relations of the said Board of Governors at the said Plains Health Centre."

and the Board directed that a new Statement of Employment be obtained, and the matter was set over for hearing to the April sittings.

INTERVENTIONS FILED BY TWO OTHER UNIONS

The Canadian Union of Public Employees and Service Employees' International Union, both of whom filed support in the proposed units, filed interventions. Broadly speaking each put forward the following submissions in opposition to the certification of the applicant:

1. That the present employees were not representative of the eventual work force.
2. That existing hospital agreements in the province of Saskatchewan are negotiated between the Saskatchewan Hospital Association representing Saskatchewan Hospital Boards and the interveners (CUPE and SEIU) representing hospital workers.
3. That the agreements negotiated by CUPE and SEIU cover hospital workers who are largely represented by these unions and any agreements entered into by the SHA with any other union would be governed by the same terms and conditions and that any certification to another union would not be desirable.

The respondent employer is a division of the new South Saskatchewan Hospital Centre. The South Saskatchewan Hospital Centre is, in effect, one large hospital complex, with three institutions, Wascana Hospital, Pasqua Hospital and The Plains Health Centre. There is one Board for the entire complex. The plan is for personnel to be integrated for all three institutions of the complex. An integrated personnel department hires personnel for all three institutions.

At the present time employees of Pasqua Hospital (formerly Grey Nuns Hospital) are basically represented by Regina Grey Nuns Hospital Employees Association (sometimes called Pasqua Hospital Employees Association), the Staff Nurses Association-Regina Grey Nuns Hospital and the Health Sciences Association of Saskatchewan (as to pharmacists only).

Wascana Hospital workers, on the other hand, are basically represented by the applicant in this application, the Saskatchewan Government Employees' Association.

Orders of this Board covering certifications in the above regard were issued as follows, in respect of Pasqua Hospital:

(a) To Regina Grey Nuns Hospital Employees Association on May 9, 1950, which was subsequently amended on June 13, 1950, and again on December 15, 1971, the present certified unit being as follows:

"The employees employed by the Sisters of Charity of the North West Territories in or in connection with the Regina Grey Nuns' Hospital in the City of Regina, in the province of Saskatchewan, except house surgeons, radiologists, pathologists, interns, staff nurses, student nurses, business manager and his secretary, accountant, chief engineer, pharmacists, Department of Veterans' Affairs students, supervisors of departments which may be created hereafter, supervisors named to replace Sisters as the management may deem advisable, and except all employees covered by the Board's certification order dated December 15, 1971, in respect of the Retail, Wholesale and Department Store Union, Local No. 568, constitute an appropriate unit of employees for the purpose of bargaining collectively."

(b) To Staff Nurses Association-Regina Grey Nuns Hospital on July 5, 1972, the certified unit being:

"All permanent full time and permanent part time registered nurses and graduate nurses, instructor — staff development, nursing care co-ordinators, and assistant nursing care co-ordinators employed by the Regina Grey Nuns' Hospital, in the City of Regina, Saskatchewan, except the assistant administrator — director of nursing service, assistant directors of nursing service, nursing instructors, health counsellor, and a person having and regularly exercising authority to employ or discharge employees and a person regularly acting on behalf of management in a confidential capacity."

(c) To Health Sciences Association of Saskatchewan on May 31, 1974, the certified unit being:

"All pharmacists employed by Pasqua Hospital (a division of the South Saskatchewan Hospital Centre), (formerly Sisters of Charity of the Northwest Territories operating the Regina Grey Nuns' Hospital, Regina), Regina, Saskatchewan."

(d) To Retail, Wholesale and Department Store Union, Local No. 568, on December 15, 1971, the certified unit covering:

> "all employees employed by Hospital Laundry Services of Regina . . . "
>
> These employees apparently perform certain laundry services for the hospital under the umbrella of Hospital Laundry Services of Regina.

The order of the Board covering Wascana Hospital was first issued on March 19, 1945. This order has been amended on many occasions through the years. This is a blanket certification under which employees in many departments of the government of Saskatchewan are certified by Saskatchewan Government Employees' Association.

INSTITUTION NOT AT FULL STAFF

At the present stage The Plains Health Centre, as shown on the Statement of Employment, which in this aspect was not challenged, employs about 39 persons in the proposed unit. Evidence was to the effect that the institution was not yet fully functional, in fact it is not yet officially open, and that when it is functional about 600 persons will be employed within the proposed bargaining unit.

The applicant argued that an appropriate unit could and should be designated as a unit which would take in all employees as health care workers and that a certification in a health care institution, such as The Plains Health Centre, should not be, in effect, on a craft basis. With this contention, the Board is inclined to agree.

In *The Health Sciences Association of Saskatchewan* v. *University Hospital and Services Employees' International Union, Local 333* (reported in 6 C.L.L.C., case no. 16101), the Board states:

> "A submission was made to the Board to the effect that a hospital was like a construction site. At such a site each craft is usually represented by its own union and it was suggested that possibly such should be the situation in a health-care institution. The Board rejects this concept.
>
> The craft form of unionization in the construction industry has been established for many years and techniques have been developed whereby it is effective in the collective bargaining process for the workers involved. This situation is entirely different in a hospital or health-care institution. The team or industry or employer approach is much more suitable in this field. The Board is of the view that craft units would not be either effective or appropriate in hospital institutions."

The applicant further argued that the Board should look beyond the date of the application and stated that in the future this hospital would be integrated very closely with the other two hospitals in the three hospital complex known as The South Saskatchewan Hospital Centre. It was

suggested that this applicant should be certified for all employees in The Plains Health Centre in order to avoid splintering the work force any more than was presently the case. It appeared to this Board that this suggestion was based on the fact that the employees at the Wascana Hospital are already represented by this applicant, the Saskatchewan Government Employees' Assocation.

Both interveners, however, while more or less conceding that an overall health care unit of employees in all three hospitals of the South Saskatchewan Hospital Centre would probably constitute the most appropriate unit, pointed out, and quite correctly, that this application was an application in respect of The Plains Health Centre employees only.

Counsel for the respondent, in this argument, stated:

> "In recent months there have been a proliferation of bargaining agents in units within the hospitals. There has been a splintering of professional and technical categories, and if taken to an extreme the hospitals could be faced with having to deal with several bargaining agents, more than just two or three, but four or five or six or seven . . . If there is a great splintering of bargaining agents there will be a restricted vertical or lateral movement of the employees if transfer policies can be worked out . . . The management does not favor one union or agent, per se, over another, but in the interest of the public it feels that the employees should not be splintered into a number of bargaining agents.
>
> There is already the SGEA at Wascana, Pasqua has the Employees' Association and the Staff Nurses Association. Health Sciences people have made an application in this particular hospital. At the Plains Hospital there is an application by the Saskatchewan Government Employees' Association, Intervention by CUPE and SEIU and the Saskatchewan Union of Nurses. It is conceivable that in the future, once these employees are in those categories, that these other unions will in addition be applying for certification orders. This is what we would hope to avoid, a proliferation of bargaining agents, as we feel the hospital otherwise will be in an unrational and unworkable position."

The Service Employees' International Union, one of the interveners, pointed out that nurses were included in the overall certification at the Wascana Hospital and generally were of the opinion that if a unit was certified it should include all health care workers. This intervener requested a vote in the event that the Board found an appropriate unit, such vote to include the applicant (Saskatchewan Government Employees' Association), and the two interveners, Canadian Union of Public Employees and Service Employees' International Union.

The other intervener, Canadian Union of Public Employees, argued that the proposed unit was not appropriate. The total number of employees at the time of the application was 39. During the hearing the applicant and the employer advised that agreement had been reached between these parties as to 21 exclusions leaving a proposed unit of 18 persons only. Both interveners indicated they would not agree to many of the suggested exclusions. The Canadian Union of Public Employees pointed out that this agreement, however, was another factor which indicated that the proposed unit was not appropriate — 18 only out of a total 600 employee complement when the institution became functional.

THE BUILD-UP PRINCIPLE

Some years ago this Board dealt with this problem, which for want of a better term was referred to as "the build-up principle". Examples of such cases were:

1. International Brotherhood of Electrical Workers' Union and ITT Canada Limited (4 C.L.L.C. Case 16016).
2. Tunnel and Rock Workers' Union and Duval Corporation of Canada (4 C.L.L.C. Case 16038).
3. United Steel Workers of America and Noranda Mines Ltd., Potash Division (5 C.L.L.C. Case 16011).

In the latter case R. H. King, for the majority of the Board, outlined the view of the Board (which prevailed in all of the above cases) as follows:

> "The application came on for hearing at the Board's January sitting. The respondent is a company who is in the process of bringing into production a potash mine. The evidence disclosed that the estimated completion of the shaft sinking and on surface construction would be completed sometime in July, 1969. Underground development would be approximately 25% completed by that date and that the mine would be in production and up to the estimated complement of employees by December, 1969.
>
> As of November 28, 1968, the date of this application, there were 23 employees only in the bargaining unit applied for and as of the date of hearing, namely January 7, 1969, there were 25 employees in the bargaining unit. The respondent company estimated that the full complement of employees in December, 1969, will number approximately 326. There was no evidence to indicate that the proposed full complement of employees would not be reached by the estimated date or that their reaching this complement depended on the foreseeable factors outside the control of the respondent that might cause them to not reach their targeted complement of employees by the said date."

The Board at that time then proceeded to review a number of prior decisions of the Board on the matter and quoted from the Tunnel and Rock Workers' Local Union No. 168 and Duval Corporation of Canada case as follows:

> "The Board by a majority decision, in the International Brotherhood of Electrical Workers, Local Union No. 2038 and ITT Canada Limited application, considered the build-up principle. A written decision was given . . . This decision set out the Board's opinion concerning this principle and the majority of the Board's opinion has not changed . . .
>
> The problem the Board is faced with in this type of application is balancing the right of present employees to be represented by a union for the purpose of bargaining collectively and the right of future employees to select a bargaining agent . . .
>
> The Board, in coming to its decision, must consider the type of operation, the segment of the employees employed in the proposed bargaining unit at time of application, the total number of employees estimated there will be in the proposed bargaining unit, and the date at which the proposed build-up will be achieved . . .
>
> The whole issue was the question as to whether the application was premature in view of the few employees that would be selecting the bargaining agent for the proposed large number of employees.
>
> The majority of the Board, having applied the principles as set out above, were of the opinion that this application was premature and for that reason the application was dismissed."

Subsequent to the above decision, however, and no doubt as a result of those decisions the former section in our *Trade Union Act* was changed by the Legislature and now provides by section 5(c) that the Board in determining an appropriate unit shall not find that a unit is not appropriate "by reason *only* that the *employer* of employees in the unit claims that his complement of employees in the unit is at less than full strength" (emphasis added).

The result of this change in the Act is, of course, that the prior three decisions referred to herein are no longer the law in Saskatchewan.

In this case, however, the factual situation is different from the three quoted cases. The employer has not objected to certification by reason of the so-called "build-up" principle. In fact the employer does not appear to object to a certification, as evidenced by the position of the employer as outlined by its counsel and already referred to herein.

In this case, the Board feels that a decision must be made on the basis of the evidence before it. The decision of the Board is not based on any argument by the employer that the complement of employees in the unit is at less than full strength.

Three unions have filed support with the Board from this small 18-employee group — a group which admittedly will shortly number 600 or thereabouts. The argument that the complement of the eventual unit is at less than full strength is raised by two of the unions involved who in their reply each made the submission: "that the present employees were not representative of the eventual work force".

APPLICATION DISMISSED

Under the factual situation here the Board accordingly finds that at this time it is not in a position to determine any unit which is appropriate and accordingly dismisses the application.

It should also be pointed out that the Saskatchewan Union of Nurses appeared on the application but was not added as an intervener by reason of the fact that it did not file any support. The Board in its discretion, however, heard the view presented by this union, which was to the effect that the unit proposed by the applicant was not an appropriate unit.

(Sgd.) "C. H. PEET,"
April 10, 1974 Chairman.

3.138 April 23, 1974

John M. Robb, Employee and Morris Rod Weeder Co. Ltd.

v.

Retail, Wholesale and Department Store Union, Local No. 955

Exclusion on Religious Grounds: Section 5(l)(i), (ii) and (iii). Whether an employee can be excluded from appropriate unit because of religious beliefs.

S.S. 1972. The Trade Union Act, 1972, C. 137, s. 5 (l) (i) (ii) and (iii).

This was an application by Mr. John M. Robb of Yorkton, Saskatchewan, an employee of Morris Rod Weeder Co. Ltd. of Yorkton, Saskatchewan, for an order excluding him from the bargaining unit and from paying dues and assessments to the Retail, Wholesale and Department Store Union, Local No. 955 as provided by section 5, clause (l), (i), (ii), and (iii) of *The Trade Union Act, 1972*.

The applicant made oral representation to the Board and filed a copy of "Review", a general church paper of the Seventh-Day Adventists, in support of his beliefs.

Having listened to Mr. Robb's submission and having read the article referred to in the exhibit filed, a majority of the Board were of the opinion that, in this particular case, the applicant sincerely believed that he should not belong to the certified union and should be excused from paying dues and assessments, and the Board so ordered.

(Sgd.) "J. R. INGRAM,"
Vice-Chairman.

April 23, 1974.

3.139 May 10, 1974

Retail, Wholesale and Department Store Union, Local 544

v.

The O.K. Economy Stores Ltd.
and
Certain Employees

Determination date — s.6(3); 10 — Whether the date of application or the date of the hearing shall be used by the Board as the determination date. Exclusions — s. 2 (f) — On what basis should employees be excluded from appropriate unit.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s.s. 2 (f); 5 (a) (b) (c); 6 (3); 10.

APPLICATION FOR CERTIFICATION

This is an application for certification under section 5 (a), (b) and (c) of *The Trade Union Act, 1972*, Chapter 137, which reads as follows:

> "5. The board may make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit, but no unit shall be found not to be an appropriate unit by reason only that the employer of employees in the unit claims that his complement of employees in the unit is at less than full strength;
>
> (b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;"

The first duty of the Board was to determine the appropriate unit of employees for the purpose of bargaining collectively.

The respondent contended in its reply that the Assistant Manager and the Meat Manager should be excluded. Both parties agreed that the Store Manager was a proper exclusion.

While the Board is of the opinion, and has so held on numerous decisions that Meat Managers should properly be included as part of the unit, the Board was of the view that in this particular case the Meat Manager should be excluded.

DEFINITION OF EMPLOYEE

The Board desires to point out, however, that in most cases it is inclined to include a meat manager in the appropriate unit under section 2(f) (ii) of the Act under which an "employee" for collective bargaining purposes is defined, in spite of the terms of section 2(f) (i) as

> "2. In this Act
>
> (f) "employee" means:
>
> (ii) any persons engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining;"

This was pointed out in the decision of this Board rendered on September 6, 1973, in *Canadian Union of Public Employees, Local Union 1594* v. *Regina Public Library Board* (reported in 6 C.L.L.C. Case 16095) where the Board stated, in its Reasons for Decision, the following:

> "In this connection, one must not forget that the definition of "employee" in section 2(f) of our Act is very wide indeed. It is as follows:
>
> 2.(f) "employee" means:
>
> (i) any person in the employ of an employer except any person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or any person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer;
>
> (ii) any person engaged by another person to perform services if, in the opinion of the Board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining;
>
> (iii) any person designated by the Board as an employee for the purposes of this Act notwithstanding that for the purpose of determining whether or not the person to whom he provides his services is vicariously liable for his acts or omissions he may be held to be an independent contractor; and includes a person on strike or locked out in a current industrial dispute who has not secured permanent employment elsewhere, and any person dismissed from his employment whose dismissal is the subject of any proceedings before the Board;
>
> If one examines this definition carefully, it is clear the Board has a wide discretion in that it can adopt either one of three definitions, that is the definition in 2(f)(i); the definition in 2(f)(ii) or the definition in 2(f)(iii). A person need not fall into all three definitions to be an "employee" within the meaning of the Act — if a person falls into any one of the three definitions, he can be an "employee" within the meaning of the Act.
>
> It is for the Board to decide whether any person in question is an "employee" within the meaning of the Act. Normally this question is quite straight forward. At times, however, as in this case, an employer will contend that a person is in effect a foreman whereas the union will contend he is simply a glorified chargehand. The Board is of the opinion that in this case the latter situation exists.

> With regard to the status to hire and fire and the claim that individual employees are in the management group, this Board is of the opinion and holds that if such an employee may simply recommend to a superior that another employee should be discharged or that further staff is required, that this is not either the exercise of "*authority*" nor is it to "actually *perform*" functions of a management character. Recommendation does not connote authority to actually perform or carry out. Further the words "*primary responsibility*" and "*regularly*" do not connote the situation here where the functions exercised are only a very, very small part of the work, and certainly an irregular part of the work, of both the department heads and the branch managers . . . In any event, and even if the Board should be in error as to section 2(f)()i), the Board held that in this case both department heads and branch managers are persons who are engaged to perform services which, in the opinion of the Board, constitute a relationship vis-a-vis such persons and the employer that the terms of any contract between them can be the subject of collective bargaining and that as such these persons are "employees" within the meaning of section 2(f)(ii) of the Act."

The general policy of the Board, in spite of the decision herein, is to include Meat Managers in the unit. Some examples of such inclusions are:

1. On May 13, 1948, the Board certified the employees employed by Canada Safeway Limited in its stores in the City of Saskatoon for all employees except the office manager, advertising manager, price marker, secretary to the zone manager and location managers. Meat Managers were accordingly included in the unit.

2. On December 16, 1958, the board certified all full time employees employed by Dominion Stores Limited in its places of business located in the city of Regina excluding thereout only the store manager and persons above the rank of store manager. Meat Managers were accordingly included in the unit.

3. On August 14, 1973, the Board certified all employees employed by Econo-Mart Division of Westfair Foods Ltd. in or in connection with its places of business located in the city of Moose Jaw except the store manager. Meat Managers were included in that unit.

4. On April 24, 1974, the Board certified all employees employed by Canada Safeway Limited in the city of North Battleford except the store manager. The Meat Manager was included in the unit and in fact the inclusion of the meat manager in the unit was not opposed by Canada Safeway Limited.

In the instant case, however, the Meat Manager, on the evidence, appeared to have managerial duties in excess of those usually held and was accordingly excluded. This was not the case, however, with the Assistant Manager (in spite of the high sounding job classification) and the Board accordingly held that the Assistant Manager should form part of the unit.

EXCLUSIONS FROM BARGAINING UNIT

With respect to exclusions in general, the Board approves the view of the Canada Labour Relations Board as set out in the recent decision of the Board in *Canadian Association of Industrial, Mechanical and Allied Workers, Local No. 3* v. *Transair Limited* (reported in 6 C.L.L.C., Case No. 16,111). A portion of the Reasons for Decisions issued by the Canada Labour Relations Board were as follows:

> "Exclusions must be the exception and there must be very serious reasons to warrant them.
>
> Two paramount grounds for exclusion are the performance of management functions and work in a confidential capacity in matters relating to industrial relations. And of the two it appears to this Board that the more critical one is the second . . . This Board therefore looks upon demands of exclusions on that ground with great care and there must be real and compelling reasons for them . . .
>
> Let it be said that the precedents created by various Labour Board or Tribunals in Canada are replete with fundamental principles which help this Board to make a determination in this area of the case under study. Let us enumerate the major ones:
>
> (a) the confidentiality has nothing to do with the competitive position of an employer. Most employees in a plant or enterprise are privy to all types of information: processing data, manufacturing devices or trade secrets which could be detrimental to the competitive position of their employer if revealed to other employers. But that has nothing to do with labour or industrial relations. The only effective protection for an employer in these circumstances is the expected cultivated loyalty of all its employees.
>
> (b) ". . . in matters relating to industrial relations" means having access to information relating to such matters as contract negotiations: for example, the persons that sit together to establish, on behalf of management, the range of salary increase that the bargaining team will be mandated to operate within at forthcoming negotiations; or to such matters as the proceedings before a Board like this one: for example, the persons that sit together and plan the strategy which the employer will use as well as the tactics used in the pursuance of its legitimate interest before a Labour Board; or to such matters as the disposition of grievances: for example the persons who plan or who know what compromise will be offered to a grievor.
>
> (c) the access to this information must not be incidental or accidental. It must be part of an employee's regular duties. If the main function of the employee is not related to matters relating to industrial relations, that employee cannot be excluded. Therein lies a serious matter of judgment and fairness on the part of employers. If management chooses to openly held discussions in matters related to industrial relations where they could be easily overheard or if management keep documents of the same nature, in a place where an unauthorized person may inspect them at will, this is no cause for excluding these persons. As an example, if management decides to give keys to files in the personnel department containing data on forthcoming negotiations to all of its clerical employees, this would not make all of them confidential employees in matters relating to industrial relations.
>
> (d) Disclosure of the information to which these persons have access must have an adverse effect on the interests of the employer. The interest of the employer concerned here, however, must be interest in industrial relations. . . . disclosure by an employee of information he has access to concerning a

> secret manufacturing process to competitors might well be a breach of confidence and loyalty on the part of that employee but has nothing to do with industrial relations."

In this case counsel appeared for certain employees who asked leave to intervene.

DETERMINATION DATE

This Board has always considered that the date which should be taken into account on an application for bargaining rights is the date of the application. That this date is the proper date is fortified by a consideration of section 6 (3) of *The Trade Union Act* which provides that in a case where a trade union applies for an Order of the Board determining it to represent a majority of employees in an appropriate unit for which there is no existing Order of the Board (which is the case here) and shows that 25% or more of the employees in the appropriate unit have within six months preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining, then the Board shall direct a vote. The clear implication is that where a majority of the employees have within six months preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining that the applicant should be certified by the appropriate unit. It is noted here that the period referred to for support is in the words of section 6(3)(b) of the Act "within six months preceding the date of the application".

Counsel for the intervener, in effect, argued that the date for determination of support should be a date subsequent to the filing or application date and while counsel did not specifically suggest that the date should be the date of the hearing there was an implication that it should be some date later than the filing or application date.

When one examines Canadian Labour Legislation, one is struck by the fact that while Canadian Labour Legislation varies in some connection from province to province that in general the application date is the determinant date although one or two jurisdictions do allow for a "terminal date" which is fairly close after the date of application.

The Canada Labour Relations Board has held that the fact that the Canada Labour Code does not provide for any such power to set a terminal date is, in its views significant. This Board feels that the same is true with respect to the province of Saskatchewan.

With respect to this matter, the Canada Labour Relations Board recently held in *General Drivers, Warehousemen and Helpers, Local Union No. 979* v. *Swan River-The Pas Transfer Ltd.* (reported in 6 C.L.L.C., Case No. 16,105) that:

"the most significant fact revealed by a scrutiny of all the provincial legislations is that none establish that a Labour Board will determine the majority status as at the date of its hearings."

The Canada Labour Relations Board then reached the conclusion that:

"The Board must therefore attach great importance to the application date."

The Canada Labour Relations Board then referred to the school of thought which claimed that the best way to achieve industrial peace and stability is to establish machinery whereby the workers are impressed with the seriousness of signing a union card since this will be considered as the chief and best expression of their free wish maturely arrived at and, once it is so expressed, it cannot be changed at will or easily after the application is made on their behalf. By such a system if a majority has been reached legally, certification will almost inevitably issue.

That Board referred to this school of thought as one which held that there must be a system where the employers know that it is virtually useless to campaign to obtain resignations once the application is in; a system where, once the application is made, the union will stop campaigning to obtain signatures because it would serve no purpose in the establishment of the majority status; a system which will not create a temptation for some employers to commit unfair labour practices to obtain resignations or indulge in effect in legal campaigning against the union.

In that case the Canada Labour Relations Board then reached the following conclusion:

"One of the purposes of the Act is to maintain industrial peace and stability and the Board believes that this is best achieved . . . by adopting a philosophy of labour relations law . . . whereby the application date is the determinant factor in assessing the wish of the employees as to their selection of the bargaining agent. The unrest and chaos consequent upon adopting a different school of thought . . . would be far more severe."

This Board concurs in the above view and is of the opinion that our Act contemplates the date of the application as being the determinant date for determination as to the majority status, or otherwise, of an applicant for certification.

This view is fortified by section 10 of our Act which reads as follows:

"10. Where an application is made to the board for an order under clause (a) or (b) of section 5, the board may, in its absolute discretion, reject any evidence or information tendered or submitted to it concerning any fact, event, matter or thing transpiring, or occurring after the date on which such application is filed with the board in accordance with the rules and regulations of the board."

CERTIFICATION ORDER ISSUED

As a result, argument of counsel for the interveners is rejected and certification issued to the applicant determining that all employees employed by O.K. Economy Stores Limited in or in connection with its places of business located in the city of North Battleford, in the province of Saskatchewan, except the store manager and the meat department manager, are an appropriate unit of employees for the purposes of bargaining collectively and finds and determines that the applicant union represents a majority of employees in the appropriate unit.

(Sgd.) "C. H. PEET,"
Chairman.

May 10, 1974.

3.140 May 10, 1974

The Mechanical Workers Trade Union

v.

Saskatoon Mechanical Maintenance Service Ltd.
and
Journeymen Plumbers and Steam Fitters of the United States and Canada, Local 264

Appropriate unit — Section 5(a). Whether a subsisting certified unit should be fractured to form a new appropriate unit — Application dismissed.

S.S. 1972. The Trade Union Act, 1972, C. 137
s. 5(a)

APPLICATION FOR CERTIFICATION

This is an application for certification by the applicant organization, The Mechanical Workers Trade Union. The respondent employer is Saskatoon Mechanical Maintenance and Service Ltd.

The factual background is of some assistance in assessing the application. The situation is as follows:

1. Local 264 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada was certified as bargaining agent for the plumbers and steamfitters employed by M. E. Cook, 542 - 4th Avenue North, Saskatoon, by an Order of this Board dated March 14, 1945, and the said certification is still in full force and effect.

2. In the month of April, 1970, a strike took place. The strike was ratified by the employees of M. E. Cook, then known as M. E. Cook & Sons. Some nine employees, however, opposed strike action. From the evidence it would appear that approximately 21 employees, largely employed in commercial and industrial work, supported the strike while nine employees largely employed on maintenance work were opposed.

3. The indicated nine employees continued to work, despite the strike, and eventually formed the applicant association, The Mechanical Workers Trade Union.

4. Shortly thereafter M. E. Cook & Sons separated their maintenance work from their general plumbing and pipefitting work and a company was formed called Saskatoon Mechanical Maintenance and Service Ltd. (the present respondent). This company was incorporated on May 14, 1970.

5. By an Order of this Board dated January 9, 1971, the respondent company, Saskatoon Mechanical Maintenance and Service Ltd. was declared to be a successor company to M. E. Cook & Sons Limited.

6. At a later date an application was made to this Board by the present applicant for an amendment to the Certification Order issued by this Board dated March 14, 1945, in which the said Order certified the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 264, as bargaining agent for certain employees of M. E. Cook & Son Limited. The amendment asked to have those classifications of employees of M. E. Cook and Son Limited who were then employed by the successor company excluded from the terms of the Order. The applicant then applied, if the amendment was granted, for certification. The applications, both for the amendment and for the certification were dismissed by the Board on July 7, 1971.

CERTIFICATION ORDER IN 1945

From the foregoing recital of facts it is apparent that the employees of Saskatoon Mechanical Maintenance and Service Ltd. are still covered by the certification order of March 14, 1945.

The present application for certification (coupled with an application for amendment), in effect, seeks the same relief as was sought in 1971.

The applicant seeks certification for a unit of employees described in the application as:

"All employees of Saskatoon Mechanical Maintenance Services Ltd."

At the hearing the applicant sought to amend by adding the words "throughout the province of Saskatchewan".

It should be noted, however, that the correct name of the company is Saskatoon Mechanical Maintenance and Service Ltd.

The first question for determination is the question as to whether the proposed bargaining unit is an "appropriate unit". Section 5(a) of *The Trade Union Act, 1972*, Chapter 137, set out this duty of the Board as follows:

> "5. The board may make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit . . . "

The employees in the proposed unit comprise 16 persons, according to the Statement of Employment filed by the employer and consist of:

5 journeyman plumbers
3 apprentice plumbers
3 apprentice refrigeration mechanics
2 journeyman refrigeration mechanics
1 journeyman (?)
2 helpers

These employees, together with the other employees of M. E. Cook & Sons, are a part of the unit certified as an appropriate unit for purposes of collective bargaining on March 14, 1945 — a unit which has subsisted for some 30 years.

The Canada Labour Relations Board in a decision handed down on December 14, 1966 (*Syndicat National and Canadian Pacific Railway — 4 C.L.L.C. 16,001*) held that ordinarily it was not conducive to stable labour relations or orderly collective bargaining negotiations to subdivide a well established craft unit of employees found to be an appropriate unit by the Board, into several units consisting of segments of the same craft group of employees. In any particular case where it was sought to do this, convincing ground for so doing should be established . . . The Board also held that the fact that a majority of employees in an existing unit desired to be separately represented in collective bargaining did not of itself make the proposed unit appropriate for collective bargaining without regard for other considerations, and specifically stated:

> "The simple fact that a majority of employees, in a bargaining unit shaped by an applicant trade union with a view to securing certification as bargaining agent thereof, desire to be thus separately represented in collective bargaining, does not *ipso facto* establish that the unit is the appropriate unit for collective bargaining without regard for other considerations."

The Ontario Labour Relations Board in *Canadian Union of Operating Engineers and Canada Foundries and Forgings Ltd.* (2 C.L.L.C., 16,203) in a somewhat similar factual situation stated:

> "The main argument submitted by the representative of the applicant in support of his contention that a craft unit was appropriate in this case was that the failure of the Board to determine that such a unit was appropriate would derogate from the freedom of the employees concerned to join a trade union of their choice as provided by section 3 of *The Labour Relations Act* . . . If this suggestion were accepted by the Board, it would follow that the sole criterion that the Board would apply in determining whether a craft unit should be severed from an established industrial unit would be the extent of successful organization by a craft applicant."

Under normal circumstances the Board is not inclined to fragment an existing bargaining unit unless a very strong case can be put forward for such a step. The carving out of a small group of employees from a long established bargaining unit (in this case 30 years) is not a light matter.

In a case before this Board some years ago (*Pratchler and St. Elizabeth's Hospital, Humboldt*), this Board expressed its view, as reported in Saskatchewan Labour Relations Board Reports 1949-71 at page 299 as follows:

> "The Board is fully cognizant of the employees rights as set out in section 3 of *The Trade Union Act*. However . . . this is an application for an exclusion from a bargaining unit that has been deemed by an earlier Board Order as being appropriate. It is, therefore, the Board's obligation to determine if through changing circumstances the presently constituted bargaining unit is no longer appropriate."

In the case referred to, the Board held that, taking all relevant factors into consideration, the then constituted bargaining unit was and still remained the appropriate unit and stated that it was the Board's opinion that very cogent reasons indeed should prevail to warrant fragmenting the existing bargaining unit.

Taking the evidence and the facts as found by the Board in the instant case into consideration, the Board is of the view that in this application the proposed fragmented group of 13 employees is not an "appropriate" unit for collective bargaining purposes, and accordingly the application must be dismissed.

During the hearing it was strongly argued that in any event the applicant was not a trade union within the meaning of *The Trade Union Act*, that it was company dominated and that there was employer interference and support for the applicant.

While the evidence did not establish that the applicant was company dominated, there is no doubt that the applicant did enjoy company support. This is evidenced by the fact that the respondent company instituted a check-off for the applicant even though the intervener herein was the certified bargaining agent.

Some doubt is also held by the Board as to whether the applicant was ever properly established. Evidence was tendered as to a founding organizational meeting on October 14, 1970, and minutes of this meeting were filed. Subsequently, however, during the hearing, the applicant (over strong objection) was required to produce its Minute Book. Minutes of the indicated organizational meeting were not recorded therein, nor did they form a part of a folder of assorted notes and memoranda tendered with the Minute Book. Under the circumstances, the reluctance to produce the Minute Book can be understood.

In any event, however, in view of the finding of the Board on the question of "appropriate unit", it is not necessary to make a finding, and the Board does not make any findings as to whether the applicant is a trade union within the meaning of *The Trade Union Act*. The Board is constrained to add, however, that there is a heavy onus for an applicant which has not previously been certified by the Board to establish status

as a trade union and any attempt to hold back documentary or other evidence, as in this case, can only militate against a favourable finding for such an applicant.

APPLICATION DISMISSED

In view of the dismissal of the application for certification, and for the reasons herein set out, among others, the Board also dismissed the application for amendment of the existing Order.

(Sgd.) "C. H. PEET,"
Chairman.

May 10, 1974.

3.141 May 28, 1974

Service Employees' Union Local 333

v.

The Saskatoon City Hospital, Saskatoon

Definition of Employee — Section 2(f) — Whether a student X-Ray Technician could be considered an employee — Reference of Dispute.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s.s. 2(f); 11(1) (a) (c); 24.

ALLEGATION OF UNFAIR LABOUR PRACTICE

This matter was initially brought before the Board as an unfair labour practice allegation by the Service Employees Union Local Union No. 333 against the Saskatoon City Hospital. The application read:

> "The applicant Union is certified as bargaining agent for all employees of Saskatoon City Hospital, with certain exceptions as listed in the Certification Order, which are not material hereto. The employer, Saskatoon City Hospital, has failed and/or refused to bargain collectively with representatives of the Union with respect to student X-Ray technicians.
>
> The applicant submits that by reason of the facts hereinbefore set forth, the said Saskatoon City Hospital has been and is engaging in an unfair labour practice (or a violation of the Act) within the meaning of sections 11(1) (a) and 11(1) (c) of *The Trade Union Act, 1972.*"

REFERENCE OF DISPUTE

At the hearing before the Board, however, the union and the hospital requested the Board hear this matter as a Reference of Dispute under section 24 of *The Trade Union Act, 1972*, Chapter 137. This section reads as follows:

> "24. A trade union representing the majority of employees in a unit of employees may enter into an agreement with an employer to refer a dispute or disputes or a class of disputes to the board and the board shall hear and determine any dispute referred to it by either party pursuant to such agreement and the finding of the board shall be final and conclusive and shall in regard to all matters within the legislative jurisdiction of the Legislature of Saskatchewan be binding upon the parties and enforceable as an order the board made in accordance with this Act."

The Board indicated that it was pleased to grant the application and the matter was accordingly heard as a Reference of Dispute. It was apparent from the evidence that this was was a case of a genuine difference of opinion between the parties. As such the determination of the difference of opinion by a Reference of Dispute is much more conducive to continued good relations between the parties and industrial peace than would be the case if it were dealt with as an unfair labour practice. The fact that the parties could agree to this procedure is indicative of the good faith of each and is to be commended.

Under the Certification Order originally made on April 8, 1946, and updated and amended from time to time until December 9, 1971, the union is certified as the representative for collective bargaining purposes for all employees of the hospital except for certain classifications referred to in the Order. Student X-Ray technicians are not listed as one of these exceptions. X-Ray technicians are included in the Order although the Chief Registered X-Ray technician is excluded.

WHETHER OR NOT STUDENT X-RAY TECHNICIANS ARE EMPLOYEES

It accordingly follows that the real question for determination is whether or not "student x-ray technicians" are employees within the definition of that term in *The Trade Union Act.*

"Employee" is defined in the Act as follows:

> "2.(f) "employee" means:
>
> (i) any person in the employ of an employer except any person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or any person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer;
>
> (ii) any person engaged by another person to perform service if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining;
>
> (iii) any person designated by the board as an employee for the purpose of this Act notwithstanding that for the purpose of determining whether or not the person to whom he provides his services is vicariously liable for his acts or omissions he may be held to be an independent contractor;
>
> and includes a person on strike or locked out in a current industrial dispute who has not secured permanent employment elsewhere, and any person dismissed from his employment whose dismissal is the subject to any proceedings before the board;"

No suggestion is raised as to the managerial or confidential capacity. The Board is of the view that if the "student x-ray technicians" are, in the words of section 2(f)(ii) "engaged . . . to perform services" by the hospital that they are then persons in respect of which "the relationship

between those persons is such that the terms of the contract between them can be the subject of collective bargaining.

Evidence established that to become a "student x-ray technician" an applicant must make an application to the Saskatoon City Hospital, that upon acceptance each is provided with an identification card reading "_____ is an employee of the Saskatoon City Hospital, Radiology Department", and that remuneration is received from the Saskatoon City Hospital by each such student x-ray technician. From this remuneration unemployment insurance, Canada Pension Plan and income tax is deducted. During training, which in fact is a joint working and training routine remuneration is increased on a more or less regular basis. Salary increase authorization forms were filed which read:

"The above-named employee is due to receive a scheduled wage increase of $_____ per month effective _____. Present salary $_____."

It is noted that on the above form the hospital refers to the student x-ray technician as an employee and refers to "a schedule wage increase" and that the remuneration is "salary". It is also significant that both unemployment insurance and Canada Pension Plan deductions are made. It is also significant that the remuneration received by each student x-ray technician is by cheque from the hospital. The students are also subject to discipline by the hospital and can be terminated by the hospital if not satisfactory.

It was indicated to the Board that x-ray students are not considered as employees but are considered as students under The Labour Standards Act. Presumably the effect of this would be that minimum wage requirements need not be complied with by an employer. Whether this is so or not (and we make no finding on that point), we are here concerned with the definition of "employee" under *The Trade Union Act*, and not under *The Labour Standards Act*. The fact that an employer might not be obliged to honour minimum wage requirements is not to say that a bargaining agent cannot, by collective bargaining, bargain up the remuneration to be received by an x-ray student technician.

Evidence was received to the effect that the hospital is reimbursed by the Saskatchewan Hospital Services Plan in respect of remuneration paid to student x-ray technicians. The Personnel Director of the hospital, Mr. Ralph Van Ness, stated that if the hospital paid the student x-ray technicians more than the hospital was allowed by the Saskatchewan Hospital Services Plan, that in that event the hospital itself would have to find and provide the additional funds required. This may well be so, but this fact alone does not derogate from the fact that student x-ray technicians do "perform services" for the hospital, in fact the evidence indicated that during the first 3 months the students work for 8 hours and take classes for one hour each day, that for 3 months they take full-time training, and thereafter for a period of 18 months they

work 37 hours a week and put in an additional 3 hours training each week. Services rendered are accordingly substantial. Student x-ray technicians are in fact scheduled on duty the same as "other employees" (to use the words of a hospital witness).

It was suggested to the Board that some years ago the Saskatchewan Labour Relations Board has held that persons taking a training period to acquire requisite skills were not employees appropriate for collective bargaining purposes. The decision to which we were referred was *International Brotherhood of Electrical Workers, Local 2038, and I.T.T. Canada Limited* (reported in 4 C.L.L.C., case no. 16,016).

A careful examination of the Reasons for Decision given in this case shows, however, that while there was considerable argument as to whether in fact persons taking the training were employees within the meaning of *The Trade Union Act*, that the Board did not feel that it was necessary for the purpose of considering the application to decide that point. It was opinion of the board at that time that the persons in training, irrespective of their status as employees, could not be considered as part of a unit appropriate for the purpose of collective bargaining. The board at that time by a majority decision (some members of the board dissented in that case) held that the special status which existed for a limited period of time at the outset of their association with the company could not, in the opinion of the majority of the board, qualify these employees as a classification that should be included in the bargaining unit applied for by the union. In that case it should be noted, however, that the period of training was a mere 22-week period.

The Trade Union Act, 1972, is, of course, quite different in its definition of "employee" than was the case in 1966 when the above *International Brotherhood of Electrical Workers, Local 2038 and ITT Canada Limited* matter was decided. The difference in the length of the training period, that is a training period of 24 months rather than 22 weeks is also of some significance.

In 1973, this Board had before it an application by *Retail, Wholesale and Department Store Union, Local 480, and Western Automotive Rebuilders* (LRB File No. 043-73-4) in which the respondent company argued that this Board did not have jurisdiction either to hear an application for certification or to make any Order with respect to certification in so far as such Order might affect persons who are alleged to be employed by the respondent company under a contract with the Government of Canada. In that case the workers involved were to receive occupational training in the nature of training on the job pursuant to the provisions of the *Adult Occupational Training Act.*

In that case the Board held that such persons were "employees" under section 2(f)(ii) of *The Trade Union Act* and these workers were included in the certified unit. The decision of the Board was

subsequently challenged in the Court of Queen's Bench on the basis that the Board had no jurisdiction to make the Order, one of the grounds advanced being as follows:

> "That despite the fact that the Board was informed that a number of employees were trainees under a contract between the Federal Government and the employer it nevertheless made the order of certification and thereby exceeded its jurisdiction."

Mr. Justice Johnson rejected this contention and held "that the Board had jurisdiction to find as it did" although he expressed no opinion on the finding. The Order of the Board was upheld.

DECISION

Taking all the facts into account, the Board holds that student x-ray technicians are persons who are in its view employees within the meaning of section 2(f)(ii) of *The Trade Union Act, 1972*, and accordingly finds and determines that the Saskatoon City Hospital is required to bargain collectively with the applicant union with respect to such student x-ray technicians.

(Sgd.) "C. H. PEET,"
Chairman.

May 28, 1974.

3.142 May 28, 1974

Canadian Brotherhood of Railway, Transport and General Workers,
Local No. 329,

v.

Mid-City Motors (1950) Ltd., Saskatoon
and
James Hill

Certification — Whether evidence of employee support shall be accepted after application date.

S.S. 1972. The Trade Union Act, 1972, C 137,
s. 5 (a) (b) (c).

APPLICATION FOR CERTIFICATION

This is an application for certification under section 5(a), (b) and (c) of *The Trade Union Act, 1972*, Chapter 137, which reads as follows:

> "5. The board may make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit, but no unit shall be found not to be an appropriate unit by reason only that the employer of employees in the unit claims that his complement of employees in the unit is at less than full strength;
>
> (b) determining what trade union, if any represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;"

The first duty of the Board was to determine the appropriate unit of employees for the purpose of bargaining collectively.

In this application the unit originally proposed by the union applicant was:

> "All employees employed by Mid-City Motors (1950) Ltd. at its main building at 304 - 4th Avenue South, and the Body Repair Branch at 46th Street and McKee Avenue, in Saskatoon, Sask. except Car Salesmen, on the road parts salesmen, personal secretary, Managers, and Departmental heads having and regularly exercising authority to employ and discharge employees or regularly acting on behalf of management in a confidential capacity."

The Statement of Employment filed by the respondent employer suggested the exclusion of five additional classifications, namely:

"computer controller
new and used cost accountant
purchasing agent parts shop counter
payroll time keeper & workorder clerk
workorder clerk & payroll time clerk"

By the date of the hearing, however, the applicant union and the respondent employer had reached an agreement as to a unit which each believed might be appropriate for purposes of collective bargaining. The Board considered both this agreement and submissions presented with respect to the proposed appropriate unit, and, upon consideration, found that the suggested unit would be an appropriate unit, The unit so found is as follows:

> "All employees employed by Mid-City Motors (1950) Ltd. at its main building at 304 - 4th Avenue South and the Body Repair Branch at 805 - 45th Street, Saskatoon, except car salesmen, on the road parts salesmen, personal secretary, managers, departmental heads, shop foremen, assistant service manager, assistant parts manager, payroll accountant, computer controller, cost accountant and contract painter."

Under the circumstances, counsel for the respondent employer, quite properly, took no further part in the proceedings, although he did maintain a watching brief and did make a submission during argument relative to a vote.

Mr. James Hill, an employee, appeared before the Board by counsel and also gave *viva voce* evidence. Objection was raised as to the receipt of this evidence but the Board exercised its power of discretion to hear the evidence. The evidence related to a petition.

From the evidence, it appears that this petition was launched by Mr. Hill after he had seen a notice on a bulletin board on the company premises to the effect that employees could "sign off" or "sign out" from the union, that they could change their mind. The witness stated he could not remember exactly what the notice had said, but this was substantially what it said. The notice was not produced. No evidence was led as to the source of this notice although Mr. Hill stated it was a Xerox document but not on company stationery. In any event, Mr. Hill says he spoke to Mr. Charlie Gordon, the General Manager of the company, after he saw the notice and Mr. Gordon suggested he see a lawyer. Mr. Hill stated that he did, in fact, see a lawyer. Presumably the petition was circulated by Mr. Hill as a result although very little evidence was presented on this aspect of the matter.

REQUEST FOR A VOTE

In all the circumstances surrounding the petition, the Board is of the view that no great weight can be attached to it. In any event, it is

worthy of note that the petition did not oppose the application. It only asked for a vote. The application was filed on April 3, 1974. Mr. Hill stated that the petition was begun about two weeks before the date of the hearing. The hearing was on May 7th so the petition (undated) must have been started about April 23rd or thereabouts.

In a recent decision (*Retail, Wholesale and Department Store Union and The O.K. Economy Stores Limited* — LRB File No. 300-73-4 dated May 10, 1974), this Board stated:

> This Board has always considered that the date which should be taken into account on an application for bargaining rights is the date of the application. That this date is the proper date is fortified by a consideration of section 6(3) of *The Trade Union Act* which provides that in a case where a trade union applies for an Order of the Board determining it to represent a majority of employees in an appropriate unit for which there is no existing Order of the Board (which is the case here) and shows that 25% or more of the employees in the appropriate unit have within six months preceding the date of the application indicated that the applicant trade union is their choice as a representative for the purpose of collective bargaining, then the Board shall direct a vote. The clear implication is that where a majority of the employees have within six months preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining that the applicant should be certified for the appropriate unit. It is noted here that the period referred to for support is in the words of section 6 (3) (b) of the Act "within six months preceding the date of the application".
>
> Counsel for the intervener, in effect, argued that the date for determination of support should be a date subsequent to the filing or application date and while counsel did not specifically suggest that the date should be the date of the hearing there was an implication that it should be some date later than the filing or application date.
>
> When one examines Canadian labour legislation, one is struck by the fact that while Canadian labour legislation varies in some connection from province to province that in general the application date is the determinant date although one or two jurisdictions do allow for a "terminal date" which is fairly close after the date of application. The Canada Labour Relations Board has held that the fact that the Canada Labour Code does not provide for any such power to set a terminal date is, in its view significant. This Board feels that the same is true with respect to the Province of Saskatchewan.
>
> With respect to this matter, the Canada Labour Relations Board recently held in *General Drivers, Warehousemen and Helpers,*

Local Union No. 979 and Swan River — The Pas Transfer Ltd. (reported in C.L.L.C., Case No. 16,105) that:

> "the most significant fact revealed by a scrutiny of all the provincial legislations is that none establish that a Labour Board will determine the majority status as at the date of its hearings."

The Canada Labour Relations Board then reached the conclusion that:

> "The Board must therefore attach great importance to the application date."

The Canada Labour Relations Board then referred to the school of thought which claimed that the best way to achieve industrial peace and stability is to establish machinery whereby the workers are impressed with the seriousness of signing a union card since this will be considered as the chief and best expression of their free wish maturely arrived at and, once it is so expressed, it cannot be changed at will or easily after the application is made on their behalf. By such a system if a majority has been reached legally, certification will almost inevitably issue.

That Board referred to this school of thought as one which held that there must be a system where the employers know that it is virtually useless to campaign to obtain resignations once the application is in; a system where, once the application is made, the union will stop campaigning to obtain signatures because it would serve no purpose in the establishment of the majority status; a system which will not create a temptation for some employers to commit unfair labour practices to obtain resignations or indulge in effect in legal campaigning against the union.

In that case the Canada Labour Relations Board then reached the following conclusion:

> "One of the purposes of the Act is to maintain industrial peace and stability and the Board believes that this is best achieved . . . by adopting a philosophy of labour relations law . . . whereby the application date is the determinant factor in assessing the wish of the employees as to their selection of the bargaining agent. The unrest and chaos consequent upon adopting a different school of thought . . . would be far more severe."

This Board concurs in the above view and is of the opinion that our Act contemplates the date of the application as being the determinant date for determination as to the majority status, or otherwise, or an applicant for certification.

This view is fortified by section 10 of our Act which reads as follows:

> "10. Where an application is made to the board for an order under clause (a) or (b) of section 5, the board may, in its absolute discretion, reject any evidence or information tendered or submitted to it concerning any fact, event, matter or thing transpiring, or occurring after the date on which such application is filed with the board in accordance with the rules and regulations of the board."

Under section 10 of the Act, the Board was not obliged to consider "any fact, event, matter or thing transpiring, or occurring after the date on which such application is filed with the board in accordance with the rules and regulations of the board". In this case, as previously indicated, the Board did, however, consider the evidence of Mr. Hill but on the basis of this evidence could not consider that the petition necessarily represented the view of a majority of the employees.

UNION HAD MAJORITY SUPPORT

In any event, in this case, the Board noted with interest that the petition did not oppose the application. It only related to a vote. The Board, however, was satisfied from the evidence that the applicant union represented a majority of employees in the unit appropriate for collective bargaining and accordingly issued certification without a vote. A vote would only be considered by the Board on the basis that the Board was not satisfied as to majority support which was not the case with respect to this application.

An order for certification accordingly issued.

(Sgd.) "C. H. PEET,"
Chairman.

May 28, 1974.

3.143 May 31, 1974

Health Sciences Association of Saskatchewan

v.

Saskatoon City Hospital
and
Service Employees Union, Local 333.

Res Judicata — Whether res judicata can be applied in matters before the Board — Res Judicata should apply in this case — Application dismissed.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s. 5(a) (b) (c).

REASON FOR DECISION

This application was very similar to a prior application made by this applicant and on which an Order was issued on December 14, 1973. At that time the applicant was certified for a unit of employees in the respondent hospital which the Board considered to be appropriate for collective bargaining purposes.

The present application, while in form a new application, is, in many ways, very similar to an appeal from the prior decision. The group for which the applicant now seeks certification is substantially the same which the Board by its Order on December 14, 1973, excluded from certification when it found a group which it considered was appropriate and which did not include the present group.

The evidence in this application was by and large the same as that on the prior application for which reasons for decision was previously handed down.

This application was brought on February 18, 1974 — only two months after the earlier decision was handed down. The certified union and intervener argued that the application was *res judicata* — already decided.

This Board has previously held that in certain circumstances the rule of *res judicata* can be applied in matters before this Board. The matter was dealt with in *Retail, Wholesale and Department Store Union, Local No. 955* and *Morris Rod Weeder Co. Ltd.* (LRB File No. 262-72-3) as follows:

"If the issues raised were identical, it is possible that *res judicata* could apply. Reference is made to Halsbury's Laws of England, Third Edition, Volume 15, at page 181 (paragraph 355) which reads as follows:

"The most usual manner in which questions of *estoppel* have arisen on judgments *inter partes* has been where the defendant in an action raised a defence of *res judicata*, which he could do where former proceedings for the same cause of action by the same plaintiff had resulted in the defendant's favour, by pleading the form judgment by way of *estoppel.* In order to support that defence it was necessary to show that the subject matter in dispute was the same (that is to say, that everything that was in controversy in the second suit as the foundation of the claim for relief was also in controversy or open to controversy in the first suit), that it came in question before a court of competent jurisdiction, and that the result was conclusive so as to bind every other court."

Res judicata normally applies to courts of record. The Labour Relations Board, of course, is not a court but rather an administrative tribunal and there appears to be authority in law by which *res judicata* could apply to decisions of the Board if the matters in issue were identical. Halsbury, again, states, at page 212 (paragraphs 396 and 398) of the volume already referred to that:

"The doctrine of *estoppel* by record has been extended by analogy to the decisions of all tribunals which have jurisdiction, whether by the law of this country, or by the consent of parties — to whose tribunals the parties have . . . submitted themselves."

As respects the many other tribunals which have by statute been given jurisdiction in particular matters, it seems that the general principal that the law has respect not only to courts of record and proceedings in those courts but also to all other proceedings where the person who gives judgment has judicial authority is applicable."

In the Morris Rod Weeder case the facts in certain important particulars were different. This is not the case here. While certain additional information was provided to the Board the issues and parties were identical.

The Board accordingly held that this is a case where *res judicata* should apply and accordingly dismissed the application.

(Sgd.) "C. H. PEET,"
Chairman.

May 31, 1974.

3.144 May 31, 1974

Health Sciences Association of Saskatchewan

v.

Holy Family Hospital, Prince Albert
and
Canadian Union of Public Employees, Local 81

Appropriate Unit — Whether a subsisting certified unit should be fragmented to form a second small unit — Application dismissed.

S.S. 1972, The Trade Union Act, 1972, C. 137,
s.s. 5 (a) (b) (c); 6 (1)

APPLICATION FOR CERTIFICATION

This was an application for certification in respect of the radiological technicians, pharmacists and physical therapists employed by the respondent hospital.

The total number of employees in the above classifications were five only . . . 3 radiological technicians, 1 pharmacist and 1 physical therapist.

FRAGMENTATION OF BARGAINING UNITS NOT DESIRABLE

All five of the above employees were already certified to the certified union under a unit of some 150 employees in the respondent hospital which by a prior Board Order had been found to be appropriate for collective bargaining purposes. This Board, and virtually every labour relations board or industrial relations board in Canada has consistently held that fragmentation of bargaining units in hospitals and health-care institutions among diverse small units is not desirable — that a multiplicity of small units is not appropriate for effective collective bargaining.

In a recent Ontario case the Labour Relations Board in that province state in *Nurses' Association Wellesley Hospital and The Wellesley Hospital* — reported in (1974) 1 Canadian L.R.B.R. at page 71 that:

> "It has been the policy of this Board since the initial applications for hospitals by such unions as the Service Employees International Union to find an "all employee unit" which includes registered nursing assistants in the appropriate bargaining unit."

The Ontario Board also referred to other Ontario Board decisions with approval — one such decision was *The Board of Education and The City of Toronto* (1970) O.L.R.B.M.R. 430 where the Board commented on the problem as follows:

> "The fact finding process is at all times directed toward and governed by the concept of appropriateness and the essence of appropriateness in the context of Labour Relations is that the unit of employees be able to carry on a viable and meaningful collective bargaining relationship with their employer. *It is the Board's experience that employees may in some cases subdivide themselves into small groups which may result in an unnecessary fragmentation or atomization of the employees. Thus an employer faced with the possibility of lengthy, protracted and expensive bargaining and the further possibility of jurisdictional disputes among multiple bargaining groups represented by one or more trade unions may find it impossible to carry on a viable and meaningful collective bargaining relationship. The Board therefore is adverse to certifying employee groups where the result is undue fragmentation* and in those circumstances the Board will find the unit proposed inappropriate on the basis that a meaningful and viable collective bargaining relationship will not result. See, e.g. Waterloo County Health Unit (1969), OLRB M.R. 1016." (our emphasis)

The Board concluded at p. 437 as follows:

> "In conclusion we hold that where s. 6(1) refers to the 'unit of employees that is appropriate' it does not impose any requirement that the Board choose the more or most comprehensive unit — it only requires the Board to determine the unit of employees that is appropriate for collective bargaining having particular regard to the facts of the immediate application."

This Board approves the general concept set out in this decision and calls particular attention to that portion of the decision which we have underlined.

In this application there are some 150 employees and it is proposed to take out a small group of five persons from the present certified unit. Such atomization or fragmentation is not appropriate for viable, meaningful or effective collective bargaining. The factual situation here "having particular regard for the facts of the immediate application" as set out certainly require an adverse decision on the merits of the application.

The first duty of the Board, as set out in the Swift Current Union Hospital Board case (LRB File No. 098-73-4) was to consider the matter

of an appropriate unit. Once this is done, and if the proposed unit is found not to be appropriate for collective bargaining purposes, as is the case here, the Board need not canvass the matter of support. In this application it is to be noted, however, that the applicant did not have the full support of the group it sought to certify — another factor against the separation of this small group of five from the present unit of some 150 employees.

In addition to the above it is noted that the applicant did not apply, prior to the hearing, for an amendment to the existing Order. If the Board had been inclined to grant the application such an amendment would, of course, have been necessary.

APPLICATION DISMISSED

The Board accordingly dismissed the application.

(Sgd.) "C. H. PEET,"
Chairman.

May 31, 1974.

3.145 May 31, 1974

Health Sciences Association of Saskatchewan

v.

University Hospital, Saskatoon
and
Service Employees' Union, Local 333.

Time limitation — Whether Board had jurisdiction to hear application not filed within the specified time period.

S.S. 1972. The Trade Union Act, 1972, C 137,
s.s. 5 (k) (i); 19.

This application was very similar to a prior application made by this applicant and on which an Order was issued on December 14, 1973. At that time the applicant was certified for a unit of employees in the respondent hospital which the Board considered to be appropriate for collective bargaining purposes.

The present application, while in form a new application, is, in many ways, very similar to an appeal from the prior decision. The group for which the applicant now seeks certification is substantially the same which the Board by its Order on December 14, 1973, excluded from certification when it found a group which it considered was appropriate and which did not include the present group.

The evidence in this application was by and large the same as that on the prior application for which reasons for decision was previously handed down.

APPLICATION OUT OF TIME

At the commencement of the hearing the applicant requested to amend its application. The application was out of time under section 5 (k)(i) in respect of certain employees covered by an existing certification dated January 8, 1965.

A question was raised as to whether, in these circumstances, the Board had jurisdiction to hear the application, or even allow the applicant to amend its application. Counsel for the certified union did not initially raise the objection, but when the matter was mentioned counsel stated that the certified union was not prepared to waive the matter. In

any event it is doubtful if waiving an objection could have clothed the Board with jurisdiction if it did not have jurisdiction otherwise.

Section 19 of the Act gives the Board wide power to cure any irregularity or technical objection but cannot be used by the Board to confer jurisdiction upon itself in a case where the Board does not otherwise have jurisdiction under the statute. This would appear to be the situation here.

Under the circumstances the Board held that it neither had jurisdiction to hear the application nor did it have jurisdiction to grant leave to the applicant to amend its application. The application was accordingly dismissed.

(Sgd.) "C. H. PEET,"
May 31, 1974. Chairman.

3.146 May 31, 1974.

Health Sciences Association of Saskatchewan

v.

St. Paul's Hospital, Saskatoon
and
Service Employees' Union Local 333

Employer Interference — Effect of employer's decision to bargain with applicant union rather than certified union.

S.S. 1972. The Trade Union Act, 1972, C 137,
s. 2(e).

The applicant herein brought two applications to the Board, an application for bargaining rights in respect of certain employees of the respondent hospital and an application to amend an existing Order of this Board dated February 3, 1965, wherein Service Employees Union Local Union No. 333 was certified as bargaining agent for all employees of the respondent hospital save and except for certain classifications set out in that Order.

All persons for whom the applicant sought bargaining rights form a part of the existing unit previously held to be appropriate for collective bargaining purposes by this Board.

HOSPITAL REFUSED TO BARGAIN WITH CERTIFIED UNION

Evidence led revealed that the respondent hospital, however, had declined to bargain with the certified union in respect of certain of the employees for whom the applicant sought certification. The respondent hospital indicated to the certified union that it was only prepared to bargain in respect of the indicated employees through the present application association. This action on the part of the respondent hospital, of course, was quite illegal. It is trite law that a certification order binds an employer until such time as it is either rescinded or altered. If support for this assertion is required, it is provided by the Saskatchewan Court of Appeal. *In Army & Navy Department Store Ltd. and Retail, Wholesale and Department Store Union* (reported in 2 C.L.L.C., Case 15,439 and in (1962) W.W.R. 311) the Chief Justice of that Court, Culliton C.J.S. speaking for the Court said:

> "It is admitted that the certification order of the Board dated December 14, 1960, was valid and subsisting at the time the applicant refused to bargain collectively with the elected or appointed representatives of the respondent union. That order constituted a determination by the Board, under the provisions of *The Trade Union Act*, that the employees of the applicant as therein described constituted an appropriate unit of employees for the purpose of bargaining collectively and that the respondent union represented a majority of such employees. As long as that order is valid and subsisting, the status of the union as representing a majority of employees in the appropriate unit for the purpose of bargaining collectively cannot be questioned."

UNFAIR LABOUR PRACTICE

The action of the respondent hospital, in fact, constituted an unfair labour practice. As Culliton C.J.S. further stated in the above case:

> ". . . it shall be an unfair labour practice for an employer to refuse to bargain collectively with the representatives, elected or appointed, by a trade union representing the majority of employees in an appropriate unit. The finding by the Board that the certification order was in effect was conclusive of the fact that the respondent union represented a majority of the employees in the appropriate unit."

Evidence led further established that the respondent hospital, in flagrant violation of the responsibility which it had to bargain with the certified union, did, in fact, bargain with the applicant association and signed a form of agreement with the applicant association September 12, 1973.

The applicant association argued that the certified union had not bargained for the persons in respect of which the present certification application was made. Evidence, however, was to the effect that the certified union had attempted to bargain, but that the management of the respondent hospital was not willing to bargain. In fact as early as December 12, 1972, the respondent hospital had written a letter to the applicant association in which it stated that the hospital would recognize the applicant association as the bargaining agent for certain employees!

Thus the respondent hospital deliberately chose to bargain, not with the certified union, as it was obligated to do, but rather with this rival association. There is no doubt but that this favouring of the applicant association influenced or might have influenced a certain number of employees to believe that they could only obtain the benefits of the collective bargaining process by support of the applicant association.

By the agreement of September 12, 1973, the respondent hospital agreed to deduct from the wages of the employees referred to in the

agreement the dues specified by the association and remit same to the treasurer of the association. Payment and transmittal by any employer to a union other than the certified union an earlier certification is still in effect has been viewed as a financial contribution from the employer (See *Porcupine Transport Workers Union and Scott Haulage Limited* reported at 3 C.L.L.C., Case No. 16,401). By section 2(e) of our *Trade Union Act* a body to which an employer has contributed "financial or other support, except as permitted by this Act," can be considered a "company dominated organization."

APPLICATION IS TAINTED BY THE ACTIONS OF THE EMPLOYER

The Board is of the view, based on the evidence, that this application is tainted by the actions of the employer. There is no doubt as to employer interference or improper influence or both in bargaining with the applicant association in the face of the existing Certification Order and thus attempting to go behind the Order. In *Diehl and Army & Navy Department Store Ltd.* (2 C.L.L.C., Case No. 16,240) this Board held (in a decision later upheld by Balfour J. and reported in 2 C.L.L.C., Case No. 15,470) that in protracting negotiations for a collective agreement and refusing to bargain with a certified union until the union had satisfied the employer that it in fact commanded the support of the majority of the employees in complete disregard of the current Certification Order, that the employer by its conduct had influenced its employees and that an application for decertification was made, at least in part, if not in whole, as a result of such influence. The Board accordingly dismissed the application for decertification.

The Board is of the opinion that the actions of the respondent hospital has tainted both of the applications in this instance, or in any event, has influenced the applications. The Board accordingly felt obliged to dismiss both applications.

(Sgd.) "C. H. PEET,"
May 31, 1974. Chairman.

Dissenting Option

Dissent: Board member S. D. Eisnor submitted a dissenting opinion with which Board member C. T. Hazen agreed.

The applicant, herein brought two applications to the Board, one being an application for bargaining rights in respect to certain employees of the respondent hospital and an application for amendment to an existing Board Order, dated February 3, 1965, wherein Service Employ-

ees Union, Local No. 333, was certified as bargaining agent for all employees of the respondent hospital, save and except for certain classifications set out in the Boards February 3, 1965 Board Order.

Service Employees Union, Local No. 333 was originally certified as bargaining agent for certain employees in St. Paul's Hospital, Saskatoon, Saskatchewan, on February 21, 1946, said order being amended on November 9, 1955, October 11, 1960, and February 3, 1965 by orders of the Saskatchewan Labour Relations Board.

Evidence led, revealed that Service Employees had never bargained for the paramedic group in St. Paul's Hospital in Saskatoon, Saskatchewan, the group for whom The Saskatchewan Health Science Association was applying for certification as their bargaining agent. Evidence was also led to the effect, that the Service Employees Union, Local No. 333, had never requested to bargain for the group, or unit, applying for certification with Health Science as their bargaining agent and it was further stated by sworn testimony, that until 1973, Service Employees Union, Local No. 333, had never shown any interest whatsoever, to bargain for the paramedic unit, for which the application number 190-73-4 was made. Evidence was also led to the effect, that until *The Trade Union Act* for the province of Saskatchewan was amended in 1972, and under certain conditions, paramedic groups were excluded from union bargaining units.

PARAMEDIC UNIT NOT IN PRESENT WAGE SCALE

Evidence led, was to the effect that Service Employees Union, took the position, that coupled with the change in the Saskatchewan *Trade Union Act* which took effect in 1972, and the unions agreement with the St. Paul's Hospital, that the Service Employees Union did in fact, have the bargaining rights for the paramedic group, covered by the present application before the Board. The Union Business Agent stated in testimony, that the paramedic unit was in fact in Service Employees scope clause as of 1973, but that the present agreement did not carry a wage scale for this group in the present contract.

In evidence led by the Service Employees Union, he testified that he had called a meeting of the paramedic group in St. Paul's, in an effort to ascertain what support there was for his union amongst this particular group. The meeting was of an informal nature with some twenty-five staff members present. At the conclusion of the meeting, the Union Business Agent gave evidence to the effect, that he contacted the assistant manager of the St. Paul's Hospital and stated that Service Employees did not have the support of this group, but that the agreement in existence between the Service Employees Association of Saskatchewan and St. Paul's Hospital did cover the paramedic group and that he was prepared to bargain for the paramedic group separately.

In further sworn evidence, the Service Employees Business Agent testified that the union took the position, that Health Science Associa-

tion of Saskatchewan, was not a trade union under *The Trade Union Act* for Saskatchewan, because and he stated, "The Health Science Association is management dominated".

Further evidence was led, to the effect that Health Sciences had applied for certification in St. Paul's for the paramedic group in the early spring of 1973, however the application was opposed by Service Employees Union and dismissed by The Labour Relations Board because the application was out of time.

Evidence was also led, to the effect, that the paramedic group had been left to fend for themselves, where bargaining was concerned and that the method used over the years to accomplish some semblance of bargaining, was done by the group receiving proposals from the administration, and then they would bargain as an unorganized group.

PARAMEDIC GROUP NOT REPRESENTED BY UNION

It is my position, that there never was any intention shown by the Service Employees Union, to represent the paramedic group, until they were made aware of the fact, that The Health Science Association was prepared to apply for certification of this unit of employees, further, from the evidence submitted to The Labour Relations Board, it was undeniably clear, that the employees in the unit covered by the application presented to the Board, did not want to be a part of the Service Employees Union and The Service Employees Union were fully aware of this position. It was made clear also by the evidence submitted, that the employees involved in the present application were not aware, that Service Employees supposedly had the bargaining rights for their unit. The most amazing evidence given in my considered opinion, was that of Mrs. Tweed, the secretary for the unorganized group of paramedics, when she testified, that in the period of the 1950's the paramedics had made approaches to the Service Employees to join their group or union, and nothing was ever done to accomodate their wishes by the union.

In this circumstance, it is my position that the administration of St. Paul's Hospital, knowing how the paramedic group felt about being members of Service Employees Union, knowing the history of the paramedic group and the bargaining process that had been followed for years in the hospital, which was completely void of any involvement of Service Employees representation, acted in good faith in bargaining with the group that they felt represented the paramedic group in St. Paul's Hospital. The administration's action in this situation was natural and appropriate. How could any employer enter into negotiations with a union, that did not have the support of the employees in the unit it wished to bargain for and this lack of support was indicated by the testimony of Service Employees Business Agent.

Further, in my considered opinion, there was no clear evidence given, to support The Service Employees position, that Health Science Association was "management dominated". The fact was clearly established, that the employees concerned, wanted The Health Science Association of Saskatchewan to be their bargaining agent and that in ruling against the application, the Board decision in this matter, denied the employees concerned who formed the paramedic group, in St. Paul's Hospital in Saskatoon, Saskatchewan, their rights under section 3 of The Saskatchewan Trade Union Act for the province of Saskatchewan.

It is for these reasons, that I opposed the decision and hereby record my written dissent.

(Sgd.) "S. D. EISNOR,"
Board Member.

3.147 May 31, 1974.

Health Sciences Association of Saskatchewan

v.

Saskatoon City Hospital
and
Service Employees' Union, Local Union No. 333.

Application for certification — Whether res judicata can be applied in Board matters.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s. 5 (a) (b) (c).

This application was very similar to a prior application made by this applicant and on which an order was issued on December 14, 1973. At that time the applicant was certified for a unit of employees in the respondent hospital which the Board considered to be appropriate for collective bargaining purposes.

The present application, while in form a new application is, in many ways, very similar to an appeal from the prior decision. The group for which the applicant now seeks certification is substantially the same which the Board by its order on December 14, 1973, excluded from certification when it found a group which it considered was appropriate and which did not include the present group.

The evidence in this application was by and large the same as that on the prior application for which reasons for decision was previously handed down.

This application was brought on February 18, 1974 — only two months after the earlier decision was handed down. The certified union and intervener argued that the application was *res judicata* — already decided.

WHEN RES JUDICATA CAN APPLY

This Board has previously held that in certain circumstances the rule of *res judicata* can be applied in matters before this Board. The matter was dealt with in *Retail, Wholesale and Department Store Union, Local No. 955 and Morris Rod Weeder Co. Ltd.* (LRB File No. 262-72-3) as follows:

If the issues raised were identical, it is possible that *res judicata* could apply. Reference is made to Halsbury's Laws of England, Third Edition, Volume 15, at page 181 (paragraph 355) which reads as follows:

> "The most usual manner in which questions of *estoppel* have arisen on judgments *inter partes* has been where the defendant in an action raised a defence of *res judicata*, which he could do where former proceedings for the same cause of action by the same plaintiff had resulted in the defendant's favour, by pleading the form judgment by way of *estoppel*. In order to support that defence it was necessary to show that the subject matter in dispute was the same (that is to say, that everything that was in controversy in the second suit as the foundation of the claim for relief was also in controversy or open to controversy in the first suit), that it came in question before a court of competent jurisdiction, and that the result was conclusive so as to bind every other court."

Res judicata normally applies to courts of record. The Labour Relations Board, of course, is not a court but rather an administrative tribunal and there appears to be authority in law by which *res judicata* could apply to decisions of the Board if the matters in issue were identical. Halsbury, again, states, at page 212 (paragraphs 396 and 398) of the volume already referred to that:

> "The doctrine of *estoppel* by record has been extended by analogy to the decisions of all tribunals which have jurisdiction, whether by the law of this country, or by the consent of parties, . . . to whose tribunals the parties have . . . submitted themselves.
>
> As respects the many other tribunals which have by statute been given jurisdiction in particular matters, it seems that the general principle that the law has respect not only to courts but also to all other proceedings where the person who gives judgment has judicial authority is applicable."

In the Morris Rod Weeder case the facts in certain important particulars were different. This is not the case here. While certain additional information was provided to the Board the issues and parties were identical.

APPLICATION DISMISSED

The Board accordingly held that this is a case where *res judicata* should apply and accordingly dismissed the application.

(Sgd.) "C. H. PEET,"
Chairman.

May 31, 1974.

3.148 June 3, 1974

Moose Jaw Typographical Union No. 627, chartered by the International Typographical Union of North America,

v.

Moose Jaw Times-Herald

Definition of an employee — Whether foremen should be considered employees.

S.S. 1972. The Trade Union Act, 1972, C. 137, s.s. 2 (f) (i) (ii); 3.

The applicant union applied for certification of a unit of employees of the respondent company which it described as follows:

> "All printing production employees employed by Moose Jaw Times-Herald, a division of Western Publishers Limited, at 44 Fairford Street West, in the City of Moose Jaw, in the province of Saskatchewan, except those excluded by the Act."

The respondent company did not oppose the application for certification but contended that the appropriate unit should be:

> "All printing plant production employees employed by Moose Jaw Times-Herald, Division of Western Publishers Limited, Moose Jaw, Saskatchewan, except the Plant Superintendents and Foremen."

At the hearing, however, the respondent company led no evidence whatsoever with respect to "plant superintendents". No "plant superintendents" are listed on the Statement of Employment and no evidence was presented to indicate that such a classification existed on the staff of this company.

Counsel for the applicant, in fact, stated that one category was in issue here — and that only two persons were involved. The evidence was that the two persons were a Mr. George Axon and a Mr. Les Despins. The General Manager, Mr. Joseph R. Guay, stated that Mr. Axon was foreman of the composing room and that Mr. Despins was foreman of the stereo-pressman department.

The evidence of Mr. Guay was to the effect that both of these foremen did exercise some management functions — in fact the collective agreement (apparently entered into on a voluntary basis although there

was no certified unit) set out certain management duties (Section 15.01) but also provided that "foremen must be members of the union" (Section 15.02).

Mr. Guay quite frankly admitted, however, that both foremen were working foremen — Mr. Axon was a hand compositor and Mr. Despins was a Journeyman pressman. When pressed, Mr. Guay stated that both foremen spent a large proportion of their time on the day-to-day work of their trade although when asked if this would amount to 95% of their time he stated he was not sure as to whether it would amount to 95% though.

It is thus apparent that both foremen spent by far the greater part of their working hours actually working at their trade — they were working foremen in every sense of the word, even though they each did have minimal management duties.

It is obvious that neither was "regularly" acting in a confidential capacity in respect of the industrial relations of his employer. It is equally clear that neither had a "primary" responsibility to actually exercise authority and perform functions that were of a managerial nature. The words "primary responsibility" and "regularly" in section 2 (f) (i) of *The Trade Union Act* do not connote the situation here where the functions exercised are only a very, very small part of the work of these foremen.

DEFINITION OF AN EMPLOYEE

In any event, the Board holds that in the factual situation here the foremen are persons who should properly be embraced within section 2(f)(ii) of the Act. This reads:

> "2.(f) "employee" means:
>
> (ii) any person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining;"

The Board is of the view that the foremen, taking into account the factual situation here, are persons who have a relationship with their employer which is such that the terms of an employment contract between their employer and themselves can be the subject of collective bargaining and holds that they are properly a part of the proposed appropriate unit.

It has been held by the Canada Labour Relations Board, and by provincial Labour Relations Boards that exclusions from units can only be warranted by very serious reasons, and that requests for exclusions must be looked at with great care and there must be real and compelling reasons for them.

Section 3 of the Saskatchewan Trade Union Act, R.S.S.1972, Chapter 137 states:

> "3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively."

It should be noted — this is a "right" — not merely a privilege.

The fact that an individual working for an employer performs some managerial functions surely is not either a real or a compelling reason for exclusion — nor is exclusion required to enable such an individual to carry on minimal management functions — and the more so at a junior management level. This Board agrees with the recent decision in *Corporation of District of Burnaby and Canadian Union of Public Employees* which held:

> "there is no reason to expect that being represented by a trade union makes any employee less trustworthy than one excluded from such representation" as reported in (1974) 1 Canadian LRBR at page 11.

In argument before the Board, counsel for the company referred to the Yorkton Enterprise case, a recent decision of this Board. That case, on the facts, was quite different. In that case, the Board excluded "the plant superintendent". Foremen were not excluded.

CERTIFICATION ORDER ISSUED

The company also requested that the unit should embrace "all printing *plant* production employees" rather than "all printing production employees". In the opinion of the Board, this request had no merit — clearly the employees of the company are entitled to enjoy the *right* of collective bargaining whether they work in the actual plant or otherwise. The certification accordingly issued to cover all printing production employees employed by this employer, the Moose Jaw Times-Herald.

(Sgd.) "C. H. PEET,"
Chairman.

June 3, 1974.

3.149 June 3, 1974

Canadian Brotherhood of Railway, Transport and General Workers, Local No. 274

v.

Gene's Ltd., Regina and Certain Employees

Certification — Whether evidence of employee support shall be accepted after application date.

S.S. 1972. The Trade Union Act, 1972, C. 137, s.s. 5(a) (b) (c); 6(3)(b); 10.

This is an application for certification under section 5(a), (b) and (c) of *The Trade Union Act*, S.S. 1972, Chapter 137, which reads as follows:

> "5. The board may make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit, but no unit shall be found not to be an appropriate unit by reason only that the employer of employees in the unit claims that his complement of employees in the unit is at less than full strength;
>
> (b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;".

The first duty of the Board was to determine the appropriate unit for the purposes of bargaining collectively. On the evidence the Board had no difficulty in determining that the appropriate unit should be:

> "all employees employed by Gene's Ltd., located at 1515 Albert Street, Regina, Saskatchewan, except the general manager, assistant manager, kitchen supervisor and the beverage room manager,"

SPECIMEN SIGNATURES ON STATEMENT OF EMPLOYMENT

In this case evidence was led which revealed that the Statement of Employment has been taken in an irregular manner. Regulation 21 of *The Trade Union Act* provides:

> "21.—(1) Any employer affected by an application for certification shall, if requested in writing by the secretary to do so, complete and file with the secretary within the time prescribed by the secretary a statement of employment.

(2) The statement of employment shall be in Form 12 and shall be verified by statutory declaration.

(3) If so required by the secretary, the employer shall include in the statement of employment, a specimen signature of each employee employed in the unit described in the application for certification. The employer shall, if requested by the applicant trade union, permit a representative of such trade union to be present at the time when and the place where specimen signatures of the employees are obtained."

The respondent employer was requested by the Secretary of the Board to complete and file a Statement of Employment and was also required to include in the Statement of Employment a specimen signature of each employee employed in the unit described in the application for certification.

In spite of the clear provision of Regulation 21(3), however, the respondent employer did not allow a representative of the trade union applicant to be present at the time when and at the place where the specimen signatures of the employees were obtained. Under examination, the manager of the respondent company admitted that he was aware of the fact that the union wanted to be present but he did not contact the union.

Regulation 21(4) of the Act provides:

"21.—(4) The employer shall, if so required by the secretary, permit an agent of the board to interview any of his employees during working hours and to inspect his payroll records and any records the employer may possess containing specimens of the signatures of any of his employees."

Under the circumstances here, the Board could have inspected the payroll records of the employer. This was not necessary, however, as the payroll records were produced at the hearing under a subpoena issued by the applicant union and the manager was examined on such records. In the end result the Board determined that there were both inclusions in the Statement of Employment of persons who should not have been listed as employees as of the date of the filing of the application, and there were also exclusions from the Statement of Employment of employees who should have been included. This sorry state of affairs might not have existed if a representative of the applicant union had been present when the signatures were taken. This case points up the desirability of all parties being represented in the taking of employee signatures in accord with Regulation 21(3).

SOME EMPLOYEES APPEARED BEFORE THE BOARD

A number of employees appeared at the hearing with counsel. These employees were not in the position of interveners nor were they in the position of one who has filed a reply.

If a party has filed either an intervention or a reply then all parties coming before the Board are aware of the allegations of fact and the position to be taken by all parties at the hearing of the application.

The situation here, however, is somewhat different. Certain employees appeared before the Board with the request to be heard. Objection was taken to these employees being heard.

In spite of the position in which the applicant and the respondent were placed in this situation, however, the Members of the Board were nevertheless of the opinion that in this case the Board should hear the employees who appeared before the Board. It was pointed out, however, at the hearing, that the employees were heard on the basis that the evidence produced by these employees would be evidence with respect to the position of the witnesses vis-a-vis support of the applicant union.

Evidence was produced to the Board which indicated that after the filing of the application a staff-management meeting had been held. The union was not invited. Management personnel also spoke to employees, and, as one witness said "gave us their side of the story". In the end result certain employees appeared with counsel to oppose the application.

On the evidence, however, the Board were not convinced that these employees appeared on a voluntary basis and without employer pressure. The evidence in this case reinforced the view which the Board holds that in most cases the date at which support for a certification application should be taken is the date of the filing of the application.

The Board recognizes that if fraud, undue pressure, coercion or illegal conduct is present in the signing up of support that such might well be a factor which would lead the Board in such a situation to consider support at a date other than the date of filing. An attempt was made here to suggest undue pressure. The Board finds on the evidence accepted to it, however, that there was no such conduct here.

The position of the Board in respect of the support date was set out in a recent written decision of the Board as follows:

> "This Board has always considered that the date which should be taken into account on an application for bargaining rights is the date of the application. That this date is the proper date is fortified by a consideration of section 6(3) of *The Trade Union Act* which provides that in a case where a trade union applies for an order of the Board determining it to represent a majority of employees in an appropriate unit for which there is no existing order of the Board (which is the case here) and shows that 25% or more of the employees in the appropriate unit have within six months preceding the date of the application indicated that the applicant trade union is their choice as a representative for the purpose of collective bargaining, then the Board shall direct a vote. The clear implication is that where a majority of the employees have within six months preceding the date of the application indicated that the applicant trade union is their choice as a representative for the purpose of collective bargaining that the applicant should be certified by the

appropriate unit. It is noted here that the period referred to for support is in the words of section 6(3)(b) of the Act "within six months preceding the date of the application".

APPLICATION DATE IS THE DATE FOR DETERMINATION OF SUPPORT

Counsel for the intervener, in effect, argued that the date for determination of support should be a date subsequent to the filing or application date and while counsel did not specifically suggest that the date should be the date of the hearing there was an implication that it should be some date later than the filing or application date.

When one examines Canadian labour legislation, one is struck by the fact that while Canadian labour legislation varies in some connection from province to province that in general the application date is the determinant date although one or two jurisdictions do allow for a "terminal date" which is fairly close after the date of application.

The Canada Labour Relations Board has held that the fact that the Canada Labour Code does not provide for any such power to set a terminal date is, in its view significant. This Board feels that the same is true with respect to the province of Saskatchewan.

With respect to this matter, the Canada Labour Relations Board recently held in *General Drivers, Warehousemen and Helpers, Local Union No. 979* and *Swan River — The Pas Transfer Ltd.* (reported in 6 C.L.L.C., Case No. 16,105) that:

> "the most significant fact revealed by a scrutiny of all the provincial legislations is that none establish that a labour board will determine the majority status as at the date of its hearings."

The Canada Labour Relations Board then reached the conclusion that:

> "The Board must therefore attach great importance to the application date."

The Canada Labour Relations Board then referred to the school of thought which claimed that the best way to achieve industrial peace and stability is to establish machinery whereby the workers are impressed with the seriousness of signing a union card since this will be considered as the chief and best expression of the free wish maturely arrived at and, once it is so expressed, it cannot be changed at will or easily after the application is made on their behalf. By such a system if a majority has been reached legally, certification will almost inevitably issue.

That Board referred to this school of thought as one which held that there must be a system where the employers know that it is virtually useless to campaign to obtain resignations once the application is in; a system where, once the application is made, the union will stop campaigning to obtain signatures because it would serve no purpose in the

establishment of the majority status; a system which will not create a temptation for some employers to commit unfair labour practices to obtain resignations or indulge in effective legal campaigning against the union.

In that case the Canada Labour Relations Board then reached the following conclusion:

> "One of the purposes of the Act is to maintain industrial peace and stability and the Board believes that this is best achieved . . . by adopting a philosophy of labour relations law . . . whereby the application date is the determinant factor in assessing the wish of the employees as to their selection of the bargaining agent. The unrest and chaos consequent upon adopting a different school of thought . . . would be far more severe."

This Board concurs in the above view and is of the opinion that our Act contemplates the date of the application as being the determinant date for determination as to the majority status, or otherwise, of an applicant for certification.

This view is fortified by section 10 of our Act which reads as follows:

> "10. Where an application is made to the board for an order under clause (a) or (b) of section 5, the board may, in its absolute discretion, reject any evidence or information tendered or submitted to it concerning any fact, event, matter or thing transpiring, or occurring after the date on which such application is filed with the board in accordance with the rules and regulations of the board."

CERTIFICATION ORDER ISSUED

It was strongly urged that this was a situation where the Board should consider a vote on the basis that if doubt existed as to support that only a vote could clear it up. The Board, however, does not consider that there is any doubt here. The applicant clearly enjoys a majority support in the appropriate unit as found by the Board. An Order of Certification was accordingly directed.

(Sgd.) "C. H. PEET,"
Chairman.

June 3, 1974.

3.150 June 3, 1974

Soft Drink Workers, Local Union No. 319, chartered by the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.L.C.
v.
Coca-Cola Ltd.

Certification — Whether a court proceeding or union merger affects initial status of applicant.

S.S. 1972. The Trade Union Act, 1972, C. 137, s. 5(a) (b) (c) (k); Regulations 5(1), (2), (3), 35.

This is an application for certification by the Soft Drink Workers, Local Union No. 319, chartered by the International Union of United Brewery, Flour, Cereal, Soft Drink, and Distillery Workers of America, C.L.C. for a proposed appropriate unit described as follows:

> "All employees of Coca-Cola Ltd. in the City of Regina except Office Manager, Sales Manager, Production Manager, Bottling Foreman and Sales Supervisor."

At the commencement of the hearing, a question arose as to onus and as a result the Board considered representations in this respect placed before it by Mr. Taylor, counsel for the applicant union, and Mr. Barclay, counsel for the respondent company.

BOARD DOES NOT RENDER PIECEMEAL DECISIONS

Under normal circumstances, the Board does not, as a matter of practice, deal with applications piecemeal in so far as rendering decisions is concerned. In this case, however, the Board did take time out to consider the matter raised by counsel and the Chairman of the Board after consideration by the Board, delivered the decision of the Board as follows:

> "The Board has considered the representations placed before it by Mr. Barclay and Mr. Taylor with reference to the question of onus herein. It is noted that in the reply by the respondent the matter of the status of the applicant is not denied, it is merely questioned.
>
> Counsel for the respondent now, however, raises the question of the status of the applicant as a formal objection to the applica-

tion by the applicant local of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.L.C.

It is not the usual practice of this Board to render piecemeal decisions. Any decision as to status will accordingly be made in the usual course of our final decision after all evidence which either party before us may desire to place is in evidence. We are not, however, asked to make any such formal decision at this time. The point raised before us is that of onus.

This Board does not purport to nor intend to become involved in the niceties of legal argument and to render a decision on the basis of onus alone — we shall hear all the evidence from all parties in this application before rendering a final decision. Our decision at this time is therefore not so much a formal rule on onus but rather is intended as a guide to counsel in the conduct of this hearing.

In the present matter, the applicant is a union which has been before this Board on prior occasions. The applicant International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.L.C., is not a new union. Certain statements have been made to this Board but no evidence has been led to date to indicate that this is the case. *Prima Facie* the applicant union is therefore considered by the Board to have a status which has previously been established as a labour organization and a trade union within the meaning of the Act.

The assertion is then made, however, and this is apparently a fact, that the applicant is a new local of the said International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.L.C. — local 319. This is apparently so but a letter filed indicates that this new local is chartered and functions under the constitution of Local 318.

It is stated that the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.L.C., and the Teamsters Union have merged as a result of a merger convention held recently in Cincinnati. This may or may not be so. We have had no evidence to this effect.

It is also stated that a legal action is underway in another jurisdiction (Ontario) for a declaration that such purported merger, of which we have had no evidence, is valid. It is questionable as to whether a decision on this matter by the court of a foreign — that is non-Saskatchewan Court would be binding upon us — we are of the view that it would not — but in any event no decision has been rendered. We are, in any event, of the view that even if such proceedings were underway in a Saskatchewan Court that the hand of the Board to act in this application would not be

stayed. Section 5(k) of the Act explicitly provides that in considering the rescission or amendment of a certification order under section 5(a), (b) and (c) of the Act, the Board may proceed

> "notwithstanding that a motion, application appeal or other proceeding in respect of or arising out of the order or decision is pending in any Court".

We are accordingly of the view that by implication, in any event, the Act would allow the Board to proceed even in the fact of court proceedings in this province, if such should occur, in an instance similar to that now before us. Certainly the fact that proceedings are under way in another jurisdiction can only be of academic interest.

What has been said of court proceedings in another jurisdiction is also applicable, of course, to proceedings which may be under way before a sister board in another jurisdiction.

As to the fact that this is a new local, attention is directed to the latter portion of regulation 5(3)(b) which states:

> ". . . but in any case where the charter has not been received by the applicant trade union, the applicant may, with the consent of the board, file a statement signed by the president, secretary or similar officer of the national or international organization declaring that the grant of a charter to the applicant trade union has been approved,"

The Board formally consents to the filing by the applicant of the letter or statement referred to. The Constitution was filed by the applicant on March 14, 1974, and this Constitution together with the letter of March 21, 1974, from the president of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.L.C., would appear to fit the requirements of the regulation and the Board accepts these documents as compliance with regulation 5(3)(b) of the Act.

The Board accordingly holds that the applicant, subject to what I shall state in a moment, has met the initial requirements of Regulations 5(1) and 5(3) of the Board — the initial onus — if one desires to put it that way. The Board, however, directs that the documents filed — the Constitution of the applicant union and of Local 318 be certified. This direction is granted under the general authority of section 19 of the Act. The Board is not prepared to direct that this minor defect and non-compliance with regulation 5(a) as to certification should render the filing void. (See Regulation 35).

Having said this, however, the respondent is not precluded from leading evidence to establish, if it desires to do so, and if it can establish such fact by evidence, that the applicant is a new organization.

The Board must state, however, that this is an unusual situation. Normally a challenge as to union status is made by an intervener

> — not by the company which is the subject of the certification application. Such was the case in the Nipawin case referred to by counsel. Such was also the case in the Health Sciences application to which counsel also referred. The Board itself raised the question in the Pioneer Village application, and ultimately, in that case, held that the applicant had established union status. In none of these cases did the employer take any part.
>
> While the Board will not, of course, give any direction to the respondent, it does feel constrained to state that on the surface it appears that the respondent may be carrying the ball, probably quite unintentionally, for the Teamsters union.
>
> This is a case where there could be a shifting onus. We hold that the applicant has met the initial onus — the initial requirements to establish status.
>
> If the respondent leads evidence which convinces the Board that the applicant is in fact a new organization, then the onus might well shift to the applicant which the applicant, in turn, could attempt to meet by rebuttal evidence."

In the above interim decision, delivered during the hearing, the Board held that the applicant had met the initial onus to establish status. Having so ruled, the hearing proceeded. During the hearing no evidence was adduced to convince the Board that the applicant was a new organization as such, although the applicant was a new local of a long established and well-known trade union.

The Board holds that the applicant has met the requirements set out in the *Nipawin District Staff Nurses Association* case (6 C.L.L.C., case no. 16,081) at page 16,258 as follows:

> "It is thus clear that an applicant must establish that it has a right to be certified as the representative of a group of employees for the purpose of bargaining collectively. The organization must qualify, as it were, as a bona fide trade union within the meaning of the Act. The applicant must have an organic structure — it must have such a thing as a constitution containing, among other items, provisions for the election of officers.
>
> In order to satisfy the Board an applicant must file its constitution and bylaws. This is generally necessary to establish that it is an organization "that has bargaining collectively among its purposes". If the applicant is a local or branch of a larger organization it must also establish to the satisfaction of the Board that the local or branch has been established in accordance with the constitutional requirements of the larger or parent organization. The parent organization must, of course, also qualify as a trade union as defined in the Act."

and at page 16,279:

> "An applicant must be prepared to establish status if this is questioned either by the Board or by any party to the hearing. An applicant must be prepared to present evidence, if required, as to the manner in which it came into existence. If status is in any manner called into question, then the Board must reject the application. The Board is quite strict in this regard. Each case of necessity must, however, depend on its own circumstances."

and at page 16,262:

> "It has been held, however, that it is not enough to deck an organization with outward trappings of unionism for it to meet the requirements of *The Trade Union Act.* The organization applying to the Labour Relations Board must be a genuinely independent body in all respects which serve the purpose of employees who have had conferred upon them the right and the freedom to organize."

In this application the applicant is a local of a well-recognized and long-established trade union, a trade union which holds a considerable number of existing certifications issued over the years by this Board. The Board is prepared to consider this as established status. The respondent, of course, could have led evidence in an attempt to controvert this status but failed to do so to the satisfaction of the Board.

It was also argued by the respondent that the applicant did not meet the requirements set out in this Board in a Health Sciences Association of Saskatchewan case where it was stated by counsel that the Board had held that the organization had not elected officers in accordance with its Constitution and where the Board had accordingly held that it had failed to establish status as a trade union.

This, however, was an over-simplification by counsel and not in accordance with the facts. The matter apparently referred to was LRB Board File No. 204-72-3 dated March 15, 1973. In that case the Board held:

> "The Board finds, on the evidence presented to it in this application, that the applicant has not met the onus on it to satisfy the Board that it is a trade union within the meaning of the Act, nor, in fact, to satisfy the Board that the applicant has been duly constituted as an organized body. The minutes of the meeting held on November 2, 1972, which were filed in evidence, for one thing, do not show that the proposed constitution was ever formally adopted. In any event, even if the constitution had been formally adopted, the evidence is to the effect that the officers of the purported association were elected prior to that date, that is prior to the proposed constitution being discussed by the founding members . . .
>
> It has been held, and the Board adopts the views expressed in the *Ontario Canadian Brotherhood of Welders & Burners* case (2 C.L.L.C. — Case No. 16,177) as follows:

> "It is, of course, elementary that the applicant organization could not come into existence until the adoption of its constitution nor could it have officers as such until that time. Any purported election of officers to the applicant organization before the adoption of its constitution would, therefore, be premature. Whatever may have occurred before the adoption of the applicant's constitution, it is abundantly clear from the evidence that no officers have been elected since that date."
>
> The same situation exists in this case. The purported election of officers was on October 30th but there is no evidence that the proposed Constitution was even available to the members until November 2nd. Even if the Constitution had been validly adopted there is no evidence that officers were elected following such adoption. The present application was filed with the Board on November 3rd.
>
> As stated in the Ontario case quoted, how may a trade union perform its functions, achieve its purposes, or exercise its rights, or discharge its obligations, unless it has duly authorized persons by and through whom it may act and be bound? Without officers, or other duly authorized persons, the applicant may only act and be bound through a general convention of its members.
>
> As was said by Harris J. of the New Brunswick Court of Appeal in *The King v. The Labour Relations Board* (Canadian Labour Law Reporter, 1949-54), Case 15,038 — a trade union "in the ordinary sense" is "a body with a charter or constitution with properly elected officers".
>
> In the instant case, even if the proposed constitution had been adopted, the applicant had no officers elected in accordance with such constitution and has accordingly failed to establish its status as a trade union — a requirement of substance in the application.
>
> It accordingly follows that the application signed by McRobbie, the purported president is, in effect, a nullity, and cannot be acted upon by the Board."

This is in striking contrast to the situation here where the applicant trade union had been in existence for many years. A Local 318 had also been in existence for many years. The applicant herein, Local 319, was composed, at least in part, of members transferred from Local 318, or formerly members of Local 318. There is no doubt whatsoever but that the applicant is a bona fide trade union organization — albeit a new local of International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.L.C., but a local with officers including a president, secretary-treasurer and corresponding and recording secretary.

CERTIFICATION ORDER ISSUED

In this application, the applicant enjoyed a very substantial majority. Certification was accordingly directed.

(Sgd.) "C. H. PEET,"
June 3, 1974. Chairman.

3.151 July 23, 1974

Professional Engineers Employees Association

v.

Government of Saskatchewan
and
Saskatchewan Government Employees' Association

Application for certification — Fragmentation into occupational or craft groups. Multiplicity of bargaining units. Alternative proposals for a bargaining unit. Application dismissed.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s.s. 2(e) (j) (l); 3; 5(a) (b) (c).

This was an application for certification under section 5(a), (b) and (c) of *The Trade Union Act, 1972*, C. 137. The statute reads as follows:

> "5. The board may make orders;
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit, but no unit shall be found not to be an appropriate unit by reason only that the employer of the employees in the unit claims that his complement of employees in the unit is at less than full strength;
>
> (b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;"

The application was brought by an organization known as Professional Engineers Employees Association. The applicant requested certification for a unit of employees employed by the respondent Government of Saskatchewan. The applicant in the initial application described the following as the appropriate unit for which it requested certification:

"All professional and graduate engineers employed by the province of Saskatchewan in its Departments of Agriculture, Continuing Education, Environment, Government Services, Highways, Mineral Resources, Northern Saskatchewan and Natural Resources, and by the Municipal Road Assistance Authority, except:

(a) In the Department of Agriculture, the Deputy Minister thereof and the first and second levels of authority below the said Deputy Minister.

(b) In the Department of Continuing Education, the Deputy Minister thereof and the first and second levels of authority below the said Deputy Minister.

(c) In the Department of the Environment, the Deputy Minister thereof and the first level of authority below the said Deputy Minister.

(d) In the Department of Government Services, the Deputy Minister thereof and the first level of authority below the said Deputy Minister.

(e) In the Department of Highways, the Deputy Minister thereof and the first level of authority below the said Deputy Minister, and all District Engineers.

(f) In the Department of Mineral Resources, the Deputy Minister thereof and the first level of authority below the said Deputy Minister.

(g) In the Department of Natural Resources, the Deputy Minister thereof and the first level of authority below the said Deputy Minister.

(h) In the Department of Northern Saskatchewan, the Deputy Minister thereof and the first level of authority below the said Deputy Minister.

(i) In the Municipal Road Assistance Authority, the Director thereof and the first level of authority below the said Director.

(j) All of said employees who are represented by the Saskatchewan Government Employees Association pursuant to existing Order or Orders of the Saskatchewan Labour Relations Board,"

At the conclusion of lengthy hearings, the applicant suggested two other units which it felt could be appropriate and suggested such as alternative appropriate units, namely:

"(1) All Professional and Graduate Engineers who function as Professional or Graduate Engineers or who teach or instruct in respect of matters pertaining to Professional Engineering, employed by the province of Saskatchewan in its Departments of Agriculture, Continuing Education, Environment, Government Services, Highways, Mineral Resources, Northern Saskatchewan and Natural Resources, and by the Municipal Road Assistance Authority, except: . . .

(2) All Professional and Graduate Engineers whose function is to perform work or teach or instruct in respect to Profes-

> sional Engineering as defined in *The Engineering Profession Act*, R.S.S. 1965, C. 309, employed by the province of Saskatchewan in its Departments of Agriculture, Continuing Education, Environment, Government Services, Highways, Mineral Resources, Northern Saskatchewan, Natural Resources and by the Municipal Road Assistance Authority, except: . . ."

The respondent, hereinafter, for convenience, referred to merely as Government of Saskatchewan, in a Reply filed by the Public Service Commission of the province of Saskatchewan denied that the unit of employees applied for was appropriate for the purpose of collective bargaining. Counsel for the respondent elaborated on this in argument by stating:

> "The Government's argument is under three general propositions. Firstly, that the context of the existing situation is such that what is asked for is not an appropriate bargaining unit; secondly, that the application, if granted, would tend to provide for different conditions of employment in the same class; and thirdly, that the certification of the applicant would lead to a multiplicity of bargaining units."

The intervener and certified union objected to certification in its Intervention as follows:

> "(a) This intervener claims that the unit applied for is not an appropriate unit of employees for the purpose of bargaining collectively.
>
> (b) This intervener says further that the applicant is not a trade union."

The question of the status of the applicant was thoroughly canvassed both in the evidence and in argument. The Board holds that the applicant has established that it is a trade union within the meaning of *The Trade Union Act*. Sections of the Act which must be considered in reaching this conclusion are:

> "2. In this Act:
>
> (l) "trade union" means a labour organization that is not a company dominated organization.
>
> (j) "labour organization" means an organization of employees, not necessarily employees of one employer, that has bargaining collectively among its purposes;
>
> (e) "company dominated organization" means a labour organization, the formation or administration of which an employer or employer's agent has dominated or interfered with or to which an employer or employer's agent has contributed financial or other support, except as permitted by this Act;"

Detailed evidence was presented to the Board by the applicant outlining the steps and procedures taken in the establishment of *The Profes-*

sional Engineers Employees Association. The Constitution of the Association by section 2.01 sets out persons eligible for membership as follows:

> "The Association shall be composed of persons employed by the Government of the province of Saskatchewan or any Crown corporation, council, commission, agency, or other body of or belonging to the Government of the province of Saskatchewan, who:
>
> (a) Are graduates in engineering of The University of Saskatchewan or of an institution of learning recognized by the University with respect to its program in Applied Science or Engineering.
>
> (b) Are Professional Engineers or licensed land surveyors."

The Association accordingly is "an organization of employees" as required by the definition of "labour organization" in section 2(j) of the Act.

The objectives of the Association are set out in section 3.01 of its Constitution which reads:

> "The Association is formed with the object to unite all persons so employed in order to advance and safeguard their economic and social welfare. To accomplish this object, the Association pledges itself to the establishment of the following:
>
> (a) Adequate wage standards and working conditions;
>
> (b) Reasonable insurance of the certainty of employment;
>
> (c) To preserve the rights of collective bargaining and to bargain collectively with employers in order to obtain and maintain collective bargaining agreements."

While this section of the Constitution does not spell out the purpose of the organization as clearly as might be desirable, the Board is of the opinion that section 3.01 (c) setting out an objective as "to preserve the rights of collective bargaining" and more particularly "to bargain collectively with employers in order to obtain and maintain collective bargaining agreements" satisfactorily meet the requirement of "that has bargaining collectively among its purposes" as is required by section 2(l) of the Act.

The only other requirement to meet the definition of "trade union" under the Act is that the Association must not be "a company dominated organization". A great deal of evidence was led on this point. It was argued that the organization was a "company dominated organization" within the meaning ascribed to that phrase in the Nipawin Hospital Case (*Nipawin District Staff Nurses Association and Nipawin Union Hospital and Service Employees Local Union No. 333*, reported at 6 CLLC, Case

No. 16,081 which was upheld by the Supreme Court of Canada in a decision reported at 6 CLLC, Case No. 14,193). The Board is of the view, however, that the evidence did not establish that the applicant (The Professional Engineers Employees Association) was under the control of or that it was dominated by the Association of Professional Engineers of Saskatchewan, the licensing body under *The Engineering Profession Act*, R.S.S. 1965, C. 309. The fact that the employer here was not dominating the applicant was also borne out by the fact that the employer appeared and vigorously opposed the present application.

The Board accordingly holds that the applicant is a "trade union" within the meaning of *The Trade Union Act, 1972*, C. 137.

ALTERNATIVE PROPOSALS FOR A BARGAINING UNIT

The applicant initially applied for certification for a given proposed unit, but subsequently, in argument and after all evidence had been completed, put forth two other alternative proposals for consideration as possible "appropriate" units. The respondent and intervener quite properly objected to the "alternative" proposals on the basis that evidence had been completed and also on the basis that they might each have framed their presentations other than they did if the "alternative" proposals had been put forward at the commencement of the hearing. In the view which the Board adopts neither the original proposed unit or either of the alternatives are appropriate and a decision as to whether the applicant should be allowed to amend is accordingly academic. If the Board had decided otherwise, it might well have been that the Board would have felt obliged to allow an amendment only on terms by which the respondent and the intervener, if either had selected to do so, would have been allowed to adduce further evidence.

Each of the proposed appropriate units would have cut a swath through each of some eight departments of the Government of Saskatchewan and the Municipal Road Assistance Authority. The Board is of the view that such fragmentation, almost on a craft basis, is not desirable.

DETERMINATION OF AN APPROPRIATE UNIT

In the province of Saskatchewan, the Labour Relations Board has on several occasions had to consider the problem of an appropriate bargaining unit for employees in the public service.

On March 19, 1945, the Board held that the entire public service (with certain minor named exceptions) was an appropriate unit for collective bargaining purposes. In a decision rendered on that date (*United Civil Servants of Canada, Local No. 1, chartered by the Canadian Congress of Labour and His Majesty in right of Saskatchewan (Department of Municipal Affairs)* and *The Saskatchewan Civil Service Association, affiliated with*

the Trades and Labour Congress of Canada) the Board, in dealing with the question of "appropriate unit", expressed the following view:

> "The Act, however, lays down no rules as to when a unit smaller than an employer unit should be determined as appropriate, and whenever cases of this kind have arisen the Board has attempted to make its decision in the manner which seems to accord best with the circumstances of the individual case. One important principle which the Board has applied is that if the nature of the operations performed by a particular group of employees is sufficiently distinct that the wages, hours and other working conditions of these employees must necessarily be determined on a different basis than the wages, etc. of other employees of the same employer, then those employees may be regarded as a distinct unit for the purpose of bargaining collectively if they so desire . . . "

The Board in that case could find no great differentiation between employees of the Department of Municipal Affairs and other public servants and stated:

> ". . . To give these employees the right to bargain collectively as a separate group, therefore, would merely result in confusion, because it would involve the employer in bargaining collectively with two different unions in regard to identical classes of employees.
>
> Moreover, it would negate the principle of majority rule which not merely is clearly enunciated in section 3 of *The Trade Union Act* but is an accepted democratic principle. It is very rarely indeed that a group of employees are 100 per cent in agreement as to the trade union, if any, which will represent them for the purpose of bargaining collectively. It is almost inevitable that there will be one or more groups — or perhaps merely one or more individuals — within the larger group, who will have ideas of their own. The mere fact that the employees of the small group wish to have a union of their own is not, in the opinion of the Board, sufficient reason in itself for constituting that group as a separate appropriate unit of employees for the purpose of bargaining collectively. There must be some reason to believe that collective bargaining can feasibly be carried on between employer and that particular group, i.e. it must be shown that the conditions of work to be established for that group must necessarily be different in important particulars from the conditions to be established for other employees of the same employer . . .
>
> If the Board were to determine that the employees of the Department of Municipal Affairs constituted a separate appropriate

> unit for no other reason than that a majority of such employees wanted it so, then there would be no reason why the employees in some office within the Department should not also be determined as an appropriate unit if they so desired. The Board would be involved in an endless process of determining units within units, and if the process were carried on within the entire public service, the resultant confusion would be beneficial to neither employer nor employees."

In the present application the following facts were established in evidence:

1. Persons who are not professional engineers do similar work to that done by many professional engineers. Many professional engineers in the government service work side by side with such fellow employees.
2. Classification in the public service is by jobs. In some job classifications both professional engineers and non-engineers are employed and often do the same work.
3. The proposed unit (including the alternative units) would cut across occupational lines and include persons not necessarily employed as engineers.

The Board is of the opinion that any one of the proposed units would create the possibility of significant differences in pay and conditions of employment generally within the same occupation and thereby destroy the principle of equal pay and conditions of employment for equal work and equal qualifications. The end result could be multiple bargaining units within the same occupation, bearing in mind that in some cases the persons performing the job might be professional engineers and in some cases might be persons who are not professional engineers and therefore could not be in the same "appropriate" unit for collective bargaining purposes.

If professional engineers (whether performing engineering duties or not) were to be segregated into a unit of their own for collective bargaining purposes, a dangerous precedent would be established. If professional engineers were segregated into a separate bargaining unit, then why should not persons in every other occupation also be entitled to their own separate unit?

FRAGMENTATION OF BARGAINING UNIT NOT BENEFICIAL

Fragmentation into occupational or craft groups would be beneficial to neither the employees or the employer. As far as employees are concerned the effectiveness of the bargaining unit would be greatly reduced if the employee bargaining group were fragmented into a great many small bargaining units. This would be even more so in the situation here

when the employer — the Government of Saskatchewan — is the employer of a very large number of employees. Fragmentation of the bargaining group would indeed destroy the possibility of effective collective bargaining.

APPLICATION DISMISSED

The Board accordingly finds that neither the unit applied for by the applicant nor the units suggested in the proposed amendments, are appropriate for the purpose of collective bargaining, and orders that the application be dismissed.

(Sgd.) "C. H. PEET,"
July 23, 1974. Chairman.

3.152 October 25, 1974

Brian Moncrief and Bridge City Electric Ltd.

v.

International Brotherhood of Electrical Workers,
Local Union No. 529

Certification Rescission — Whether an employee outside designated area shall be considered an employee — Whether date affidavit sworn is applicable date.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s.s. 4(10); 5 (k) (ii).

This was an application for rescission of a Certification Order made by this Board on September 1, 1964, wherein the International Brotherhood of Electrical Workers, Local Union No. 529, was certified as the representative of certain employees of Bridge City Electric Ltd.

The appropriate bargaining unit for which the certified union was certified is described as follows:

> "All journeymen electricians, apprentice electricians and helpers, employed by Bridge City Electric Ltd., between the boundaries of the 51st and 53rd parallels in the province of Saskatchewan."

At the hearing, the certified union raised the preliminary objection that the application was out-of-time under section 5(k)(ii) of the Act. This reads as follows:

> "5. The board may make orders:
>
> (k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:
>
> (ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than thirty days or more than sixty days before the anniversary date of the order to be rescinded or amended;"

The clauses (a), (b) and (c) referred to in the above are the certification sections of the Act under which the certification was made.

The affidavit in support of the application was sworn on July 2, 1974. The application was filed on July 4, 1974.

The certification order was made on September 1, 1964. The 'open' period, that is the 30 - 60 day period would accordingly be the period between July 3, 1974 and August 1, 1974 in a situation where no collective agreement is in existence. The parties agreed that no collective bargaining agreement was in existence on the date of filing, that is on July 4, 1974.

The certified union argued that the affidavit in support of the application was sworn on July 2nd and was not in the 'open' period. The solicitor for Brian Moncrief argued that the date to be considered was the filing date, that is July 4th.

APPLICATION WAS IN TIME

On this preliminary objection the Board held that the application was in time. The date on which to determine the timeliness of the application under section 5(k) of the Act, the Board held, is the date of filing, not the date on which the affidavit in support of the application was sworn. The application was accordingly held to have been brought within the 'open' period (July 3rd to August 1st) and was "in time".

STATEMENT OF EMPLOYMENT FILED BY EMPLOYER

A Statement of Employment was filed by the employer, as required by the Rules, on July 17, 1974. The employer was called to give evidence during the hearing and verified under oath that the facts set out in the Statement of Employment were correct. The applicant, Moncrief, did not at this stage dispute the particulars set out in the Statement of Employment. Evidence was concluded and the matter proceeded to argument.

During argument the certified union raised objection to the continuation of the hearing on the ground that the applicant did not have status to bring the application and that the Board was without jurisdiction to deal with the matter. The basis of the argument was that while the Statement of Employment listed the applicant, Moncrief, as an employee, it set out his place of employment as of July 4, 1974 (the filing date) as La Ronge, Saskatchewan. La Ronge, it is conceded, is not within the area of the certification "between the 51st and 53rd parallels in the province of Saskatchewan". Moncrief on the filing date, the crucial date, was accordingly not employed within the area covered by the certification and accordingly, it was argued, did not have status on July 4th to launch the application.

BOARD SAID TO BE WITHOUT JURISDICTION

The applicant applied for leave to deduce further evidence. Strangely enough it was suggested that the party who had sworn the Statutory Declaration on the Statement of Employment and who had given *viva voce* evidence in support, should be recalled to controvert his

own sworn testimony. The certified union argued that since the Board was without jurisdiction, it could not consider such a request or further deal with the matter.

The Board feels that it is bound by a decision of the Court of Queen's Bench of the province of Saskatchewan made by Mr. Justice Disbery on April 22, 1966 and reported in 3 CLLC, Case 14,132 at page 467.

The case in which the above decision was made was *Construction and General Laborers' Local Union No. 180* and *Graham Construction Ltd.* In that case two employees, Polster and Korol were employed by the employer outside the designated area at the material time, the Court held that the Board exceeded its jurisdiction in that case when it considered these persons to be employees by reason of the fact that these employees were not at the time of the filing of the Statement of Employment employed in the designated area. Mr. Justice Disbery stated:

> "The second ground is that in deciding to dismiss the application on the ground that Polster and Korol were employed by the employer outside the designated areas at the material time, the Board exceeded its jurisdiction. The primary question before the Board was the determination of the status of the two employees as to whether they were "new employees" within the meaning of the union security clause, a matter which was exclusively within the Board's jurisdiction. I am satisfied from a study of the "Reasons for Decision" and the "Dissenting Opinion" of J. R. Ingram, that the Board understood and appreciated that this was the question before them for determination.
>
> I am entirely in agreement with learned counsel for the union that the Board erred in finding that "the said employees" names should have been included in the "Statement of Employment". They were not then employed in the designated area and it would have been improper for the employer, in my opinion, to have included their names in the list of employees."

Under the above decision Mr. Justice Disbery, therefore, held that that the names of the employees "not then employed in the designated area" should not have been included in the "Statement of Employment".

APPLICANT NOT AN EMPLOYEE WITHIN THE DESIGNATED AREA

Applying the above decision of Mr. Justice Disbery of the Saskatchewan Court of Queen's Bench to the present case it is apparent that Moncrief should not have been listed in the Statement of Employment. He was not an employee within the designated area of the certification at the date of the filing of the application and accordingly the Board is obliged to hold that he did not have status to bring the present application.

During argument counsel for Moncrief raised a further point which had not been brought forward during the hearing. He suggested that it was improper for Mr. G. F. Gerecke to have acted for the certified union during the hearing. Mr. Gerecke, who is a member of this Board, did not, of course, sit on the case, nor did he at any time have access to any Board documents on the case. The Saskatchewan Labour Relations Board is a part-time Board. Mr. Gerecke is an employee member of the Board and relies for his livelihood on his job as business agent of Local 529, International Brotherhood of Electrical Workers. Certainly his livelihood does not come from his part-time appointment as a member of this Board.

The Board categorically rejects any suggestion that it was improper for Mr. Gerecke to have acted for the certified union on the application.

In this connection attention is called to a decision of the Saskatchewan Court of Appeal in *British Columbia Oil Company Limited and Saskatchewan Labour Relations Board* (33 WWR (NS) at page 44) wherein Mr. Justice Gordon stated:

> "It is true that the legislature has directed that the board shall be constituted of certain representatives, but when once appointed, they become the labour relations board with quasi-judicial duties and very important administrative duties, which require the exercise of the utmost good faith on the part of all members of the board . . . "

Attention is called to the fact that each member of the Board as required by Section 4(10) of *The Trade Union Act* takes an oath before entering upon the duties of his office that:

> "I, _____, do swear that I will faithfully and impartially, to the best of my judgment, skill and ability, execute and perform the office of member of the Labour Relations Board. So help me God."

The Board rejects the insinuation that any member of this Board would so misconduct himself as to allow himself to be improperly influenced by the fact that Mr. Gerecke appeared for the International Brotherhood of Electrical Workers, Local Union No. 529, at the hearing.

APPLICATION DISMISSED

The Board, for the reasons set forth, concluded that it did not have jurisdiction to further deal with the matter and accordingly felt that it was obliged to dismiss the application.

Having rejected the application on the question of jurisdiction the Board is constrained to point out, by way of obiter, that it would, in any event, have dismissed the application on the merits. The application was

largely based on a so-called "secret" ballot conducted by the applicant. The Board rejects the suggestion that it should attach any weight to such a ballot conducted unilaterally by one of the parties to an application.

(Sgd.) "C. H. PEET,"
October 25, 1974. Chairman.

3.153 October 25, 1974

Canadian Brotherhood of Railway, Transport and General Workers
Local No. 44

v.

Crestview Chrysler Dodge Ltd., Regina
and
Barbara Koch (Employee)

Application for certification — Evidence of employer interference. Certification order issued.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s. 5(a) (b) (c).

APPLICATION FOR CERTIFICATION

This is an application for certification by the applicant union and with respect to employees of the respondent company.

Counsel for the company called no evidence on behalf of the respondent company but did take part in the cross-examination of witnesses called by the applicant as well as of Mrs. Barbara Koch, an employee.

EVIDENCE OF EMPLOYER INTERFERENCE

In argument the union, which was represented by a union official as counsel, suggested that the evidence of Mrs. Koch was to a petition which she circulated left a "shadow" of employer interference. On the basis of evidence adduced by Mrs. Koch the Board has no difficulty in finding much more than a "shadow", and noted the following from her own evidence:

1. Mrs. Koch, an accounts clerk in the office went to see Mr. Paul Rousseau, president of the company, in his office, very soon, if not immediately, after she became aware of the fact that there was a union drive to sign up employees of the company.
2. Mrs. Koch told Mr. Rousseau at the meeting in his office of a letter which the union was circulating.
3. Mr. Rousseau "passed on" some figures to Mrs. Koch. He obtained these "figures" from the company records, it was stated, and also from Chrysler in Winnipeg.

4. Mr. Rousseau, she stated, made a phone call to Regina Motor Products, another automobile agency in Regina, on her behalf. Later under cross-examination by the solicitor for the company Mrs. Koch watered down this statement by saying "I am not sure if I asked him to do it or not." In the opinion of the Board, this would appear to be reprehensible conduct on the part of the employer whether it was done at the request of Mrs. Koch, or in the alternative was done by Mr. Rousseau in order to assist her in her anti-union campaign.

5. Mrs. Koch subsequently called a meeting (after the application for certification was filed) of a number of employees. This was held in the office of Mr. Rousseau. Permission to use this office was given by a Mr. Gunther, Controller-Secretary-Treasurer of the company. At this meeting a petition was drafted.

6. Mrs. Koch circulated this petition among the employees. Her evidence was to the effect that when she circulated the petition she told the employees whom she approached that those who had signed for the union could write a letter to the Labour Relations Board. The fact that no employees who had signed for the union did this is of overwhelming significance, in the view of the Board.

7. Under cross-examination, Mrs. Koch admitted that she had discussed the matter of her non-support of the union with both Mr. Rousseau and Mr. Gunther.

Under the circumstances here, and taking into account the total evidence of Mrs. Koch, the Board finds that the employer influenced the petition and that it would be dangerous to believe that the petition represented the true opinion of those who signed it. Mrs. Koch was an employee in the "front office" who was known for her anti-union sentiments. The fact that the meeting, ostensibly called by her, and held in the office of Mr. Rousseau drafted the anti-union petition alone would taint the petition. The petition accordingly carried no evidential weight. Such a view is substantiated by the facts set out in item 6 above, but even without the facts in item 6 the Board could have reached no other conclusion.

On the basis of the evidence, the Board accepted the fact placed before it by counsel for the company that no confidential secretary was employed by the firm, and accordingly amended the appropriate unit suggested by the applicant to read as follows:

> "all full-time employees of Crestview Chrysler Dodge Ltd. at its location at 661 Albert Street, Regina, Saskatchewan, except the General Manager, Secretary-Treasurer, Accountant, Sales Manager, Automotive Rental Manager, Office Manager, Service

Manager, Parts Manager, Assistant Parts Manager, Body Shop Manager, Assistant Body Shop Manager, Service Department Foreman, Automotive Salesmen, Travelling Parts Salesman."

CERTIFICATION ORDER ISSUED

The Board also found, on the basis of majority support for the application, that the applicant union represented the majority of employees in the appropriate unit and accordingly directed certification to issue.

(Sgd.) "C. H. PEET,"
October 25, 1974. Chairman.

3.154 November 5, 1974.

United Brotherhood of Carpenters and
Joiners of America, Local Union No. 1867

v.

Telmed Construction Ltd., Regina.

Application for certification — Definition of "employee" — Definition of "employer" — Respondent not the employer. Application dismissed.

S.S. 1972. The Trade Union Act, 1972, C. 137,
s.s. 2(f)(iii), (g)(iii); 5(a)(b)(c).

APPLICATION FOR CERTIFICATION

The applicant applied for certification as the bargaining agent for all carpenters employed by the respondent company Telmed Construction Ltd.

Facts adduced in evidence, as accepted by the Board were as follows:

1. Telmed Construction Ltd. was incorporated on February 13, 1974.
2. On the date of the certification application the respondent company was in the process of constructing a building at 2161 Scarth Street, Regina.
3. Carpenter services on the 2161 Scarth Street project were being performed by Hillsden & Co. (1973) Ltd. under contract from the respondent company. Evidence was to the effect that Hillsden had a sub-contract from Telmed to do the carpenter and concrete work and that services were being performed under a cost-plus contract.
4. The carpenters were paid by Hillsden. Telmed had no responsibility whatsoever to the carpenters either for wages, nor for Canada Pension, Unemployment Insurance or Worker's Compensation contributions.

DEFINITION OF "EMPLOYEE"

The applicant contended that even if the carpenters were employed by Hillsden that a certification order should be made in respect of the employed carpenters and relied on the following definition in *The Trade Union Act, 1972*, C. 137:

"2. In this Act:

(f) "employee" means:

(iii) any person designated by the board as an employee for the purposes of this Act notwithstanding that for the purpose of determining whether or not the person to whom he provides his services is vicariously liable for his acts or omissions he may be held to be an independent contractor;"

DEFINITION OF "EMPLOYER"

"(g) "employer" means:

(iii) in respect of any employees of a contractor who supplies the services of the employees for or on behalf of a principal pursuant to the terms of any contract entered into by the contractor or principal, the contractor or principal as the board may in its discretion determine for the purposes of this Act;"

The submission was to the effect that under section 2(g)(iii) Telmed should be considered as the 'employer' of the carpenters on the project as the carpenters were supplied, it was argued, by Hillsden as sub-contractor to Telmed as the principal. The evidence, however, did not show that Hillsden supplied carpenters to Telmed, but rather that Hillsden had a sub-contract with Telmed to perform certain services which services were supplied by carpenters who were employed by Hillsden.

In any event, the Board did not feel that it could grant any relief to the applicant on the basis of section 2(g) (iii) of the Act, a subsection of the Act which the Board felt was very ineptly drawn and almost beyond comprehension as to the meaning which could or should be drawn from it. It is to be hoped that the legislature may see fit to clarify the subsection at some future date as the subsection as it presently exists is almost incomprehensible.

Under the circumstances the Board dismissed the application.

(Sgd.) "C. H. PEET,"
Chairman.

November 5, 1974.

3.155 November 15, 1974.

Health Sciences Association of Saskatchewan

v.

Victoria Union Hospital Board, Prince Albert, Saskatchewan,
and
Canadian Union of Public Employees Local Union 84 (Certified union and Intervener).

Application for certification amendment — Application for certification — Applications dismissed.

S.S. 1972. The Trade Union Act, 1972, C. 137, s.s. 5(a) (b) (c) (k).

APPLICATION FOR CERTIFICATION AMENDMENT

Two applications were made herein by the applicant. One application (LRB File No. 192-73-4) was an application for an amendment to existing certification orders made by this Board on January 5, 1954, and on September 6, 1973. The order of January 5, 1954, provided for certification of an appropriate unit described as follows:

> "The employees employed by the Victoria Hospital of Prince Albert, Saskatchewan, except the administrator, secretary to the administrator, office manager, house surgeons, radiologist, pathologist, interns, staff nurses, domestic supervisor, student nurses, housekeeper, dietitian, pharmacist, and accountant, constitute an appropriate unit of employees for the purpose of bargaining collectively."

by Canadian Hospital Employee's Union Local No. 302 (now Canadian Union of Public Employees Local Union 84).

The later order dated September 6, 1973, provided for certification of an appropriate unit described as follows:

> "All Physiotherapists employed by the Victoria Union Hospital in the Physiotherapy Department at Prince Albert, Saskatchewan, except the chief physiotherapist, are an appropriate unit of employees for the purpose of bargaining collectively."

by the Canadian Union of Public Employees Local Union 84.

The certified union, Canadian Union of Public Employees Local Union 84 opposed the present applications.

APPLICATION FOR CERTIFICATION

The companion application (LRB File No. 194-73-4) was for the certification of certain employees by the applicant, The Health Sciences Association of Saskatchewan. The employees involved would in large part have had to be split-off from the existing certified appropriate unit. To be successful on the certification application the applicant would also have to succeed in the amendment applications. All applications were accordingly dealt with by the Board as one hearing.

Before final determination a most unusual situation arose. Certain employees contacted the Board and subsequently gave sworn evidence before the Board to the effect that the applicant had agreed to withdraw the application. The applicant did not answer this allegation, although given the opportunity to do so.

APPLICATION DISMISSED

Under these circumstances, the Board decided to hold a vote of the employees concerned. As a result of this vote, the application for certification by the applicant was dismissed. The application for amendments were accordingly also dismissed.

(Sgd.) "C. H. PEET,"
Chairman.

November 15, 1974.

PART II

COURT CASES
ARISING OUT OF DECISIONS

of the

LABOUR RELATIONS BOARD

made under

The Trade Union Act

1965 - 1974

SASKATCHEWAN

COURT OF APPEAL

Before Culliton, C.J.S., Maguire and Hall, JJ.A.

Regina ex rel Oil, Chemical & Atomic Workers International Union, Local 9-649 et al (Applicants)
v. Nicol et al (Respondents)
As reported in 52 W.W.R. 434

Mandamus — Application to Compel Production of Documents — Conditions Precedent to Issue of Writ — Trade Union Act.

Application for a writ of mandamus to compel the production of documents for which privilege had been claimed. Application dismissed.

Per curiam: Mandamus lies only where there is failure to carry out an imperative duty and the applicant must show a specific legal right to the relief asked. *Reg. ex rel F. W. Woolworth Co. and Slabick v. Labour Relations Board* (1954) 13 WWR (NS) 1, at 16, 19 CR 308, affirmed [1956] SCR 82, 6 AbrCon (2nd) 982, applied.

Error in the exercise of a discretion is not, in itself, a subject of mandamus, provided there was not want or excess of jurisdiction. *Re Ault; Ault v. Read* (1956) 18 WWR 438, 24 CR 260, 115 CCC 132, affirming (1956) 18 WWR 428, 1956 Can Abr 746 (Alta. App. Div.) applied.

The actions of an administrative tribunal performing neither judicial nor quasi-judicial functions are not subject to review in certiorari proceedings. *Re Alberta Labour Act; F. F. Ayriss & Co. v. Board of Industrial Relations* (1959-60) 30 WWR 634, 1960 Can Abr 952 (Alta.); *Gay v. LaFleur* [1965] SCR 12, reversing [1963] Que QB 623, [1963] CTC 201, 63 DTC 1098; *Re Securities Act; Duplain v. Cameron, Beaudry and Holgate* (1960) 32 WWR 193, 1960 Can Abr 835 (Sask.) applied.

Nor does certiorari lie to question a decision of a judicial tribunal provided that such decision was made within its jurisdiction. *Farrell v. Workmen's Compensation Board* (1960-61) 33 WWR 433, affirmed (1962) 37 WWR 39, [1962] SCR 48, 1961 Can Abr 1635; *Reg. v. Labour Relations Board of Sask.; Ex parte Tag's Plumbing & Heating Ltd.* (1962) 34 DLR (2d) 128, 1962 Can Abr 986 (Sask. C.A.) applied.

[Note up with 15 CED (2nd ed.) *Mandamus*, secs. 1, 4, 5, 6; 3 CED (2nd ed.) *Certiorari*, sec. 3.]

D. G. McLeod, Q.C., for applicants.

E. D. Noonan, Q.C., and *G. W. Sandstrom,* for minister.

J. G. McIntyre, for respondent, Clipsham.

February 15, 1965.

The judgment of the court was delivered by

CULLITON, C.J.S. — The Oil, Chemical and Atomic Workers International Union, Local No. 9-649, is pursuant to the provisions of *The Trade Union Act*, R.S.S., 1953, ch. 259, the duly certified and lawful

bargaining agent for certain employees of the Saskatchewan Power Corporation, including the applicant, Clifford E. Basken. On October 5, 1964, the Saskatchewan Power Corporation suspended or dismissed the said Clifford E. Basken. On November 17, 1964, the union applied to the minister of labour for the appointment of a board of conciliation with respect to the suspension or dismissal of Basken, pursuant to sec. 18 of *The Trade Union Act*, and the regulations issued thereunder. Sec. 18 reads as follows:

> "18.—(1) The Minister may establish a board of conciliation to investigate, conciliate and report upon any dispute between an employer or employers and a trade union or trade unions, or if no trade union has been determined under this Act as representing a majority of the employees concerned, between an employer and any of his employees affecting any terms or conditions of employment of any employees of such employer or affecting or relating to the relations between such employer and all or any of his employees or relating to the interpretation of any agreement or clause thereof between an employer and a trade union.
>
> (2) The chairman of a board of conciliation, or in his absence, the acting chairman, shall have the powers of a commissioner under *The Public Inquiries Act* [R.S.S., 1953, ch. 15] and a board may receive and accept such evidence on oath, affidavit or otherwise as in its discretion it may deem fit and proper."

The minister complied with this request and by an order dated December 29, 1964, established a board of conciliation to investigate, conciliate and report upon the dispute between the union and the employer respecting:

(1) The suspension from the employ of the corporation of one, C. E. Basken;

(2) The payment to employees for travelling time outside of normal hours of work;

(3) The reversion of day workers to shift workers for the establishment of shift work to be performed by day workers;

(4) The use of the standby and call-out provisions of the collective agreement for the performance of "preplanned" work outside of an employee's regular hours of work.

The board so appointed consisted of A. M. Nicol, Q.C., chairman, and George J. D. Taylor, Q.C. and Robert H. McKercher as members. Under the powers granted the chairman by sec. 18, the chairman issued a *subpoena duces tecum* directed to W. B. Clipsham, acting general manager of the Saskatchewan Power Corporation. Clipsham duly appeared before

the board and his counsel submitted a list of documents which he was prepared to produce but stated that there were three letters pertaining to the dispute which Clipsham refused to produce. These consisted of a letter dated January 6, 1964, from the minister in charge of the Saskatchewan Power Corporation to the then manager; a letter dated July 8, 1964, from the then manager to the minister, and a letter dated October 5, 1964, from the minister to the acting manager, Clipsham. Learned counsel for Clipsham contended that these letters belonged to that class of documents which the public interest requires to be withheld. There was then filed an affidavit by the minister in charge of the Saskatchewan Power Corporation. In this affidavit the minister deposed that he was a member of the executive council of the province of Saskatchewan and duly appointed by order in council as minister in charge of the Saskatchewan Power Corporation; that he had personally examined the letters in question and he had come to an independent decision, after considering the material submitted to him and concluded the affidavit by stating:

> "That I object to the production by the said Saskatchewan Power Corporation or by any other person whatsoever of the said communications on the following grounds, that is to say, that the communications belong to the class of documents which on the grounds of public interest must be withheld from production, such communications being in the class of documents being inter-departmental or intra-departmental communications, as the case may be, disclosure of which class of documents is contrary to the public interest in that it is prejudicial to the proper functioning of the public service, in that it tends to suppress freedom and candour of communication."

After hearing argument by counsel, the board, by majority decision, sustained the objection taken by learned counsel for Clipsham and the minister and ruled that the said letters belonged to that class of documents which the public interest requires to be withheld from publication and that the claim to privilege was well founded. The sittings of the board was then adjourned to permit the present application to be made.

This is an application for an order that a peremptory writ of mandamus do issue directing the respondent, W. B. Clipsham, to comply with the writ of *subpoena duces tecum* by producing to the board the said letters or, alternatively, for a similar order: (a) Requiring the minister to produce the said letters; or (b) Requiring the chairman to enforce the writ of *subpoena duces tecum* by requiring the production of the said letters; or (c) Requiring the board to exercise the jurisdiction conferred on it by secs. 18 and 19 of *The Trade Union Act*.

The grounds of the application as set forth in the notice of motion are:

(1) That *The Trade Union Act* is binding upon the crown and the crown cannot thwart, prevent or limit the investigation, conciliation or report under the guise of crown privilege;

(2) That the refusal of the board to exercise its jurisdiction to compel production of the letters was based upon extraneous matters and constitutes a denial or natural justice;

(3) That the crown in claiming privilege was not acting in good faith;

(4) That the said letters are not privileged or, alternatively, the board should not have sustained the claim for privilege without examining the letters.

The application also contains a request for an order that a writ of *certiorari* do issue for the return of the decision that the said letters are privileged so that the said order may be quashed on the grounds already stated in support of the application for a writ of *mandamus* as well as on the additional allegation that the board erred in law in its decision and that such error is manifest upon the face of the record.

Sec. 19 of *The Trade Union Act* authorizes the minister to make regulations respecting boards of conciliation and reads as follows:

> "19. The minister may make such regulations as he thinks fit in regard to the establishment of boards of conciliation and the appointment of the members including the chairman thereof by the nomination of the parties to the dispute or by himself and for the sittings, procedure and remuneration of such boards and publication of the reports of such boards with a view to the rapid disposition of any dispute."

Regulations were made under the foregoing section and subsec. (2) of regulation 13 is,

> "A board may accept, admit and call for such evidence as in equity and good conscience it thinks fit, whether strictly legal evidence or not."

This regulation appears to be only a re-statement of the power granted to the board under sec. 18 (2) of the Act, which in part states:

> "18.—(2) * * * a board may receive and accept such evidence on oath, affidavit or otherwise as in its discretion it may deem fit and proper."

I think it is obvious, whether reliance be placed upon the Act or regulations or both, that the board has complete discretion both as to the nature and the admissibility of the evidence that may be adduced.

The question which first arises here is whether or not *mandamus* lies. In approaching this question I adopt the statement of Gordon J.A. in *Reg. ex rel F. W. Woolworth Co. and Slabick v. Labour Relations Board*

(1954) 13 WWR (NS) 1, 19 CR 308, affirmed [1956] SCR 82, when he said at p. 16:

> "It seems hardly necessary to say that in approaching this question it must be borne in mind that the applicant for the prerogative writ of *mandamus* must show a clear legal specific right to the relief asked. The duty must be imperative and not discretionary."

In my opinion, the applicants have failed to show any right to a writ of *mandamus* directed either to the chairman or to the board. There is no suggestion that either the chairman or the board has failed to perform any statutory duty imposed upon him or it, or that either has failed to exercise a jurisdiction which they have. The only complaint is that the board erred in its ruling on privilege. In making that ruling the board exercised its discretion on a matter within its jurisdiction and, therefore, such decision is not the subject of *mandamus*: *Re Ault; Ault v. Read* (1956) 18 WWR 438, 24 CR 260, 115 CCC, 132, affirming (1956) 18 WWR 428 (Alta. App. Div.). Moreover, *mandamus* is not the remedy to remove something which has been done, or to review what has been done. This was the opinion expressed by Macfarlane, J. in *In re Rex and Labour Relations Board (B.C.)* [1949] 2 WWR 873, with which opinion I am in full agreement. No authority is needed for the statement that the court cannot exercise an appellate jurisdiction under the guise of *mandamus*.

I think it is evident, too, that certiorari does not lie to question the board's decision. The board is an administrative tribunal performing neither a judicial nor quasi-judicial function: *Vide Re Alberta Labour Act; F. F. Ayriss & Co. v. Board of Industrial Relations* (1959-60) 30 WWR 634 (Alta.); and *Guay v. LaFleur* [1965] SCR 12, reversing [1963] Que QB 623, [1963] CTC 201, 63 DTC 1098. Being an administrative tribunal, its decisions are not subject to review in *certiorari* proceedings: *Re Securities Act; Duplain v. Cameron, Beaudry and Holgate* (1960) 32 WWR 193 (Sask.). Even if I could hold that the board was a judicial tribunal, *certiorari* would not lie to question a decision made within its jurisdiction: *Vide Farrell v. Workmen's Compensation Board* (1960-61) 33 WWR 433, affirmed (1962) 37 WWR 39, [1962] SCR 48, and *Reg. v. Labour Relations Board of Sask.; Ex parte Tag's Plumbing & Heating Ltd.* (1962) 34 DLR (2d) 128 (Sask. C.A.).

In my respectful view, the applicants, in seeking a writ of *mandamus,* directed to Clipsham and the minister, have misconceived both the nature of the board and its functions. The issue of the *subpoena duces tecum* was an administrative act performed by the chairman. To argue that the subpoena constitutes an order by the chairman imposing an absolute duty on Clipsham and depriving him of the right to object to the production of certain documents in his custody is a new and novel proposition and one I cannot accept. Clipsham fully complied with the

subpoena and exercised a right which he had. Similarly, the minister had a right to claim privilege on the ground of public policy. It was for the board then to rule on the validity of the submission made by Clipsham and the minister. This the board did and, as I have already stated, that decision is not open to review.

In the application it was alleged that in claiming privilege the crown was not acting in good faith and was attempting to thwart the purposes of the board. On the argument no attempt was made to substantiate these allegations, which I must say are entirely without foundation.

The application is dismissed with costs.

SASKATCHEWAN

COURT OF APPEAL

Before Culliton, C.J.S., Maguire and Hall, JJ.A.

Regina, ex rel Construction and General Laborers' Local Union No. 890 and Neumann (Applicants) Appellants v. Labour Relations Board et al (Respondents) Respondents

Mandamus — Whether Ordering Vote Proper Exercise of Board's Discretion — Jurisdiction.

Appeal from the dismissal by MacPherson, J. of an application for a writ of *mandamus* (1965) 50 WWR 318. Appeal dismissed.

Per curiam: A labour relations board has an unfettered discretion to direct a vote under sec. 6 (1) of *The Trade Union Act*, R.S.S., 1953, ch. 259, in the exercise of the powers conferred upon it by sec. 5, and this discretion is in addition to any powers derived from sec. 15. *Simpsons-Sears Ltd. v. Dept. Store Organizing Committee, Local 1004* (1956) 19 WWR 439, at 441, 1956 Can Abr 522 (Sask. C.A.) considered; this being so, the board, in ordering a vote in the instant case, was exercising its discretion on a matter within its jurisdiction and its decision is not the subject of *mandamus*. *Re Ault; Ault v. Read* (1956) 18 WWR 438, 24 CR 260, 115 CCC 132, affirming (1956) 18 WWR 428, 1956 Can Abr 746 (Alta. App. Div.), applied.

[Note up with 15 CED (2nd ed.) *Mandamus*, secs. 1, 4, 5.]

G. J. D. Taylor, Q.C., for applicants, appellants.

R. L. Barclay, for respondents, respondents.

April 22, 1965.

The judgment of the Court was delivered by

CULLITON, C.J.S. — This is an appeal from the judgment of MacPherson, J. [48 D.L.R. (2d) 770, 46 C.R. 107], in which he dismissed the application of the appellants that a peremptory writ of *mandamus* do issue directed to the Labour Relations Board of Saskatchewan commanding it to exercise the jurisdiction conferred upon it by s. 5(*b*) and (*c*) of *The Trade Union Act*, R.S.S. 1953, c. 259, in respect of an application for certification made to it by the applicant union, and for an order that a writ of *certiorari* do issue for the return to the Court of the order of the Labour Relations Board directing a vote pursuant to s. 6(1) of *The Trade Union Act*.

The appellant trade union applied to the Labour Relations Board for an order determining that the unit of employees described in the application is an appropriate unit of employees for the purpose of bargaining collectively; that the applicant trade union represents a majority of the employees in the said unit and requiring the employer to bargain collectively with the union. In support of the application was filed the statement of employment showing four persons to be employed

by the employer, applications for membership in the union and dues deduction authorizations by four employees, the names of three of whom appear on the statement of employees.

Oral representations were made by the business representative of the union and by Stanley Cavill on behalf of the employer. The Board then made an order which reads in part:

> "AND UPON HEARING oral representations on August 24, 1964, by A. Neumann, Business Representative, and Stanley Cavill, on behalf of the applicant Union and the respondents respectively;
>
> "AND UPON INSPECTING APPLICATION for membership-and-dues-deduction authorizations filed on behalf of the applicant union by the said A. Neumann, and a statement of employment dated August 11, 1964, filed by the said Stanley Cavill on behalf of the Respondents; AND HAVING REGARD TO all the facts adduced in evidence before the Board;
>
> "AND UPON THE BOARD HAVING FOUND that it is expedient to conduct a representation vote by secret ballot to determine whether or not the employees concerned wish to be represented by the Applicant Union for the purpose of bargaining collectively with their Employer;
>
> "IN VIRTUE of the authority vested in it by Section 5, Clause (a) of *The Trade Union Act*, Chapter 259, R.S.S. 1953;
>
> "THE LABOUR RELATIONS BOARD HEREBY FINDS AND DETERMINES THAT all employees employed by Stanley Cavill, carrying on a business under the firm name and style of Cavill Cartage in the City of Saskatoon, Saskatchewan, and the said Cavill Cartage, except the office staff and those regularly employed in a confidential capacity, constitute an appropriate unit of employees for the purpose of bargaining collectively;
>
> "IN VIRTUE of the authority vested in it by Section 6 of the said Trade Union Act, Chapter 259, R.S.S. 1953;
>
> "THE LABOUR RELATIONS BOARD HEREBY DIRECTS that a vote by secret ballot be conducted among all employees who are within the bargaining unit herein determined to be appropriate for the purpose of bargaining collectively, and who were employed within the said Unit as of August 11, 1964, and who are still employed within the said unit as of the date of voting, to determine whether or not the said employees wish to be represented by the Construction and General Laborers' Local Union No. 890, for the purpose of bargaining collectively with their Employer; * * * * *"

The applicant then made application to the Court of Queen's Bench for a writ of *mandamus*. This application was based upon the submission

that section 5 of the Act puts upon the Board a duty to exercise the powers therein granted when called upon to do so. The applicant contended that it produced before the Board evidence that it represented a majority of the employees in the appropriate unit and therefore the Board declined jurisdiction by failing to exercise the duty imposed upon it by subsections (b) and (c) of section 5 and could not in law avoid this duty by ordering a vote pursuant to section 6(1). The applicant further argued that in directing such vote the Board acted upon extraneous considerations. In support of this position the appellants relied upon the judgment of this Court in *Simpson-Sears Limited v. Department Store Organizing Committee*, [1956] 19 W.W.R. (NS) 439, and the judgment of the Supreme Court of Canada in *Re F. W. Woolworth Company Limited*, [1956] S.C.R. 82.

The learned Chamber Judge held that the decision of the Board to order a vote was not an act of a judicial nature. I do not think the decision of this Court in *Simpson-Sears Limited v. Department Store Organizing Committee, supra* was brought to his attention. In that case the Court, in *certiorari* proceedings, quashed the order of the Board directing a vote and such an order would not have been made if such decision of the Board was administrative. However, this aspect of the application becomes significant only if *mandamus* lies and the order must be quashed to make *mandamus* effective. The question then is, "Does *mandamus* lie?"

The powers of the Board to make orders are provided for in section 5 of the Act, the pertinent portions of which are:

> "5. The board shall have the power to make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;
>
> (b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer to bargain collectively; **** "

The power of the Board to accept and receive evidence is given by section 15 of the Act, which reads as follows:

> "15. The board and each member thereof and its duly appointed agents shall have the power of a commissioner under *The Public Inquiries Act* and may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not."

Section 6 makes provision for a representation vote. It is subsection (1) with which we are concerned on this appeal and that subsection reads:

> "6. — (1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 15, the board may, in its discretion subject to subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question."

In my view the language of section 6(1) makes it abundantly clear that the Board, in the exercise of its powers under section 5(b), subject to the provision of subsection (2) of section 6, with which I am not concerned in this appeal, has an infettered discretion to direct a vote. The right to do so is clearly in addition to any powers conferred upon the Board by section 15. That being so, the Board, in ordering a vote, exercised its discretion on a matter within its jurisdiction and therefore such decision is not the subject of *mandamus* : *Re Ault; Ault v. Read*, [1956] 18 W.W.R. (NS) 438.

Learned counsel for the appellant argued, while this may appear to be the proper interpretation of the sections under review, such was not the view taken by this Court in *Re Simpson-Sears Limited, supra.* He contended that in *Re Simpson-Sears, supra* the Court held that resort could not be taken to section 6 to obtain information that could be obtained by the Board pursuant to the powers granted to it by section 15. In support of this position he relied upon the statement of Gordon, J.A. at page 441:

> "With every deference to the argument of Mr. Carter that such vote could be directed for the information of the board, I do not think that the board can direct a vote under sec. 6 to get any information which it should get under sec. 15 of the Act, which gives the board and its agents the power of a commissioner under *The Public Inquiries Act*, R.S.S. 1953, ch. 15."

With respect, I do not think the foregoing statement can be in interpreted as restricting the discretionary power granted to the Board by section 6(1). This statement must be construed in relation to the problem to which the learned justice had directed his mind. In that case the Board ordered a vote pursuant to section 6 without first having found and determined an appropriate unit of employees for the purpose of bargaining collectively. Learned counsel argued that the Board had a right to direct such vote for its own information, notwithstanding the failure to find and determine an appropriate unit. In disposing of this argument, Gordon, J.A., at page 441, said:

> "I have read this order many times and can say definitely that there is no direct determination of any appropriate unit of the company's employees for the purpose of bargaining collectively. Nor can I see that such determination was made inferentially. We have nothing but an order directing a vote to be taken and the only power of the board to direct a vote is contained in sec. 6 of *The Trade Union Act* and I am perfectly certain that under this section no vote can be directed until an appropriate unit of employees has been determined under sec. 5(2) of the Act. With every deference to the argument of Mr. Carter that such vote could be directed for the information of the board, I do not think that the board can direct a vote under sec. 6 to get any information which it should get under sec. 15 of the Act, which gives the board and its agents the power of a commissioner under *The Public Inquiries Act*, R.S.S. 1953, ch. 15."

From this excerpt I think it is evident that the learned Justice, having found that under section 6(1) there was no power to direct a vote until an appropriate unit had been determined, meant no more than that the Board was restricted to the powers to be found in section 15 in determining whether or not there was an appropriate unit, or, to put it more succinctly, having found that the determination by the Board of an appropriate bargaining unit was a condition precedent to the direction of a vote, resort could not be had to a vote to establish the condition upon which the right to conduct a vote was dependent. If this is the correct view, and I am satisfied that it is, then it cannot possibly be given the broad interpretation attributed to it by counsel for the appellants, nor can it be construed as a pronouncement by the Court restricting the Board's discretion to direct a vote once an appropriate bargaining unit has been determined.

I do not think the decision of the Supreme Court in *F. W. Woolworth Company Limited, supra*, in any way advances the position of the appellants in the appeal under review. In that case the Supreme Court held that while the language in section 5 is permissive in form, it imposes a duty upon the Board to exercise the power or powers therein conferred when called upon to do so by a party interested and having the right to make an application thereunder. The Court there held that when the right of the applicant to make the application was conclusively established, dismissal of the application upon extraneous or irrelevant considerations was a refusal by the Board to perform its statutory duty. I am satisfied that had the Board directed a vote pursuant to section 6(1) instead of dismissing the application on extraneous and irrelevant considerations, the application for *mandamus* would not have been entertained.

In the present case the application was not dismissed. In ordering a vote the Board exercised a statutory right which it had in discharging the duty imposed upon it by section 5(b) of the Act. I am satisfied, too, that it has the right to order such a vote, notwithstanding the nature of the evidence before it. It was for the Board, and the Board alone, to determine whether a vote should be directed and that decision cannot be questioned in *mandamus* proceedings.

The appeal is dismissed with costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 22nd day of April, A.D. 1965.

"E. M. Culliton"
E. M. Culliton, C.J.S. for the Court.

SASKATCHEWAN

COURT OF APPEAL

Woods, Brownridge and Maguire, JJ.A.
June 14, 1965.

Regina v. Saskatchewan Labour Relations Board, Ex parte United Steelworkers of America

Labour relations — Certification — Order for vote — Power of Board to determine "employees eligible to vote" — Exclusion of those not still employed at voting date — Whether a reviewable error of law — Whether *mandamus* lies.

Mandamus — Labour Board's determination of "employees eligible to vote" in certification proceeding — Power to exclude those not still employed at voting date — Trade Union Act (Sask.).

In the absence of a statutory definition of "employees entitled to vote" in connection with a certification application under *The Trade Union Act*, R.S.S. 1953, c. 259, it is the duty and within the jurisdiction of the Labour Relations Board to determine who comes within this designation, and it cannot be said that all rights are crystallized upon the completion of the certification application so as to oblige the Board to permit voting by persons who were employees at the date of the application but not at the date of the voting. If there is an error of law in excluding those not still employed at the date of the voting it is an error of law within the Board's jurisdiction and it cannot be reviewed by *mandamus*.

[*The Queen v. Cotham*, [1898] 1 Q.B. 802; *Rex v. Port of London Authority, Ex p. Kynoch, Ltd.*, [1919] 1 K.B. 176, apld]

APPLICATIONS for *mandamus*, with *certiorari* in aid, to the Saskatchewan Labour Relations Board.

G. J. D. Taylor, Q.C., and *C. F. Tallis*, for applicants.

D. K. McPherson, for Schentag Construction Ltd.

N. R. McKay, for Saskatchewan Labour Relations Board.

The judgment of the Court was delivered by

MAGUIRE, J.A. — The applicants have applied for a writ of *mandamus* with *certiorari* in aid in respect to the order of the Labour Relations Board dated April 6, 1965, directing a vote of the employees of Schentag Construction Ltd., in connection with an application for certification of United Steelworkers of America, as the bargaining agent of employees of Schentag Construction Ltd., in or about the construction, maintenance and operation of a mine, shaft, mill and associated plant and facilities known as "I.M.C. — Shaft No. 2", or the "Cut-Arm Plant". Counsel for the applicants informed the Court that the primary relief desired was a writ of *mandamus* directed to the Board, and that *certiorari* was applied for merely to obtain the record from the Board.

By appropriate application under *The Trade Union Act*, R.S.S. 1953, c. 259, dated February 22, 1965, the above union applied for an order determining the employees referred to except persons who are of the

rank of foreman or above, as an appropriate unit of employees for the purpose of bargaining collectively, determining that said union represented a majority of the employees and requiring the employer to bargain collectively with the union.

Certain facts constituting the background of these motions occurred immediately before the hearing of the application by the Board, namely,

(1) on April 3, 1965, ten of the employees of the employer, who were in the proposed unit on February 22, 1965, were informed that their employment was terminated and that they were to report for work on a hospital construction job in the area, being performed by another corporation;

(2) eleven employees, whose employment commenced after February 22, 1965, were on the same day, April 3, 1965, informed that their employment was terminated, and that they also were to report for work with the contracting company engaged in building said hospital;

(3) two persons employed as of February 22, 1965, were on a date prior to April 6, 1965, required to work for the employer, but in a job location outside the proposed unit.

All these facts were placed before the Board in its hearing on the application for certification. It was not suggested that the employer in terminating the employment of employees, or in transferring the two employees to employment outside the proposed unit, had been guilty of an unfair labour practice.

The affidavit of the applicant Ross, filed on these applications to the Court, sought to establish that the incorporators, shareholders and officers of the employer, and the limited company engaged in the construction of the hospital were identical. In argument, however, counsel for the applicants made no reference to, and advanced no argument based upon these facts.

The Board by order dated April 6, 1965, found and held that the proposed unit of employees did constitute an appropriate unit for the purpose of bargaining collectively and pursuant to section 6 of the Act directed that,

> "a vote by secret ballot be conducted amongst all the employees who are within the bargaining unit herein determined to be appropriate for the purpose of bargaining collectively and who were employed within the said unit as of February 22, 1965, and who are still employed within the said unit as of the date of voting, to determine whether or not the said employees wish to be represented by United Steelworkers of America for the purpose of bargaining collectively with the employer."

The objection is to the inclusion in the order of the words "and who are still employed within the said unit as of the date of voting".

Briefly stated, the applicants' submission may be summarized as follows:

(1) that it is not within the jurisdiction of the Board to determine "employees eligible to vote";

(2) alternatively, if it is within the jurisdiction of the Board to determine these employees, then the Board, in so interpreting that phrase, has not merely erred in law in the exercise of its jurisdiction, but has proceeded on an erroneous legal principle for which *mandamus* is the proper remedy;

(3) that having regard to the purpose and intent of the Act, and the provisions relative to an application for certification, the proper and required meaning of the words "employees entitled to vote", is those employees in the employment of the employer as of the date of the application without regard to continuance or cessation of employment and the latter regardless of whether such cessation was voluntary on the part of the employees or by action of the employer and this whether for cause or otherwise.

Argument supporting this submission was to the effect that on completion of the application for certification all rights and the relative positions of the parties became crystallized and static.

I cannot accept this submission. The term "employees entitled to vote" not being defined, it follows that it is the duty, and within the jurisdiction of the Board, to determine the persons coming within this category.

The error, if any, existing here, is not a failure to hear and determine according to law through basing its decision on a wrong principle of law: Wills, J., considering this question in *The Queen v. Cotham*, [1898] 1 Q.B. 802 at page 806, states:

> "It is obvious that the distinction between an erroneous decision and a failure to hear and determine according to law may be very fine, and the cases on the subject show that it is so. I take the governing principle to be that if the justices have applied themselves to the consideration of a section of an Act of Parliament, and have, no matter how erroneously, determined the question which arises upon it before them, their decision cannot be reviewed by process of *mandamus*."

In *Rex v. Port of London Authority, Kynoch Ltd.*, [1919] 1 K.B. 176, Bankes, L.J., considering this question, states at page 183:

> "There must be something in the nature of a refusal to exercise jurisdiction by the tribunal or authority to whom the writ is directed. A refusal may be conveyed in one of two ways: there may be an absolute refusal in terms, or there may be conduct amounting to a refusal. In the latter case it is often difficult to

> draw the line between those cases where the tribunal or authority has heard and determined erroneously upon grounds which it was entitled to take into consideration and those cases where it has heard and determined upon grounds outside and beyond its jurisdiction; but this conclusion may be drawn from decided cases, and there is no refusal to hear and determine unless the tribunal or authority has in substance shut its ears to the application which was made to it, and has determined upon an application which was not made to it."

I am of the opinion that if the Board has erred, the error is one of law within its jurisdiction; it has exercised its discretion on a matter within its jurisdiction, and the decision cannot be the subject of *mandamus* : *Re Ault, v. Read*, 18 WWR (NS) 438; *Oil, Chemical and Atomic Workers International Union v. Nicol et al*, (a recent and as yet unreported decision of this Court).

The applications are dismissed with costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 14th day of June, A.D. 1965.

"P. H. Maguire"
Maguire, J.A. for the Court.

QUEEN'S BENCH — DISBERY, J.

Regina ex rel Construction and General Laborers' Local Union No. 180 and Sebastian (Applicants)

v. Labour Relations Board of Saskatchewan and Graham Construction Ltd. (Respondents)

Trades and Trade Unions — Alleged Unfair Practice by Employer — Refusal of Board to Find Unfair Practice — Whether Board Erred within Its Jurisdiction — Application for Certiorari — Principles.

Application for a writ of *certiorari* to bring up and quash an order of the labour relations board, and for an order of *mandamus* to compel it to exercise the jurisdiction conferred upon it by secs. 5 (*d*) and (*e*) of *The Trade Union Act*, R.S.S., 1965, C. 287. Application dismissed.

The board, having certified the applicant, negotiations were conducted between the applicant and the respondent, Graham Construction Ltd., which led to an agreement containing a union security clause; breach of such a clause is, by sec. 32 (2) of the Act, declared to be an unfair practice. The union applied to the board for an order declaring that the employer had been guilty of an unfair practice by reason of its retention of two non-union employees contrary to the security clause; the board's refusal to make such an order was the subject of the present proceedings.

It was *held* that the application must be dismissed; an application for *certiorari* is not an appeal upon the merits but a challenge to the legality of the proceedings below, which must be dealt with in the light of any privative section in the Act, where such exists. The question to be determined is whether the alleged error goes to jurisdiction or to an issue within the board's jurisdiction. Even if the board erred in law, its error is not reviewable if it was an error made within the exercise of its jurisdiction. *Reg. v. Labour Relations Board of Sask.; Ex parte Tag's Plumbing & Heating Ltd.* (1962) 34 DLR (2d) 128, at 131-32, 1962 Can Abr 986 (Sask. C.A.);

Farrell v. Workmen's Compensation Board (1962) 37 WWR 39, at 41, [1962] SCR 48, affirming (1960-61) 33 WWR 433, 1962 Can Abr 1703; *Labour Relations Board of Sask. v. Dom. Fire Brick & Clay Products Ltd. and Clay Products Workers' Union* [1947] SCR 336, at 339, 341, reversing [1946] 3 WWR 459, 10 Abr Con (2nd) 745, applied. In the case at bar the alleged error was one clearly made within the board's jurisdiction.

A trade union is a legal entity and has status to make an application for an order for *certiorari*, and invididuals who have grievances of their own may join as parties. *Regina Grey Nuns' Hospital Employees' Assn. v. Labour Relations Board* [1950] 2 WWR 659, 6 Abr Con (2nd) 985 (Sask.) applied. An agent of a union, which is a legal entity though unincorporated, may make an affidavit in support of an application to the court. *Reg. ex rel F. W. Woolworth Co. and Slabick v. Labour Relations Board* (1954) 13 WWR (NS) 1, 19 CR 308, affirmed [1956] SCR 82, 6 Abr Con (2nd) 982, applied.

[Note up with 3 CED (2nd ed.) *Certiorari*, sec. 3; 3 CED (CS) *Trades and Trade Unions*, secs. 7, 7A, 7B, 21A.]

G. J. D. Taylor, Q.C., for applicants

H. M. Ketcheson, Q.C., for respondent, labour relations board.

D. H. Wright, for respondent, Graham Construction Ltd.

April 22, 1966.

DISBERY, J. — While this application was commenced prior to the coming into force of the revised statutes of Saskatchewan, 1965, on February 7, 1966, I shall, in this judgment, refer to the relevant sections of *The Trade Union Act*, R.S.S., 1965, ch. 287, by the numbers they now bear in the said revised statutes.

This is an application for an order that a writ of *certiorari* issue for a return to this court of the record and a certain order made on August 5, 1965, by the labour relations board of Saskatchewan, hereafter referred to as the "board", whereby the board dismissed an application by the applicant, Construction and General Laborers' Local Union No. 180, hereafter referred to as the "union", for an order of the board determining if the respondent Graham Construction Ltd., hereafter referred to as the "employer", had or was engaging in an unfair labour practice, and for an order requiring the employer to refrain from engaging in such practice. The application before me also asks for an order of this court quashing the said order of the board.

The applicants also ask "for an order that a peremptory writ of *mandamus* do issue, directed to the Labour Relations Board of Saskatchewan, commanding it to exercise the jurisdiction conferred upon it by section 5(d) and (e) of *The Trade Union Act* in respect of an application made to it by the Applicant trade union dated the 19th day of July, A.D. 1965, for an Order determining whether an unfair labour practice was being or had been engaged in by the respondent Graham Construction Ltd., (formerly P. W. Graham & Sons (1963) Ltd.), and requiring the said respondent to refrain from engaging in the said unfair labour practice, according to law."

When the application came on for hearing learned counsel for the employer raised several preliminary objections to it being heard. Learned counsel for the Board adopted an attitude of neutrality towards the objections, neither supporting nor opposing any of them. It will therefore be necessary at the outset to deal with these objections.

The first objection advanced is that the union is not a legal entity known to the law and consequently has no status to make this application. Learned counsel submits that the only way the application could be brought would be upon the application of one or more members of the union acting on behalf of himself or themselves and their fellow union members, such being a course authorized with respect to ordinary actions by Rule of Court 45. Learned counsel relied on *Regina Grey Nuns' Hospital Employees' Association v. Labour Relations Board et al*, [1950] 2 W.W.R.

659. In that case the applicant for a writ of *certiorari* was an unaffiliated and unchartered association who had not been a party in the proceedings before the Board which it sought to attack. Doiron, J. held at p. 663:

> "The applicant herein was given corporate recognition by the board when the board made an order directing a vote, and the board in making the order must have found that it was a labour organization..."

Learned counsel stressed the filing of an affidavit, which is referred to on the same page, in order to also comply with Rule 45 by naming representatives. As I read the judgment, the affidavit was not filed to meet any ruling or requirement by Doiron, J.; it was filed by counsel out of abundant caution in order to give the applicant two strings to its bow.

The Court of Appeal of this Province held in *MacKay and MacKay v. International Association of Machinists Lodge No. 1057 of Saskatoon*, [1946] 2 W.W.R. 257, that for the purpose of applications of this nature a trade union is a legal entity. See also *Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay Products Limited and Clay Products Workers' Union*, [1947] S.C.R. 336 at pp. 339 and 341; *International Brotherhood of Teamsters, etc. Local 213 v. Therien*, [1960] S.C.R. 265; and *Nissho (Canada) Limited et al v. International Longshoremen's and Warehousemen's Union (Canadian Area) et al*, [1965] 54 W.W.R. (N.S.) 295. I therefore find that the union has status to bring this application in its own name and consequently the objection fails.

Learned counsel for the employer next objected that the applicant Sebastian had no status to make this application, firstly, because he was not a party to the proceedings before the Board, the parties appearing there being only the employer and the union; and, secondly, that Sebastian had no real interest in the proceedings. The fact that he was not a party before the Board is no barrier to his joining as an applicant in this application for a writ of *certiorari* if he is a person aggrieved by the Board's order. Any person aggrieved by the decision of a statutory tribunal may apply for a writ of *certiorari, Regina Grey Nuns' Hospital Employees' Assn. v. Labour Relations Board, supra; R. v. Ludlow, Ex parte Barnsley Corpn.*, [1947] 1 All E.R. 880 at 882. Persons aggrieved have been defined as those who "have a peculiar grievance of their own beyond some grievance suffered by them in common with the rest of the public.": per Smith, L.J. in *Reg. v. Nicholson*, [1899] 2 Q.B. 455 at 471.

In his affidavit filed in support of this application Sebastian describes himself as being the "business agent" of the union. The record reveals that he was not a party to the proceedings before the Board, and there is nothing to show that he is a member of the union. Sebastian, therefore, is only an agent acting on behalf of his principal, the union. It is the union and its members who are "aggrieved" by the decision of the Board, and whose interests are affected by it. The personal interest of Sebastian as an agent of the union in the subject matter of the Board's

order is, in my opinion, too remote and too slight to qualify him, in the legal sense, as a person "aggrieved" by the order. Therefore I should not exercise the discretion which I have in *certiorari* proceedings in his favour. This objection is sustained and Sebastian is dismissed from the application. This, however, is no bar to the application continuing insofar as the applicant union is concerned.

The next objection raised by learned counsel for the employer is non-compliance with Rule of Court 325 which reads as follows:

> "325. Affidavits upon which any application to the court is founded shall be filed before the application is made, if made *ex parte*, or before service of any notice of motion or petition, or other proceeding as the case may be."

One purpose of the rule is to enable the party served with the notice of motion to have immediate access at the Local Registrar's office to the supporting affidavits. The material before me reveals that the notice of motion, together with a copy of Sebastian's supporting affidavit, was served on the Labour Relations Board in Saskatoon on January 28th; upon the employer in Moose Jaw on January 31st; and upon the Attorney General in Regina on February 2nd. The original affidavit and the original notice of motion with proof of such services was then filed with the Local Registrar on February 4th. Technically the rule was not complied with but the non-compliance is nothing more than an irregularity which did not prejudice the employer in any way; *In re Price* (1912), 5 S.L.R. 318; *Coulthard v. Coulthard*, [1952] 5 W.W.R. (N.S.) 663. In the words of Wetmore, C.J. in the former case, "I will not allow the application to be defeated on that ground." Accordingly, leave is given the Union, *nunc pro tunc*, to file said affidavit in the office of the Local Registrar up to and inclusive of February 4th, 1966.

With reference to the application for the issuance of a peremptory writ of *mandamus*, learned counsel for the employer raises the objection that Crown Practice Rule 32 has not been complied with. The rule is as follows:

> "32. No order for the issuing of any writ of *mandamus* shall be granted, unless at the time of application an affidavit be produced, by which some person shall depose upon oath that such application is made at his instance as prosecutor, and if the writ be granted the name of such person shall be endorsed on the writ as the person at whose instance it is granted."

Learned counsel submits that such an affidavit could only be made by a member of the union, and as Sebastian is not shown to be a member and is not a person aggrieved by the Board's order, he could not take the required affidavit. He further submits that only in those cases where the applicant is a body corporate can the affidavit be taken by an agent. In support of his submission he cites *Myhra v. Elliott*, [1915] 7 W.W.R. 1340, which was followed by Balfour, J. In *Diehl v. Army & Navy Department Store Ltd. et al*, [1963] 44 W.W.R. 441. In the *Myhra* case, *supra*, the

affidavit was taken by the applicant's solicitor, and Elwood, J. held that the word "prosecutor" in the rule meant the applicant himself, and the solicitor could not be said to be his client, the applicant. In the *Diehl* case, *supra*, the affidavit was taken by the solicitor, and Balfour, J. said at p. 445, "it was conceded that the applicant had not complied with R. 32." The applicants in both these cases were natural persons and no question arose in either case as to the taking of the affidavit when a body corporate or an unincorporated association was the applicant.

Paragraph 2 of Sebastian's affidavit is as follows:

> "2. That the within application for the issuance of a peremptory writ of *mandamus* is made at the instance of Construction and General Laborers' Local Union No. 180 and myself as prosecutors, and I say that I make this affidavit on my own behalf and also on behalf of the Applicant, Construction and General Laborers' Local Union No. 180, because I have been specially authorized by the said Construction and General Laborers' Local Union No. 180 to make this affidavit in support of the said application."

The affidavit also states that he is the "business agent" of the Union, and the truth of the statements made in the affidavit is not challenged.

In *Regina ex rel F. W. Woolworth Company Limited et al v. Labour Relations Board*, (1954) 19 C.R. 308, the affidavit filed was that of one Caravaggie, who swore that he was the manager of the company's store at Weyburn where the labour dispute arose, and that the application was made at the instance of F. W. Woolworth Company Limited as one of the prosecutors for the writ of *mandamus*. He did not swear that he was specially authorized to take the affidavit and its sufficiency was therefore attacked. It was held that the affidavit sufficiently complied with the rule.

Finding, as I have, that the union is a legal entity entitled to bring this application in its own name, the union, like a body corporate, is not able to make an affidavit itself. Reasoning in the same manner as Gordon and Procter, JJ.A. did in the *Woolworth* case, *supra*, I have no hesitation in finding that the affidavit of Sebastian, who was the business agent of the union, sufficiently complies with the requirements of Crown Practice Rule 32.

The applicant union in its notice of motion asks that the giving of security for costs be dispensed with. It is so ordered.

The preliminary objections having been disposed of, I will now consider that portion of the application seeking the issuance of a writ of *certiorari* and the quashing of the Board's order. For this purpose I am entitled to refer to the record. As to what constitutes the record, Denning L.J. in *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1952] 1 K.B. 338, said at p. 352:

> "Following these cases, I think the record must contain at least the document which initiates the proceedings, the pleadings, if any, and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them."

In the later case of *Regina v. Medical Appeal Tribunal, Ex p. Gilmour*, [1957] 1 Q.B. 574, the tribunal in their adjudication gave an extract from a specialist's report. Denning, L.J. said at p. 582, ". . . thereby, I think, they made that report a part of the record," and the court so held. The incorporation in this way of the whole report disclosed an error of law on the face of the record.

Marked as Exhibit 'M' to Sebastian's affidavit is a transcript of evidence given by the witnesses Polster and Korol before the Board. I do not consider such to form part of the record in this application.

The facts, as such are to be found in the record, are not in dispute. On the 1st day of September, 1964, upon the application of the union, the Board, pursuant to the authority given to it by section 5(a), (b) and (c) of the Act, made the following order:

> "(1) All construction labourers, power buggy operators, form setter lead men (streets and sidewalks), concrete finisher non-journeymen, (steel trowel or power float), pipe layers (final alignment and grouting), all air tool operators, mortar mixer (hand or machine) operators, and labour foremen employed by P. W. Graham & Sons (1963) Ltd., in the City of Moose Jaw, Saskatchewan, and within a twenty mile radius of the boundaries of the said City of Moose Jaw, except any person having and regularly exercising authority to employ or discharge employees, or regularly acting on behalf of management in a confidential capacity, constitute an appropriate unit of employees for the purpose of bargaining collectively.
>
> "(2) Construction and General Laborers' Local Union No. 180, chartered by the International Hod Carriers', Building and Common Laborers' Union of America represents a majority of the employees in the appropriate unit of employees referred to in paragraph (1) hereof.
>
> "(3) P. W. Graham & Sons (1963) Ltd., a body corporate, incorporated under the laws of Saskatchewan, with Head Office in the City of Moose Jaw, Saskatchewan, shall bargain collectively with the duly appointed or elected representatives of the Construction and General Laborers' Local Union No. 180 in respect of the employees in the appropriate unit of employees referred to in paragraph (1) hereof."

On December 16th, 1964, an agreement was entered into between the employer and the union which contained, *intra alia*, the following provisions:

> "ARTICLE 1. UNION SECURITY.
>
> "In accordance with *The Trade Union Act* every employee who is now or hereafter becomes a member of the Union shall maintain his membership as a condition of employment and every new employee whose employment commences hereafter shall within (30) days after the commencement of his employment, apply for and maintain membership in the Union as a condition of his employment.
>
> "ARTICLE 3. GEOGRAPHICAL JURISDICTION.
>
> "Geographical jurisdiction shall be the City of Moose Jaw and within a twenty (20) mile radius of Moose Jaw City Hall . . ."

The clause providing for union security (Article 1.) is by section 32, subsection 1 of the Act to be included in a collective bargaining agreement whenever its inclusion is requested by the union concerned; and by subsection (2) failure on the part of an employer to carry out the provisions of such a clause is declared to be an unfair labour practice.

The record discloses that at the time the union was certified on September 1st, 1964, and at the time the said agreement was entered into on December 16th, 1964, the employer was carrying on its business on projects both within the designated area and at other places in this province beyond said area. Prior to the time the union applied for certification on June 22nd, 1964, at that date, and at the times when the order of certification was made and the said agreement was entered into, two men, F. Polster and N. Korol were employees of the employer engaged in construction work on projects outside the designated area. Subsequently as such employees they commenced working on projects within the designated area. When so requested they refused to join the union, and the employer refused to dismiss them from its employ. Accordingly, on July 21st, 1965, the union applied to the Board for an order under section 5(d) and (e) of the Act on the ground that the employer's refusal constituted an unfair labour practice under said section 32(2) of the Act and for an order of the Board that the employer refrain from engaging in such practice. The decision of the majority of the members of the Board was as follows:

> "The Board, therefore, finds that the said employees were employees of the said Respondent at the time the union security clause went into effect, and that the Respondent in failing to dismiss them has not committed an unfair labour practice pursuant to section 27, sub-section 1 of *The Trade Union Act*. The application is therefore dismissed."

The reasons for this majority decision are set forth in the "Reasons for Decision" delivered by the Chairman, R. H. King, J.M.C., and such reasons require a reference to the regulations of the Board which are to be found in The Saskatchewan Gazette of April 15th, 1947. Clause 10 of the regulations provides that when an application for certification has been made by a union, the employer shall, upon request, "complete and file with the secretary (of the Board) within the time prescribed by the secretary a statement according to Form G, to be known as a Statement of Employment." The employer filed a completed Form G with the Board on July 6th, 1964, and paragraph 2 thereof was as follows:

> "The following is a true and completed list of the name and occupational classifications of all employees described in the bargaining unit in paragraph 4 of the application employed by the above named employer as at June 22nd 1964, in the City of Moose Jaw and within a twenty-mile radius of the boundaries thereof as well as specimen signatures of the said employees, if the secretary of the Board requires such signatures to be provided."

The names and occupations of fifteen employees were then listed in Form G. Polster and Korol were not included in the list. They were employees of the employer at that date but were not working within the designated area.

After quoting Article 3 of the agreement, the Chairman, in the "Reasons for Decision" said:

> "This gives non-union employees employed by the employer at the time of certification and after the request for the Union Security Clause the right to maintain their employment without joining the union if they so desire . . .
>
> "The Respondent is in the construction business and much of the work it performs is done outside the area as set out in the bargaining unit. At the time the application for certification was made the two above mentioned employees were working on construction sites some distance from Moose Jaw. Their names were not included on the Statement of Employment filed by the Respondent with the Labour Relations Board. There is no evidence before the Board that they knew the application for certification was being made.
>
> "These two employees are now working on projects of the Respondent within the area as set out in the bargaining unit. They have declined to join the Union and the Respondent has refused to dismiss them and as a result, this unfair labour practice application has come before the Board.
>
> "There is no doubt the said employees' names should have been included in the Statement of Employment as filed by the Respon-

> dent at the time the application for certification was made. This omission on the part of the Respondent however cannot abrogate the rights or change the status of the employees. The evidence clearly establishes that these two men were employees of the Respondent at the time the Applicant made the request *re* the Union Security clause pursuant to section 27, sub-section (1) of *The Trade Union Act*. The fact that at the time they happened to be employed outside the area as set out in the bargaining unit should not now militate against them, insofar as their employment is concerned. Had they been working at the time the union security clause went into effect within the area of the bargaining unit, they would then have had the right to choose whether they wished to join the Union or not. It was the Board's opinion they have not, through the circumstances in this particular case, lost that right. They both gave evidence before the Board that they did not wish to join the union".

It is appropriate at this point to briefly state the powers of this Court upon an application for a writ of *certiorari* to bring before it an order of statutory tribunal for the purpose of having it quashed. In *R. v. Ludlow, supra*, Lord Goddard, C.J. said at p. 382:

> "Many Acts of Parliament in recent years have given the decision of certain matters to tribunals or bodies that are not the King's courts, and it may be said that many statutes have taken away the right of the subject to come to the King's courts and to have the decisions of those tribunals or bodies challenged. This court has to consider whether in the present case the legislature has given the corporation a right to come to the court. A person who is aggrieved by a decision of one of these statutory tribunals can only apply to the court for relief by way of *certiorari* to bring up the order and quash it if the tribunal has acted outside its jurisdiction."

Applications for writs of *certiorari* are not appeals upon the merits. They are applications which question the legality of the proceedings before such tribunals and boards. *Labour Relations Board (Sask.) v. Dominion Fire Brick and Clay Products Ltd., supra*, at p. 344. In *R. v. Ludlow, supra*, at p. 881 Lord Goddard, C.J. said:

> "The question is whether the umpire was acting within his jurisdiction. If he was, it is a matter of no moment whether or not his decision would commend itself to this court because we are not sitting as a court of appeal from him."

In my opinion it is necessary when considering a *certiorari* application to examine cases cited by counsel to ascertain whether or not the Act which was under consideration in the cited case contained a privative section. The existence of a privative section is an additional factor. It must be construed and its scope determined, remembering always that

it is a Common Law presumption of legislative intent that access of the subject to this Court in respect of justiciable issues is not to be denied save by clear words in the statute; and remembering also that as a privative section results in a restriction of the Common Law right of the subject to have access to this Court to obtain justice, privative sections should be construed with great strictness. The privative section in *The Trade Union Act*, section 20, enacts as follows:

> "20. There shall be no appeal from an order or decision of the Board under this Act, and the Board shall have full power to determine any question of fact necessary to its jurisdiction, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari*, *mandamus*, prohibition, injunction or other proceedings whatever."

A privative section was before the Supreme Court of Canada in *Farrell et al v. Workmen's Compensation Board et al*, [1961] 31 D.L.R. (2d) 177, which was an application for *mandamus* with *certiorari* in aid. Judson, J., delivering the judgment of the court, said at p. 179:

> The issue here is a very simple one — whether there was an accident arising out of and in the course of employment. This issue is unquestionably within the jurisdiction of the Board under Part I of the Act and *even if there was error whether in law or fact*, it was made within the exercise of the jurisdiction and is not open to any judicial review including *certiorari*." (The italics are mine.)

The Supreme Court applied the *Farrell* case in *Kinnaird v. The Workmen's Compensation Board*, [1963] S.C.R. 239. It is interesting to note that Ritchie, J. said at p. 245, ". . . the fact that I am unable, on the material before us, to understand how the board reached the decision which it did is quite beside the point."

In *Regina v. Labour Relations Board of Saskatchewan, Ex parte Tag's Plumbing & Heating Limited*, [1962] 34 D.L.R. (2d) 128, Culliton, A.C.J.S. (as he then was) quoted the excerpt from the judgment of Judson, J. In the *Farrell* case, *supra*, and applied the same principles to the Labour Relations Board of this Province. He said at pp. 131-132:

> "In my opinion the principles thus stated are equally applicable to the Labour Relations Board exercising the jurisdiction conferred upon it by *The Trade Union Act*. In the disposition of issues within its jurisdiction, its decisions are not open to judicial review, including *certiorari* even if there was error. The Court, in its review of an order of the Board in *certiorari* proceedings is restricted to determining whether the Board acted within its jurisdiction or whether there is error apparent on the face of

the record. The problem which confronts the Court when the Board errs is whether the error is one going to jurisdiction or one on an issue within its jurisdiction."

The issue which was before the Board in this case was a very simple one — whether Polster and Korol at the time when they came to work within the designated area, which at that time might be described as union territory, were "new employees whose employment commences hereafter" within the meaning to be given to those words in the union security clause of the agreement. Was this an issue which was within the jurisdiction of the Board? In my opinion it undoubtedly was an issue within the Board's jurisdiction. Failure to carry out the provisions of the statutory union security clause is declared by the Act to be an unfair labour practice (section 32(2)). The Board is given the express power to make orders determining whether an unfair labour practice is being or has been engaged in (section 5(e)). Such being the case, in the words of Judson, J., "even if there was error whether in law or in fact" if such was made within the exercise of the Board's jurisdiction it is not reviewable by this Court. I am not sitting in appeal upon the Board's order, and the fact that in my opinion the Board erred in its finding has no bearing upon the matter.

The grounds set forth in the notice of motion upon which the union seeks to quash the order of the Board are as follows:

"(1) That in making the said order or decision the Respondent Board erred in law and that the said errors are manifest upon the face of the record;

"(2) That in deciding to dismiss the said application because the said POLSTER and KOROL were employed by the Respondent employer at the material time but outside the area as set out in the bargaining unit represented by the applicant trade union, the Respondent Board exceeded its jurisdiction;

"(3) That in finding that the said POLSTER and KOROL were employees of the Respondent employer at the time the union security clause went into effect the Respondent Board exceeded its jurisdiction;

"(4) Such further and other grounds as counsel may advise and this Honourable Court may allow."

Before examining these grounds I would refer to *Jarvis v. Associated Medical Services Inc. et al*, [1964] S.C.R. 497. The appellant, Mrs. Jarvis, had been discharged on the ground that she had engaged in union activities on the company's premises during working hours. The Labour Relations Board of Ontario made an order in her favour which the court found they had no jurisdiction to make and on *certiorari* the order was quashed. Cartwright, J. at p. 500 said:

> "The question calling for determination is whether, under *The Labour Relations Act* R.S.O. 1960, C.202, hereinafter referred to as "the Act", the Board had jurisdiction to order the reinstatement of the appellant who at the time of her discharge had for almost a year ceased, for the purpose of the Act, to be an employee of the respondent.
>
> "It appears to me that the appeal can succeed only if we are able to construe the Act as giving the Board power, in the appropriate circumstances, to compel the continuation of the employment not only of all persons who are "employees" within the meaning of that term as defined in the Act but also of all persons exercising managerial functions."

As to the effect of the privative section in the Ontario Act, Cartwright, J. said at p. 502:

> "The effect of this section, if it receives the construction most favourable to the appellant, is to oust the jurisdiction of the superior Courts to interefere with any decision of the Board which is made in exercise of the powers conferred upon it by the Legislature; within the ambit of those powers it may err in fact or in law; but I cannot take the section to mean that if the Board purports to make an order which, on the true construction of the Act, it has no jurisdiction to make the person affected thereby is left without a remedy . . . The extent of the Board's jurisdiction is fixed by the statute which creates it and cannot be enlarged by a mistaken view entertained by the Board as to the meaning of that statute."

Ritchie, J., with whom Taschereau, C.J. and Martland and Hall, JJ. concurred, said at p. 503:

> "I agree with the reasons for judgment of my brother Cartwright . . ."

Fauteux, J. said at p. 506:

> "For the reasons given by my brothers Cartwright and Ritchie, I would dismiss the appeal but make no order as to costs."

Abbott, Judson and Spence, JJ. dissented.

With respect to the first ground, namely, that the Board erred in law, if the Board so erred while exercising its jurisdiction this Court could not correct such an error. *Farrell et al v. Workmen's Compensation Board et al, supra.* In *Vantel Broadcasting Company Ltd. v. National Association of Broadcast Employees and Technicians et al*, [1964] 49 W.W.R. (N.S.) 1, Aikins, J., with respect to a like objection, at p. 10 said:

> "I next turn to those grounds advanced by the applicant claiming error of law. The applicant's ground 3 in its notice of motion

> simply makes the bare assertion that the Board erred in law in finding that the three units were appropriate for collective bargaining and in certifying the three unions; the third ground does not state wherein the Board erred and for this reason does not require particular consideration."

I cannot tell from the objection whether the error complained of is one going to jurisdiction or is an error by the Board while acting in the exercise of its jurisdiction. I have already found that the issue of whether or not Polster and Korol were "new employees" was a matter within the jurisdiction of the Board to determine.

The second ground is that in deciding to dismiss the application on the ground that Polster and Korol were employed by the employer outside the designated area at the material time, the Board exceeded its jurisdiction. The primary question before the Board was the determination of the status of two employees as to whether they were "new employees" within the meaning of the union security clause, a matter which was exclusively within the Board's jurisdiction. I am satisfied from a study of the "Reasons for Decision" and the "Dissenting Opinion" of J. R. Ingram, that the Board understood and appreciated that this was the question before them for determination.

"I am entirely in agreement with learned counsel for the union that the Board erred in finding that "the said employees' names should have been included in the Statement of Employment." They were not then employed in the designated area and it would have been improper for the employer, in my opinion, to have included their names in the list of employees. Having fallen into this error the Board arrived at the conclusion that the employer had not been guilty of an unfair labour practice by refusing to discharge the two employees for failure to join the union, thereby, of necessity, finding that these two employees were not "new employees."

In the *Vantel* case, *supra*, Aikins, J. said at p. 14:

> "If the Board erred in failing to recognize that the evidence established the things which the applicant in grounds 14, 15 and 19 asserts that the evidence did establish, and I am not suggesting that the Board did so err, then such error occurred while the Board was exercising the exclusive jurisdiction given to it by parliament . . ."

In *Galloway Lumber Company Ltd. v. Labour Relations Board et al*, [1965] 51 W.W.R. 90, Judson, J., with Martland, J. concurring, at p. 91 said:

> "The company's argument before this court was based on the dissenting reasons delivered in the Court of Appeal ([1964] 48 W.W.R. 78), that the Board must come to a correct decision on this question before it can make the appointment and that the correctness of this decision is reviewable by way of *certiorari*.

> "With respect, the board's jurisdiction does not depend upon whether or not a court may think its opinion to be erroneous. There is nothing "collateral" or "preliminary" or "jurisdictional" about this question. To continue with the established vocabulary in this branch of the law, it is "of the very essence" of the inquiry. Further there can be no ground here for judicial review based on an opinion of error in statutory interpretation or an exercise of power beyond that conferred by the statute."

And at p. 92:

> "The Board made the decision which it alone had the power to make. It was made within the assigned area of the exercise of the power. It is final and not reviewable."

In *Prince Albert School Unit No. 56 v. National Union of Public Employees Local No. 832*, [1962] 39 W.W.R. (N.S.) 314, Culliton, A.C.J.S. (as he then was) said at pp. 316 and 317:

> "I think it is apparent from this section that the Board could not exercise the powers therein granted unless it has a right to determine who are employees. Such a right, in my opinion, is implicit in the section and clearly within the Board's jurisdiction. That being so I do not think the finding of the Board is open to judicial review in these proceedings."

Again in the unreported decision of our Court of Appeal in *Regina ex rel. United Steel Workers of America and Ross v. The Labour Relations Board and Schentag Construction Ltd.*, delivered on June 14th, 1965, Maguire, J.A. said:

> "The error, if any, existing here, is not a failure to hear and determine according to law through basing its decision on a wrong principle of law. Wills J. considering this question in *The Queen v. Coltham*, [1898] 1 Q.B. 802 at p. 806 states:
>
> > " 'It is obvious that the distinction between an erroneous decision and a failure to hear and determine according to law may be very fine, and the cases on the subject show that it is so. I take the governing principle to be that if the justices have applied themselves to the consideration of a section of an Act of Parliament, and have, no matter how erroneously, determined the question which arises upon it before them, their decision cannot be reviewed by process of *mandamus*.'
>
> "I am of the opinion that if the Board has erred, the error is one of law within its jurisdiction, it has exercised its discretion on a matter within its jurisdiction and the decision cannot be the subject of *mandamus*. *Re Ault, Ault v. Read* 18 W.W.R. (N.S.) 438; *Chemical and Atomic Workers v. Nichol et al*, [1965] 52 W.W.R. (N.S.) 434."

The third ground upon which the union asks that the order be quashed is that "in finding that the said Polster and Korol were employees of the respondent employer at the time the union security clause went into effect the respondent Board exceeded its jurisdiction." In my opinion one of the facts which the Board would be expected to find was where and by whom these men were employed at the time the union security clause became effective, and if, as turned out to be the case, they were then employed by the employer, whether or not they were working in the designated area at that time. I find that the Board was acting within its jurisdiction in finding this fact.

It is not necessary to comment with respect to the fourth and final ground.

I therefore have arrived at the conclusion that the Board did apply themselves to a consideration of said section 32 and that when doing so they were acting within the jurisdiction given to them by the Legislature. They came to the conclusion that these men were not "new employees" and consequently decided that the employer had not committed the unfair labour practice charged against it. The fact that, in my opinion, the Board came to an erroneous decision is quite immaterial because, as I am not sitting on appeal from the order, I have neither right nor power to substitute my opinion for that of the Board. Applying the law as laid down in the aforementioned authorities, I find that the Board's decision and order was one which they alone had the power to make, and having made it in the exercise of their jurisdiction, it is not reviewable by this Court. The application by way of *certiorari* to quash the Board's order of August 5th, 1965, herein is therefore dismissed.

There remains that part of the application asking for the issuance of a peremptory writ of *mandamus* commanding the Board to exercise its jurisdiction according to law. Broadly speaking, *certiorari* lies to quash a determination which has been made in excess of or without jurisdiction. When *certiorari* is successful and the attacked determination is quashed, the way lies open, if a new determination is desired of the same question, to apply for a writ of *mandamus* to secure a new hearing and a new determination. In this case the attack by way of *certiorari* has failed and I have found that the Board exercised its jurisdiction according to law. Each application of this nature must be decided on its own facts and in the circumstances of this case I am of the opinion that I should exercise my discretion by refusing the application for a writ of *mandamus*. *Regina ex rel. United Steel Workers of America and Ross v. The Labour Relations Board and Schentag Construction Ltd., supra.* The application is accordingly dismissed.

I am greatly indebted to all counsel for their able presentations and for the authorities they cited in support of their respective submissions.

Mr. Taylor also cited *The King v. The Board of Education.* [1910] 2 K.B. 165 and [1911] A.C. 179 (H of L); *Regina ex rel. F. W. Woolworth*

Company Ltd. and Slabick v. Labour Relations Board, [1954] 13 W.W.R. (N.S.) 1 (C.A.) and [1955] 5 D.L.R. 607 (S.C.C.); *Rex ex rel. Bender v. Piggott*, 89 C.C.C. 360; and *The Queen and McDonnell v. Leong Ba Chai*, [1954] S.C.R. 10.

Mr. Ketcheson also cited *The King v. Port of London Authority*, [1919] 1 K.B. 176 and *Regina ex rel. Construction and General Laborers' Local Union 890, and Neuman v. Labour Relations Board*, [1965] 52 W.W.R. 440.

Mr. Wright also cited *Regina ex rel. Oil and Atomic Workers International Union v. Nicol*, [1965] 52 W.W.R. 434.

All of these decisions I have read and taken under consideration in the preparation of this judgment.

The Board is given the power by section 5(i) of the Act to rescind or amend its own orders or decisions but that, of course, is a matter entirely for them. I only mention this provision, in passing, to point out that while the privative section prohibits any appeal from the orders and decisions of the Board, the Legislature has given the Board the power to rescind or amend.

For the reasons given above, the application is dismissed with costs.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 22nd day of April, A.D. 1966.

"D. C. Disbery", J.

QUEEN'S BENCH CHAMBERS — BENCE, C.J.Q.B.

Re Trade Union Act
Brodsky Construction Ltd.
v. International Union of Operating Engineers

Trades and Trade Unions — Interested Party Not Served with Notice of Hearing — Order of Labour Relations Board — Bona Fide Mistake Leading to Denial of Hearing — Whether Certiorari Lies to Quash Order.

Application by way of *certiorari* for an order quashing an order of the labour relations board on the ground that there was a denial of natural justice. Application dismissed.

The order appealed from named the respondent as the bargaining agent of a certain category of applicant's employees as representing a majority of such employees, and directed the applicant to bargain with a representative of the respondent. Notices of the board hearing were never received by the applicant, and the hearing was conducted and the order made in the absence of the applicant. In fact, the address to which, in all good faith, the board's notices were sent was an office occupied as tenant by the applicant, not for the conduct of business, but for the storage of books.

It was *held* that the application must be dismissed; the board's error in the applicant's address, which led to an injustice in that the applicant was denied a hearing, was not an error going to the jurisdiction of the board but was on an issue within the board's jurisdiction; such being the case the remedy by way of *certiorari* was not, on the authorities, open to the applicant: *Reg. v. Labour Relations Board of Sask.; Ex parte Tag's Plumbing & Heating Ltd.* (1962) 34 DLR (2d) 128, 1962 Can Abr 986 (C.A.) applied.

[Note up with 3 CED (CS) *Trades and Trade Unions*, sec. 7B.]

B. Goldstein, for applicant.

G. J. D. Taylor, Q.C., for respondent.

January 4, 1967.

BENCE, C.J.Q.B. — This is an application for an order quashing, without the actual issuance of a writ of *certiorari*, an order of the labour relations board of Saskatchewan dated September 10, 1966, whereby the said labour relations board ordered that a certain category of the employees of the applicant, which is specifically described in the order, constitutes an appropriate unit of employees for the purpose of bargaining collectively; that the respondent represents a majority of employees in that unit, and directing that the applicant shall bargain collectively with the duly appointed or elected representatives of the respondent in respect to the employees in the said unit.

An application in Form A, as provided for in the Regulations of the said Board, passed under the provisions of *The Trade Union Act 1944*, for such an Order was completed on behalf of the Union and filed with the Labour Relations Board on August 22nd, 1966.

As required under the provisions of the said Regulations, a copy of the application together with a form of Statement of Employment, Form G, and a letter dated August 23rd, 1966, from the secretary of the Board, were sent by registered mail to the address of the applicant given in paragraph 3 of the said application by the Union. That paragraph is:

> "3. The name and address and the general nature of the business of the employer concerned are as follows:
>
> Name Brodsky Construction Ltd. Nature of business Earth Moving
> Address 308 Avenue Building, Saskatoon, Saskatchewan".

The said copy of application, Form G and letter were not received by the applicant. They were returned to the Labour Relations Board marked "Unable to deliver" and received by their office in Regina on September 12th, 1966.

At a meeting of the Board held on September 9th, 1966, it was decided that the application of the respondent should be granted and the said Order of September 10th, 1966, was signed by the vice-chairman on behalf of the Board.

A letter dated August 26th, 1966, sent registered mail to the applicant at 308 Avenue Building from the secretary of the Board, was as follows:

> "August 26, 1966
>
> Brodsky Construction Ltd.,
> 308 Avenue Building,
> SASKATOON, Saskatchewan.
>
> Dear Sirs:
>
> Re: Application by International Union of Operating Engineers, Hoisting and Portable Local Union No. 870 for bargaining rights among employees of Brodsky Construction Ltd., Province of Saskatchewan
>
> Your Statement of Employment, in respect of the above named application, is due in our office on September 2, 1966. If the Labour Relations Board fails to receive your Statement, it may deal with the application without such Statement having been filed.
>
> The application is now scheduled to be placed before the Board at 10:00 a.m. on Tuesday, September 6, 1966, in the Court of Appeal room, Court House, Saskatoon. Oral representations may be made to the Board at that time.
>
> Yours truly,
> Sgd. 'Ida Jones'
> (Mrs.) Ida Jones
> Secretary."

This letter was received by an employee of the Board but not until September 12th.

The application is based upon the following grounds, namely:

> "AND FURTHER TAKE NOTICE that the grounds of this application are that the said order was made without jurisdiction in the following among other respects:
>
> 1. That the applicant was served with no notice of the hearing which the Labour Relations Board purported to consider upon the motion of the respondent.
>
> 2. That by reason of receiving no notice of the intention of the Board to consider the application of the respondent, the applicant did not appear upon the hearing of the application of the respondent nor did the applicant otherwise make any representations to the Labour Relations Board in respect of the respondent's application or motion.
>
> 3. That being denied an opportunity to be heard in respect of the said application, there was a denial of natural justice to the applicant in respect of the said application.
>
> 4. That by reason of the applicant receiving no notice of the said hearing, it was unable to provide the Labour Relations Board of Saskatchewan with a Statement of Employment setting out the names of the employees of the applicant, and the said Board was therefore without any information concerning the number of employees employed by the applicant from which it could determine, as it is required to determine under the provisions of *The Trade Union Act*, whether the respondent or any other trade union represents a majority of employees in an appropriate unit of employees.
>
> 5. That the Labour Relations Board of Saskatchewan did not have before it any information which would enable it to determine whether the appropriate unit of employees of the applicant for purposes of collective bargaining should be an employer unit, craft unit, plant unit, or a subdivision thereof."

Paragraphs 7, 9 and 11 of the said Regulations of the Board are:

> "7. Upon the filing of any application referred to in any of the foregoing clauses, the secretary shall make every reasonable effort to determine the names of all persons, trade unions and labour organizations having a direct interest in the matter in respect of which the application is made, and shall, with reasonable dispatch, forward a copy of the application to every such person, trade union and labour organization".

****

"9.—(1) Any employer directly affected by an application made under clause 2 or any trade union, labour organization, employer or person directly affected by an application made under clauses 3, 4, 5 or 6 may reply to such application within such time not exceeding fourteen days as may be prescribed by the chairman.

(2) The reply shall be in witing, shall be verified by statutory declaration and two copies thereof shall be filed with the secretary.

(3) The reply shall contain the following:

(a) the name and address of the person, trade union or labour organization replying, and if the reply is made by a trade union or labour organization, the name and address of an officer acting on behalf of such trade union or labour organization;

(b) a concise statement of the material facts on which the person, trade union or labour organization replying intends to reply;

and, in addition, shall specifically admit, deny or comment upon each of the statements made in the application."

****

"11. Any trade union failing to give notice of intervention with the time prescribed pursuant to clause 8 or any trade union, labour organization, employer or person failing to reply within the time prescribed pursuant to clause 9 shall not be entitled to any further notice of the proceedings commenced by the applicant and the application may be granted without further opportunity being given for representations to be made or evidence adduced with regard thereto by or on behalf of such trade union, labour organization, employer or person, but the board may nevertheless hear from such trade union, labour organization, employer or person such representations or evidence as it deems expedient."

Section 19 of *The Trade Union Act*, R.S.S. 1965, Chapter 287, is:

"19. A notice given for any of the purposes of this Act may be given by prepaid registered post addressed to the last known address of the addressee's residence or place of business."

The President of the applicant deposed to the fact that the only post-office address of the applicant in Saskatchewan is 309 Isabella Street, Saskatoon, Saskatchewan, and that such address appears on the letter-head of the company.

The representative of the Union in paragraph 2 of his affidavit of November 24th, 1966, stated that he obtained the said address, 308 Avenue Building, in the following manner:

> "THAT on the 22nd day of August, A.D. 1966, I made a long distance telephone call to the offices of Brodsky Construction Ltd. at Broderick, Saskatchewan, and was told by an unidentified person who answered the telephone at the said Company offices that the Company had an office located in the Avenue Building, in the City of Saskatoon. As a result of that conversation, I went to the Avenue Building on the 22nd day of August, A.D. 1966, and located an office on the third floor in the name of Brodsky Construction Ltd., 308 Avenue Building, Saskatoon, Saskatchewan."

The evidence of the applicant is that the said 308 Avenue Building is a small room in that building rented by the applicant for the purpose of storage of books of account of the company as a convenience to its auditors and used for no other purpose.

The representative of the Union admitted that on August 30th he learned as a result of a conversation he had over the long distance telephone with the President of the applicant that the applicant had not received the letter from the secretary of the Labour Relations Board of August 23rd with its accompanying documents. There is nothing to indicate, however, that the representative conveyed this information to the Board when the application was heard. If he had I feel that the material would have indicated this fact.

The applicant is an extra-provincial company with head offices in the City of Winnipeg, in the Province of Manitoba, and William J. Goodall, barrister, of the City of Regina, whose offices are situated at Ste. 201, 1822 Scarth Street, Regina, is the lawful attorney appointed by the said applicant pursuant to the provisions of *The Companies Act* of the Province of Saskatchewan, for the purpose of receiving service of process in all suits and proceedings by or against the company within Saskatchewan, and of receiving all lawful notices, in respect of such suits and proceedings.

The material filed shows that the applicant was engaged in construction work at Broderick, Saskatchewan, at all times relevant hereto.

By an amendment to *The Trade Union Act* enacted in 1966, being Chapter 83, of the Statutes of that year, section 5 of the Act was amended to provide that the Board's powers to rescind or amend an order or decision of the Board such as the one under consideration in this application is restricted to an application made for such an amendment "during a period of not less than thirty days nor more than sixty days before the anniversary date of the order to be rescinded or amended."

Consequently, even if the Board felt that the matter should be opened up to give the applicant an opportunity to file the information

required in Form G and to make representations in connection with the application, it has no power to do so.

The Legislative Assembly may have had good reason for passing such an amendment but it appears to me to be a little too rigid in the light of the possibility of an injustice such as in my opinion occurred in the present matter.

There may have been a number of grounds which the applicant could have advanced in opposition to the granting of the Order. Through no fault of its own the applicant was denied this opportunity.

This does not mean, however, that the applicant has a remedy by way of *certiorari*.

Even though it may not be necessary for me to do so, I find that the Union acted in good faith in giving the address it did. That good faith is demonstrated by the fact that not only did its representative telephone to the applicant at the construction job but verified the information which it received by visiting the premises in the Avenue Building.

The Board proceeded as it was entitled to do after sending out the required notice at the only address known to it and in due course made the Order which is the subject of this application.

It is not my function to determine whether or not the address was a correct one within the meaning of section 19 of the Act. That is entirely a matter for the Board to decide. If it erred it is on a fact within its jurisdiction.

The principle which must guide a Court on an application such as this has been recited so often that I find no need to set forth a brief of law. I content myself by referring to *Reg. v. Labour Relations Board of Saskatchewan, Ex Parte Tag's Plumbing & Heating Limited* (1962), 34 D.L.R. (2d) 128, and that statement contained therein by Culliton, J.A. (now C.J.S.) when he said, in referring to the position of the Board, at pages 131-32:

> "In the disposition of issues within its jurisdiction, its decisions are open to judicial review, including, *certiorari*, even if there was error. The Court, in its review of an order of the Board in *certiorari* proceedings is restricted to determining whether the Board acted within its jurisdiction or whether there is error apparent on the face of the record. The problem which confronts the Court when the Board errs is whether the error is one going to jurisdiction or one on an issue within its jurisdiction."

If there was an error in the address, a fact which I do not determine, it was not one going to jurisdiction but was one on an issue within the Board's jurisdiction.

In his submission that there was a denial of natural justice, counsel for the applicant relied very strongly upon the case of *Jim Patrick Limited v. Stone and Allied Products Workers of America, Local 189, and Labour Relations Board*, 29 W.W.R. 592.

The facts in that case show that a solicitor appeared on the hearing and informed the Board that only persons who had authority to make representations on behalf of the company were away and had been absent since before the date of the sending of the notice of hearing and asked for an adjournment. The Board refused the request.

The Court of Appeal in upholding the Order of McKercher, J., found that in so refusing the Board acted contrary to the principles of natural justice.

In my view the position in the Patrick case was entirely different to the present one. The principle upon which Patrick was determined was that of *audi alteram partem* or a refusal to hear the other side.

In the instant matter there was no request and no refusal and consequently no denial of natural justice.

The application is refused.

The respondent will have its costs of the application.

DATED at the City of Regina, in the Province of Saskatchewan, this 4th day of January, A.D. 1967.

"A. H. Bence"
A. Bence, C.J.Q.B.

SASKATCHEWAN

COURT OF APPEAL

Before Culliton, C.J.S., Brownridge and Hall, JJ.A.

Brodsky Construction Ltd. (Applicant) Appellant
v. International Union of Operating Engineers et al
(Respondents) Respondents

Trades and Trade Unions — Certification Order — Interested Party Not Served with Notice of Hearing — Bona Fide Mistake Leading to Denial of Hearing — Order Made in Conformity with Statutory Requirements — Natural Justice — Certiorari.

Appeal from the dismissal by Bence, C.J.Q.B. (1967) 58 WWR 618, of an application to quash a certification order made by the Saskatchewan labour relations board. Appeal dismissed.

The order which was the subject of the application to Bence, C.J.Q.B. named the respondent as bargaining agent for certain of appellant's employees; notices of the board hearing which preceded the order were sent to appellant in conformity with statutory requirements but were never received by appellant and the hearing was conducted and the order made in its absence. In fact, the address to which, in all good faith, the notices were sent, was an office occupied as tenant by the appellant, not for the conduct of business but for the storage of books.

It was *held*, *per curiam*, that the appeal must be dismissed; the fact that the appellant did not receive the notices and therefore was denied the opportunity to appear did not necessarily mean that the board had transgressed the *audi alteram partem* rule by which it was unquestionably bound: *Alliance des Professeurs Catholiques de Montreal v. Labour Relations Board* [1953] 2 SCR 140, at 161, reversing [1951] Que KB 752, 2 Abr Con (2nd) 943, applied. The order was regularly issued following proceedings which were in strict compliance with the statute, and *certiorari* did not lie to quash it.

[Note up with 3 CED (CS) *Trades and Trade Unions*, sec. 7B.]

M. C. Schumiatcher, Q.C., and *B. Goldstein*, for applicant, appellant.

George J. D. Taylor, Q.C., for respondent union.

H. M. Ketcheson, Q.C., for respondent labour relations board.

July 11, 1967.

CULLITON, C.J.S. — This is an appeal from Bence, C.J.Q.B. (1967) 58 WWR 618, dismissing an application to quash, without the actual issue of a writ of *certiorari*, a certification order made by the Saskatchewan labour relations board, dated September 10, 1966. In the application the appellant contended that the Saskatchewan labour relations board, in making the certification order without an opportunity having been afforded to the appellant to be heard on the application, failed to observe the rules of natural justice.

The facts are not in dispute. An application was made by the respondent union in the form prescribed by the regulations made pursuant to

The Trade Union Act, Chapter 287, R.S.S. 1965, for an order under section 5 of the said Act, that the Board find and determine that the employees therein named constituted an appropriate unit for the purpose of bargaining collectively; that a majority of such employees were represented by the applicant union; and requiring the appellant to bargain collectively with the said union.

The form prescribed by the regulations required that there be stated therein the name and address and the general nature of the business of the employer. In the application this information was set forth as follows:

"NAME: BRODSKY CONSTRUCTION LTD.
"NATURE OF BUSINESS: EARTH MOVING.
"ADDRESS: 308 Avenue Building,
Saskatoon, Sask."

Section 7 of the regulations provides:

"7. Upon the filing of any application referred to in any of the foregoing clauses, the secretary shall make every reasonable effort to determine the names of all persons, trade unions and labour organizations having a direct interest in the matter in respect of which the application is made, and shall, with reasonable dispatch, forward a copy of the application to every such person, trade union and labour organization."

On August 23, 1966, the Board forwarded, by registered mail, addressed to the appellant at 308 Avenue Building, Saskatoon, Saskatchewan, a copy of the application and a statement of employment in Form "G", to be completed by the appellant. In the letter forwarding these documents the appellant was required to complete the form of employment not later than September 2, 1966, and was advised the application would be heard by the Board at Saskatoon, Saskatchewan, on or about September 6. The appellant was also advised that it would be further notified as to the exact time and date of the hearing. This the Board did by registered letter dated August 26, 1966, which reads:

> "Your statement of employment, in respect of the above named application, is due in our office on September 2, 1966. If the Labour Relations Board fails to receive your statement, it may deal with the application without such statement having been filed.
>
> "The application is now scheduled to be placed before the Board at 10:00 a.m. on Tuesday, September 6, 1966, in the Court of Appeal room, Court House, Saskatoon. Oral representations may be made to the Board at that time."

No reply was received from the appellant and the Board disposed of the application on September 9, 1966, and the order granting certification was issued on September 10, 1966.

Section 9 of the regulations provides that an employer affected by an application may reply to such application within such time not exceeding fourteen days as may be prescribed by the chairman. If no reply is received from the employer within the prescribed time, then, pursuant to section 11 of the regulations, the employer is not entitled to any further notice and the Board may proceed with the application.

On September 12, 1966, the registered letter of August 23, 1966, addressed to the appellant was returned to the office of the Board stamped "unable to deliver". The letter of August 26, 1966 was received by an employee of the appellant on September 12, 1966.

The application which is the subject of this appeal was then made. In support of the application an affidavit was filed in which the president of the appellant company deposed that the only post office address of the appellant was 309 Isabella Street, Saskatoon, Saskatchewan, and that such address appeared on the letterhead of the company's stationery. The bookkeeper of the appellant company deposed that on May 5, 1966, the appellant company rented a room at 308 Avenue Building, Saskatoon, Saskatchewan, for the purpose of storing records and accounts of the company which, when required, would be readily available to the appellant's auditors, and that the said room was used only for that purpose. The representative of the union, in his affidavit, stated that he had obtained the address of the appellant as 308 Avenue Building, Saskatoon, Saskatchewan in the following manner:

> "That on the 22nd day of August, A.D. 1966, I made a long distance telephone call to the offices of Brodsky Construction Ltd., at Broderick, Saskatchewan, and was told by an unidentified person who answered the telephone at the said Company offices that the Company had an office located in the Avenue Building, in the City of Saskatoon. As a result of that conversation, I went to the Avenue Building on the 22nd day of August, A.D. 1966, and located an office on the third floor in the name of Brodsky Construction Ltd., 308 Avenue Building, Saskatoon, Saskatchewan."

I think the law is well settled that the Saskatchewan Labour Relations Board is bound, in the exercise of its functions, by the rule expressed in the maxim *audi alteram partem: Alliance des Professeurs Catholiques de Montreal v. Labour Relations Board*, [1953] 2 S.C.R. 141. In this case Rand, J., at page 161, said:

> "*Audi alteram partem* is a pervading principle of our law, and is peculiarly applicable to the interpretation of statutes which delegate judicial action in any form to inferior tribunals: in making decisions of a judicial nature they must hear both sides, and there is nothing in the statute here qualifying the application of that principle."

See also *Jim Patrick Limited v. United Stone and Allied Products Workers of America, Local 189 and Labour Relations Board*, 29 W.W.R. 592.

The fact, however, that the appellant did not receive the notices, and therefore was denied the opportunity to appear, does not necessarily mean the Saskatchewan Labour Relations Board transgressed the *audi alteram partem* rule. If the order were regularly issued, that is, after full compliance with the statute and regulations, then, notwithstanding that the appellant did not in fact receive notice of the hearing, *certiorari* would not lie to quash the order: see *Regina v. County of London Quarter Sessions Appeals Committee: ex parte Rossi*, [1956] 1 Q.B.D. 682, and particularly Denning, L.J. at 693.

Here the application for certification was on its face in conformity with the regulations. The Board served the appellant as required by section 7 of the regulations. The Board, notwithstanding the failure of the appellant to reply, did forward a notice of the hearing as required by section 11 of the regulations. The notices under sections 7 and 11 were served in accordance with section 19 of the Act. Thus, on the record, the Board had full power to make the order which it made on September 10, 1966. It was not until September 12, two days after the issue of the order that the Board was aware that the notice served, enclosing copy of the application, had not been received by the appellant.

The true issue, in my opinion, is not whether the Board contravened the principle expressed in the maxim *audi alteram partem*, but whether the order was regularly issued. Unless the appellant can establish that the order was not regularly issued, *certiorari* does not lie. It if were clear that the address of the place of business of the appellant was incorrectly stated in the application for certification, thereby depriving the appellant of notice of the application and the opportunity to be heard thereon, it could be argued that the order was not regularly issued. That, however, is not the situation. There is a dispute between the appellant and the respondent as to the proper address of the appellant's place of business. This is disclosed by the affidavits filed by the parties. These affidavits do little more than point out to the Court the conflicting positions of the appellant and respondent union and are not such as to enable the Court to say the order was not regularly issued. Under these circumstances, the appellant has failed to establish that the order was irregularly issued and the appeal must be dismissed.

I would point out that prior to the amendment to section 5 of *The Trade Union Act* by Chapter 83, S.S. 1966, the appellant, as soon as it became aware of the issue of the order, could have applied to the Board to rescind the order made in its absence and rehear the application. The amendment restricted the right to make such application to a period of not less than thirty days and not more than sixty days before the anniversary date of the order. In my opinion, notwithstanding the dismissal

of the appeal, there remains with the appellant the right to make an application to the Board to rescind the order and rehear the application in accordance with the amendment of 1966.

Costs are reserved and may be spoken to.

DATED at the City of Regina, in the Province of Saskatchewan, this 11th day of July, A.D. 1967.

"E. M. Culliton"
E. Culliton, C.J.S. for the Court.

SASKATCHEWAN

COURT OF QUEEN'S BENCH, JULY 17, 1967.

Regina ex rel. Saskatoon Printing Pressmen and Assistants Union, No. 206 v. LRB (Sask.) and Western Publishers (Prince Albert) Limited et al.

Unfair labour practices — Notice to renegotiate collective agreement — Employer refusing to execute — Application alleging unfair labour practice dismissed — Mandamus to compel Board to exercise jurisdiction — *The Trade Union Act*, R.S.S. 1965, c. 287, s. 5; 9(1)(c).

A union applied to the Board for a ruling that a certain employer had committed an unfair labour practice and for an order that it desist from engaging in the same. It was alleged that following notice from the union the employer had entered negotiation for the revision of a collective agreement but then refused to execute it. The Board decided that there was no obligation on the employer to bargain as the notice had been given outside the times permitted by the Act and, therefore, the refusal in question did not amount to an unfair labour practice. On this application for a writ of *mandamus* the union contended that the Board had failed to hear and determine the earlier application according to law and that it now be ordered to exercise the jurisdiction conferred on it by the Act.

Held: The application was dismissed. It was settled law that an applicant for *mandamus* in order to succeed had to show a clear legal specific right to the relief asked. Furthermore, the duty which it was to enforce had to be imperative and not discretionary. In the instant case the Board, after hearing all the evidence, concluded that the notice to negotiate had not been served within the period specified in the Act. Therefore, the obligation to bargain collectively did not arise and the negotiations which did take place, not being legally obligatory, could not make the employer guilty of an unfair labour practice. This was a decision within the jurisdiction of the Board and if there was an error it could not be interfered with by *mandamus*, as to do so would be, in effect, for the Court to entertain an appeal against such decision which was prohibited by the Act. Moreover, *mandamus* was granted to compel the performance of an act by someone having the legal duty to perform it but which had not been performed. Here, the Board had adjudicated by dismissing the complaint and, the hearing having been ended by the dismissal of the application, there was nothing pending before the Board to warrant a *mandamus* order.

G. J. D. Taylor, Q.C., for the Applicants.

M. Chan for the Labour Relations Board.

J. R. Davidson for Western Publishers (Prince Albert) Ltd.

Before: Tucker, J.

In this case the applicants applied to The Labour Relations Board (hereafter referred to as "the Board") for an order under section 5(d) and (e) of *The Trade Union Act* determining whether an unfair labour practice was being or had been engaged in by Western Publishers (Prince Albert) Limited (hereafter referred to as "the employer") and requiring the employer to refrain from engaging in any such unfair labour practice.

The alleged unfair labour practice or practices was said to be on the basis

(a) that the applicant trade union had been duly certified as a bargaining agent of a certain unit of employees of the employer by an order of the Board dated May 1st, 1963, and

(b) that a collective bargaining agreement had been entered into by the applicant trade union and the employer on October 31st, 1965, and

(c) (quoting from the application filed before the Board) "In the month of September, A.D. 1965, the applicant trade union gave notice in writing to the respondent employer to negotiate a revision of the said collective bargaining agreement.", and

(d) "Thereafter the applicant trade union made repeated and persistent efforts to conduct negotiations with the respondent employer, but the respondent employer evinced unwillingness and reluctance to engage in such negotiations and from time to time suspended such negotiations and refused to meet with representatives of the applicant union. Notwithstanding the foregoing, however, on or about the month of April, A.D. 1966, the applicant trade union and the respondent employer had agreed to all the terms and conditions of a new collective bargaining agreement and it was further agreed between the applicant trade union and the respondent employer that the respondent employer would embody in writing the terms of agreement so arrived at for execution by or on behalf of the parties.

"Subsequently, the applicant trade union made repeated requests of the respondent employer that the employer produce and execute a written collective bargaining agreement containing the terms of agreement arrived at as aforesaid, but the respondent employer failed or refused to produce such agreement in writing. On or about the 18th day of October, A.D. 1966 the representatives of the applicant trade union and the respondent employer met and on that date the respondent employer announced that it refused and would continue to refuse to execute any collective bargaining agreement with respect to the appropriate unit of employees represented by the applicant trade union."

The Board made a ruling on January 5th, 1967, which was conveyed to the applicants by a letter on that date to the applicants' solicitors with copy to the applicants as follows:

"Re: Application by Saskatoon Printing Pressmen and Assistants' Union, No. 206, alleging an unfair labour practice v.

Western Publishers (Prince Albert) Limited in the business carried on by the said Western Publishers (Prince Albert) Limited under the name of The Daily Herald, Prince Albert

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"This will confirm the dismissal of the above named application by the Labour Relations Board at its sitting in Saskatoon on January 5, 1967."

An application has now been made for a peremptory writ of *mandamus* commanding the Board "to exercise the jurisdiction conferred on it by section 5(d) and (e) of *The Trade Union Act* in respect of an application made to it by the "Applicant trade union dated the 17th day of November, A.D. 1966 for an order determining whether an unfair labour practice was being or had been engaged in by the Respondent, WESTERN PUBLISHERS (PRINCE ALBERT) LIMITED, carrying on business under the name of THE DAILY HERALD, and requiring the said Respondent to refrain from engaging in the said unfair labour practice, according to law."

There is also an application for a writ of *certiorari* in aid.

The application for *mandamus* is based upon 12 grounds, which are as follows:

"(1) That the Labour Relations Board refused or declined to exercise its jurisdiction in respect of the said application.

"(2) That the refusal of the Labour Relations Board to exercise its jurisdiction as aforesaid was based upon consideration of extraneous or irrelevant matters.

"(3) That in dismissing the said application, the Labour Relations Board failed to hear and determine the application according to law.

"(4) That in deciding that there was a bargaining unit in effect between the Applicant trade union and the Respondent company whose termination date was October 31st, 1965, the Respondent Board erred in law and decided a question it was not asked to decide and refused or declined to decide a question it was asked to determine.

"(5) That in deciding that the written notice served on the Respondent Company by the Applicant trade union to negotiate a revision of the contract between the said Respondent company and the Applicant trade union was served well in advance of the period wherein such notice may be given, namely, not less than thirty days nor more than sixty days before the expiry date of the contract aforesaid, the Respondent Board erred in law and decided

a question it was not asked to decide and refused to decide or declined to decide a question it was asked to determine.

"(6) That in deciding that the written notice served on the Respondent company by the Applicant trade union to negotiate a revision of the contract between the said Respondent company and Applicant trade union was served well in advance of the period wherein such notice may be given, namely, not less than thirty days nor more than sixty days before the expiry date of the contract, aforesaid, the Respondent board refused or declined jurisdiction to hear and determine whether the Respondent company engaged in or was engaging in an unfair labour practice, according to law.

"(7) That in deciding that it was the clear intention of the Legislature that the said Respondent Board could only determine whether the Respondent company engaged in or was engaging in an unfair labour practice if the written notice to negotiate a revision of the contract is served not less than thirty days nor more than sixty days before the expiry date of such a contract, the Respondent Board erred in law and refused or declined jurisdiction to hear and determine whether the Respondent Company engaged in or was engaging in an unfair labour practice, according to law.

"(8) That in deciding that voluntary collective bargaining carried on between the Applicant trade union and the Respondent company cannot give rise to an unfair labour practice under the particular subsection of the Trade Union Act, aforesaid, namely, Section 9, subsection (1)(c), the Respondent Board erred in law and refused or declined jurisdiction to hear and determine whether the Respondent company engaged in or was engaged in an unfair labour practice, according to law.

"(9) That in deciding that the clear intention of the Legislature in enacting Section 9, subsection (1)(c) of the Trade Union Act was that if there was a bargaining agreement in effect and the provisions of Section 30, subsection (4) were not strictly complied with then the above mentioned subsection (c) could not apply, the Board erred in law and by reason of such error refused or declined jurisdiction and arrived at its decision upon a consideration of irrelevant and extraneous matters.

"(10) That in arriving at the opinion that voluntary negotiations carried on between the Applicant trade union

and the Respondent company cannot give rise to an unfair labour practice under Section 9, subsection (1) (c) of the Trade Union Act, the Board erred in law and by reason of such error refused or declined jurisdiction and arrived at its decision upon a consideration of irrelevant and extraneous matters.

"(11) That in arriving at the opinion that the Trade Union Act clearly sets out the time when the sanctions of the Act may be invoked and that such time must be strictly complied with in respect of the Applicant Trade Union's application under Section 9, subsection (1)(c) of the Act, the Board erred in law and by reason of such error refused or declined jurisdiction and arrived at its decision upon a consideration of irrelevant and extraneous matters.

"(12) That in dismissing the application of the Applicant trade union notwithstanding the admission of facts contained in the reply filed by the Respondent employer with the said Respondent Board including *(inter alia)* the admission that the Respondent employer was served with a notice requiring it to bargain collectively with the Applicant trade union within the period of time specified in Section 30, subsection (4) of the Trade Union Act, the Board erred in law and by reason of such error refused or declined jurisdiction and arrived at its decision upon a consideration of irrelevant and extraneous matters."

The words of the Chairman of the Board when giving the decision of the Board were before me in the form of a transcription of a tape recording (certified to be correct by the secretary of the Board) of his words, speaking on behalf of the Board at that time. This was as follows:

"We were asked to rule on whether the Board could hear further this application.

"Both parties to this application, namely, the Applicant and the Respondent, agreed there was a bargaining unit in effect whose termination date was October the 31st, 1965. The Board is satisfied on the evidence that the written notice served on the Respondent by the Applicant to negotiate a revision of the contract was served well in advance of the 60-30 day period, as provided by Section 30, Subsection (4) of *The Trade Union Act.* Section 30, Subsection (1) of *The Trade Union Act* states as follows:

" 'Except as hereinafter provided, every collective bargaining agreement, whether heretofore or hereafter entered into, shall remain in force for the term of operation provided therein and thereafter from year to year.'

"Section 30, Subsection (4) states: 'Either party to a collective bargaining agreement may, not less than thirty days nor more than sixty days before the expiry date of the agreement, give notice in writing to the other party to terminate the agreement or to negotiate a revision of the agreement, and where a notice is given the parties shall forthwith bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.'

"This application is made pursuant to Section 9, Subsection (1)(c), which reads as follows: 'It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer to fail or refuse to bargain collectively with representatives elected or appointed (not necessarily being the employees of the employer) by a trade union representing the majority of the employees in an appropriate unit.'

"It was the Board's opinion that the clear intention of the Legislature in enacting this subsection, namely, Section 9, Subsection (1)(c), was that if there was a bargaining agreement in effect and the provisions of Section 30, Subsection (4) were not strictly complied with, then the above mentioned subsection under which this application was made could not apply.

"It was the Board's opinion that voluntary negotiations carried on between the Applicant and the Respondent cannot give rise to an unfair labour practice under the particular subsection of the Act, namely, section 9, subsection (1)(c) under which this application was made. The Act clearly sets out the time when the sanctions of the Act may be invoked, and it was the Board's opinion that it must be strictly complied with, insofar as an application under this subsection is concerned.

"The Board, therefore, is of the opinion that the application must be dismissed, and we so dismiss it."

The employer on November 25th, 1966, had sent the secretary of the Board a statement, verified by statutory declaration, in part, as follows: "We agree with paragraph (c)." Paragraph (c), as already stated, set out that notice in writing had been given to the employer by the applicant trade union to negotiate in the month of September, 1965.

During the course of the hearing evidence was given which apparently satisfied the Board that notice in writing had not been given in September, 1965, but had actually been given "well in advance of the 60-30 day period" and not within the period required by section 30(4) of *The Trade Union Act.*

Apparently when this evidence came out before the Board the chairman expressed doubt as to the jurisdiction of the Board to continue the

hearing. However, it was finally decided to hear all the evidence before any decision was made. This was done.

This resulted in the point being argued that the Board had incorrectly decided that it had no jurisdiction in the matter because of failure to serve the notice within the time specified by Section 30(4) and if this Court was of the opinion that it (the Board) had actually declined to exercise jurisdiction on this allegedly erroneous ground, the applicants were entitled to a *mandamus* order directing the Board to hear the application.

Admittedly, the first sentence of the ruling indicates that the Board was deciding a question of whether it had jurisdiction to hear the application further. However, in view of the fact that at this time it had already heard all the evidence and the wording of the remainder of the ruling, I have come to the conclusion that the Board did not decline jurisdiction but actually exercised it and made a ruling. This ruling is based on the fact that

(a) there was an agreement in effect expiring October 31st, 1965;

(b) the notice to negotiate was served before the period required by section 30(4) of the Act;

(c) that if it had been served within such period there was *then* an obligation to "forthwith" bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement";

(d) that if the notice was not served within the period specified the obligation to bargain collectively did not apply; and

(e) that negotiations which took place, not being legally obligatory, could not make the employer guilty of an unfair labour practice under section 9 (1)(c). (In other words, that one of the elements necessary to be proved to establish the offence was both the obligation to bargain and the failure to do so, and if there was no obligation to bargain, the other party could not be punished for not continuing such bargaining.)

It seems to me the final sentence is conclusive that this was the effect of the ruling, namely, that jurisdiction *was* exercised on the grounds stated, for it plainly states: "The Board, *therefore*, is of the opinion that the application must be dismissed, and we so dismiss it." (italics mine)

It was common ground that this decision was within the jurisdiction of the Board. If the decision on the point mentioned was in error (and I do not suggest that it was) it cannot be interfered with by *certiorari* and *mandamus*, as to do so would be, in effect, for this Court to entertain an

appeal against such decision which, in my opinion, would be contrary to section 20 of *The Trade Union Act* and the decisions applying the same. Section 20 provides:

> "There shall be no appeal from an order or decision of the board under this Act, and the board shall have full power to determine any question of fact necessary to its jurisdiction, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari, mandamus,* prohibition, injunction or other proceeding whatever."

It was argued that as on the application the allegation of the applicants that the written notice to renegotiate the contract was served within the proper time to bring the section of the Act requiring negotiations into effect was admitted by the employer, an *estoppel* operated to prevent evidence being tendered or received establishing this was not so.

In this respect the Board, in my opinion, was acting within its jurisdiction and rules of evidence applied in court in respect of such a matter cannot be the basis for this Court to question the Board's ruling.

Section 16 of *The Trade Union Act* states:

> "The board and each member thereof and its duly appointed agents shall have the power of a commissioner under *The Public Inquiries Act* and may receive and accept such evidence and information on oath, affidavit or otherwise as *in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not."*
> *(italics mine)*

For this Court to take the position that the Board should not have acted on evidence adduced before it which was at variance with an incorrect allegation made at the time of launching the application even though admitted by the employer, would, in my opinion, be at variance with the basic principles applied by our courts in construing *The Trade Union Act* and particularly sections 16 and 20 thereof.

In *Regina ex rel Oil, Chemical & Atomic Workers International Union, Local 9-649 et al v. Nicol et al* (1965), 52 W.W.R. 434, Culliton, C.J.S., delivering the judgment of our own Court of Appeal, said at p. 438:

> "The question which first arises here is whether or not *mandamus* lies. In approaching this question I adopt the statement of Gordon, J.A. in *Reg. ex rel F. W. Woolworth Co. and Slabick v. Labour Relations Board* (1954) 13 WWR (NS) 1, 19 CR 308, affirmed (1956) SCR 182, when he said at p. 16:
>
> > " 'It seems hardly necessary to say that in approaching this question it must be borne in mind that the applicant for the prerogative writ of *mandamus must show a clear legal specific right to the relief asked.* The duty must be imperative and not discretionary.' " (Italics mine)

In *Regina vs. Saskatchewan Labour Relations Board, ex parte United Steelworkers of America* (1965), 53 D.L.R. 663, Maguire, J.A. said at p. 666:

"The error, if any, existing here, is not a failure to hear and determine according to law through basing its decision on a wrong principle of law. Wills, J., considering this question in *The Queen v. Cotham*, [1898] 1 Q.B. 802 at p. 806, states:

> " 'It is obvious that the distinction between an erroneous decision and a failure to hear and determine according to law may be very fine, and the cases on the subject show that it is so. I take the governing principle to be that if the justices have applied themselves to the consideration of a section of an Act of Parliament, and have, no matter how erroneously, determined the question which arises upon it before them, their decision cannot be reviewed by process of *mandamus*.'

"In *R. v. Port of London Authority, Ex p. Kynoch, Ltd.*, [1919] 1 K.B. 176, Bankes, L.J., considering this question, states at p. 183:

> " 'There must be something in the nature of a refusal to exercise jurisdiction by the tribunal or authority to whom the writ is to be directed. A refusal may be conveyed in one of two ways: there may be an absolute refusal in terms, or there may be conduct amounting to a refusal. In the latter case it is often difficult to draw the line between those cases where the tribunal or authority has heard and determined erroneously upon grounds which it was entitled to take into consideration and those cases where it has heard and determined upon grounds outside and beyond its jurisdiction; but this conclusion may be drawn from decided cases, that there is no refusal to hear and determine unless the tribunal or authority has in substance shut its ears to the application which was made to it, and has determined upon an application which was not made to it.'

"I am of the opinion that if the Board has erred, the error is one of law within its jurisdiction; it has exercised its discretion on a matter within its jurisdiction, and the decision cannot be the subject of *mandamus*: *Ault v. Read* (1956), 115 C.C.C. 132, 24 C.R. 260 sub nom. Re Ault, 18 W.W.R. 438; *R. ex rel. Oil, Chemical & Atomic Workers International Union, Local 9-649 v. Nicol et al.* (1965), 52 W.W.R. 434 (a decision of this Court)."

In *Halsbury*, 3rd ed., Vol. 11, p. 62, para. 119, the learned author states:

> "* * * When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, *or admits illegal evidence*, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction. If, however, an administrative body comes to a decision which no

> reasonable body could ever have come to, it will be deemed to have exceeded its jurisdiction, and the Court can interfere.
>
> "* * *
>
> "Where *certiorari* is taken away by statute, even if it appears upon the face of the proceedings that there was no evidence whatever in support of the conviction, the order will not be granted." (Italics mine)

In *Regina vs. Wisnoski* (1956-58), 23 W.W.R. 217, at p. 221, the trial judge cites Fullerton, J.A. in *Rex vs. Pochrebny*, [1930] 1 W.W.R. 689, as follows

> "The authorities referred to in the judgment appealed from (ante, p. 139) make it clear that a *mandamus* should be granted where persons having a jurisdiction to exercise decline to exercise it upon some matter preliminary to the hearing of the merits of the appeal as regards fact or law * * *."

In *Regina vs. Labour Relations Board of Saskatchewan, ex parte Tag's Plumbing & Heating Limited* (1962), 34 D.L.R. (2d) 128, Culliton, J.A. (Acting C.J.S.) at pp. 131-132, said:

> "In the disposition of issues within its jurisdiction, its decisions are not open to judicial review, including *certiorari, even if there was error*. The Court, in its review of an order of the Board in *certiorari* proceedings is restricted to determining whether the Board acted within its jurisdiction or whether there is error apparent on the face of the record. The problem which confronts the Court when the Board errs is whether the error is one going to jurisdiction or one on an issue within its jurisdiction." (Italics mine)

In deciding the point that because the notice to negotiate was not served within the time prescribed in the Act the employer was not guilty of an unfair labour practice, the Board was clearly deciding a matter within its jurisdiction. Whether it based this decision on the ground that a necessary element in the offence was not established or that when it was not established it therefore had no jurisdiction to find the offence proved, in my opinion, is not of vital importance. It made the decision to dismiss the application after hearing all the evidence and such decision was clearly within its jurisdiction and so, on the authority of the *Tag's* case, not reviewable by this Court.

If there was an error here (which, with all deference, I must say I do not consider there was) it was an error made in exercising its jurisdiction to determine the question before it, namely, whether the employer had been guilty of an unfair labour practice. The case, in my opinion, comes within the authorities cited *supra*.

If I am in error in the construction I have placed on the ruling of the Board and such ruling was actually to the effect that having heard the

evidence, no notice as required by section 30(4) had been served on the employer and therefore it had no jurisdiction to proceed further under section 9(1), in my opinion, on the authorities, the application for *mandamus* must still fail.

In *Regina ex rel Irvine v. Zentner* (1959), 29 W.W.R. 679, Martin C.J.S. cites with approval Boyd, C. in *Re Ratcliffe v. Crescent Mill and Tbr. Co.*, [1901] 1 O.L.R. 332, where the trial judge had found that the evidence given showed that the case was beyond the jurisdiction of a division court and ruled that *further* evidence should not be given and entered judgment for non-suit, an application for *mandamus* did not lie. In his judgment Boyd, C. referred to *Kernot v. Bailey*, [1856] 4 W.R. 608, where a judge of the Queen's Bench in dealing with a judgment in a lower court held that where the judge in the lower court had heard evidence as to the jurisdiction and non-suited the plaintiff, the only remedy is by appeal and not by *mandamus*. He also cited Boyd, C. in *Ex parte Milner*, [1851] 15 Jur. 1037, where Erle, J. Stated:

> "When the judge has entered upon the hearing of a plaint, and from the evidence decides he has no jurisdiction to adjudicate between the parties, a *mandamus* will not lie commanding him to hear and determine it, even though he be wrong in point of law. Contra, if having jurisdiction he refuses to hear it upon the mistaken notion that he has no jurisdiction in respect of some preliminary matter."

Boyd, C. comments upon this statement in the *Ratcliffe* case at p. 333 as follows:

> "That is clearly right if he goes so far as to adjudicate by entering a non-suit or dismissing the plaint. But if he hold his hand and declines to go on with the trial or to hear and determine the matter, erroneously believing that he has no jurisdiction, then he may be directed to proceed by way of *mandamus* from the higher court: *Reg. v. Southampton C.C.J. and Fisher and Sons Ltd.* (1891), 65 LTNS 320. But this last case does not go far enough to warrant our interfering when the litigation has been ended and determined by the judgment of non-suit."

In the *Zentner* case Martin, C.J.S. at p. 686 further said:

> "Where the inferior court has entered judgment in an action and the action is not pending before it, *mandamus* does not lie: *Williamson v. Bryans*, [1862] 12 UCCP 275; *Re Ratcliffe v. Crescent Mill and Tbr. Co., Supra* * * *
>
> "*Mandamus* is granted to compel the performance of an act which it is the legal duty of the officer to perform and which has not been performed. It is not granted to undo what has already been done * * *."

Here, as in the *Ratcliffe* case, the Board had adjudicated by dismissing the complaint. It did not hold its hand and decline to go on with the

hearing and give a decision. Here, as in the *Southampton* case, the hearing had been ended and determined by a decision dismissing the application and, so far as the material before me shows, nothing is pending before the Board. For this Court to make a *mandamus* order on this application would be to endeavour "to undo what has already been done."

The application is therefore dismissed with costs.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 17th day of July, A.D. 1967.

"W. A. Tucker", J.

IN THE COURT OF QUEEN'S BENCH

(CROWN SIDE)

IN THE MATTER OF THE TRADE UNION ACT, R.S.S. 1965, CHAPTER 287, AND

IN THE MATTER OF THE CROWN PRACTISE RULES, AND

IN THE MATTER OF A CERTAIN APPLICATION PURPORTEDLY MADE BY PIONEER CO-OPERATIVE ASSOCIATION LIMITED TO THE LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN FOR AN ORDER REQUIRING ALBERT THOLL AND EVELYN KLAUDT TO REFRAIN FROM ENGAGING IN AN UNFAIR LABOUR PRACTISE.

BETWEEN:

ALBERT THOLL, of the City of Regina, in the Province of Saskatchewan,

APPLICANT

— and —

THE LABOUR RELATIONS BOARD of the Province of Saskatchewan, and PIONEER CO-OPERATIVE ASSOCIATION LIMITED, of Swift Current, in the Province of Saskatchewan,

RESPONDENTS

BEFORE THE HONOURABLE MR. JUSTICE F. W. JOHNSON IN QUEEN'S BENCH CHAMBERS AT SASKATOON, SASKATCHEWAN — MONDAY, THE 6TH DAY OF NOVEMBER, A.D. 1967.

ORDER

UPON the Application of the Applicant for an Order of Prohibition directed to the Labour Relations Board of the Province of Saskatchewan and Pioneer Co-operative Association Limited to prohibit them from further proceeding in the above mentioned application, upon reading the Applicant's Notice of Motion and Affidavit, all filed, and upon hearing what was said by George J. D. Taylor, Esq., of counsel for the Applicant, Harry Dahlem, Esq., of counsel for the Respondent, Pioneer Co-operative Association Limited, and M. Chan, Esq., of counsel for the Respondent, Labour Relations Board; and upon Harry Dahlem, Esq. giving before me his verbal undertaking that the Respondent, Pioneer Co-operative Association Limited was going to withdraw its application, the subject matter of these proceedings, from the Respondent Labour Relations Board for hearing and determination;

IT IS HEREBY ORDERED AND ADJUDGED that the application of the Applicant for a Writ of Prohibition be and the same is hereby dismissed;

AND IT IS FURTHER ORDERED AND ADJUDGED that if the Respondent, Pioneer Co-operative Association Limited, does not withdraw its said

Application from the said Labour Relations Board, leave be and it is hereby reserved to the within Applicant to renew his Application;

AND IT IS FURTHER ORDERED AND ADJUDGED that the Applicant be and he is hereby given the costs of his Application.

"D. H. Hibbert"
D. Hibbert, Local Registrar.

IN THE COURT OF QUEEN'S BENCH

(CROWN SIDE)

IN THE MATTER OF THE TRADE UNION ACT, R.S.S. 1965, CHAPTER 287, AND

IN THE MATTER OF THE CROWN PRACTISE RULES, AND

IN THE MATTER OF A CERTAIN APPLICATION PURPORTEDLY MADE BY PIONEER CO-OPERATIVE ASSOCIATION LIMITED TO THE LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN FOR AN ORDER REQUIRING ALBERT THOLL AND EVELYN KLAUDT TO REFRAIN FROM ENGAGING IN AN UNFAIR LABOUR PRACTISE.

BETWEEN:

ALBERT THOLL, of the City of Regina, in the Province of Saskatchewan,

APPLICANT

— and —

THE LABOUR RELATIONS BOARD of the Province of Saskatchewan, and PIONEER CO-OPERATIVE ASSOCIATION LIMITED, of Swift Current, in the Province of Saskatchewan,

RESPONDENTS

BEFORE THE HONOURABLE MR. JUSTICE A. L. SIROIS IN QUEEN'S BENCH CHAMBERS AT SASKATOON, SASKATCHEWAN } ON FRIDAY, THE 19TH DAY OF JANUARY, A.D. 1968.

ORDER

UPON the Application of the Applicant for an Order of Prohibition directed to the Labour Relations Board of the Province of Saskatchewan and Pioneer Co-operative Association Limited to prohibit them from further proceeding in the above mentioned application, upon reading the Applicant's Notice of Motion and Affidavit, all filed, and upon hearing George J. D. Taylor, Q.C., of counsel for the Applicant, Harry H. Dahlem, Esq., of counsel for the Respondent, Pioneer Co-operative Association Limited, and M. Chan, Esq., of counsel for the Respondent, Labour Relations Board.

IT IS HEREBY ORDERED AND ADJUDGED that the Application of the Applicant for a Writ of Prohibition be and the same is hereby dismissed.

AND IT IS FURTHER ORDERED AND ADJUDGED that the Respondents be and each of them is hereby given the costs of this Application.

"O. A. Heidgerken"
O. Heidgerken, Local Registrar.

IN THE COURT OF APPEAL FOR SASKATCHEWAN

IN THE MATTER OF THE TRADE UNION ACT, R.S.S. 1965, CHAPTER 287, AND

IN THE MATTER OF THE CROWN PRACTISE RULES, AND

IN THE MATTER OF A CERTAIN APPLICATION BY INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, LOCAL UNION 771, TO THE LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN FOR AN ORDER DETERMINING THAT A UNIT OF EMPLOYEES OF WEBER CONSTRUCTION (SASKATOON) LTD., DESCRIBED IN PARAGRAPH 4 OF THE SAID APPLICATION IS AN APPROPRIATE UNIT OF EMPLOYEES FOR THE PURPOSE OF BARGAINING COLLECTIVELY, DETERMINING THAT THE APPLICANT TRADE UNION REPRESENTS A MAJORITY OF THE EMPLOYEES IN THE SAID UNIT, AND REQUIRING THE SAID WEBER CONSTRUCTION (SASKATOON) LTD. TO BARGAIN COLLECTIVELY WITH THE APPLICANT.

BETWEEN:

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, LOCAL UNION 771,

APPELLANT
(APPLICANT)

— and —

THE LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN AND WEBER CONSTRUCTION (SASKATOON) LTD.,

RESPONDENTS
(RESPONDENTS)

JUDGMENT

DATED and entered on the 25th day of January, A.D. 1968.

THIS APPEAL having come on for hearing in the Court of Appeal before the Honourable Mr. Justice M. H. Woods, acting Chief Justice; the Honourable Mr. R. L. Brownridge and the Honourable Mr. Justice M. A. MacPherson, Jr., by way of appeal from the Judgment or Order of the Honourable Mr. Justice Tucker, made on the 15th day of January, A.D. 1968, whereby the said Honourable Mr. Justice Tucker dismissed the Appellant's application for an order staying the further hearing of the application before the Labour Relations Board of the International Association of Bridge, Structural and Ornamental Iron Workers Local Union 771, until the Applicant's Notice of Motion for an order of prohibition came before the Chamber Judge on Friday, the 19th day of January, A.D. 1968, and in the presence of counsel for the Appellant and Respondents, and upon hearing read the Affidavit of August James Zaba, and upon hearing what was alleged by counsel for the Appellant and for the Respondent, Labour Relations Board.

THIS COURT DOTH ORDER that this Appeal be and the same is hereby dismissed.

AND THIS COURT DOTH FURTHER ORDER that the Appellant do pay to the Respondents their costs of this Appeal forthwith after taxation thereof.

"R. B. Horner", (seal)
R. Horner, Registrar of the
Court of Appeal for Saskatchewan

SASKATCHEWAN

COURT OF QUEEN'S BENCH,
February 19, 1969; received February 24, 1969.

Regina v. Labour Relations Board (Sask.) ex parte The Sisters of St. Joseph et al.

Unfair labour practice — Employer failing to bargain collectively — Application to quash Board order — Reviewability on certiorari — Trade Union Act, R.S.S. 1965, c. 287, ss. 5, 9(1)(*c*), 20.

A hospital employer was found by the Board to have engaged in an unfair labour practice by failing to bargain collectively with the union. On this application to quash the order the Court was confronted with the question whether the Board's error, if any, went to jurisdiction or whether it was an error on an issue within the Board's jurisdiction.

Held: The application was dismissed. By virtue of the Act the Board was empowered to determine whether an unfair labour practice had been engaged in. Since this was the very issue before the Board it unquestionably had jurisdiction to deal with it. Accordingly, any error in law or in fact that it might have made, was made within the exercise of that jurisdiction. It was settled law that in these circumstances the Board's decision was not open to review by any Court and this was so whether the Board was right or wrong in its findings.

D. K. MacPherson, Q.C., for the Hospital, Applicants.

R. J. Romanow for the Union Respondent.

Michael Chan for the Labour Relations Board.

JUDGMENT (IN CHAMBERS) — JOHNSON, J.

This is an application for an Order quashing without the actual issue of a Writ of *Certiorari* a certain Order of the Saskatchewan Labour Relations Board which found that the applicant hospital did engage in an unfair labour practice within the meaning of section 9(1)(c) of *The Trade Union Act*, being Chapter 83, R.S.S. 1966, and amendments thereto, by failing to bargain collectively with the respondent union with a view to the conclusion of a collective bargaining agreement.

Counsel for the respondent union raised several preliminary objections but in the light of my findings hereinafter stated there is no need for me to deal with them.

The jurisdiction of the Labour Relations Board to entertain an application with respect to unfair labour practices must be found within *The Trade Union Act* which creates the Board. Section 5 states:

"5. The board shall have power to make orders:

(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;

(d) determining whether an unfair labour practice is being or has been engaged in;

(e) requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice;"

Unfair labour practices by employers are described in section 9(1) and 9(1)(c), which state:

"9.—(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:

(c) to fail or refuse to bargain collectively with representatives elected or appointed (not necessarily being the employees of the employer) by a trade union representing the majority of the employees in an appropriate unit;"

Section 20 of the Act is a privative section, which, since its amendment in 1966, now reads:

"20. There shall be no appeal from an order or decision of the board under this Act, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari*, *mandamus*, prohibition, injunction or other proceeding whatever."

Before the amendment the section read as follows:

"20. There shall be no appeal from an order or decision of the board under this Act, and the board shall have full power to determine any question of fact necessary to its jurisdiction, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari*, *mandamus*, prohibition, injunction or other proceeding whatever."

Where there is such a privative clause the law appears to be well settled that the Court in *certiorari* proceedings is restricted to a determination of whether or not the inferior tribunal acted within its jurisdiction or whether there is error on the face of the record. See *R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1952] 1 K.B. 338; *Re Ontario Labour Relations Board, Bradley et al v. Canadian General Electric Co. Ltd.*, 8 D.L.R. (2d) 65, [1957] O.R. 316, and *R. v. Agricultural Land Tribunal for the South Eastern Area, Ex parte Bracey*, [1960] 2 All E.R. 518; and *Regina v. Labour Relations Board of Saskatchewan, Ex parte Tag's Plumbing & Heating Limited* (1962), 34 D.L.R. (2d) 128, per Culliton, J.A., now C.J.S. The problem, of course, posed by this kind of application is whether the Board's error, if any, goes to jurisdiction or whether it is an error on an issue within the jurisdiction of the Board.

With respect, I must say that in my opinion the deletion from section 20 by the 1966 amendment of the words "and the Board shall have full power to determine any question of fact necessary to its jurisdiction." does not in any way affect the application of that privative section to the matter before me. Having found that an unfair labour practice had been engaged in by the applicant then, by its creating statute, the Board had jurisdiction to deal with it.

The problem before the Board was really quite simple — whether the employer engaged in an unfair labour practice as alleged by the union. Unquestionably this issue was within the jurisdiction of the Board and if there was an error in law or in fact it was made within the

exercise of that jurisdiction and is not open to review by any Court and it matters not whether the Board was right or wrong in its findings. *Farrell et al v. Workmen's Compensation Board*, [1962] 37 W.W.R. 39 (S.C.).

The application is dismissed with costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 19th day of February, A.D. 1969.

"F. W. Johnson"
F. Johnson, J.Q.B.

SASKATCHEWAN

COURT OF APPEAL

REGINA V. SASKATCHEWAN LABOUR RELATIONS BOARD, Ex parte THOLL

Before *Culliton, C.J.S., Brownridge and Hall, JJ.A.*
March 21, 1969.

Labour relations — Jurisdiction of Labour Relations Board — Prohibiting unfair labour practice — Necessity for allegation of unfair practice at times of application — Trade Union Act (Sask.), s. 5(d), (e).

Prohibition — Basis for order — Labour Relations Board proceeding to hear application for order prohibiting unfair labour practice — Basis for jurisdiction not satisfied — Trade Union Act (Sask.), s. 5(d), (e).

Section 5 of *The Trade Union Act*, R.S.S. 1965, c. 287, provides that the Labour Relations Board shall have the power to make orders "(*d*) determining whether an unfair labour practice is being or has been engaged in; (*e*) requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice". Although an order under s. 5(*d*) is not a prerequisite to an order under s. 5(*e*), a finding that the person is violating the Act or engaging in an unfair labour practice is. Thus where at the time of an application under s. 5(*e*) the strike out of which the alleged unfair practice arose is over, the basis for an order under s. 5(*e*) does not exist. An order under s. 5(*d*) could nevertheless issue, but on an application under s. 5(*e*) alone the Board has no jurisdiction to make an order under s. 5(*d*). On the application under s. 5(*e*), in the absence of an allegation that a person was engaged in an unfair labour practice, one the bases of the Board's jurisdiction is missing and prohibition will lie where the Board has dismissed a preliminary objection of its jurisdiction.

[*Board of Education v. Rice*, [1911] A.C. 179; *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw*, [1952] 1 All E.R. 122; *Farrell et al. v. Workmen's Compensation Board*, 31 D.L.R. (2d) 177, [1962] S.C.R. 48, 37 W.W.R. 39; *Segal v. Montreal*, [1931] 4 D.L.R. 603, 56 C.C.C. 114, [1931] S.C.R. 460, refd. to]

APPEAL from a judgment of Sirois, J., dismissing an application for a writ of prohibition.

George J. D. Taylor, Q.C., for appellant, Tholl.

H. H. Dahlem, for Pioneer Co-operative Ass'n. Ltd.

Michael Chan, for Labour Relations Board.

The judgment of the Court was delivered by

CULLITON, C.J.S. — This is an appeal from the order of Sirois, J., dismissing an application of the appellant for a writ of prohibition.

On October 16, 1967, the respondent Pioneer Co-operative Association Limited filed with the Labour Relations Board an application purporting to be for an order under cl. (*b*) of s.s. (2) [am. 1966, c. 83, s. 7] of s. 9 of *The Trade Union Act*, R.S.S. 1965, c. 287. This

was an application for an order requiring Albert Tholl and Evelyn Klaudt to refrain from engaging in an unfair labour practice within the meaning of *The Trade Union Act* violating the provisions of said *Trade Union Act*. The respondent Pioneer Co-operative Ass'n. Ltd. alleged that an unfair labour practice had been engaged in by reason of the following facts:

> The applicant filed on the 30th day of May, A.D. 1967, an application with the Labour Relations Board to amend the certification order issued by the said Labour Relations Board on June 4th, 1962, in accordance with Section 5(k)(i) [enacted 1966, c. 83, s. 3(4)] of *The Trade Union Act*. The Labour Relations Board adjourned the application to either the September or October sittings of the Labour Relations Board. On or about the 31st day of August, A.D. 1967, Albert Tholl as business agent for the Retail, Wholesale and Department Store Union affiliated with the Retail, Wholesale and Department Store Union, A.F.L./C.L.O.; C.L.C. and Evelyn Klaudt as Shop Steward and Chairman of the Negotiating Committee of the said Union commenced to take part in or attempted to persuade employees to take part in a strike of the said Union which commenced on the 31st day of August, A.D. 1967, and lasted until the 13th day of September, A.D. 1967.

When the application came on for hearing before the Labour Relations Board, learned counsel for the appellant took the following preliminary objections:

(1) that the application was void as the applicant did not allege in the application that there was any application pending before the Board within the meaning of section 9(3) of *The Trade Union Act*; and

(2) that the matter referred to in the application having been heard and determined by the Board, there was, as of the date the application was filed, nothing to litigate and consequently the application could not be heard by the Board.

The Board, in a written decision dated December 5, 1967, disposed of these objections as follows:

> "We now deal with submission (b). The application is based on an allegation dealing with a strike between the dates August 31st and September 13th, 1967. This strike as of the date the application was filed was over. It is the majority of the Board's opinion that the fact the strike was over at the date this application was filed in no way affects this application. The application alleges certain activities of the respondents which resulted in a strike were an unfair labour practice within the meaning of section 9(2) of *The Trade Union Act* as these activities took place during a period when an application was pending before the Board. It is the Board's majority opinion that the conclusion of the strike in no way relieved the respondents of their obligations under *The Trade Union Act* nor does it remove

the applicant's rights to proceed under *The Trade Union Act*. The Board therefore rules it does have jurisdiction to hear this application."

The appellant then applied to the Court of Queen's Bench for an order of prohibition directed to the Labour Relations Board and Pioneer Co-operative Association Limited prohibiting them from further proceeding with the application. The grounds set forth in the notice of motion are as follows:

(1) That the said Labour Relations Board is without jurisdiction to hear and determine the said application.

(2) That the alleged acts described in paragraph (3) of the said application do not amount to an unfair labour practise or to a violation of *The Trade Union Act* within the meaning of section 9(2) (b) of the said Act and that the want of jurisdiction of the said Board to hear and determine the said application appears on the face thereof.

(3) That the said Labour Relations Board erred in law in holding that it had jurisdiction to hear and determine the said application."

Sirois, J., dismissed the application and from this judgment the appeal is taken.

The power of the Labour Relations Board to make orders is provided for in section 5 of *The Trade Union Act*, Chapter 287, R.S.S. 1965. This section provides, in part, as follows:

"5. The board shall have power to make orders:

(d) determining whether an unfair labour practice is being or has been engaged in;

(e) requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice;".

Learned counsel for the appellant argued that the Labour Relations Board has no jurisdiction to make an order under section 5 (e) without first having made an order under section 5(d). With respect, I cannot agree with this submission. In my view the Board has jurisdiction to entertain an application for an order under section 5(e) provided the application alleges, as required by the regulations, that a violation of the Act, or an unfair labour practice is being engaged in at the time the application is filed. Before an order could be made requiring any person to refrain from engaging in a violation of the Act, or an unfair labour practice, the Board would be required to find that there had been such violation or unfair labour practice. The Board's jurisdiction and duty to so find is inherent in its jurisdiction to make an order under section 5(e) without the prerequisite of a special application for an order under section 5(d).

In my respectful view, the difficulties which have arisen in this matter result from a misconception, both by learned counsel for the respondent Pioneer Co-operative Association Limited and the Board, as to the order for which application was made. Both learned counsel and the Board have construed the application as one under section 5(d), that is, for an order that the appellant Albert Tholl did engage in an unfair labour practice. This is made clear by the decision of the Board in disposing of the preliminary objections taken before it by learned counsel for the appellant. The Board held it had jurisdiction, notwithstanding the settlement of the labour dispute, to make an order finding that the appellant did engage in an unfair labour practice.

If the application were for an order under section 5 (d), I would be in full agreement with both the submission of learned counsel for the respondent and with the decision of the Board. The application, however, was not for such an order, but for an order under section 5(e). This is made perfectly clear by the application, the opening paragraph of which reads:

> "Pioneer Co-operative Association Limited of Swift Current, in the Province of Saskatchewan, hereby applies to the Labour Relations Board for an Order requiring the persons designated in paragraph 2 of this application to refrain from engaging in an unfair labour practice within the meaning of *The Trade Union Act*, 1965, violating the provisions of *The Trade Union Act*, 1965, particulars of which are set out below."

As I have already stated, while a finding that the appellant was engaged in an unfair labour practice is a prerequisite to an order under section 5 (e), that in no way changes the nature of the application which in its form is for an order under section 5(e). That being so, the Board has no jurisdiction to make an order under some other section: *Board of Education v. Rice*, [1911] A.C. 179.

The record in this case consists of the application, the Order of the Board disposing of the preliminary objections, and the reasons therefor: *R. v. Northumberland Compensation Appeal Tribunal*, [1952] 1 All E.R. 122. It is abundantly clear from this record that there is an allegation that the appellant Tholl did engage in an unfair labour practice between August 31, 1967 and September 13, 1967. It is equally clear that the labour dispute was settled on September 13, 1967, and that there is no allegation that the appellant was engaging in an unfair labour practice at the time the application was filed for an order under section 5(e) on October 16, 1967. As a matter of fact, the record conclusively establishes, in my opinion, that any allegation of the unfair labour practice by the appellant Tholl is restricted to the period August 31st, 1967, to September 13th, 1967. On the argument before this Court it was admitted by counsel for the respondent that this was in fact the situation.

The law is well settled that when an order is made by a tribunal within its jurisdiction, even if there be error, whether in fact or in law, that decision is not open to judicial review: *Farrell et al v. Workmen's Compensation Board*, [1962] S.C.R. 48. In *Segal v. City of Montreal*, [1931] S.C.R. 460, Lamont, J., said at page 473:

> "If the existence or non-existence of the jurisdiction of a judge of an inferior court depends upon a question of fact, then, if, upon the facts proved or admitted he has no jurisdiction, his finding that he has jurisdiction will not prevent prohibition, but if the jurisdiction depends upon contested facts and there has been a real conflict of testimony upon some fact which goes to the question of jurisdiction, and the judge decides in such a way as to give himself jurisdiction, a superior court, on an application for prohibition, will hesitate before reversing his finding of fact and will only do so where the grounds are exceedingly strong. *Mayor of London v. Cox*, (1867) L.R. 2 H.L. 239; *Brown v. Cocking*, (1868) L.R. 3 Q.B. 672; *Liverpool Gas Company v. Everton*, (1871) L.R. 6 C.P. 414; *Rex v. Bradford*, (1908) 1 K.B. 365, at 371."

In my opinion, one of the allegations necessary to the Board's jurisdiction to entertain an application for an order under section 5(e) would be one that the appellant was engaging in an unfair labour practice at the time the application was made. It is obvious that the record discloses no such allegation, nor, in the light of the uncontested facts, could such an allegation be made. The unfair labour practice alleged was that the appellant did commence to take part, or attempted to persuade the employees to take part, in a strike while an application was pending before the Board.

At the time the application for the order herein was made, there was no application pending before the Board and consequently the appellant could not at that time have been engaged in the unfair labour practice alleged in the application. Therefore no order requiring the appellant from refraining to do so could be made by the board. Even if all the facts as alleged in the application are taken as being admitted and proved, there would still be lacking that essential fact upon which an order under section 5 (e) is dependent.

The appeal will be allowed. The writ of prohibition as asked for will issue. The appellant will have his costs of appeal, and the costs of the application below against the respondent Pioneer Co-operative Association Limited.

DATED at the City of Regina, in the Province of Saskatchewan, this 21st day of March, A.D. 1969.

"E. M. Culliton"
E. Culliton, C.J.S. for the Court.

CORAM: CULLITON, C.J.S., BROWNRIDGE and HALL, JJ.A.

SASKATCHEWAN

COURT OF APPEAL

Before Culliton, C.J.S., Woods and Hall, JJ.A.

Regina ex rel United Steelworkers of America et al
Applicants

v. Labour Relations Board of Saskatchewan et al
Respondents

Trades and Trade Unions — Labour Relations Board — Refusal of Application for Certification on Irrelevant Grounds — Jurisdiction.

Although the language of sec. 5 of *The Trade Union Act*, R.S.S., 1965, ch. 287, is permissive in form it imposes a duty on the labour relations board to exercise the powers therein set out when called upon to do so by a party interested and having the legal right to make the application. Thus where an application was made to the board, pursuant to the section by a union for certification and for the additional relief provided by the section and the board dismissed the application on the grounds that the number of employees did not at the date of the application constitute a substantial and representative segment of the working force to be employed in the future it was *held* that the board's refusal of the application on wholly irrelevant grounds was, in effect, a refusal to exercise its jurisdiction, and its order must be quashed and a writ of *mandamus* issue to compel it to determine the application according to law: *Labour Relations Board v. Reg. ex rel F. W. Woolworth & Co.* [1956] SCR 82, at 86, affirming (1954) 13 WWR (NS) 1, 6 Abr Con (2nd) 985 applies.

[Note up with 21 CED (2nd ed.) *Trades and Trade Unions*, secs. 8A, 8B.]

G. J. D. Taylor, Q.C., for applicants.

D. K. MacPherson, Q.C., for respondent employer.

M. Chan, for respondent board.

April 29, 1969.

The judgment of the court was delivered by

CULLITON, C.J.S. — Sec. 5 (*a*), (*b*) and (*c*) of *The Trade Union Act*, R.S.S., 1965, ch. 287, reads as follows:

"5. The Board shall have power to make orders:

"(*a*) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;

"(*b*) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;

"(*c*) requiring an employer to bargain collectively; * * *."

Pursuant to the foregoing provisions of *The Trade Union Act*, the United Steelworkers of America, CLC, made application to the labour relations board for an order:

> "(a) That all employees of Noranda Mines Limited, Potash Division, except managers, superintendents, supervisors, foremen, office and clerical staff, plant security and any person having and regularly exercising authority to employ or discharge employees, or regularly acting on behalf of management in a confidential capacity, constitute an appropriate unit of employees for the purpose of bargaining collectively; and
>
> "(b) that the applicant trade union represents a majority of employees in such unit; and
>
> "(c) requiring the employer to bargain collectively."

The application was heard by the labour relations board. In its order dismissing the application, the board said:

> "THE MAJORITY OF THE BOARD having found that, in this particular case, the number of employees employed by the above named Respondent at the filing date of the application, namely, November 28, 1968, did not constitute a substantial and representative segment of the working force to be employed in the future by the Respondent and, HEREBY ORDERS the application be dismissed."

The union now applies for a peremptory writ of *mandamus* directed to the Labour Relations Board commanding it to exercise the jurisdiction conferred upon it by section 5 of *The Trade Union Act*, and to dispose of the application according to law. In support of the application, learned counsel for the Union contended that the Board, in dismissing the application upon the ground stated, declined to exercise its jurisdiction, and did so refuse upon an extraneous and irrelevant ground. Learned counsel for both the employer and the Labour Relations Board contended that the order of the Board must be construed as a determination by the Board that the unit of employees described in the application did not constitute an appropriate unit for the purpose of bargaining collectively; that such determination was a matter wholly within the Board's jurisdiction and therefore not subject to review, either in *certiorari* or *mandamus* proceedings.

If the order made by the Board were one within its jurisdiction, then even if wrong in law or fact, the order would not be open to judicial review. *Farrell et al v. Workmen's Compensation Board*, [1962] S.C.R. 48. Too, if the decision of the board could be construed as contended for by learned counsel for the employer, and the Board, a strong argument might be advanced that the decision, even if wrong, cannot be questioned in these proceedings. In my respectful view, however, the decision of the Board cannot be construed as a determination that the unit of employees described in the application does not constitute an appropriate unit for

the purpose of bargaining collectively. Clearly, the Board dismissed the application because, in its opinion, the number of employees employed by the employer at the time of the application, did not constitute a substantial and representative segment of the working force to be employed in the future. There was no finding that the unit of employees described in the application was not an appropriate unit, nor was there any finding that the applicant union did not represent a majority of employees in such unit. What the Board in fact did, was to dismiss the application because, in its opinion, the time for making the same was not appropriate.

The Supreme Court of Canada, in *Labour Relations Board v. The Queen, on relation of F. W. Woolworth & Company Limited et al*, [1956] S.C.R. 82, considered the effect to be given to section 5(i) of *The Trade Union Act*. Locke, J., in delivering the judgment of the Court, at pages 86-7, said:

> "The language of s. 5, in so far as it affects this aspect of the matter, reads: —
>
> '5. The board shall have power to make orders: —
> .....
> (i) rescinding or amending any order or decision of the board.'
>
> "While this language is permissive in form, it imposed, in my opinion, a duty upon the Board to exercise this power when called upon to do so by a party interested and having the right to make the application (*Drysdale v. Dominion Coal Company*) [1904] 34 Can. S.C.R. 328: Killam, J.). Enabling words are always compulsory where they are words to effectuate a legal right (*Julius v. Lord Bishop of Oxford*, (1880) 5 A.C. 214 at 243: Lord Blackburn)."

In my opinion, the view expressed by Locke, J., is equally applicable to section 5, subsections (a), (b) and (c) of the present Act. While the language of section 5(a), (b) and (c) is permissive in form, it imposes the duty upon the Board to exercise the powers when called upon to do so, by a party interested and having the right to make the application. In the present case, the right of the Union to make the application, and that the union represents a majority of employees in the proposed unit, were never questioned.

When the application was made, it was the duty of the Board to hear the application and to give effect to the statutory rights of the employees. While the Board considered the application, it failed to direct its consideration to the rights of the employees as provided for in *The Trade Union Act* and rejected the application on a ground which was wholly

irrelevant. By so doing, in my opinion, the Labour Relations Board declined to exercise the jurisdiction and to perform the duties imposed upon it by the section of the Act I have quoted.

The present application is one for *mandamus* with *certiorari* in aid. I therefore direct that the order of the Labour Relations Board, dated the 11th day of January, 1969, be quashed, and that a writ of *mandamus* issue commanding the Labour Relations Board to determine the application according to law. The applicant will have its costs against the respondent, Noranda Mines Limited.

DATED at the City of Regina, in the Province of Saskatchewan, this 29th day of April, A.D. 1969.

"E. M. Culliton"
E. Culliton, C.J.S. for the Court.

CORAM: CULLITON, C.J.S., WOODS and HALL, JJ.A.

IN THE COURT OF APPEAL FOR SASKATCHEWAN

(CROWN SIDE)

IN THE MATTER OF THE TRADE UNION ACT, R.S.S. 1965, CHAPTER 287, AS AMENDED, AND

IN THE MATTER OF THE CROWN PRACTISE RULES, AND

IN THE MATTER OF A CERTAIN ORDER OR DECISION MADE BY THE SASKATCHEWAN LABOUR RELATIONS BOARD DATED THE 11TH DAY OF JANUARY, A.D. 1969, AT THE CITY OF SASKATOON, IN THE PROVINCE OF SASKATCHEWAN

BETWEEN:

HER MAJESTY THE QUEEN on the relation of UNITED STEELWORKERS OF AMERICA, CLC and KENNETH A. SMITH, both of the City of Saskatoon, in the Province of Saskatchewan,

APPLICANTS

— and —

THE LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN and NORANDA MINES LIMITED, Potash Division, a body corporate, incorporated under the laws of Ontario, with head office in the City of Toronto, in the Province of Ontario, and also of Colonsay, in the Province of Saskatchewan,

RESPONDENTS

JUDGMENT

Dated and entered the 29th day of April, A.D. 1969.

THIS Application for an Order of Mandamus and an Order of Certiorari having come on for hearing in the Court of Appeal before the Honourable Chief Justice E. M. Culliton, the Honourable Mr. Justice Mervyn Woods and the Honourable Mr. Justice R. N. Hall;

AND UPON HEARING what was said by counsel for the Applicants, and by counsel for the Respondent, THE LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN, and the Respondent, NORANDA MINES LIMITED respectively;

THIS COURT WAS PLEASED TO DIRECT that this Application stand over for Judgment, and the same coming on this day for Judgment;

1. THIS COURT DOTH ORDER AND DIRECT that the Order of the Respondent LABOUR RELATIONS BOARD dated the 11th day of January, A.D. 1969 whereby the said Board dismissed the Application of the Applicant for an Order:

   (a) that all employees of NORANDA MINES LIMITED, Potash Division, except managers, superintendents, supervisors, foremen, office and clerical staff, plant security and any person

having and regularly exercising authority to employ or discharge employees, or regularly acting on behalf of management in a confidential capacity, constitute an appropriate unit of employees for the purpose of bargaining collectively; and

(b) that the applicant trade union represents a majority of employees in such unit; and

(c) requiring the employer to bargain collectively:

be and the same is hereby quashed;

2. AND THIS COURT DOTH FURTHER ORDER AND DIRECT that a Peremptory Writ of Mandamus be and the same is hereby issued commanding the Respondent LABOUR RELATIONS BOARD to determine the said Application according to law;

3. AND THIS COURT DOTH ORDER that the Respondent NORANDA MINES LIMITED, pay to the Applicant its costs of this Application forthwith after taxation thereof.

"F. C. Newis"
F. Newis, "Deputy" Registrar,
Court of Appeal for Saskatchewan.

SASKATCHEWAN

COURT OF APPEAL

Before: Culliton, C.J.S., Brownridge and Hall, JJ.A.

April 30, 1969; received May 7, 1969.

Regina ex rel. International Woodworkers of America, Local 1-184 v. Labour Relations Board (Sask.), Woodlands Enterprises Ltd., et al.

Labour Relations Board — Applications for certification — Request for combined hearing — Motion for writ of Mandamus — Trade Union Act, R.S.S. 1965, c. 287, s. 5.

A union made separate applications on different dates to be certified for the employees of two employers. After the date for the hearings had been set the union requested that both applications be heard and determined at the same sittings of the Board. When the Board refused, the union moved for a writ of *mandamus* requiring the Board to hear the applications simultaneously. On the hearing of the motion the Court was advised that the parties had already agreed as to a new date for the certification hearings.

Held: The motion was dismissed. In view of the arrangement reached by the parties there was no longer any problem to be resolved by the Court, and it was settled law that a Court would not decide abstract propositions of law even if to determine the liability as to costs.

COUNSEL:

G. J. D. Taylor, Q.C., for the Applicant.

R. W. Mitchell, for the Respondents, Woodlands Enterprises Limited and Waskesui Holdings Ltd.

R. L. Barclay, for the Respondent Construction & General Laborers Union.

Michael Chan, for the Labour Relations Board.

JUDGMENT OF THE COURT — CULLITON, C.J.S.

The applicant made application, by way of notice of motion, for a writ of *mandamus* requiring the Labour Relations Board to hear and determine an application made by the applicant, dated March 19, 1969, at its April sittings, or, in the alternative, for a writ of prohibition, prohibiting the Labour Relations Board from hearing at the said sittings, an application made by the applicant, dated March 12, 1969. The application dated March 12th, 1969, was an application by the applicant union for an order of certification, pursuant to *The Trade Union Act*, R.S.S. 1965, Chapter 287, in request to certain employees of Waskesiu Holdings Ltd. The application of March 19th was a similar application in respect of employees of Woodlands Enterprises Limited.

On April 1st, 1969, learned counsel for the applicant union appeared before the Labour Relations Board, and requested that the Board hear

and determine the application dated March 19th, 1969, or, alternatively, that the hearing of the application dated March 12th, 1969, be adjourned to the sittings of the Board commencing May 6th, 1969. It would appear that the applicant union was desirous that both applications be heard and determined at the same sittings of the Board. The Board ruled that it would not then hear the application dated March 19th, 1969, but that it would proceed to hear the application dated March 12th. The applicant union then launched the present motion and made application to my brother Brownridge for an order staying the Board from proceeding with the application dated March 12th until the disposition of the motion. This order was granted.

On the return of the motion, the Court advised that all parties have now agreed that both applications will be heard and determined by the Labour Relations Board at a sittings commencing May 6th next. In view of this arrangement, there is no longer any problem to be resolved, or, in other words, no further *lis* exists between the parties.

In *Coca Cola Company of Canada Limited v. Florence Mathews*, [1944] S.C.R. 385, Rinfret, C.J., speaking for the Court, said at page 389:

> "It may now, therefore, be regarded as well-settled that this Court will not decide abstract propositions of law, even if to determine the liability as to costs, which is not the case in the present instance."

The application is, therefore, dismissed.

It was argued that the respondents should be entitled to the costs of the application. In my opinion, when an application is dismissed because no further *lis* exists between the parties, the Court will not enter into an inquiry as to the merits for the purpose of determining liability as to costs. Therefore, in the absence of an agreement as to costs, as was the case in *Coca Cola Company v. Mathews, supra* there will be no order as to costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 30th day of April, A.D. 1969.

"E. M. Culliton"
E. Culliton, C.J.S. for the Court.

Regina ex rel Retail, Wholesale and Department Store Union and Gilbey, Applicants
v. Labour Relations Board of Saskatchewan and Main, Respondents

Trades and Trade Unions — Labour Relations Board Hearing — Perjured Evidence — Perjury Exposed before Board's Decision — Whether Decision Invalidated.

Application for a writ of *certiorari* to bring up and quash an order of the labour relations board directing a secret ballot of employees pursuant to sec. 7 (1) of *The Trade Union Act*, R.S.S., 1965, ch. 287, and for an order of *mandamus* to compel the board to hear and determine according to law an application for certification.

Deliberately perjured evidence was given by a witness during the hearing of an application by the union for certification and, following a number of adjournments, the true facts were made to appear. The board thereafter ordered a secret vote of all employees in what it held to be an appropriate bargaining unit to determine whether or not the majority wished to be represented by the applicant union.

It was *held* that while it was well settled by authority that the court had inherent jurisdiction to quash by *certiorari* the orders and decisions of inferior tribunals which had been obtained by fraud, it must be clearly established that the fraud was with respect to a material matter and that it could reasonably be considered to have misled the tribunal into reaching a decision in favour of the fraudulent party; perjury *per se* was not sufficient to justify the setting aside of an order.

In the case at bar the fraudulent conduct and perjury of the employee in question were fully exposed before the conclusion of the bearing and before the board's determination of the question before it; it could not be said therefore that the tribunal had been misled on a material matter into a decision in favour of the fraudulent party: *Reg. v. Gillyard* (1848) 12 QB 527, at 529, 17 LJMC 153, 116 ER 965; *Colonial Bank of Australasia v. Willan* (1874) LR 5 PC 417, 43 LJPC 39; *Rex v. Safruk* [1923] 2 WWR 1126, 19 Alta LR 677, 40 CCC 222, reversing [1922] 3 WWR 244, 38 CCC 144, 11 Can Abr (2nd) 7759 (App. Div.); *MacDonald (McDonald) v. Pier* [1923] 1 WWR 376, [1923] SCR 107, affirming [1922] 1 WWR 1208, 17 Alta LR 401, 30 Can Abr 638; *In re Edlund and Scott* [1944] 2 WWR 39, 82 CCC 203, 1 Abr Con (2nd) 946 (Sask.); *Rex v. Leicester Recorder; Ex parte Wood* [1947] KB 726, [1947] LJR 1045, [1947] 1 All ER 928; *Meek v. Fleming* [1961] 2 QB 366, [1961] 3 WLR 532, [1961] 3 All ER 148, at 154 applied.

In ordering a secret vote after determining that an appropriate unit existed, the board was clearly exercising the jurisdiction conferred upon it by secs. 5 and 7 of the Act: *Reg. ex rel Const. & General Laborers' Local Union No. 890 v. Labour Relations Board* (1965) 52 WWR 440, at 443, 445, affirming (1965) 50 WWR 318, 46 CR 107, 1965 Can Abr 997 (Sask.) applied.

[Note up with 21 CED (2nd ed.) *Trades and Trade Unions*, secs. 8A, 8B.]

G. J. D. Taylor, Q.C., appearing for the applicants.

D. E. Gauley, Q.C., appearing for the respondent The Labour Relations Board of the Province of Saskatchewan.

B. Sherstobitoff, Esq., appearing for the respondent Harold Main.

JUDGMENT

This is an application by the applicants that a peremptory Writ of *Mandamus* do issue directed to The Labour Relations Board of Saskatchewan, hereafter referred to as "the Board", commanding it to exercise the jurisdiction conferred upon it by section 5 subsections (a), (b) and (c) of *The Trade Union Act*, R.S.S. 1965, Ch. 287 and amendments thereto, hereafter referred to as "the Act", in respect of an application for certification made to it by the applicant Retail, Wholesale and Department Store Union AFL-CIO/CLC, hereafter referred to as "the Union"; and for an order that a Writ of *Certiorari* do issue for the return to this Court of the record and a certain order or decision of the said Board made on March 6th, 1969, whereby the said Board ordered that a vote by secret ballot be conducted in the manner directed in said order; and further that said order be quashed.

Broadly speaking, *certiorari* lies to quash a determination which has been made in excess of or without jurisdiction. When *certiorari* is successful and the attacked determination quashed the way then lies open, if a new determination is desired of the same question to apply for a writ of *mandamus* to secure such new determination. *Regina ex rel Construction and General Labourers Local Union No. 180 et al v. Labour Relations Board of Saskatchewan et al (1966), 56 W.W.R. 133.*

Section 5 subsections (a), (b) and (c) of the Act are as follows:

> "5. The Board shall have power to make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, professional association unit or a subdivision thereof or some other unit;
>
> (b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;"

The grounds upon which the writ of *mandamus* is sought are as follows:

> "(1) That the said LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN refused or declined to exercise its jurisdiction in respect of the said application;
>
> (2) That the refusal of the said LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN to exercise its jurisdiction as aforesaid was based upon consideration of extraneous or irrelevant matters;
>
> (3) That the refusal of the said LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN to exercise its jurisdiction as aforesaid was procured by fraud and mispresentation on the part of the Respondent employer;

(4) That the LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN failed to hear and determine the said application according to law;

(5) Such further and other grounds as counsel may advise and this Honourable Court may allow."

On August 19th, 1968, the union filed an application with the Board for an order determining that all the employees employed in Brother's Bakery in Saskatoon, Saskatchewan, except "the Owners and the Owner Managers", constituted an appropriate unit of employees for bargaining collectively; that the Union represented a majority of such employees; and requiring the respondent Main to bargain collectively with the Union. The application also stated that "If it should be found that the applicant trade union does not represent a majority" the union did not apply for a vote to be taken.

On August 30th, Main filed the usual statement of employment listing Ann Ens, Lorna Reidt, Terry Ede, Bill Semeniuk and Elsie Zecharki all of whom signed the statement. Main attached a letter stating that he had two other employees, Mary Friesen and Emergene Coxford who had "declined to sign" the statement.

The application first came before the Board on September 3rd. W. G. Gilbey, a union representative, appeared for the union. Paul Hrabinsky, a solicitor and E. R. Stromberg, a student-at-law associated with the firm of Makaroff, Sherstobitoff and Hrabinsky, appeared for Main. As soon as the matter of amending the style of cause had been dealt with Stromberg said to the Board: "I have been informed that there is an employee here from Brother's Bakery who would like to make a representation." After a short discussion between Stromberg and the Chairman of the Board, R. H. King, concerning another matter the following conversation took place:

Mr. King:	"Fine. If you wish to call someone Mr. Stromberg.
Mr. Stromberg:	Mr. Terry Ede who is an employee.
Mr. King:	Now I don't want to put you in the position of having, — is he coming on his own?
Mr. Stromberg:	He is on his own.
Mr. King:	That's fine then. I won't put you in the position of presenting this witness. We'll put him under oath and then you can both ask him questions."

Ede having been sworn testified that he was "representing six of the seven employees of Brother's Bakery" and tendered the following document to the Board:

"IN THE MATTER OF AN APPLICATION BY THE RETAIL WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO/CLC, FOR BARGAINING RIGHTS AMONG EMPLOYEES OF BROTHER'S BAKERY.

WE, THE UNDERSIGNED, respectively request THE LABOUR RELATIONS BOARD to allow our names to be withdrawn from the SPECIMEN SIGNATURE CARD presented by the above-named union and wish to advise the LABOUR RELATIONS BOARD that we no longer wish to be represented by the above-named union. OR, IN THE ALTERNATIVE, we request that the LABOUR RELATIONS BOARD direct a vote to be taken by secret ballot of all employees eligible to vote to determine whether or not the above-mentioned application should be granted.

Dated at the City of Saskatoon, Province of Saskatchewan this 31st day of August A.D. 1968.

'Miss Elsie Zecharki'	*'Terry Ede'* Witness
'Terry Ede'	*'Elsie Zecharki'* Witness
'Lorna Reidt'	*'Terry Ede'* Witness
'Mary Friesen'	*'Terry Ede'* Witness
'Emergene Coxford'	*'Terry Ede'* Witness
'Ann Ens'	'Terry Ede' "

All the document was typewritten on a sheet of foolscap; only the signatures which I have shown in italics were handwritten. Bill Semeniuk was the only employee who did not sign the document which was entered as Exhibit "A".

Invited to question the witness Mr. Gilbey wisely asked for an adjournment in order that he might, as he put it, "assess this situation". The Board adjourned until the next morning.

In the course of his cross-examination by Gilbey the following morning Ede gave the following answers:

"Q. Did you bring the document subsequently to work for signature?

A. Yes.

Q. You wrote it yourself?

A. Typed it out.

Q. You typed it out yourself and you brought it to the council and Mr. Main didn't — (inaudible) You were unassisted?

A. Yes, well I had assistance.

Q. Tell the Board where you had your assistance from.

A. From my wife.

Q. And that is the only person?

A. Yes."

In giving these answers Ede knowingly and deliberately lied. Stromberg questioned Ede but avoided any reference to Exhibit "A".

At the conclusion of Ede's evidence Gilbey asked for an adjournment "to allow time to further clarify and with a possibility to enlighten the Board so they could make a judgment as to what really happened." Stromberg opposed an adjournment and asked that the union's application for certification be dismissed. The Board adjourned the hearing to its next sitting at Saskatoon.

At a subsequent sitting of the Board on March 5th, 1969, the truth came out. Ede testified that Main had given him Stromberg's telephone number and that he had had a telephone conversation with Stromberg. Main, who gave evidence after Ede, did not dispute this evidence. Stromberg went to the bakery about noon on August 31st, 1968, bringing Exhibit "A" with him. It is not without significance that that date is typed in on the document. Ede proceeded to have the signatories sign it and Stromberg was present when Mary Friesen signed.

Stromberg was called as a witness by Gilbey. He then informed the Board, "I was also representing Mr. Ede", a statement in complete contradiction to his statement to the Board at the opening of the hearing when he told them that "He (Ede) is on his own." Stromberg admitted he heard Ede testify that he with the assistance of his wife had drawn up Exhibit "A". Stromberg refused to answer questions as to whether he himself had drawn up or typed out the said exhibit, and as to whether any employee had signed it in his presence, all on the ground of professional privilege because Ede was his client.

It is quite clear that Stromberg deliberately deceived the Board at the onset by representing Ede as being "on his own" and by concealing the fact that he "was also representing Ede", and of his own involvement with respect to Exhibit "A"; thus deluding the Board into believing that they were listening to an independent representation made by an employee. Furthermore, knowing that Ede had by his perjured answers strengthened the representation that he was acting independently, Stromberg urged the Board to dismiss the union's application for certification on the basis of Ede's testimony, the Board being of course ignorant of the perjury and of Stromberg's own involvement with Exhibit "A". This constituted most improper conduct on his part. Youth, inexperience and excessive zeal may well have played a part in

determining the course he pursued and, having found himself in a discreditable situation, instead of frankly advising his principals of the predicament in which he found himself and seeking their guidance he also concealed the situation from them and continued to act for Main on the application. The most charitable view that I am able to take of his conduct is that he is not sufficiently acquainted with the ethical standards that are strictly required of all those who practise as gentlemen of the bar and of the duties owed by every lawyer to his client, his opponent, the Court, the state and to himself, and not the least of these are complete candour, honesty and integrity. He would be well advised to study the Canon of Ethics and to read such cases as *Meek v. Fleming*, [1961] 3 All E.R. 148.

It is but just that I should state that learned counsel for the union stated that they were entirely satisfied that Stromberg's principals, Makaroff, Sherstobitoff and Hrabinsky were in no way involved in Stromberg's actions, and Mr. Sherstobitoff advised the Court that while his firm must accept responsibility for their student's conduct, such was done without their knowledge.

It is upon these actions of Stromberg that the applicants rely to support the fourth ground advanced, namely; that the Board's refusal to exercise jurisdiction "was procured by fraud and misrepresentation on the part of the respondent employer".

On the 5th day of November, Ede completed the following document in the Union Hall in Saskatoon, and such was forwarded to the Board which was to resume hearing the application on the following morning:

"

503 33rd Street West,
Saskatoon, Saskatchewan,
November 5, 1968.

Judge R. H. King, Chairman
Labour Relations Board,
c/o Court House,
Spadina Crescent East,
Saskatoon, Saskatchewan.

I wish to withdraw my application given to the Labour Relations Board during its September hearing. I was misinformed by my employer. He stated the Union would drive him to Bankruptcy if he had to pay McGavin-Toastmaster rates. I was referred to a lawyer by my employer and the lawyer typed up the document which you have now. I misinformed the Board by answers to the questions asked me by Mr. W. G. Gilbey during the September hearings for which I am sorry.

'Terry Ede'
"DECLARED before me at
Saskatoon, in the Province
of Saskatchewan this 5th
day of November A.D. 1968
'Joanne S. Bailey'
A Commissioner for Oaths in
and for the Province of
Saskatchewan. My commission
expires December 31, 1971."

The receipt of Ede's "declaration" was the first intimation the Board received that they had listened to false evidence.

At the subsequent March hearing Ede testified that immediately following the adjournment on September 4th and while still in the Court House he approached Gilbey and said, "I guess I messed that up. I guess I didn't tell the truth." Gilbey replied, "Yes Terry you did, and I feel I have to get the truth." By appointment Ede subsequently met Gilbey at Semeniuk's home. Ede testified that he was given to understand that if he signed a document "releasing" his name from Exhibit "A" there would be no more hearings before the Board and Gilbey told him, "I was not after anybody's hide on a perjury charge — words to that effect." On a later occasion Gilbey went to Ede's house and discussed "writing this document up" and, Gilbey properly declining to write a statement for him, in due course Ede went to the Union Hall and signed the document of November 5th. He said the thought "crossed his mind" that if he did not give this document he "might run into the authorities". Thus Gilbey knew from and after September 4th of the false evidence which had been given.

The hearing re-opened on November 6th and continued on into the following day. Both Mr. Hrabinsky who replaced Stromberg on the 7th, and Mr. Gilbey advised the Board that they did not wish to call further evidence and they each addressed the Board. Mr. Gilbey stated the union's position as follows:

> "I am not prepared to abandon the area of my earlier request for outright certification and/or the alternative of the Board using its powers to inquire at an in camera hearing where the employees would be more at ease, where myself and the counsel for the employer were not present; and examine the matter. And in conscious (sic) I cannot undertake to risk any employee's tenure of employment that this union feels might be involved in any other procedure."
>
> Mr. Hrabinsky simply said:
>
> "I feel that the Board has the evidence before it and I don't think that I can add anything by saying anything further."

The Board adjourned and on November 8th ordered that a secret vote be taken. Their reason for so doing, given later in response to a request therefor by Mr. Gilbey was as follows:

> "The reason the Board ordered a vote in this application was that the majority of the Board were of the opinion that there was so much contradictory and conflicting evidence placed before it at the hearing of the application that the only way the Board could determine the wishes of the employees was to order a vote and a vote was so ordered."

The Board appointed T. Lysack, an Industrial Relations Officer, to conduct the vote. Gilbey advised Lysack that the union objected to a vote being taken and that the union would not "participate in any way in the arrangements for the conduct of the vote." The vote was held on November 28th and resulted in a tie vote. Having failed to obtain a majority of the votes the union attacked the vote by filing a "Statement of Objections to Vote". The Board heard argument on the objections on January 10th and 11th when it appeared that Lysack had inadvertently left two employees who were entitled to vote off the voters' list and such employees had not voted. Following the conclusion of the submissions the Chairman stated:

> "The Board has considered submissions placed before it and are of the opinion that in view of all the circumstances surrounding these submissions, or contained in the submissions made, they are not in a position at this time to give a decision."

The Board then adjourned the proceedings.

The hearing was again resumed on March 5th. Both Stromberg, who was again appearing for Main, and Gilbey stated that they wished to call witnesses. Gilbey called Stromberg, Miss Ens, Miss Friesen and Ede. Stromberg called Miss Zecharki and Main. The Board called Semeniuk, Mrs. Coxford and Mrs. Kucy (nee Reidt), who had come to the hearing at Stromberg's invitation. The examinations conducted by Stromberg and Gilbey ranged over areas relevant to the union's application for certification, to the false evidence given previously by Ede, to the conduct of the vote by Lysack and to alleged improper interference by Main with his employees, and the evidence of these witnesses occupies 77 pages of transcript. After hearing summations the Board adjourned. The Board now had before it sworn testimony of the falsity of Ede's testimony given them the previous September.

On March 6th the Board issued the Order which is now under attack. This order, after reciting, *inter alia*, "upon hearing the sworn evidence of witnesses and having regard to all the facts adduced in evidence before the Board," continued as follows:

> "THE BOARD HAVING FOUND THAT the vote ordered on November 8th 1968, and held on November 28th, 1968 was null and void; AND THE BOARD HAVING FOUND THAT it is expedient to conduct

a second vote by secret ballot to determine whether or not the employees concerned wish to be represented by the Applicant Union named herein, for the purpose of bargaining collectively with their Employer;

IN VIRTUE OF the authority vested in it by Section 5, Clause (a) of *The Trade Union Act*, being Chapter 287 of the R.S.S. 1965, as amended:

THE LABOUR RELATIONS BOARD HEREBY FINDS AND DETERMINES THAT all employees, including all regular part time employees, who were employed on August 19, 1968, (filing date of the application), and were still employed on November 28th, 1968, (date of the original vote) by Brother's Bakery Ltd. in or in connection with its places of business located in the City of Saskatoon, in the Province of Saskatchewan, except the owners and for the owner managers, and a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, constitute an appropriate unit of employees for the purpose of bargaining collectively;

AND IN VIRTUE OF the authority vested in it by Section 7 of *The Trade Union Act*, being Chapter 287 of the R.S.S. 1965, as amended:

THE LABOUR RELATIONS BOARD HEREBY DIRECTS THAT a vote by secret ballot be conducted among all employees who are within the bargaining unit herein determined to be appropriate for the purpose of bargaining collectively, and as stated, were employed within the said unit as of August 19th, 1968 (filing date of the application) and November 28th, 1968, (date of the original vote), to determine whether or not the said employees wish to be represented by the Retail, Wholesale and Department Store Union, AFL-CIO/CLC;"

The remainder of the order contained directions for the taking of the vote.

The power of the Board to order a representation vote is found in section 7(1) of the Act which reads as follows:

> "7. (1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by Section 16, the Board may, in its discretion subject to subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question."

In considering the forerunning section, section 6(1), *in Regina ex rel Construction and General Laborers' Local Union No. 890 et al v. Labour Relations Board et al* (1965), 52 W.W.R. 440, Culliton C.J.S., delivering the judgment of the Court said at pp. 443-44:

> "In my view the language of sec. 6(1) makes it abundantly clear that the board, in the exercise of its powers under Sec. 5(b), subject to the provision of subsec. (2) of sec. 6, with which I am not concerned in this appeal, has an unfettered discretion to direct a vote. The right to do so is clearly in addition to any powers conferred upon the Board by sec. 15. That being so, the board in ordering a vote, exercised its discretion on a matter within its jurisdiction and therefore such decision is not the subject of *mandamus*: *Re Ault: Ault v. Read* (1956), 18 W.W.R. 438; 24 C.R. 260; 115 C.C.C. 132, affirming (1956) 18 W.W.R. 428 (Alta. App. Div.)"

And at p. 445:

> "In ordering a vote, the board exercised a statutory right which it had in discharging the duty imposed upon it by sec. 5(b) of the Act. I am satisfied too, that it has the right to order such a vote, notwithstanding the nature of the evidence before it. It was for the board, and the board alone, to determine whether a vote should be directed, and that decision cannot be questioned in *mandamus* proceedings."

Again in *Regina ex rel United Steel Workers of America, CLC and Smith v. The Labour Relations Board and Noranda Mines Limited* (as yet unreported but delivered April 29th 1969)[1] Culliton C.J.S., said:

> "If the order made by the board were one within its jurisdiction, then even if wrong in law or fact, the order would not be open to judicial review. *Farrell et al v. Workmen's Compensation Board*, [1962] S.C.R. 48"

Learned counsel for the applicants submits that the union applied for certification; that instead of granting the application the Board directed a vote; and such direction resulted from the false testimony given by Ede coupled with the conduct of Stromberg. Therefore as the direction was brought about as the result of fraud this Court on *certiorari* should set the direction aside. Learned counsel relied on the following authorities:

> *Regina v. Gillyard*, [1843] 12 Q.B. 527; 116 E.R. 965. Here a maltster having procured the conviction of a servant for an offence against the Excise laws by fraud and collusion with the servant in order to protect himself against proceedings for the same offence, the Court of Queen's Bench granted a *certiorari* and quashed the conviction. Lord Denman C.J., stated that the affidavits "disclose such a case of fraud and collusion to defeat the law that this conviction cannot be allowed to stand"
>
> *The Colonial Bank of Australasia v. Willan*, [1874] L.R. 5 P.C. 417 : 43 L.J.P.C. 39. Here it was held that the Supreme Court had jurisdiction to quash on *certorari* an order of the Court of Mines on the ground of manifest fraud in the party procuring the order.

[1] Now reported in 69 WWR 58; page 535 of this volume.

Rex v. Safruk, [1923] 2 W.W.R. 1126. The Court of Appeal of Alberta on *certiorari* proceedings quashed a conviction for a liquor offence which had been obtained as a result of fraud and perjured evidence.

MacDonald v. Pier, [1923] S.C.R. 107. In an action to set aside a judgment the court held that a judgment in a civil action can be attacked on the ground of fraud and that perjury is fraud within the rule.

In re Edlund and Scott, [1944] 2 W.W.R. 39. Here Bigelow J., on *certiorari*, quashed an order given under The Deserted Wives and Childrens Maintenance Act, finding that the magistrate had been induced to make the order by the perjured evidence of the applicant in swearing that she was married to the defendant.

In *R. v. Recorder of Leicester ex p. Wood*, [1947] 1 All E.R. 928, on an application for *certiorari*, an order allowing an appeal against a bastardy order was quashed because the Recorder believed evidence which "with regard to a most material fact" was wholly untrue and perjured. Singleton J., said:

"In the words of Erle J. in *R. v. Gillyard, (supra)* :

> 'This court has authority to correct all irregularities in the proceedings of inferior tribunals, which in this case have been resorted to for the purpose of fraud. In quashing this conviction we are exercising the most salutary jurisdiction which this court can exercise.'

So, in the present case the order of the inferior court was obtained by fraud and perjury. So far as I know, this procedure is the only one which can be adopted to put right the wrong which has been done."

I have no doubt, buttressed by these decisions, that this Court had inherent jurisdiction to quash on *certiorari* proceedings the orders and decisions of inferior tribunals which were obtained by fraud and thus right the wrong which had been perpetrated upon the tribunal. In all these decisions however, the fraud had been successful in deceiving the Court below and had only come to light after the judgment had been given or the order made. It is my duty to consider the evidence dehors the record where fraud or corruption is charged. A careful examination of the 150 page transcript reveals that before the Board made the attacked order on March 6th the Board had before it the evidence filed by the Union in support of its application for certification; they had heard the *viva voce* testimony of nine witnesses and they had the exhibits tendered. Ede's perjury and the extent thereof and Stromberg's conduct had been completely exposed and the Board were fully cognizant thereof. How then can it be said that the Board was the victim of deception at the time it made its order?

This then brings me to the final case cited by learned counsel for the applicants, *Meek v. Fleming*, [1961] 3 All E.R. 148, which was an application for a new trial on the ground that the defendant had deliberately misled the Court in a material matter. Here, at the trial, the defendant had been deliberately palmed off to the Court as being a police inspector, which he was not, in order to give his testimony greater credit with the jury, and credit was a crucial issue as it was one man's word against the other. Holroyd Pearce L. J., said at p. 154:

> "Where a party deliberately misleads the court *in a material matter and that deception has probably tipped the scale in his favour* (or even, as I think, where it may reasonably have done so) it would be wrong to allow him to retain the judgment thus unfairly procured. *Finis litium* is a desirable object, but it must not be sought by so great a sacrifice of justice which is and must remain the supreme object. Moreover, to allow the victor to keep the spoils so unworthily obtained would be an encouragement to such behaviour, and do even greater harm than the multiplication of trials. In each case it must be a question of degree, weighing one principle against the other."
>
> (the italics are mine.)

And at page 155:

> "It would be an intolerable infraction of the principles of justice to allow the defendant to retain a verdict thus obtained."

Willmer L. J., said at pp. 155-56:

> "But here we are concerned with evidence relating to the character of one of the parties to the suit, and it is a case in which the character of the parties was of peculiarly vital significance, so that failure to disclose the defendant's record amounted in effect to presenting the whole case on a false basis." and
>
> "Where the court has been thus deceived in relation to what I conceive to be a matter of vital significance, I think that it would be a miscarriage of justice to allow a verdict obtained in this way to stand."

Unfortunately perjury is no stranger to Her Majesty's Courts and no doubt visits boards and other tribunals with equal frequency. To justify setting aside a judgment or order the perjury must be with respect to a material matter. Ede's perjury was with respect to who prepared Exhibit "A" and who took the document to the bakery. In my opinion this evidence can hardly be said to be with respect to a material matter before the Board for determination, or be said to have "tipped the scale" in the Board arriving at a decision to hold a representation vote. Furthermore, perjury in a collateral area not affecting a material issue or perjury discovered and exposed during the trial or hearing do not have the effect of undiscovered perjury on a material issue which could

reasonably be considered as having had the effect of causing the misled Court or tribunal to tip the scale in favour of the fraudulent party. Perjury *per se* is not sufficient cause to set aside an order or judgment of an inferior tribunal.

Section 3 of the Act provides as follows:

> "Employees shall have the right to organize in and to form, join or assist Trade Unions and to bargain collectively through *representatives of their own choosing*, and the representatives designated or selected for the purpose of bargaining collectively by the majority of employees in a unit appropriate for that purpose shall be the exclusive representatives of all employees in that unit for the purpose of bargaining collectively."
>
> (The italics are mine.)

The fundamental right given to employees by this section is to bargain collectively with their employer "through representatives of their own choosing." According to the union's application it claimed to represent the choice of a majority of the employees of the bakery. The choice of an employee made prior to certification to be represented by a union is not final and sacrosanct, and surely an employee is free to change his mind and so advise the Board at the hearing. This right of an employee to change his mind is not to be circumvented by following the course suggested by Mr. Gilbey in his argument that the Board should grant certification and advise the employees that they had "the right at the end of ten months to withdraw from the union" by making an application for decertification. The rights of unions and employees are subordinate to the right of every employee to express his free choice on an application for certification as to whether or not he wishes to be represented by a union for the purpose of collective bargaining.

One of the paramount duties of the Board is to ascertain if the applicant union represents a majority of the employees in the unit, (sec. 5 (b)), and one of the tools given the Board for this purpose is the democratic process of ordering vote by secret ballot: Sec. 7. This the Board did by its order of March 6th, in which it also determined that the said employees were an appropriate unit for the purpose of bargaining collectively. It was within its jurisdiction in directing a vote and it did so at a time when no undisclosed fraud was operating upon it. The union's application for certification stands undetermined while the Board ascertains by vote whether the majority of the employees in fact wish to be represented by the union.

To avoid further applications of a technical nature relative to the Order of March 6th, I draw the Board's attention to two matters which are not before me. The "Notice to Vote" form in the regulations of the Board prepared pursuant to Regulation 14(e) contains the following provision:

> "Those eligible to vote shall be the persons whose names appear on the 'Voters List' which is marked 'Appendix II' . . . and who, at the time of voting, are still in the employment of the employer referred to above."

The Order instead states "were still employed on November 28th 1968". Secondly: the employer is referred to in the Order as "Brother's Bakery Ltd.". No doubt in drafting the order the amendment to the style of cause was overlooked.

For the reasons given above the application is dismissed.

I further order that the respondent Board recover its costs of and incidental to this application from the applicants; such costs to be taxed and allowed under Column 5 of the Tariff of Costs. As this application arose as a result of the improper conduct of the employer's representative and to express the Court's disapproval thereof there will be no order as to costs in so far as the respondent Main is concerned.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 16th day of May, A.D. 1969.

"D. C. Disbery", J.

SUPREME COURT OF CANADA

Before Martland, Judson, Ritchie, Hall and Spence, JJ.

Noranda Mines Limited v. Reginam *et al*
Labour Relations Board of Saskatchewan v. Reginam *et al*

Trades and Trade Unions — Labour Relations Board — Application for Certification — Determination Whether Proposed Unit Appropriate — Whether Estimated Growth of Work Force Relevant Factor.

Appeal from the judgment of the court of appeal for Saskatchewan (1969) 69 WWR 58, quashing an order of the labour relations board and causing to issue a writ of *mandamus* against the board to hear and determine an application for orders pursuant to sec. 5 of *The Trade Union Act*, R.S.S., 1965, ch. 287. The board found as a fact that at the date of the application there were 25 employees in the unit applied for and that in approximately a year's time the number would have grown to 326, and dismissed the application on the ground that the present number of employees did not constitute a representative segment of the future working force of the employer. The court of appeal held that the board had failed to discharge the duty imposed upon it by sec. 5 (*a*), (*b*) and (*c*) of the Act, that it had not directed its consideration to the rights of the present employees as provided by the Act, and that it had, for these reasons declined to exercise its jurisdiction.

It was *held, per curiam*, that the appeal must be allowed and the board's order restored; the combined effect of secs. 3, 5 (*a*) and 5 (*b*) of the Act was to confer on the board, as a matter within its exclusive jurisdiction, the power to determine whether a proposed unit was appropriate for the purpose of collective bargaining, and in so doing it was not subject to any directions contained in the Act and it could consider any factors which might be relevant; in the case at bar the board properly took into account the size of the proposed unit and the estimated growth of the work force, both of which matters were relevant to the question whether the unit was appropriate; it had in fact exercised its jurisdiction and upon proper grounds.

[Note up with 21 CED (2nd ed.) *Trades and Trade Unions*, secs. 8A, 8B.]

D. K. MacPherson, Q.C., for Noranda Mines Ltd.

M. Chan, for labour relations board.

G. J. D. Taylor, Q.C., for respondents.

July 22, 1969.

The judgment of the court was delivered by

MARTLAND J. — This is an appeal from a judgment of the Court of Appeal for Saskatchewan,[1] which quashed an order of the Labour Relations Board of the Province of Saskatchewan (hereinafter referred to as "the Board") and issued a peremptory writ of *mandamus* to the Board to determine, according to law, the application of the United Steelworkers of America, C.L.C. (hereinafter referred to as "the Union"), to become the representative of a unit of employees of the appellant company (hereinafter referred to as "Noranda"), for the purpose of bargaining collectively.

[1] Page 535 of this volume. (1969) 69 WWR 58

The union's application to the Board was made on November 28, 1968. The proposed unit of employees comprised all employees of Noranda's Potash Division at its mine site near Colonsay, Saskatchewan, except managers, superintendents, foremen, office and clerical staff, plant security, and any person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity.

The application asked the Board to determine: That this was an appropriate unit of employees for the purpose of bargaining collectively; and that the union represented a majority of the employees in that unit; and to require Noranda to bargain collectively with it.

By a majority decision, the Board, on January 11, 1969, ordered that the application be dismissed. The order stated that the majority of the Board found that, in this particular case, the number of employees employed by Noranda, at the filing date of the application, did not constitute a substantial and representative segment of the working force to be employed in the future by Noranda.

In the reasons delivered by the majority of the Board, the following statement is made:

> As of November 28, 1968, the date of this application, there were 23 employees only in the bargaining unit applied for and as of the date of hearing, namely, January 7, 1969, there were 25 employees in the bargaining unit. The Respondent Company estimated that the full complement of employees in December, 1969, will number approximately 326. There was no evidence to indicate that the proposed full complement of employees would not be reached by the estimated date or that their reaching this complement depended on foreseeable factors outside the control of the Respondent that might cause them to not reach their targeted complement of employees by the said date.
>
> ....

The problem the Board is faced with in this type of application is balancing the right of present employees to be represented by a union for the purpose of bargaining collectively and the rights of future employees to select a bargaining agent as was stated in the *Emil Frants and Peter Wasilowich* case, Volume 1 [1944-1959] C.L.L.C. Paragraph 18057, and applied by this Board in the *International Brotherhood of Electrical Workers, Local Union No. 2038 and ITT Canada Limited* case, [1967] C.L.L.C. Paragraph 16016.

The Board, in coming to its decision, must consider the type of operation, the segment of the employees employed in the proposed bargaining unit at time of application, the total number of employees estimated there will be in the proposed bargaining unit, and the date at which the proposed build-up will be achieved.

The minority of the Board took the position that the "principle" applied by the majority was in direct contradiction to the provisions of *The Trade Union Act*, R.S.S. 1965, C. 287, as amended. It was their view that:

In this case the basic requirements to obtain certification under *The Trade Union Act* were present.

1. There was an "Employer".
2. There were a number of "Employees".
3. An appropriate bargaining unit had been set out and agreed upon.
4. There was clear cut evidence of support.
5. All forms had been filed in proper order.

The union applied to the Court of Appeal for Saskatchewan for a writ of *mandamus* requiring the Board to exercise its jurisdiction under s. 5(a), (b) and (c) of the above Act, in respect of the union's application; for a writ of *certiorari*; and for an order quashing the order of the Board.

This application was granted. The reasons for so doing are stated in the following passages from the judgment of the Court:

> Learned counsel for both the employer and the Labour Relations Board contended that the order of the Board must be construed as a determination by the Board that the unit of employees described in the application did not constitute an appropriate unit for the purpose of bargaining collectively; that such determination was a matter wholly within the Board's jurisdiction and therefore not subject to review, either in *certiorari* or *mandamus* proceedings.
>
> If the order made by the Board were one within its jurisdiction, then even if wrong in law or fact, the order would not be open to judicial review. *Farrell et al v. Workmen's Compensation Board*, [1962] S.C.R. 48. Too, if the decision of the Board could be construed as contended for by learned counsel for the employer, and the Board, a strong argument might be advanced that the decision, even if wrong, cannot be questioned in these proceedings. In my respectful view, however, the decision of the Board cannot be construed as a determination that the unit of employees described in the application does not constitute an appropriate unit for the purpose of bargaining collectively. Clearly, the Board dismissed the application because, in its opinion, the number of employees employed by the employer at the time of the application, did not constitute a substantial and representative segment of the working force to be employed in the future. There was no finding that the unit of employees

described in the application was not an appropriate unit, nor was there any finding that the applicant union did not represent a majority of employees in such unit. What the Board in fact did, was to dismiss the application because, in its opinion, the time for making the same was not appropriate.

. . . .

While the language of section 5(a), (b) and (c) is permissive in form, it imposes the duty upon the Board to exercise the powers when called upon to do so, by a party interested and having the right to make the application. In the present case, the right of the union to make the application, and that the union represents a majority of employees in the proposed unit, were never questioned.

When the application was made, it was the duty of the Board to hear the application and to give effect to the statutory rights of the employees. While the Board considered the application, it failed to direct its consideration to the rights of the employees as provided for in *The Trade Union Act* and rejected the application on a ground which was wholly irrelevant. By so doing, in my opinion, the Labour Relations Board declined to exercise the jurisdiction and to perform the duties imposed upon it by the section of the Act I have quoted.

From this judgment Noranda and the Board have appealed to this Court.

The relevant provisions of the Act are the following:

3. Employees shall have the right to organize in and to form, join or assist trade unions and to bargain collectively through representatives of their own choosing, and the representatives designated or selected for the purpose of bargaining collectively by the majority of employees in a unit appropriate for that purpose shall be the exclusive representatives of all employees in that unit for the purpose of bargaining collectively.

5. The board shall have power to make orders:

(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, professional association unit or a subdivision thereof or some other unit;

(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;

(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;

20. There shall be no appeal from an order or decision of the board under this Act, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari*, *mandamus*, prohibition, injunction or other proceeding whatever.

Section 3 is the primary section of the Act, giving to employees the right to organize and to bargain collectively, through representatives of

their own choosing, "in a unit appropriate for that purpose." Whether or not a unit is appropriate for the purposes of collective bargaining is a matter which requires determination, and, while s. 5(a) is not as clearly worded, in this connection, as it might be, it is my view that, reading ss. 3, 5(a) and 5(b) together, the Act obviously contemplates that the determination of that question is for the Board. By virtue of s. 20, the jurisdiction of the Board in this matter is made exclusive. Therefore, as is pointed out in the judgment of the Court of Appeal, if the order in question here is within that jurisdiction, it is not open to judicial review because of error, whether of law or fact (*Farrell v. Workmen's Compensation Board*, [1962] S.C.R. 48 at p. 51).

The Court of Appeal was of the view that the Board's order was not made within its jurisdiction, because, in the opinion of the Court, it did not thereby determine that the proposed unit of employees was not appropriate for collective bargaining, or that the union did not represent a majority of the employees in the unit. In the view of the Court, "what the Board in fact did, was to dismiss the application because, in its opinion, the time for making the same was not appropriate." In so doing, it was said, it failed to give effect to the legal rights of the employees conferred by the statute, which it was under a legal obligation to do.

With respect, I do not share this view. In my opinion, the Board has jurisdiction under the Act to determine whether or not it considers a proposed unit of employees to be appropriate for collective bargaining. In determining that issue the Board is not subject to any directions contained in the Act and it can, therefore, consider any factors which may be relevant. The application to the Board asked it, *inter alia*, to determine that the unit described in the application was an appropriate one. The application was dismissed, thereby demonstrating that the Board was not prepared to make that determination in the union's favour. The Board ruled on a matter over which it had exclusive jurisdiction.

The reasons which were given by the Board for this exercise of its jurisdiction were that the number of employees employed by Noranda at the time the application was made did not constitute a substantial and representative segment of the working force to be employed by Noranda in the future. In my opinion, the Board had full discretion under the Act to take that factor into consideration when considering the application. The expected increase in Noranda's work force, in the year 1969, from 25 to approximately 326 was a factor of great weight in deciding whether the proposed unit was appropriate and, as provided in s. 5 (b), in "determining what trade union, if any, represented a majority of employees in an appropriate unit of employees."

That the Board should consider this factor in cases of this kind, in the interests of employees, seems to me to be logical. A union selected by a handful of employees at the commencement of operations might not be the choice of a majority of the expected large work force. The selection of

a union at that early stage could be more readily subject to the influence of an employer. A large work force, when a plant went into operation, might comprise employees in various crafts for whom a plant unit, comprising all employees, other than management, might not be appropriate. In my view the Board not only can, but should, consider these factors in reaching its decision when asked to make a determination under s. 5(a) and (b).

To summarize the position, in my opinion, with respect, the Court of Appeal erred when it held that the Board had dismissed the application on a ground which was wholly irrelevant and had declined to exercise its jurisdiction. What the Board did do was to take into consideration, when determining whether the proposed unit of employees was appropriate for collective bargaining, and whether the union represented a majority of employees in that unit, the nature of Noranda's business, the fact that it was at its inception, and the fact that it was expected to increase its labour force enormously within a year. This it was entitled to do, and its decision, based on those and other factors, is not subject to review by the Court.

At the conclusion of the argument of this appeal the Court announced its decision, advising that written reasons would be delivered later. That decision was that the appeal be allowed, that the judgment of the Court of Appeal be set aside and that the order of the Labour Relations Board be restored, with costs to both appellants in this Court and in the Court of Appeal.

SASKATCHEWAN

COURT OF APPEAL

Before: Culliton, C.J.S., Woods and Maguire, JJ.A.

July 24, 1969; received July 30, 1969.

Regina, REL I.W.A. Local 1-184 and Saskatchewan Labour Relations Board and Woodlands Enterprises Ltd. *et al.*

Application for certification — Intervention by union already certified — Move to introduce evidence that certification obtained by fraud — Board refusing to go behind certification — Application for mandamus — The Trade Union Act, R.S.S. 1965, c. 287.

The applicant, a trade union, moved for a writ of *mandamus* directed to the Labour Relations Board, asking the Board to deal with an application for certification, made by the applicant, in relation to the employees of the respondent employer. The applicant was aware that another union had the bargaining rights for the employees of the respondent. The respondent union had been granted the bargaining rights two years previously and a collective agreement was in force. The applicant sought to introduce evidence that the earlier certification was procured by fraud and misrepresentation. The Board ruled that it had no jurisdiction to quash the prior certification. It also refused to permit an amendment alleging fraud. When the board refused to go behind the original order the applicant moved for a writ of *mandamus*.

Held: The application was dismissed. An order having been made under s. 5 of *The Trade Union Act* the only right which the Board had was to rescind or amend the same. Only the parties bound by the order, the employer, the employees or the trade union were entitled to apply for such rescission or amendment. There was no provision in the act giving the Board jurisdiction to entertain such an application by a third party. The Board derived its authority from the statute. Having no jurisdiction to entertain the request by the applicant to enquire into the validity of the earlier order, the Board was right in refusing to do so. The Board had not declined jurisdiction or failed to carry out the duties imposed upon it by the Act. There were no grounds for attacking the proceedings by *certiorari*.

G. J. D. Taylor, Q.C., for the applicants.

D. K. MacPherson, Q.C., for the respondent union.

M. Y. Chan, for the Labour Relations Board.

R. W. Mitchell, for the respondent employer.

JUDGMENT OF THE COURT — *CULLITON, C.J.S.*

This is an application by International Woodworkers of America Local Union 1-184, a trade union, for a peremptory writ of *mandamus* directed to the Labour Relations Board of Saskatchewan, commanding it to exercise the jurisdiction conferred upon it under section 5, clauses (a), (b) and (c) of *The Trade Union Act*, R.S.S. 1965, Chapter 287, in respect to an application made to it by the applicant trade union dated March 19, 1969. In that application the applicant trade union applied to the Labour Relations Board for an order determining that the unit of employees

therein described constituted an appropriate unit for the purpose of bargaining collectively; that the applicant trade union represented a majority of such employees, and requiring Woodlands Enterprises Limited, the employer, to bargain collectively with the trade union. In the application the trade union stated that to its knowledge there was another trade union, namely, the Construction and General Laborers Union Local No. 890, which claimed to represent the employees in the unit of employees described in the application.

As required by Rule 7 of the Rules and Regulations of the Labour Relations Board, a copy of the application was forwarded to Construction and General Workers Union Local No. 890, (formerly called Construction and General Laborers Union Local 890). This union, pursuant to Rule 8 of the Rules and Regulations of the Labour Relations Board, filed Notice of Intervention. In the Notice of Intervention the Construction and General Workers Union claimed that there were 198 employees in the proposed unit, and that it represented a majority of these employees. It further stated in the said Notice of Intervention, as follows:

> "(a) On the 3rd day of May, 1967, the Labour Relations Board of the Province of Saskatchewan issued its Order determining:
>
> (i) that all employees employed by Woodlands Enterprises Limited within the jurisdictional boundaries of Local 890, as determined by the Laborers International Union of North America, from the 51st parallel to the Northwest Territories, in the Province of Saskatchewan, save and except superintendents, foremen, office staff and a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, are an appropriate unit for the purpose of bargaining collectively;
>
> (ii) that the Construction and General Laborers Local Union No. 890, chartered by the Laborers International Union of North America, a trade union within the meaning of the Trade Union Act represents a majority of employees in the said appropriate unit of employees;
>
> (iii) requiring Woodlands Enterprises Limited to bargain collectively with the Construction & General Laborers Local Union No. 890 with respect to the said appropriate unit of employees;
>
> (b) That the only employees of Woodlands Enterprises Limited in the Province of Saskatchewan are those within the said bargaining unit set forth in the said Board Order;

(c) That the said Board Order dated the 3rd day of May, 1967 is still in full force and effect.

(d) That there is in existence a Collective Bargaining Agreement which has been entered into between Woodlands Enterprises Limited and Construction and General Laborers Union Local 890 in respect of the employees within the bargaining unit referred to in the said Board Order dated the 3rd day of May, 1967 and that the said Collective Bargaining Agreement has an effective date of February 1, 1969 and expires on the 31st day of March, 1971, and the said Collective Bargaining Agreement is still in full force and effect."

The application came on for hearing before the Labour Relations Board on May 15, 1969.[1] At that time learned counsel for the applicant union stated he proposed to adduce evidence before the Board that the order of certification made by the Board on May 3rd, 1967, was procured by fraud and misrepresentation and accordingly Construction and General Workers Union had no status to intervene and that the said Order and all matters flowing therefrom should be treated as if the Order had not been made, or as if the matters flowing therefrom had never occurred. A. Neumann, signatory to the Notice of Intervention, was called and learned counsel for the applicant union sought to cross-examine him as to the circumstances relative to the granting of the Order of May 3rd, 1967.

Learned counsel for Construction and General Workers Union contended there was no right in the application under consideration to question the validity of the Order of May 3rd. He submitted that such Order, unless rescinded in accordance with the provisions of *The Trade Union Act*, or quashed by a court of competent jurisdiction, was a valid and subsisting Order and must be so considered by the Board in the applicant's application for certification. The Labour Relations Board took this objection under consideration and, on May 27th, ruled as follows:

> "The Board being created by Statute has no jurisdiction other than that as set out in the act creating it — namely The Trade Union Act. Nowhere in the said Trade Union Act is there any power given to this Board to quash or declare any Order made by the Board a nullity. The Order, in the Board's opinion, must stand until such time as a court of competent jurisdiction quashes the Order.
>
> * * * * * * * *
>
> "The Board rules it has no jurisdiction to hear this application based on the submission of counsel for the applicant that he is proceeding on the basis that the Board should quash or declare the original Order a nullity."

[1] Page 155 of this volume [Case No. 3.071]

The same day the applicant union applied to amend its application to ask for an order rescinding the Order of May 3rd, 1967, on the ground the same was obtained by fraud and misrepresentation. The Board refused this amendment, stating it lacked jurisdiction to quash an Order alleged to have been obtained by fraud and that to allow the amendment would be to allow the applicant to circumvent the ruling already made by the Board.

Learned counsel for the applicant Union then posed the following question for the Board's consideration:[2]

> "Has this Board by its previous rulings in this case ruled that the applicant may not lead evidence to attempt to show the support filed by counsel for the Intervener ought to be totally disregarded by the Board in dealing with the Applicant's application. Mr. Taylor stated the evidence he wished to lead would deal with the intervention in the sense that he would attempt to show fraud with respect to the original certification Order which in his submission would so taint any resulting agreements made or support filed that the Board ought totally to disregard their intervention."

On June 3rd the Board ruled as follows:

> "The Board has made two previous rulings in this case. The first ruling being that the Board should not hear evidence relating to fraud or misrepresentation with respect to the original certification Order as they had no jurisdiction to quash or declare a nullity the original Order. This Board held it was not the proper forum in which such an alleged wrong could be redressed.
>
> "The second ruling was that the Board would not allow an amendment requested by the Applicant. The requested amendment was to add an application for rescission to the original application for certification. The Board ruled that in view of the previous ruling of it having no jurisdiction to quash or nullify a previous order on the basis of evidence of fraud or misrepresentation that such evidence with respect to a rescission application would only be allowing the Applicant to circumvent what it had already ruled it has no jurisdiction to determine. For this reason any evidence relating to fraud or misrepresentation with respect to the original certification order would be irrelevant and inadmissible.
>
> "Consequently in view of these above rulings, the Board does not intend to go behind the original Board Order nor does it intend to hear any evidence relating to fraud or misrepresentation with respect to the obtaining of that order."

2 Page 159 of this volume [Case No. 3.073]

The applicant union then made this application for a writ of *mandamus* and for a further order that a writ of *certiorari* do issue for return to the court of the record and Orders of the Labour Relations Board made on May 27th, and June 3rd, and that such Orders or decisions be quashed.

Two pertinent facts are beyond dispute:

(1) at the time the applicant union applied for an order under section 5, subsections (a), (b) and (c), of *The Trade Union Act*, there was in existence an Order of the Board, dated May 3, 1967, under which the Board had found and determined that all the employees of Woodlands Enterprises Limited, except those precluded by statute, constituted an appropriate unit of employees for the purpose of bargaining collectively; that Construction and General Workers Union Local 890 represented a majority of such employees and that Woodlands Enterprises Limited was required to bargain collectively with that union; and

(2) that there was in effect at the time a collective bargaining agreement between Woodlands Enterprises Limited and Construction and General Workers Union.

Section 5, subsections (a), (b) and (c), read:

"5. The board shall have power to make orders:

(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, professional association unit or a subdivision thereof or some other unit;

(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;

(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;"

When a trade union, as here, applies for an order determining it to represent the majority of employees in an appropriate unit for which there is an existing Board Order determining another trade union to represent the majority of employees in the unit, section 7(3) is applicable. This section is as follows:

"7.—(3) Where a trade union:

(a) applies for a board order determining it to represent the majority of employees in an appropriate unit for which there is an existing board order determining another trade union to represent the majority of employees in the unit; and

(b) shows that twenty-five per cent or more of the employees in the appropriate unit have, within the six months next preceding the date of the application, indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining;

> the board shall direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:
>
> (c) is satisfied that another trade union represents a clear majority of the employees in the appropriate unit;"

Learned counsel for the applicant union contended he had a right to question the validity of the order issued on May 3rd. He argued that if he could succeed in having the Board declare such an order to be a nullity, the Board would proceed to consider the present application as if there were no existing Order. It was his contention that the intervening Union need not have intervened, but, having done so, some onus rested upon it to maintain and establish the validity of its certification order.

In my respectful view such an argument is not a tenable one. The intervening union had every right to intervene. It had the right to place before the Board the basis upon which it claimed to represent a majority of employees in the appropriate unit. Too, it would have the right, in the light of the new application, to prove that it still represented a majority of such employees. No onus rested upon it to establish the validity of its order.

In my opinion the order of the Board of May 3rd, 1967, remains a valid and subsisting order until such time as,

(a) the Labour Relations Board amends or rescinds such order in accordance with the powers conferred upon it by the Act, or

(b) the Order is quashed by the decision of a court of competent jurisdiction, or

(c) the Order is rescinded or amended by the operation of statute if and when the Board should determine that another trade union represents a majority of employees in the said appropriate unit.

This was the view expressed by this Court in *Army & Navy Department Store Limited v. Retail, Wholesale and Department Store Union* (1962), 39 W.W.R. 311. Thus, when the application was made, the Order of May 3, 1967, was a valid and subsisting Order and had to be so recognized by the Board and the applicant union.

The question then arises, did the Board have the right to grant the request of the applicant union that it declare the Order of May 3rd a nullity on the allegation that the same was obtained by fraud and misrepresentation? The powers of the Board and the rights of the applicant union, must be found within the provisions of the statute. As Kerwin, J., said at page 23 in *Toronto Newspaper Guild v. Globe Printing Company*, [1953] 2 S.C.R. 18,

> "We start with the proposition that when an administrative tribunal has been set up by a paramount legislative body it is the intention that such tribunal keep within the powers conferred upon it."

When an Order has been made by the Board under section 5, subsections (a), (b) or (c) of the Act, the only right which the Board has in respect to that order is to rescind or amend the same. It seems to me that it is inherent in the whole scheme of the Act that the *only parties entitled* to apply for the rescission or amendment of the certification order would be those who were directly bound by the order when it was made: that is, the employer, the employees and the certified trade union. There is no provision in the Act giving the Board jurisdiction to entertain such an application by a third party. The Board is not a court; it has no inherent powers and has only those powers conferred upon it by the legislation. Therefore I must conclude that the Board, having no jurisdiction to entertain a request by the applicant trade union to enter upon an inquiry as to the validity of its order of May 3rd, was right in refusing to do so.

The Trade Union Act specifically provides for an application to be made under section 5, subsections (a), (b) and (c) when there is already in existence a certification order. When such an application is made, the primary issue is whether the applicant union at that time represents a majority of the employees in the appropriate unit. How, and by what means, the original certification order was obtained, is really immaterial, the basic question being which trade union, at the time of the application, represents a majority of the employees. In such application, because of the provisions of the Act, the existence of the Order does not establish as a fact that the intervening union represents at the time of the application, a majority in the appropriate unit. The existence of the Order, however, does require the Board to proceed in accordance with section 7(3) of the Act.

Learned counsel for the applicant union submitted that the refusal of the Board to permit him to adduce evidence and to cross-examine as to the circumstances relative to the granting of the Order of May 3rd, constituted a declining of jurisdiction of the Board. In support of this submission he relied upon the decision of the English Court of Appeal in *The Queen v. Marsham*, [1892] 1 Q.B. 371. In *Toronto Newspaper Guild v. Globe Printing Company, (supra)* Kerwin, J., at page 24, referred to that decision and quoted the following from Lord Esher's judgment:

> "Now, the form in which he is said to have declined jurisdiction is, that he refused to hear certain evidence which was tendered before him, and it is suggested on behalf of the board that such refusal, at the most, only amounted to wrongful refusal to receive evidence, and not to a declining of jurisdiction. The distinction between the two is sometimes rather nice; but it is plain that a

> judge may wrongly refuse to hear evidence upon either of two grounds: one, that even if received the evidence would not prove the subject-matter which the judge was bound to inquire into; the other, that whether the evidence would prove the subject-matter or not, the subject-matter itself was one into which he had no jurisdiction to inquire. In the former case the judge would be wrongly refusing to receive evidence, but would not be refusing jurisdiction, as he would in the latter. Here the magistrate does not say that the evidence tendered would not prove the fact that the claim of the board included matters outside the statute; he has refused to hear the evidence, even though it would prove that fact; he has, therefore, declined jurisdiction."

After having done so, Kerwin, J., went on to say:

> "Lord Esher's judgment, I think, sets forth the test to determine whether there be, in any particular case, a mere rejection of evidence or a refusal of jurisdiction."

In my opinion the evidence which learned counsel for the applicant union intended to adduce, and the cross-examination which he intended to conduct, would not prove the subject matter into which the Board was bound to inquire. The question for investigation was whether or not the applicant trade union, at the time, represented a majority of the employees in the appropriate unit. The circumstances surrounding the granting of the Order dated May 3rd would have no bearing on this question. The ruling of the Board, therefore, in this respect, cannot be construed as a declining of jurisdiction.

I am satisfied that the Board, in the various rulings which it made, did not decline jurisdiction, or fail to carry out the mandatory duties imposed upon it by *The Trade Union Act.* Nor in my opinion is there any basis upon which the rulings so made can be attacked in *certiorari* proceedings.

The application is therefore dismissed. The respondent union will have its costs from the applicant.

DATED at the City of Regina, in the Province of Saskatchewan, this 24th day of July, A.D. 1969.

"E. M. Culliton"
E. Culliton, C.J.S. for the Court.

CORAM: CULLITON, C.J.S., WOODS and MAGUIRE, JJ.A.

SASKATCHEWAN

QUEEN'S BENCH CHAMBERS — MACDONALD, J.

Smith-Roles Ltd.
v. Labour Relations Board of Saskatchewan et al

Trades and Trade Unions — Labour Relations Board Order — Refusal of Jurisdiction Apparent on Record — Certiorari.

Sec. 10A (added 1969, ch. 66) of *The Trade Union Act*, R.S.S. 1965, ch. 287, provides that where a strike has continued for 30 days either the trade union or the employer or any employee involved in the strike may apply to the labour relations board to conduct a vote among the striking employees to determine whether a majority are in favour of accepting the employer's final offer and returning to work.

On an application under sec. 10A the union alleged a final offer of October 15, 1968 and the employer, in its reply, alleged that its final offer was made on a later date; in its decision the board held that it had no jurisdiction to determine the terms of the final offer or when it was made.

It was *held* that the board's order must be quashed, the board having refused to exercise a jurisdiction which it had, and such refusal being apparent on the face of the record; it was clear that the board could not act under sec. 10A unless it had the power to determine what was the final offer, and unless this were so it would not be possible to hold a vote: *Labour Relations Board v. Reg. ex rel F. W. Woolworth Co.* [1956] SCR 82, affirming (1954) 13 WWR (NS) 1, 19 CR 308, 6 Abr Con (2nd) 982; *Noranda Mines Ltd. v. Reg.; Labour Relations Board of Sask. v. Reg.* (1969) 69 WWR 321, reversing *ibid.*, p. 58 (Can.); *Re Ont. Labour Relations Board; Toronto Newspaper Guild, Local 87, Amer. Newspaper Guild (C.I.O.) v. Globe Printing Co.* [1953] 2 SCR 18, at 24, 106 CCC 225, affirming [1952] OR 345, 102 CCC 318, 6 Abr Con (2nd) 970 applied.

[Note up with 21 CED (2nd ed.) *Trades and Trade Unions*, sec. 8A.]

H. H. Dahlem, for applicant.

J. A. Stack, for respondent board.

R. J. Romanow, for respondent union.

October 31, 1969.

MACDONALD, J. — This is an application on behalf of Smith-Roles Ltd. by notice of motion for an order that a writ of *certiorari* do issue for the return to this court of an order of the labour relations board (hereinafter referred to as "the board") made on October 8, 1969, and for an order that the said order be quashed without the actual issue of the writ of *certiorari*.

The respondent union made a preliminary objection to the use of portions of an affidavit of Clemence Roles on this application. The applicant's counsel stated that he was quite prepared to rely on the record and not on the affidavit, so it is not necessary to consider the objection. It was admitted by the applicant that there was no evidence offered of a denial of natural justice. The applicant relied on two grounds:

"1. That in making the said Order or Decision the said Labour Relations Board of the Province of Saskatchewan erred in law and that the said errors are manifest upon the face of the record.

"2. That in making the said Order or Decision the said Labour Relations Board exceeded its jurisdiction, or alternatively acted without jurisdiction, in that it directed a vote without ascertaining the final offer of the Applicant, Smith-Roles Ltd."

In 1969 *The Trade Union Act*, R.S.S., 1965, ch. 287, was amended by 1969, ch. 66 by adding sec. 10A:

"10A.—(1) Where a strike has continued for thirty days:

"(a) the trade union;

"(b) the employer; or

(c) any employee of the employer;

involved in the strike, may apply to the board to conduct a vote among the striking employees to determine whether a majority of such employees voting thereon whose ballots are not rejected are in favour of accepting the employer's final offer and returning to work."

"(2) Upon receipt of an application under subsection (1) the board or a person appointed by the board shall forthwith conduct the vote requested by secret ballot.

(3) Every employee who is involved in the strike and who has not secured permanent employment elsewhere is entitled to vote for the purposes of this section.

(4) No more than one vote shall be held or conducted under this section.

(5) Where pursuant to this section employees have voted to accept an employer's final offer and to return to work, the employer shall not withdraw that offer."

The United Stone and Allied Products Workers of America, Local No. 200, represented a majority of the employees of Smith-Roles Ltd. of Saskatoon, Saskatchewan. The employees of Smith-Roles Ltd. went out on strike on the 21st of March, A.D. 1969. The strike has continued to the present time.

The union made application to the Board on or about the 19th of September, 1969, asking for a vote under section 10A, *supra*, alleging a final offer of October 15th, 1968. Smith-Roles Ltd. filed a reply to the application in which it alleged that its final offer was made on the 11th day of August, 1969.

The Board made its decision stating as follows, in part:

"The Board is of the opinion that the legislature has clearly directed that in the event of a strike lasting over 30 days, and in the event any of the three parties named in 10A (1) above apply to the Board to conduct a vote the Board is required to do so.

> It is the Board's opinion the question of what the terms of the final offer are or when it was arrived at are not within the jurisdiction of this Board and form no part of the material to be filed or the evidence to be heard pursuant to an application made under section 10A of the Act."

The opinion of the Board so stated was supported by the respondent union. The respondent union argued that the Board's responsibility under section 10A was administrative only but in my opinion subsection (5) of section 10A, *supra*, makes the holding of a vote an act of a judicial nature.

The Court in an application such as this is limited to a consideration of the record and when there is a privative clause (as there is here)

> "Where there is such a privative clause, I think the law is well settled that the Court in *certiorari* proceedings is restricted to determining whether or not the inferior Court or tribunal acted within its jurisdiction (including matters akin thereto, such as bias, denial of natural justice, fraud, etc.), or whether there is error on the face of the record: * * * *"
>
> * * * * * * * * *
>
> "The problem which confronts the Court when the Board errs is whether the error is one going to jurisdiction or one on an issue within its jurisdiction."

Culliton, C.J.S., in *Regina v. Labour Relations Board of Saskatchewan, Ex Parte Tag's Plumbing & Heating Limited*, 34 D.L.R. (2d) 128 at 131.

In *Board of Prince Albert School Unit No. 56, Prince Albert, Saskatchewan v. National Union of Public Employees' Local Union No. 832*, 35 D.L.R. (2d) 361 at page 362, Culliton, C.J.S., restates the position as follows:

> "In the recent case of *R. v. Labour Relations Board of Saskatchewan, Ex parte Tag's Plumbing & Heating Ltd.* (1962), 34 D.L.R. (2d) 128, the Court reviewed the effect to be given to the privative clause and held that in the disposition of issues within the Board's jurisdiction, its decisions are not open to judicial review, including *certiorari*, even if there was error in fact or law; that to be subject to judicial review by way of *certiorari* there would have to be error apparent on the face of the record, or error in the disposition of a matter extrinsic or collateral to its jurisdiction upon which its jurisdiction is dependent."

If the Order made by the Board were one within its jurisdiction, then even if wrong in law or fact the Order would not be open to judicial review. *Farrell et al v. Workmen's Compensation Board* (1962), 37 W.W.R. 39.

The question posed is whether the Board by declaring its lack of jurisdiction to decide the terms of the final offer was in fact refusing to perform its duties under the Act within the ratio of *Labour Relations Board v. The Queen on the Relation of F. W. Woolworth Co. Ltd.*, [1956] S.C.R. 82.

The Act does not in plain words deal with the question of "final offer". It was argued by the respondent union that the legislature had overlooked the question of the determination of "final offer" and did not give the Board jurisdiction to decide it. The applicant argues that it is essential that "final offer" be determined by the Board prior to having a vote taken otherwise the whole purpose of section 10A would be defeated and that the Board has the necessary power to do so under section 16 of the Act, which states:

> "16. The board and each member thereof and its duly appointed agents shall have the power of a commissioner under The Public Inquiries Act and may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not."

It is not possible to hold a vote unless someone decides what the "final offer" was. If it was the Board's responsibility then in refusing to do so, it would have made an error in law which goes to its jurisdiction under the Act. In *Board of Prince Albert School Unit No. 56, supra*, Culliton, C.J.S., said:

> "I think it is apparent from this section that the Board could not exercise the powers therein granted unless it has a right to determine who are employees. Such a right, in my opinion, is implicit in the section and clearly within the Board's jurisdiction."

I think the same statement can be applied to the facts herein. The Board is authorized to conduct a vote on the "final offer", so, determining what was the final offer must be within the Board's jurisdiction. In my view the Board must reach a conclusion as to what was the final offer and if it did so then within the ratio of *Noranda Mines Limited v. Reginam et al* (1969), 69 W.W.R. 321, its decision could not be questioned. Kerwin, J., in *Re the Ontario Labour Relations Board — Toronto Newspaper Guild, Local 87, American Newspaper Guild (C.I.O.) v. Globe Printing Company*, [1953] 2 S.C.R. 18 at page 24, makes the distinction between a "mere rejection of evidence or a refusal of jurisdiction" and herein, in my view, the Board refused jurisdiction and the Order will be quashed. The applicant will have its costs against the respondents.

DATED at the City of Regina, in the Province of Saskatchewan, this 31st day of October, A.D. 1969.

"R. A. MacDonald"
R. MacDonald, J.Q.B. for the Court.

IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

(CROWN SIDE)

IN THE MATTER OF THE TRADE UNION ACT, R.S.S. 1965, CHAPTER 287, AS AMENDED; AND

IN THE MATTER OF THE CROWN PRACTISE RULES; AND

IN THE MATTER OF A CERTAIN ORDER OR DECISION MADE BY THE SASKATCHEWAN LABOUR RELATIONS BOARD DATED THE THIRD DAY OF DECEMBER, A.D. 1969.

BETWEEN:

SMITH-ROLES LTD., a body corporate incorporated under the laws of Saskatchewan, with head office in the City of Saskatoon, in the Province of Saskatchewan,

APPLICANT

— and —

THE LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN, and THE UNITED STONE AND ALLIED PRODUCTS WORKERS OF AMERICA, LOCAL NO. 200, and EDWARD R. LYSACK,

RESPONDENTS

BEFORE THE HONOURABLE D. C. DISBERY, IN CHAMBERS AT SASKATOON — FRIDAY, THE 5TH DAY OF DECEMBER, A.D. 1969

ORDER

Upon the application of Smith-Roles Ltd., and upon reading the Affidavits of Clemence Roles, Ivan Deibert, David E. Gauley, Q.C. and the Notice of Motion all filed and upon hearing David E. Gauley, Q.C. counsel for the Applicant, it is hereby ordered that the Labour Relations Board of the Province of Saskatchewan and Edward R. Lysack be and are hereby ordered not to proceed with the vote of the employees of Smith-Roles Ltd., scheduled to take place on Friday December 5th at 8:30 p.m. until the return of the Notice of Motion filed herein and returnable on Friday the 12th day of December 1969 and the issue raised therein as to who is entitled to vote has been determined by a Judge of this Honourable Court.

"O. Heidgerkin"
O. Heidgerkin, Local Master
in Chambers, "Registrar".

SASKATCHEWAN

COURT OF APPEAL

Before Woods, Brownridge and Maguire, JJ.A.
January 6, 1970.

REGINA v. SASKATCHEWAN LABOUR RELATIONS BOARD et al., Ex parte BUILDING SERVICE EMPLOYEES' LOCAL UNION NO. 333

Labour relations — Jurisdiction of Labour Relations Board — Exclusive jurisdiction to determine appropriate unit for collective bargaining — Exclusive jurisdiction to amend order — Trade Union Act (Sask.), s. 5(a), (k)(ii), s. 20.

[*Noranda Mines Ltd. v. The Queen et al.*, 7 D.L.R. (3d) 1, [1969] S.C.R. 898, 69 W.W.R. 321, refd to]

APPLICATION for a writ of *certiorari* to quash an order of the Labour Relations Board (Sask.).

G. J. D. Taylor, Q.C., for applicant.

J. E. Robb, for respondent, Mrs. Sandra Groshong.

J. E. Gebhard, for Labour Relations Board.

The judgment of the Court was delivered by

WOODS, J.A.: — This is an application by Building Services Employees' Union No. 333 for a writ of *certiorari* to quash an order of the Labour Relations Board of the Province of Saskatchewan.

On May 7, 1968, the said Board made an order certifying the appropriate unit of employees of Nipawin Union Hospital and determined that appropriate unit to be as follows:

> . . . all employees employed by the Nipawin Union Hospital, operated by the Nipawin Union Hospital Board in the Town of Nipawin, Saskatchewan, except the administrator, matron, accountant, registered nurses, registered lab. technicians, registered x-ray technicians, chief engineer, head housekeeper, food service supervisor, head laundress, and a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity . . .

On April 8, 1969, on the application of Mrs. Sandra Groshong, the Board amended the order of May 7, 1968, by adding the classification of "all nursing assistants" to the exclusions set out therein.

In the reasons for its decision as to this latter order, the chairman of The Labour Relations Board stated that no collective bargaining agreement had yet been entered into as a result of the certification order. He stated that the application was filed within the 30 to 60 day period of the anniversary date of the certification order and, therefore, met the requirements of section 5(k) (ii) of *The Trade Union Act* R.S.S.

1965, c. 287, as amended by S.S. 1966, C. 83, section 3(4). He went on to say that the evidence established that all persons involved in seeking the amendment were registered members of the Certified Registered Nurses' Assistants Association. He concluded by saying that for the same reasons as those set out in the written decision re *Building Service Employees' Local Union No. 333 v. Wadena Union Hospital* dated August 8, 1968, the application for the exclusion was allowed. The reasons given in this latter decision were as follows:

> "The Applicant applied to be certified as bargaining agent for the following bargaining unit:
>
> > All employees of the Wadena Union Hospital except the administrator, matron, accountant, all registered nurses, X-ray technicians, lab technicians, chief engineer, dietary supervisor and head housekeeper, also any person having, and regularly exercising, the authority to employ or discharge employees or regularly acting in a confidential capacity on behalf of management."
>
> "At the hearing Anne Sutherland of the Saskatchewan Registered Nursing Association, gave evidence concerning the relationship between their association and that of the Saskatchewan Nursing Assistants' Association. This witness also stated that by a general vote the said Nursing Assistants' Association indicated they wished the Saskatchewan Registered Nurses Association to act on their behalf with respect to bargaining collectively.
>
> "*The Registered Nurses' Act* 1965 R.S.S., C. 315 as amended 1967 S.S., C. 71 in section 11 deals with the relationship referred to by this witness. This section is headed 'Nursing Assitants' and subsections 2 and 3 reads as follows:
>
> > '(2) A nursing assistant when employed in a private home shall, except when performing ordinary household service, work only under the direction of a registered nurse or a duly qualified medical practitioner and when employed elsewhere than in a private home shall work only under the direction of a registered nurse.
> >
> > (3) The association may pass bylaws not inconsistent with this Act for:
> >
> > (a) the education, training and supervision of nursing assistants;
> >
> > (b) the certification of nursing assistants;
> >
> > (c) the amount of and method of collecting certification fees;
> >
> > (d) the cancellation of certification.'
>
> "The association referred to in subsection 3 is that of the registered nurses.
>
> "In view of this legislation and the fact that Miss Sutherland indicated in her evidence that the Registered Nurses'

Association was actively participating, in conjunction with the Department of Education, in the training program of the certified nursing assistants, the majority of the Board were of the opinion that certified nursing assistants had a very special relationship with the Registered Nurses' Association.

"This being the case and the fact that the Nursing Assistants' Association had, by a vote, indicated they wished the said Registered Nurses' Association to act for them in collective bargaining matters and most importantly in this particular case that the majority of the nursing assistants indicated they wished to be excluded from the bargaining unit, the majority of the Board were of the opinion the certified nursing assistants should be excluded from the applicant's proposed bargaining unit and it was so ordered by the Board."

The relevant provisions of the Act are the following:

"3. Employees shall have the right to organize in and to form, join or assist trade unions and to bargain collectively through representatives of their own choosing, and the representatives designated or selected for the purpose of bargaining collectively by the majority of employees in a unit appropriate for that purpose shall be the exclusive representatives of all employees in that unit for the purpose of bargaining collectively.

* * * *

5. The board shall have power to make orders:

(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, professional association unit or a subdivision thereof or some other unit;

(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;

(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;

* * * *

(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:

* * * *

(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than thirty days nor more than sixty days before the anniversary date of the order to be rescinded or amended;

notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court.

* * * *

"20. There shall be no appeal from an order or decision of the board under this Act, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari*, *mandamus*, prohibition, injunction or other proceeding whatever."

By section 12 of Cap. 83, S.S. 1966, section 20 has been amended by deletion of the words:

> "and the board shall have full power to determine any question of fact necessary to its jurisdiction."

Counsel for the applicant union before this Court argued that this amendment to section 20 had the effect of extending the powers of this Court to review so that any question of fact going to jurisdiction was now reviewable and that the question decided by the board went to jurisdiction. In *Noranda Mines Limited v. Reginam et al* (1969), 69 W.W.R. 321, Martland, J., at 326 stated:

> "In my opinion, the board has jurisdiction under the Act to determine whether or not it considers a proposed unit of employees to be appropriate for collective bargaining. In determining that issue the board is not subject to any directions contained in the Act and it can, therefore, consider any factors which may be relevant. The application to the board asked it, *inter alia*, to determine that the unit described in the application was an appropriate one. The application was dismissed, thereby demonstrating that the board was not prepared to make that determination in the union's favour. The board ruled on a matter over which it had exclusive jurisdiction.

This decision was decided after the amendment to section 20 was in effect.

If the board has exclusive jurisdiction to order what constitutes an appropriate unit under section 5(a), it follows that it has exclusive jurisdiction to amend such an order under section 5(k) (ii) where the conditions set out therein have been met, as in the case on the present application. The board here decided that because of the special relationship of the certified nursing assistants to registered nurses and their association they should not form part of the appropriate bargaining unit. This, in my view, was clearly within its jurisdiction.

The application is dismissed with costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 6th day of January, A.D. 1970.

"Mervyn Woods"
M. Woods, J.A. for the Court.

IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

GORDON QUAALE, et al,

PLAINTIFFS

— and —

THE SASKATCHEWAN REGISTERED NURSES ASSOCIATION, et al,

DEFENDANTS

BEFORE THE HONOURABLE THE CHIEF JUSTICE IN CHAMBERS

REGINA, SASKATCHEWAN
THE 3RD DAY OF FEBRUARY
A.D. 1970

ORDER

UPON the application of the Plaintiffs, ex parte; Upon reading the Plaintiff's Statement of Claim, the Affidavits of GORDON QUAALE and WILLIAM RADWAY, and the Memorandum of Relief, all filed; AND UPON hearing what was said by GEORGE J. D. TAYLOR, Q.C., of Counsel for the Plaintiffs;

IT IS HEREBY ORDERED that the Defendants FLORENCE IRENE JEROME, AGNES PRATCHLER and LILLIAN LACHMANEC be, AND THEY ARE AND EACH OF THEM IS HEREBY RESTRAINED AND ENJOINED effective to and including Friday the 13th day of February, A.D. 1970, from proceeding with certain applications made by them to The Labour Relations Board of the Province of Saskatchewan, namely:

THE DEFENDANT FLORENCE IRENE JEROME as to:

(a) An Application dated the 14th day of November, A.D. 1969, whereby the said FLORENCE IRENE JEROME applied to the Labour Relations Board of the Province of Saskatchewan to amend an Order made by the said Board on the 5th day of January A.D. 1954 by deleting from the bargaining unit established by the said Order all Nursing Assistants employed by Victoria Union Hospital, in Prince Albert, Saskatchewan;

(b) An Application dated the 24th day of November, A.D. 1969 whereby the said FLORENCE IRENE JEROME applied to the Labour Relations Board of the Province of Saskatchewan on behalf of the Defendant SASKATCHEWAN NURSING ASSISTANTS ASSOCIATION for an Order determining (inter alia) that all nursing assistants employed by St. Elizabeth's Hospital, in Humboldt, Saskatchewan, be represented by

the Defendant SASKATCHEWAN NURSING ASSISTANTS ASSOCIATION for the purpose of bargaining collectively.

THE DEFENDANT AGNES PRATCHLER as to an Application dated the 7th day of November, A.D. 1969 whereby the said AGNES PRATCHLER applied to the Labour Relations Board of the Province of Saskatchewan to amend an Order made by the Said Board on the 10th day of June, A.D. 1959 by deleting from the bargaining unit established by the said Order all Nursing Assistants employed by St. Elizabeth's Hospital, in Humboldt, Saskatchewan.

THE DEFENDANT LILLIAN LACHMANEC as to:

(a) An Application dated the 6th day of November, A.D. 1969, whereby the said LILLIAN LACHMANEC applied to the Labour Relations Board of the Province of Saskatchewan to amend an Order made by the said Board on February, 1946 by deleting from the bargaining unit established by the said Order all Nursing Assistants employed by St. Paul's Hospital, in Saskatoon, Saskatchewan;

(b) An Application dated the 6th day of November, A.D. 1969 whereby the said LILLIAN LACHMANEC applied to the Labour Relations Board of the Province of Saskatchewan on behalf of the Defendant SASKATCHEWAN NURSING ASSISTANTS ASSOCIATION for an Order determining (inter alia) that all nursing assistants employed by St. Paul's Hospital, in Saskatoon, Saskatchewan, be represented by the Defendant SASKATCHEWAN NURSING ASSISTANTS ASSOCIATION for the purpose of bargaining collectively.

"F. Lewis"
F. Lewis, Chamber Clerk.

TAKE NOTICE that if you FLORENCE IRENE JEROME, AGNES PRATCHLER and LILLIAN LACHMANEC the above named Defendants fail to comply with the terms of the above written Order you will render yourself liable to the penalties provided by law.

SASKATCHEWAN

COURT OF APPEAL

Before Woods, Brownridge and Hall, JJ.A.

International Woodworkers of America, AFL-CIO/CLC, Region No. 1, Local Union No. 184 et al (Applicants) v. Waskesiu Holdings Ltd. et al (Respondents)

Trades and Trade Unions — Application for Certification — Abortive Vote — Jurisdiction of Labour Relations Board.

Respondent union was the certified bargaining agent for a unit of employees; applicant union applied to the board claiming to represent a majority of these employees and requesting a vote pursuant to sec. 7 (amended 1966, ch. 83) of *The Trade Union Act*, R.S.S., 1965, ch. 287. The result of the vote was a tie, the board finding that 12 employees voted for each union and that one ballot was spoiled; it dismissed the applicant's application and made no further order.

On an application for a writ of *mandamus* to compel the board to exercise its jurisdiction and for a writ of *certiorari* to quash the order dismissing applicant's application, it was *held, per curiam*, that the applications must be dismissed; the board clearly had jurisdiction to decide which votes were acceptable and there was nothing in the record to indicate that it had in any way exceeded that jurisdiction; the question whether the ballot was spoiled was a question of interpretation which the board alone was empowered to determine. In the absence of a vote favourable to the applicant union there was nothing to compel the board to make a finding as to which union had a majority; the applicant had failed to prove that it represented a majority and the board had every right to dismiss its application, leaving its former order in full force and effect: *Reg. ex rel. Int. Woodworkers of Amer. Local 1-184 v. Labour Relations Board, Woodlands Enterprises Ltd. and Const. & Gen. Workers Local Union No. 890* (1969) 70 WWR 38, 7 DLR (3d) 464 (Sask. C.A.) applied.

[Note up with 21 CED (2nd ed.) *Trades and Trade Unions*, secs. 8A, 8B.]

G. J. D. Taylor, Q.C., for applicants.

J. H. C. Harradence, Q.C., for Waskesiu Holdings Ltd.

D. K. MacPherson, Q.C., for Construction and General Workers Union Local No. 890.

J. E. Gebhard, for Labour Relations Board.

February 16, 1970.

The judgment of the Court was delivered by

WOODS, J.A. — This is an application by International Woodworkers of America AFL-CIO/CLC, Region No. 1, Local Union No. 184, and Richard Eugene Larson, for a peremptory writ of *mandamus* to command the Labour Relations Board of the Province of Saskatchewan to exercise the jurisdiction conferrred upon it by *The Trade Union Act*, R.S.S. 1965, ch. 287, as amended, and for a writ of *certiorari* in aid as well as to quash an order of the board.

By an order of the board, on September 6, 1967, the respondent Construction and General Workers' Local Union No. 890, was certified as bargaining agent for a unit of employees of Waskesiu Holdings Ltd. On July 26, 1969, the applicant union applied to the board claiming to represent a majority of these employees and requesting a vote pursuant to sec. 7 (amended 1966, ch. 83) of the Act. On August 5, 1969, the respondent union filed a notice of intervention, also claiming to represent a majority but making no counter-application. The board issued a "Direction for Vote", *inter alia*, "to determine whether or not the said employees wish to be represented by the International Woodworkers of America * * * * or by the Construction and General Workers' Local Union No. 890, * * * * ." The form of ballot was set out in the "Direction to Vote" showing the name of each union with a square beside it and instructions below to, "Place an 'X' or a 'tick' in one square only".

On September 12, 1969, the agent appointed to conduct the vote reported the results of the ballot as a tie, 12 votes for each union, with one ballot spoiled. The next day the applicant union filed a "Statement of Objection to Vote", on the ground that the ballot held to be spoiled had been validly marked.

The Board, on October 9, 1969, determined that the ballot in question was spoiled and by order dismissed the application of the applicant union. It is against this order that the present motions are launched.

Counsel for the applicant contended that the Board erred in finding the ballot spoiled and that this Court had a right to review the finding. It was further argued that in any event the Board, by simply dismissing the application of the applicant, had failed to decide which of the two unions had a majority, a question it was required to decide.

The jurisdiction of this Court to review the decision of the Board is restricted by section 20 of the Act, the privative clause. Counsel for the applicant argued, however, that section 8 of the Act gives a power of determination to the employees eligible to vote and that where the Board makes a determination under section 5(b) reversing a decision under section 8, this Court has a right of review.

Section 8 reads as follows:

> "8. In any such vote a majority of the employees eligible to vote shall constitute a quorum and if a majority of those eligible to vote actually vote, *the majority of those voting shall determine the trade union which represents the majority of employees for the purpose of bargaining collectively.*"
>
> *(italics added)*

Decisions under section 8, however, are made by the Board, not by the employees, and in my view this section in no way restricts the jurisdiction of the Board to determine what constitutes a majority. The Court in its review of the order, is restricted to determining whether the Board acted within its jurisdiction or whether there is an error apparent on the

face of the record going to jurisdiction as set out in *Regina v. Labour Relations Board of Saskatchewan; ex parte Tag's Plumbing and Heating Limited* (1962), 34 D.L.R. (2d) 128. As there is no allegation of bias or fraud here, the only basis upon which the finding could be attacked would be denial of natural justice. As the ballot in question was admittedly completed contrary to the "Direction for Vote", there is no basis for such a contention here. The Board had jurisdiction to decide which votes were acceptable and there is nothing in the record to indicate that it has in any way exceeded its jurisdiction.

The ballot in question was not sent up to this Court and counsel for the Board objected to its production. The submission of counsel for the applicant made a determination of this question unnecessary. Accepting his description and argument on the ballot, it is apparent that the Board had a question of interpretation before it and it alone has the right to make that determination. The fact that it is not ordered produced here is not to be taken as a finding that in these or similar circumstances this Court could not require its production.

This leaves one question for determination and that is whether or not the Board was required to make a further order. While the purpose of the Board in ordering the vote was to determine which of the two unions represented a majority of the employees, the vote proved abortive. In the absence of a vote favourable to the applicant union, I can see nothing to compel it to make a finding as to which had a majority. On this vote such a finding would not be practical and there was on record a validly subsisting order certifying the respondent union. As the applicant union had failed to establish that it represented a majority of the employees in the bargaining unit and as the vote had proven abortive, it had every right to act as it did and simply dismiss the application, leaving its former order in full force and effect: vide *Regina ex rel International Woodworkers of America Local 1-184 et al v. Labour Relations Board, Woodlands Enterprises Limited and Construction and General Workers' Local Union No. 890* (1969), 70 W.W.R. 38.

The appeal is dismissed with costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 16th day of February, A.D. 1970.

"Mervyn Woods"
M. Woods, J.A. for the Court.

CORAM: WOODS, BROWNRIDGE AND HALL, JJ.A.

IN THE COURT OF APPEAL FOR SASKATCHEWAN

BETWEEN:

GORDON QUAALE, et al

APPELLANTS
(APPLICANTS)

— and —

THE SASKATCHEWAN REGISTERED NURSES ASSOCIATION, et al

RESPONDENTS
(RESPONDENTS)

BEFORE THE HONOURABLE MR. "Justice Woods" IN CHAMBERS } "Tues"DAY, THE "3rd" DAY OF "March", A.D. 1970

ORDER

UPON THE APPLICATION of the Appellants and upon reading the original Notice of Appeal herein with proof of service, and the Memorandum of Relief, filed; and upon hearing "Calvin Tallis, Q.C.," of counsel for the Applicants;

IT IS HEREBY ORDERED that the Appellants have and they are hereby given leave to "bring this appeal on for hearing" before this Honourable Court at the Court House, in Regina, in the Province of Saskatchewan, on *"Monday,"* the *"23rd"* day of *"March,"* A.D. 1970, at the hour of *"ten"* o'clock in the *"fore"*noon. "It is further ordered that appeal books be dispensed with."

AND IT IS FURTHER ORDERED AND ADJUDGED that all proceedings in connection with certain applications made by the Respondents, Florence Irene Jerome, Agnes Pratchler, and Lillian Lackmanec, to the Labour Relations Board of the Province of Saskatchewan and which are scheduled to come on for hearing at 9:30 in the forenoon on Wednesday, the 4th day of March, A.D. 1970 at Saskatoon, in the Province of Saskatchewan, be and the same are hereby stayed pending the hearing and determine of the said "Appeal" returnable before this Honourable Court on the "*23rd*" day of "*March*", A.D. 1970, at the hour of "*ten*" o'clock in the "*fore*"noon.

"R. B. Horner"
R. Horner, Registrar,
Court of Appeal for Saskatchewan.

IN THE COURT OF APPEAL FOR SASKATCHEWAN

(CROWN SIDE)

IN THE MATTER OF THE TRADE UNION ACT, R.S.S. 1965 CHAPTER 287 AND AMENDMENTS THERETO

AND IN THE MATTER OF THE CROWN PRACTISE RULES

AND IN THE MATTER OF A CERTAIN ORDER MADE BY THE LABOUR RELATIONS BOARD OF SASKATCHEWAN RELATING TO GORDON GIFFORD, PETER BATONI, AND JOHN HUMPHREY, CARRYING ON A BUSINESS UNDER THE FIRM NAME AND STYLE OF BATONI-HUMFORD AND INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING AND PORTABLE AND STATIONARY LOCAL UNION NO. 870

BETWEEN:

GORDON GIFFORD, PETER BATONI, and JOHN HUMPHREY, carrying on a business under the firm name and style of BATONI-HUMFORD, in the City of Saskatoon, in the Province of Saskatchewan, and the said BATONI-HUMFORD,

APPLICANT

— and —

INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING AND PORTABLE AND STATIONARY LOCAL UNION NO. 870, of the City of Saskatoon, in the Province of Saskatchewan,

RESPONDENT

The Honourable E. M. Culliton, C.J.S.

The Honourable Mr. Justice R. L. Brownridge

The Honourable Mr. Justice P. H. Maguire

Wednesday, the 25th day of March, A.D. 1970.

JUDGMENT ROLL

THIS APPLICATION for an Order of Certiorari having come on for hearing on the 25th day of March, A.D. 1970 and upon hearing the Notice of Motion and the Affidavit of W. Stanley Ross, and upon hearing D. K. MacPherson, Q.C. Counsel for the Applicants, and J. E. Gebhard Counsel for the Respondent, The Labour Relations Board of the Province of Saskatchewan, no one appearing for the Respondent, International Union of Operating Engineers, Hoisting and Portable and Stationary Local Union No. 870;

THIS COURT DOTH ORDER AND DIRECT that the Order of the Respondent LABOUR RELATIONS BOARD dated the 7th day of January, A.D. 1970 whereby the said Board made an Order:

(a) determining that all employees employed by the Applicant in the Province of Saskatchewan, engaged in the operating, repairing and servicing of cranes, hoists, tuggers, and similar equipment, all earth moving and road building equipment, all pressure and heating equipment, except a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, are an appropriate unit of employees for the purpose of bargaining collectively;

(b) determining that the Respondent Union, a Trade Union within the meaning of The Trade Union Act, represents a majority of employees in the appropriate unit of employees set out in Paragraph (a);

(c) requiring the Applicant to bargain collectively with the Respondent with respect to the appropriate unit of employees set out in Paragraph (a);

be and same is hereby quashed without the actual issue of a Writ of Certiorari.

"R. B. Horner"
R. Horner, Registrar,
Court of Appeal for Saskatchewan.

IN THE COURT OF QUEEN'S BENCH

(CROWN SIDE)

IN THE MATTER OF THE TRADE UNION ACT, R.S.S. 1965, CHAPTER 287, AND

IN THE MATTER OF THE CROWN PRACTISE RULES, AND

IN THE MATTER OF A CERTAIN APPLICATION PURPORTEDLY MADE BY BAKERS ELECTRIC LTD. TO THE LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN FOR AN ORDER UNDER SECTION 5(d) AND (e) OF THE TRADE UNION ACT IN RESPECT OF JOHN MCLEOD, GEORGE FLAMAN AND AL JEZEGOU

BETWEEN:

JOHN MCLEOD, GEORGE FLAMAN and AL JEZEGOU, all of Regina, in the Province of Saskatchewan,

APPLICANTS

— and —

THE LABOUR RELATIONS BOARD of the Province of Saskatchewan, and

of Regina, in the Province of Saskatchewan,

RESPONDENTS

BEFORE THE HONOURABLE MR. JUSTICE F. W. JOHNSON IN CHAMBERS — FRIDAY, THE 5TH DAY OF JUNE, A.D. 1970.

ORDER

UPON reading the draft Notice of Motion on behalf of the Applicants for a Writ of Prohibition, the affidavit of the Applicant's solicitor and the Memorandum of Relief, all filed; and upon hearing C. F. Tallis, Q.C. of counsel for the Applicants, ex parte:

IT IS HEREBY ORDERED that all proceedings in respect of an application launched by Bakers Electric Ltd. to the Labour Relations Board of the Province of Saskatchewan for an Order under Section 5(d) and (e) of the Trade Union Act against John McLeod, George Flaman and Al Jezegou be and they are hereby stayed pending the determination or other disposition of the Applicants' Notice of Motion herein for a Writ of Prohibition directed to the Respondents.

"Wm A. Uhrich"
Wm. Uhrich, Local Registrar.

SASKATCHEWAN

COURT OF APPEAL

Before Culliton, C.J.S., Woods and Hall, JJ.A.

July 2, 1970.

REGINA v. SASKATCHEWAN LABOUR RELATIONS BOARD,
Ex parte MCLEOD et al.

Labour relations — Jurisdiction of Labour Relations Board — Refusal of trade union to execute collective agreement based on employer's final offer — Offer approved by striking employees — Whether Board may hear application to declare union guilty of unfair practice — Trade Union Act (Sask.), ss. 5, 9(2)(c), 10A.

The duty of a trade union to bargain collectively arises from the certification order made pursuant to s. 5 (am. 1966, c. 83, s. 3) of *The Trade Union Act*, R.S.S. 1965, c. 287, and the failure to bargain collectively is an unfair labour practice under s. 9(2)(*c*) (am. 1966, c. 83, s. 7). Where, following a vote under s. 10*A* (as enacted by 1969, c. 66, s. 4) the majority of striking employees favour accepting the employer's final offer and returning to work, the Labour Relations Board has jurisdiction to determine whether the union is engaging in an unfair labour practice by refusing to bargain collectively in that it will not execute a collective agreement based on the final offer.

APPEAL from the dismissal by Sirois, J., of an application for an order prohibiting the Saskatchewan Labour Relations Board from hearing an application to determine that the representatives of a trade union were engaged in an unfair labour practice.

C. F. Tallis, Q.C., for appellants.

D. K. MacPherson, Q.C., for respondent, Bakers Electric Ltd.

J. E. Gebhard, for respondent, the Labour Relations Board.

The judgment of the Court was delivered by

CULLITON, C.J.S.: — By an order of the Labour Relations Board, (hereinafter called the "Board"), dated October 15 and 16, 1958, as amended by an order dated April 7, 1966, the Board determined that all foremen, journeymen electricians, apprentices and helpers employed by Bakers Electric Ltd., constituted an appropriate unit of employees for the purpose of bargaining collectively. The Board further determined that the International Brotherhood of Electrical Workers, Local Union No. 2038, (hereinafter referred to as the "Union"), represented a majority of the employees in the said appropriate unit and required that the employer bargain collectively with the duly appointed and duly elected representatives of the Union.

Section 10A of *The Trade Union Act*, R.S.S. 1965, C. 287, as enacted by S.S. 1969, c. 66, reads:

"10A.—(1) Where a strike has continued for thirty days:

(a) the trade union;

(b) the employer; or

(c) any employee of the employer;

involved in the strike, may apply to the board to conduct a vote among the striking employees to determine whether a majority of such employees voting thereon whose ballots are not rejected are in favour of accepting the employer's final offer and returning to work.

"(2) Upon receipt of an application under subsection (1) the board or a person appointed by the board shall forthwith conduct the vote requested by secret ballot.

"(3) Every employee who is involved in the strike and who has not secured permanent employment elsewhere is entitled to vote for the purposes of this section.

"(4) No more than one vote shall be held or conducted under this section.

"(5) Where pursuant to this section employees have voted to accept an employer's final offer and to return to work, the employer shall not withdraw that offer."

The employees of Bakers Electric Ltd., went out on strike. The material does not disclose when the strike commenced but was in effect for sufficient length of time to permit an application to be made under section 10A, *supra.* The president of the union, as provided in section 10A, applied to the Board to conduct a vote among the striking employees to determine whether a majority of such employees were in favour of accepting the employer's final offer and returning to work. Pursuant to this application, the Board, on May 22, 1970, conducted the vote and a majority of the employees, whose ballots were not rejected, voted to accept the employer's final offer.

On May 27, 1970, Bakers Electric Ltd., applied to the Board for an order,

(a) determining that an unfair labour practice is being, or has been, engaged in by John McLeod, George Flaman, and Al Jezegou, representatives of the union, and

(b) requiring such persons to refrain from violations of this Act or from engaging in the said unfair labour practice.

In the application were set forth the facts as I have related them. The applicant then alleged that the representatives of the union had failed and refused to bargain collectively with the employer, in that they failed or refused to execute the written agreement which is constituted by the employer's last offer, and thereby have, or are engaged in an unfair labour practice within the meaning of section 9(2) (c) of *The Trade Union Act.*

When the application came before the Board, learned counsel for the union representatives raised a preliminary objection. He contended the facts alleged in the application did not constitute an unfair labour prac-

tice or a violation of *The Trade Union Act, supra*, and consequently the Board was without jurisdiction to hear and determine the matter. The Board rejected this preliminary objection and held it had jurisdiction to proceed. An application was then made to a Judge of the Court of Queen's Bench for an order directed to the Board, and to Bakers Electric Ltd., prohibiting them from further proceeding with the application. The learned Chambers Judge dismissed this application for prohibition and an appeal therefrom has been taken to this Court.

Learned counsel for the appellant contended that section 10A does not require that an agreement be concluded in accordance with the terms of the employer's final offer when a majority of the employees have voted to accept such offer and consequently the failure or refusal to execute a written agreement which is constituted by the offer, is not an unfair labour practice. He further contended that if the Legislature had intended the failure or refusal to execute the agreement in accordance with the employer's final offer after acceptance thereof by the employees in a vote conducted pursuant to section 10A, constituted an unfair labour practice, it would have said so in clear language.

I must say, with respect, that I am unable to accept these arguments. The requirement of the union to bargain collectively does not arise by virtue of section 10A. That requirement arises by virtue of the certification order made pursuant to section 5 of *The Trade Union Act*. Under that section, the Board has the power, which it exercised, to determine the appropriate unit of employees and to require both the employees and the trade union, certified as the bargaining agent, to bargain collectively.

Bargaining collectively is defined in section 2(a) of *The Trade Union Act*, in the following terms:

> "2. In this Act:
>
> (a) 'bargaining collectively' means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a collective bargaining agreement, the embodiment in writing of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such written agreement and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in a unit of employees appropriate for the purpose of so negotiating;"

The failure to bargain collectively is made an unfair labour practice by section 9(2)(c) of *The Trade Union Act*. This section reads:

> "9.—(2) It shall be an unfair labour practice for an employee, a person acting on behalf of a labour organization or any other person:
> * * *
>
> (c) to fail or refuse to bargain collectively with the employer;"

While bargaining collectively is defined in the Act, nowhere in the legislation is there any attempt to define what constitutes a refusal or failure to bargain collectively. Section 5(d) is as follows:

> "5. The board shall have power to make orders:
> * * * * *
>
> (d) determining whether an unfair labour practice is being or has been engaged in;"

Thus, in my opinion, a proper interpretation of the relevant sections of the Act leads to the conclusion that the jurisdiction to determine whether an unfair labour practice is being or has been engaged in by failing or refusing to bargain collectively with the employer, rests with the Board, and the Board alone.

The application in this case is not one for a determination by the Board that there has been an unfair labour practice under section 10A. It is an application under section 5, subsections (d) and (e), requesting the Board to determine that the representatives of the union have or are engaged in an unfair labour practice as defined by section 9(2)(c), and for an order requiring such representatives to refrain from engaging in such unfair labour practices. The applicant alleges that the refusal or failure of the union representatives to conclude a collective bargaining agreement in the terms of the employer's final offer, after a favourable vote pursuant to section 10A, constitutes a failure or refusal to bargain collectively, and thus is an unfair labour practice under section 9(2)(c). The determination of whether, in law and in fact, the allegation is well founded, is, in my opinion, a matter which the Legislature has entrusted exclusively to the Board. That being so, prohibition does not lie to prevent the Board from exercising its jurisdiction.

The appeal is dismissed. The respondent Bakers Electric Ltd., will be entitled to its costs from the appellants.

DATED at the City of Regina, in the Province of Saskatchewan, this '2nd' day of July, A.D. 1970.

"E. M. Culliton"
E. Culliton, C.J.S. for the Court.

CORAM: CULLITON, C.J.S., WOODS and HALL, JJ.A.

SASKATCHEWAN

COURT OF APPEAL

Before Culliton, C.J.S., Woods and Hall, JJ.A.

September 3, 1970.

QUAALE et al. v. SASKATCHEWAN REGISTERED NURSES ASSOCIATION et al.

Trade unions — Members of trade unions seeking to persuade other members to join another union — Whether breach of contract embodied in unions' constitutions — Statutory rights to choose bargaining agent — Whether Court should make order, the effect of which would infringe statutory rights — Registered Nurses Act, R.S.S. 1965, c. 315, s. 11 — Trade Union Act (Sask.) ss. 3, 5(a), (b), (c), (k).

The plaintiffs were trade unions certified as bargaining agents for certain hospital employees, including the defendants. The defendants attempted to persuade a certain category of these employees to relinquish their membership in the plaintiff unions and change to another. The plaintiffs sued the defendants for breach of contract, on the ground that the constitutions of the respective plaintiff unions constituted contracts by which the defendants, who were members of these unions, committed themselves to all other members of the union jointly to be bound thereby; the constitutions prohibited the defendants' activities which were, accordingly, alleged to be in breach of contract. Plaintiffs obtained *ex parte* an interim injunction restraining defendants from continuing their activities, but an application to continue the injunction until trial was refused. On appeal from this decision, *held*, the appeal should be dismissed, for two reasons: First, s. 3 of *The Trade Union Act*, R.S.S. 1965, c. 287, guaranteed to employees the right to bargain collectively through members of their own choice; therefore, the defendants' actions, even if it were assumed that otherwise there would have been an actionable breach of contract, were privileged under the statute. Secondly, notwithstanding that the provisions of the union constitution might constitute contractual obligations which a member of the union had with all other members, the Court would not give effect to those provisions which, if enforced, might defeat, abrogate or vary the rights guaranteed, and the duties imposed, by the specific provisions of the statute.

[*Orchard et al. v. Tunney*, 8 D.L.R. (2d) 273, [1957] S.C.R. 436; *Stott v. Gamble*, [1916] 2 K.B. 504; *Posluns v. Toronto Stock Exchange and Gardiner*, 46 D.L.R. (2d) 210, [1964] 2 O.R. 547; affd 53 D.L.R. (2d) 193, [1966] 1 O.R. 285; affd 67 D.L.R. (2d) 165, [1968] S.C.R. 330; *United Steelworkers of America, Local 1105 et al. v. Tunnel & Rock Workers Union, Local 168 et al.* (1968), 67 D.L.R. (2d) 666, apld]

APPEAL from a judgment of MacPherson, J. dismissing the appellants' application to continue until trial an *ex parte* injunction.

G. J. D. Taylor, Q.C., for appellants.

James E. Robb, for respondents.

The judgment of the Court was delivered by

CULLITON, C.J.S.: — This is an appeal from the judgment of MacPherson, J., who, without written reasons, dismissed the appellants' application to continue, until trial, an injunction obtained by the appellants on an *ex parte* application.

The Canadian Union of Public Employees is a trade union and certain locals of that union were duly determined by the Labour Relations Board of Saskatchewan to represent, for the purpose of bargaining collectively, the employees of St. Elizabeth's Hospital at Humboldt, Saskatchewan; St. Joseph General Hospital at Estevan, Saskatchewan, and the Victoria Union Hospital at Prince Albert, Saskatchewan. The Service Employees International Union is also a trade union, locals of which were duly determined by the Labour Relations Board of Saskatchewan, to represent, for the purpose of bargaining collectively, the employees of St. Paul's Hospital, Saskatoon, Saskatchewan, and the Nipawin Union Hospital, at Nipawin, Saskatchewan. The said trade unions have bargained collectively with the respective employers and have completed with each a collective bargaining agreement.

The employees in the respective appropriate units included, in each case, nursing assistants. In 1958, there was formed and still continues the Saskatchewan Nursing Assistants' Association. Section 11 of *The Registered Nurses Act*, Chapter 315, R.S.S. 1965, provides for the certification of nursing assistants by the Registered Nurses Association. All nursing assistants so certified are eligible for membership in the Saskatchewan Nursing Assistants' Association.

Florence Irene Jerome, pursuant to section 5(k) of *The Trade Union Act*, R.S.S. 1965, c. 287, applied to the Labour Relations Board, by an application dated November 14, 1969, for an order to amend the order of certification dated January 5, 1959, by deleting from the bargaining unit established by the said order all nursing assistants employed by the Victoria Union Hospital. On November 24, 1969, she made a further application to the Labour Relations Board, pursuant to section 5(a), (b) and (c) of *The Trade Union Act, supra*, for an order determining, *inter alia*, that all nursing assistants employed by St. Elizabeth's Hospital be represented by the Saskatchewan Nursing Assistants' Association for the purpose of bargaining collectively.

Agnes Pratchler, by an application dated November 7, 1969, applied to the Labour Relations Board, pursuant to section 5(k) of *The Trade Union Act, supra*, for an order to amend the certification order dated January 10, 1959, by deleting from the bargaining unit established by that order all nursing assistants employed by St. Elizabeth's Hospital.

Lillian Lachmanec, by an application dated November 6, 1969, applied to the Labour Relations Board, pursuant to section 5(k) of *The Trade Union Act, supra*, for an order to amend the Certification Order dated February, 1946, by deleting from the bargaining unit established

by that order all nursing assistants employed by St. Paul's Hospital. By a further application, dated November 6, 1969, she applied to the Labour Relations Board, pursuant to section 5(a), (b) and (c) of *The Trade Union Act, supra*, for an order determining, *inter alia*, that all nursing assistants employed by St. Paul's Hospital be represented by the Saskatchewan Nursing Assistants' Association for the purpose of bargaining collectively.

After the foregoing applications were filed, an action was commenced by Gordon Quaale, an officer of Canadian Union of Public Employees, and by William Radway, an officer of Service Employees International Union, both on their own behalf and on behalf of all of the members of their respective unions. In the action, there were named as defendants:

(a) The Saskatchewan Registered Nurses Association and certain officers thereof, namely: Madge McKillop, President, Agnes Gunn, immediate past President, Alice Mills, Executive Secretary, and Ann Sutherland, employment relations officer; and

(b) The Saskatchewan Nursing Assistants' Association, and certain officers thereof, namely: Mabel Miller, second Vice-President, and Margaret Young, an executive member; and

(c) Florence Irene Jerome, Agnes Pratchler, Velma Frey, Verna Styre and Yvette Schnell, members of a local union of Canadian Union of Public Employees, and Jean Jack, Lillian Lachmanec and Sandra Groshong, members of a local union of Service Employees International Union.

In this action, it was alleged that those defendants who were members of the two trade unions acted unlawfully and in breach of their contractual obligations in persuading and attempting to persuade those persons employed as nursing assistants to relinquish their memberships in the said trade unions and to seek another representative to bargain collectively for them. It was further alleged that the other defendants conspired with these defendants in persuading such employees to so relinquish their memberships in the trade unions and to seek another organization to bargain collectively for them. It was further alleged that the defendants, in so acting, did so for the purpose of preventing or hindering the said trade unions from exercising their lawful rights to represent and bargain for such employees. The plaintiffs sought an injunction restraining the defendants from continuing the alleged breaches of their contractual obligations and from proceeding with the applications pending before the Labour Relations Board. The plaintiffs also claimed damages in respect to the alleged breaches of contract and for conspiracy.

The defendants in their defence admitted that those defendants who were alleged to be officers or employees of the Saskatchewan Registered

Nurses Association or of the Saskatchewan Nursing Assistants' Association were in fact such officers or employees. The defendants further admitted that the various applications made to the Labour Relations Board were made, but that in making such applications the defendants acted without malice and in good faith and in accordance with the laws of the Province of Saskatchewan, and particularly in accordance with the provisions of *The Trade Union Act, supra*, and *The Saskatchewan Registered Nurses Act, supra.* Apart from these admissions, the defendants denied all other allegations in the plaintiffs' statement of claim.

The plaintiffs applied to the learned Chambers Judge of the Court of Queen's Bench, *ex parte*, for an interim injunction, restraining the defendants from proceeding with the various applications before the Labour Relations Board. Such an injunction was granted and an application was made to MacPherson, J., for an order continuing the said injunction until the trial of the action. This application was dismissed and the *ex parte* injunction dissolved. From this judgment the plaintiffs have appealed.

The grounds of appeal are as follows:

(1) that the learned Chambers Judge erred in not holding that there was a substantial question to be tried and until the trial matters should be maintained in *statu quo* ;

(2) that the learned Chambers Judge erred in not holding that the appellants had established a threatened violation of their proprietory right which, if it were committed, would entitle the injured party to an action at law and thus entitle them *prima facie* to an injunction and that the onus was upon the respondents of rebutting the presumptions in favour of an injunction;

(3) that the learned Chambers Judge erred in not granting the injunction in that the contracts, which are one of the subject matters of the action, will have ceased to exist when the action comes to trial, if the applications pending before the Labour Relations Board are granted.

It is to be noted that the application for an interlocutary injunction is in respect only to the applications made by the defendants who are alleged to have been members of the trade unions. Notwithstanding this, however, in order to dispose of the appeal, I think it is necessary to review the nature and character of the action in which the injunction is sought.

The primary position taken by the appellants is that the constitutions of the respective trade unions constitute contracts by which those defendants who were members of the unions committed themselves to all other members of the union jointly to be bound thereby in their

individual and collective actions; that the said constitutions prohibit the activities and actions taken by the said defendants and, consequently, they were in breach of their contracts; and that the other defendants conspired with these defendants to bring about the alleged breaches of contracts. The appellants submit that such contentions raise a substantial question to be tried and an interlocutary injunction should be granted to maintain the status quo until the trial.

In *Orchard v. Tunney*, [1957] S.C.R. 436, the Supreme Court of Canada held that the rights of a member of a trade union are based upon contract and not upon status, and that such contract is with all other members of the unions and not with the union as such. This view was expressed by Rand, J., when at page 445 he said:

> "Apart, then, from statute, that a union is held together by contractual bonds seems obvious; each member commits himself to a group on a foundation of specific terms governing individual and collective action, a commitment today almost obligatory, and made on both sides with the intent that the rules shall bind them in their relations to each other. That means that each is bound to all the others jointly."

The very foundation of the appellants' action and of their claim to an injunction rests upon the acceptance of their submission that the activities of those defendants who were members of the unions, in persuading employees to relinquish their memberships in the said unions and to seek another agent to represent them for the purpose of bargaining collectively, constituted an actionable breach of their respective contracts and a violation of the plaintiffs' rights. If this submission is rejected, then the action must fail and there falls with it the application for the injunction.

In my opinion, there are two reasons, at least, why the submission of the appellants cannot be accepted:

Firstly; section 5(k) of *The Trade Union Act, supra*, confers upon the Labour Relations Board the right to rescind or amend any certification order made by it. The application for such rescission or amendment may be made by any party bound by the certification order. Section 3 of *The Trade Union Act* guarantees to employees the right to bargain collectively through representatives of their own choice. Thus, the defendants who were members of the trade unions, in persuading fellow employees to relinquish their memberships in the unions which had been certified and to apply for amendments to the certification orders removing such employees from the bargaining unit, and in requesting that another representative be certified to bargain collectively for them, were acting pursuant to their statutory rights. Therefore, their actions, even if it be assumed would otherwise have been an actionable breach of contract, were privileged under the statute. See *Stott v. Gamble*, [1916] 2

K.B. 504, and the remarks of Gale, J., (now C.J.O.) in *Posluns v. Toronto Stock Exchange and Gardiner*, [1964] 2 O.R. 547 at pages 608 and 609.

Secondly: notwithstanding that the provisions of the constitution of the union may constitute contractual obligations which a member of the union has with all other members of the union, the Court will not give effect to those provisions of the constitution which, if enforced, may defeat, abrogate or vary the rights guaranteed and the duties imposed by the specific provisions of the statute. This view, I think, is in accord with the principles stated by MacFarlane, J.A. in delivering the judgment of the British Columbia Court of Appeal in *United Steelworkers of America Local 1105 et al. v. Tunnel & Rock Workers Union, Local 168, et al.*, D.L.R. 666.

Learned counsel for the appellants also argued that by virtue of the certification orders, the appellants had the right to represent the employees of the hospitals for the purpose of bargaining collectively and the actions of the defendants constituted an interference with such a "proprietory right". I do not find it necessary to decide whether the right of the union to bargain collectively for the employees pursuant to the certification orders can properly be termed a "proprietory right", because, even if it was, there was a statutory justification for what the defendants did.

The appeal is dismissed with costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 3rd day of September, A.D. 1970.

"E. M. Culliton"
E. Culliton, C.J.S. for the Court.

CORAM: CULLITON, C.J.S., WOODS and HALL, JJ.A.

IN THE COURT OF APPEAL FOR SASKATCHEWAN

ON APPEAL FROM

IN THE QUEEN'S BENCH FOR SASKATCHEWAN
JUDICIAL CENTRE OF SASKATOON

JUDGMENT

BEFORE:

THE HONOURABLE CHIEF JUSTICE E. M. CULLITON,

THE HONOURABLE MR. JUSTICE MERVIN WOODS,

THE HONOURABLE MR. JUSTICE R. N. HALL.

BETWEEN:

GORDON QUAALE, et al,

APPELLANTS,
(APPLICANTS)

— and —

THE SASKATCHEWAN REGISTERED NURSES' ASSOCIATION, et al,
RESPONDENTS
(RESPONDENTS).

The 3rd day of September, A.D. 1970.

The appeal of the above named Appellants from the Judgment of the Honourable Mr. Justice M. A. MacPherson delivered in the above action on the 26th day of February, A.D. 1970, having come on for hearing on the 23rd day of March, A.D. 1970, and upon hearing read the Notice of Appeal and the Factums and upon hearing Mr. George J. D. Taylor, Q.C. of counsel for the Appellants and Mr. James E. Robb of counsel for the Respondents and it having pleased the court to reserve until this day their judgment, the court this day having pronounced judgment dismissing the said appeal with costs.

"R. B. Horner"
R. Horner, Registrar.

SASKATCHEWAN

COURT OF QUEEN'S BENCH

REGINA V. SASKATCHEWAN LABOUR RELATIONS BOARD
Ex parte MCLEOD et al.

MacDonald, J. *September 21, 1970*

Labour relations — Order of Saskatchewan Labour Relations Board — Overriding effect of Proclamation of Lieutenant-Governor in Council — Trade Union Act (Sask.) — Essential Services Emergency Act, 1966 (Sask.), s. 3.

On July 10, 1970, the Labour Relations Board of Saskatchewan made an order against the applicants finding them guilty of an unfair labour practice within the meaning of *The Trade Union Act*, R.S.S. 1965, c. 287. On the same date the Lieutenant-Governor in Council issued a proclamation under s. 3 of the *Essential Services Emergency Act*, 1966 (Sask. 2nd), c. 2, proclaiming that on and after July 10, 1970, certain labour disputes, which included the dispute which was the subject of the Board's order, should be decided by one board of arbitration. On an application for *certiorari* to quash the order of the Board, *held*, the *Essential Services Emergency Act, 1966* overrode the authority of the Board and its order of July 10, 1970, should be quashed because effective from that date the Board was without jurisdiction to make the order. Where there was a privative clause in a statute, as in *The Trade Union Act, certiorari* was only available to question a decision of the Labour Relations Board for error of law going to jurisdiction, that appeared on the face of the record, or where there had been a denial of natural justice, bias or fraud.

[*R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw*, [1952] 1 All E.R. 122; *R. v. Labour Relations Board of Saskatchewan, Ex p. Tag's Plumbing & Heating Ltd.* (1962), 34 D.L.R. (2d) 128; *Board of Prince Albert School Unit No. 56, Prince Albert, Sask. v. National Union of Public Employees' Local Union No. 832* (1962), 35 D.L.R. (2d) 361, 39 W.W.R. 314; *Farrell et al. v. Workmen's Compensation Board and A.-G. B.C.*, 31 D.L.R. (2d) 177, [1962] S.C.R. 48, 37 W.W.R. 39, apld]

APPLICATION for a writ of *certiorari* to quash an order of the Labour Relations Board of Saskatchewan finding that the applicants had engaged in an unfair labour practice in refusing to execute a collective agreement.

G. J. D. Taylor, Q.C., for applicants.

J. E. Gebhard, for respondent, the Labour Relations Board.

D. K. MacPherson, Q.C., for respondents other than the Labour Relations Board.

JUDGMENT — MACDONALD, J.

This is an application by three officials of The International Brotherhood of Electrical Workers, Local Union 2038, for an order that a Writ of *Certiorari* do issue for the return to this Court of the record and

certain orders and decisions of The Labour Relations Board of the Province of Saskatchewan (hereinafter referred to as the Board) made on the 10th day of July A.D. 1970 wherein the Board found that the applicants did engage and have been engaging in an unfair Labour Practice by failing and refusing to execute on behalf of their union a collective bargaining agreement in the terms set out in a final offer made by the employers being all the respondents except the Board (the employers will hereinafter be referred to as the "respondents"), and wherein the Board also ordered the applicants to refrain from engaging in the aforesaid unfair labour practice. The applicants are asking that such orders be quashed.

The authority of this Court in an application as herein is limited to a consideration of the record. *Certiorari* is only available to quash a decision for error of law, if the error appears on the face of the record. The record contains the document which initiates the proceedings, the pleadings, and the adjudication, but not the evidence unless the tribunal chose to incorporate its reasons in its adjudication. See Lord Denning in *Rex v. Northumberland Compensation Appeal Tribunal*, [1952] 1 All E.R. 122 at 130.

The transcript of the proceedings before the Board has been filed herein, but in my view it does not constitute part of the record and cannot be considered by this Court. The record herein comprises the application made to the Board by the respondents, the Board's Order, the Notice of Motion asking for relief and the affidavits of the parties insofar as they relate to a failure of natural justice or for the purpose of putting the record on file herein.

When there is a private clause, as there is herein, to be subject to judicial review by way of *certiorari*, there would have to be error apparent on the face of the record going to its jurisdiction or where there is a denial of natural justice, bias or fraud. One of the problems is whether the inferior tribunal has made an error going to its jurisdiction or one on an issue within its jurisdiction. See Culliton C.J.S. in *Regina v. Labour Relations Board of Saskatchewan Ex Parte Tag's Plumbing & Heating Limited*, 34 D.L.R. (2d) 128 at 131 and in *Board of P.A. School Unit No. 56 P.A. Sask. v. National Union of Public Employees' Local Union No. 832*, 35 D.L.R. (2d) 361 at 362.

If the order of the inferior tribunal is one within its jurisdiction then even if wrong in law or fact, the Order would not be open to judicial review. *Farrell et al v. Workmen's Compensation Board* (1962), 37 W.W.R. 39.

Identical applications were made by each of the respondents to the Board. I shall set out that of Cameron Electric Ltd. It is agreed by the parties that all of the others were to like effect, with variation of offices etc.:

"APPLICATION BY 'Name of Applicant' CAMERON ELECTRIC LTD. FOR AN ORDER UNDER SECTION 5(d) and (e) OF THE TRADE UNION ACT IN RESPECT OF JOHN MCLEOD, GEORGE FLAMAN AND AL JEZEGOU

1. 'Name of Applicant' CAMERON ELECTRIC LTD., of 1861 Cornwall Street, Regina, Saskatchewan, HEREBY APPLIES to the Labour Relations Board for an Order:

   (a) Determining that an unfair labour practice is being or has been engaged in by the persons designated in Paragraph No. 3 of this Application; and

   (b) Requiring such persons to refrain from violations of this act or from engaging in the said unfair labour practice.

2. THE name, address and office held by an Officer acting on behalf of the Applicant:

   Name: Mr. Donald J. Cameron
   Address: 1861 Cornwall Street, Regina, Sask.
   Office Held: Secretary-Treasurer.

3. THE name and address of the persons alleged to have engaged in and/or to be engaging in an unfair labour practice are:

   Name: Mr. John McLeod
   Address: 2A-2127 Albert Street, Regina, Sask.

   Name: Mr. George Flaman
   Address: 20 Mill Bay, Regina, Sask.

   Name: Al Jezegou
   Address: 36 McCusker Avenue, Regina, Sask.

4. THE Applicant alleges that an unfair labour practice has been and/or is being engaged in by reason of the following facts:

   (a) 'Name of Applicant' CAMERON ELECTRIC LTD. (herein called "the Employer") is subject to an Order of the Labour Relations Board of Saskatchewan dated October 15 & 16, 1958, as amended by Order dated April 7, 1966, wherein the Board ordered:

      (i) That all foremen, journeymen electricians, apprentices and helpers employed by the Employer, in the Province of Saskatchewan, constitute an appropriate unit of employees for the purpose of bargaining collectively;

      (ii) That International Brotherhood of Electrical Workers, Local Union No. 2038 (herein called "the Union") represents a majority of the employees in the said appropriate unit of employees;

(iii) That the said Employer shall bargain collectively with the duly appointed and duly elected representatives of the Union

(b) That John McLeod is the Business Manager of the Union, George Flaman is the President of the said Union and Al Jezegou is the Recording Secretary thereof.

(c) That on the 22nd day of May, A.D. 1970, as a result of an Application made therefor to the Labour Relations Board by James E. Chase, on behalf of the Employer, a vote was held pursuant to the provisions of Section 10A of the Trade Union Act among the striking employees of the Employer. (In some instances the application for a vote was made by the Union.)

(d) The result of such vote was that a majority of such employees, whose ballots were not rejected, voted in favour of accepting the Employer's Final Offer.

(e) That the said John McLeod, George Flaman and/or Al Jezegou have failed or refused to bargain collectively with the Employer in that they have failed or refused to execute the written Agreement which is constituted by the Employer's said last offer.

5. THE Applicant submits that by reason of the facts hereinbefore set forth, the persons designated in Paragraph No. 3 of this Application have engaged and/or are engaging in an unfair labour practice within the meaning of Section 9(2)(c) of The Trade Union Act."

After a hearing before the Board on the 8th and 9th July 1970, an order was made by the Board on the 10th July 1970 which states in part:

"THE LABOUR RELATIONS BOARD HEREBY:

(1) FINDS AND DETERMINES THAT THE Respondents, the said John McLeod, the said George Flaman, and the said Al Jezegou, did engage and have been engaging, in an unfair labour practice by failing and refusing to execute on behalf of the International Brotherhood of Electrical Workers, Local Union No. 2038, a collective bargaining agreement in the terms set out in the final offer made by the Employer, Cameron Electric Ltd., on the 14th day of May, A.D. 1970, such final offer being Exhibit "P8" filed as evidence in this application, within the meaning of Section 9, subsection (2), (c) of The Trade Union Act;

(2) ORDERS AND REQUIRES the said John McLeod, George Flaman, and Al Jezegou, to refrain from engaging in the aforesaid unfair labour practice."

The applicants launched this motion on the 21st day of July 1970 and immediately applied for an order staying the respondents herein from enforcing or acting upon the orders made by the Board. My brother Disbery J. stayed the respondents by order on the 23rd July 1970 pending the return of the motion on the 4th of September 1970. On the 4th of September, this stay was extended by myself pending a decision on this application.

The grounds on which the application for an Order of *Certiorari* is made are nine in number. Counsel for the applicants abbreviated the grounds during his argument to three allegations.

> "(1) That the Board did not have jurisdiction to make the Order,
>
> (2) That if the Board had jurisdiction, there was no evidence on which it could exercise its jurisdiction.
>
> (3) That on the date of making of the said Orders, the Executive Council of the Province of Saskatchewan, pursuant to Section 3 of The Essential Services Emergency Act, 1966, as amended at the 1970 (Second) Session of the Legislature of Saskatchewan, enacted Order-in-Council numbered O.C. 1031/70, which said Order-in-Council applied to and affected each one of the Respondents, namely, BAKERS ELECTRIC LTD., CAMERON ELECTRIC LTD., MARS ELECTRIC, STETNER ELECTRIC LTD., ORTMAN ELECTRIC LTD., LAKEVIEW ELECTRIC LTD., J. K. ELECTRICAL CONTRACTORS LTD., and ANTHONY ELECTRIC LTD., and superseded all other actions and procedures in the labour dispute between the said Respondents and the International Brotherhood of Electrical Workers, Local Union No. 2038."

I have concluded that the order of the Board cannot be questioned on the basis of lack of evidence as this Court has no right to consider the evidence heard by the Board.

As to the allegation that the Board did not have jurisdiction to make the order — when the application for the order was made to the Board by the respondents on the 27th of May 1970, the applicants herein applied to this Court for an order prohibiting the Board from proceeding with the hearing. My brother Sirois J. dismissed the application. This ruling was appealed to the Court of Appeal. In an unreported Judgment delivered on 2 July 1970,[1] Culliton C.J.S. said:

> "Thus, in my opinion, a proper interpretation of the relevant sections of the *Act* leads to the conclusion that the jurisdiction to determine whether an unfair labour practice is being or has been engaged in by failing or refusing to bargain collectively with the employer, rests with the Board, and the Board alone.

1. Now reported at 16 DLR (3d) 474.

> The application in this case is not one for a determination by the Board that there has been an unfair labour practice under Section 10A. It is an application under Section 5, subsections (d) and (e), requesting the Board to determine that the representatives of the union have or are engaged in an unfair labour practice as defined by Section 9(2) (c), and for an order requiring such representatives to refrain from engaging in such unfair labour practices. The applicant alleges that the refusal or failure of the Union representatives to conclude a collective bargaining agreement in the terms of the employer's final offer, after a favourable vote pursuant to section 10A, constitutes a failure or refusal to bargain collectively, and thus is an unfair labour practice under Section 9(2) (c). The termination of whether, in law and in fact, the allegation is well founded, is, in my opinion, a matter which the Legislature has entrusted exclusively to the Board. That being so, prohibition does not lie to prevent the Board from exercising its jurisdiction."

This decision of the Court of Appeal settles the question of the Board's jurisdiction and it is no consequence herein that, that decision was in an application for Prohibition.

In 1966, the Legislature of the province passed an act known as *The Essential Services Emergency Act, 1966*, ss. 1966, c. 2.

Section 3 of this Act States:

> "Where at any time in the opinion of the Lieutenant Governor in Council a state of emergency exists in the province or in any area of the province in such circumstances that life, health or property could be in serious jeopardy by reason of a labour dispute involving:
>
> (a) employees engaged in the operation of any system, plant or equipment for furnishing or supplying water, heat, electricity or gas service to the public or any part of the public; or
>
> (b) employees engaged in the provision of hospital services anywhere in the province;
>
> the Lieutenant Governor in Council may by proclamation declare that from and after a date fixed in the proclamation all further action and procedures in the dispute are to be replaced by the emergency procedures provided in this Act."

This section was amended at the Second Session of the Legislature in 1970 as indicated in the Proclamation hereinafter recited. On the 10th day of July A.D. 1970, the following Proclamation was issued and it was published in the Saskatchewan Gazette No. 29 on the 17th day of July 1970.

"A PROCLAMATION

1. WHEREAS section 3 of The Essential Emergency Act, 1966, as amended at the 1970 (Second) Session of the Legislature, reads as follows:

"3.—(1) Where at any time in the opinion of the Lieutenant Governor in Council a state of emergency exists in the Province or in any area of the province in such circumstances that:

(a) life, health or property could be in serious jeopardy by reason of a labour dispute involving:

(i) employees engaged in the operation of any system, plant or equipment for furnishing or supplying water, heat, electricity or gas service to the public or any part of the public; or

(in employees engaged in the provision of hospital services anywhere in the province; or

(b) the economic welfare of the province or any area of the province could be in serious jeopardy by reason of a labour dispute involving employees engaged in the provision of construction services in the province or in any area of the province;

the Lieutenant Governor may by proclamation declare that from and after a date fixed in the proclamation all further action and procedures in the dispute are to be replaced by the emergency procedures in this Act.

(2) Where at any time in the opinion of the Lieutenant Governor in Council there are two or more labour disputes involving employees mentioned in:

(a) subclause (i) of clause (a) of subsection (1);

(b) subclause (ii) of clause (a) of subsection (1); or

(c) clause (b) of subsection (1)

the proclamation of the Lieutenant Governor under subsection (1) may declare that all further action and procedures in any or all of the labour disputes involving employees referred to in clause (a), (b) or (c) shall be replaced by the emergency procedures provided in this Act and that the labour disputes specified in the proclamation shall be decided by one board of arbitration"; and

2. WHEREAS the employees of each of the employers listed in the schedules attached hereto and marked as "Schedule A" and "Schedule B":

(a) are engaged in the provision of construction services in the Province;

(b) are involved in a labour dispute with their employer; and

(c) are employees on whose behalf the trade union shown opposite the name of the employer in the said schedules is entitled to bargain with the employer under The Trade Union Act; and

3. WHEREAS certain of the said employees have been on strike and while a number of the employees have returned to work certain matters remain in dispute; and

4. WHEREAS the economic welfare of the Province could be in serious jeopardy by reason of labour disputes involving the said employees and the said employers who are engaged in the provision of certain construction services and the trade unions referred to in paragraph 2; and

5. WHEREAS it is desirable and in the public interests that the said labour disputes involving the said employees be replaced by the emergency procedures provided in The Essential Services Emergency Act, 1966, as amended and that these labour disputes be decided by one board of arbitration.

NOW KNOW YE, that by and with the advice of Our Executive Council of Our Province, We do by these Presents proclaim:

(a) that in the opinion of the Lieutenant Governor in Council a state of emergency exists in the Province in such circumstances that the economic welfare of the Province could be in serious jeopardy by reason of labour disputes involving employees engaged in the provision of construction services in the Province namely the employees of each of the employers listed in the schedules attached hereto and marked as Schedules "A" and "B", their respective trade unions and their employers.

(b) the tenth day of July, 1970, as the date from and after which all further action and procedure in the said labour dispute are to be replaced by the emergency procedures provided in The Essential Services Emergency Act, 1966, as amended.

(c) that from and after the date fixed by paragraph (b) hereof, all further action and procedures in the said labour disputes are to be replaced by the emergency procedures provided in The Essential Services Emergency Act, 1966, as amended.

(d) that the said labour disputes shall be decided by one board of arbitration."

All of the respondents herein are named in Schedule "A" to the said proclamation.

The Essential Services Emergency Act makes provision for the naming of an Arbitration Board within certain time limits and provides

for the decision of such Board to be binding on both parties — the details of these provisions are not of concern herein.

On the date (10 July 1970) that the board made its order finding that the applicants herein had been engaging in an unfair Labour Practice, the Proclamation was in effect and "all further action and procedures in the said labour dispute are to be replaced by the emergency procedure". Any argument as to whether there was in fact a labour dispute on the 10th of July 1970 involving the respondents has no merit, the Act of the Legislature authorizes the Lieutenant Governor in Council to decide whether a labour dispute exists, and he did so find. *The Essential Services Emergency Act 1966* (see Section 16) overrides the authority of the Labour Relations Board. The orders of the Board will be quashed for the reason that effective 10 July 1970, the Board was without jurisdiction to make orders affecting the parties herein, declared by the Lieutenant Governor to be involved in a labour dispute. Costs to the applicants against the respondents.

DATED at the City of Regina, in the Province of Saskatchewan, this 21st day of September, A.D. 1970.

"R. A. MacDonald"

SASKATCHEWAN

COURT OF QUEEN'S BENCH (CROWN SIDE)

September 28, 1970

Regina ex rel. Jubilee Ford Sales Ltd. v. LRB (Saskatchewan) and United Brotherhood of Carpenters and Joiners of America, Local Union 1021 (Saskatoon, Sask.).

Applicant failing to bargain collectively — Respondents charging unfair labour practice — Jurisdiction of Labour Board to make ruling — The Trade Union Act, R.S.S. 1965, c. 287, s. 33.

The respondent union was the bargaining agent for the employees of Dominion Motors (Saskatoon) Ltd. The applicant, Jubilee Sales, apparently bought out Dominion Motors and had failed or refused to bargain collectively with the respondent. The union applied to the Labour Relations Board and obtained a decision that Jubilee Sales had engaged in an unfair labour practice by failing to bargain collectively. The Board went further and ordered Jubilee to refrain from engaging in such an unfair labour practice. Jubilee applied for a writ of *certiorari* to quash the Board's order. The basis of Jubilee's claim was the lack of jurisdiction of the Board to make the order under s. 33.

Held: The application was dismissed. The jurisdiction of the Court pertained only to error on the face of the record going to the jurisdiction of the Board; an error in fact or law within jurisdiction of the latter was not reviewable. The Board had to decide whether the applicant, being an employer, was obliged to bargain with the respondent union. To reach a conclusion, it was necessary for the Board to decide whether s. 33 applied. The Board did make that decision and had exclusive jurisdiction to do so. It was not open to the Court to consider the evidence upon which the Board reached its conclusion.

W. T. Molloy for the applicant; R. J. Romanow for the respondent union; J. E. Gebhard for the Labour Relations Board; before: MacDonald, J.

JUDGMENT — MACDONALD, J.

This is an application for an order that a Writ of Certiorari do issue for the return to this Court of a certain order made by the Labour Relations Board of the Province of Saskatchewan wherein the Board:

> "(1) FINDS AND DETERMINES THAT the Respondent, the said Jubilee Ford Sales Limited in the City of Saskatoon, Saskatchewan, did engage in an unfair Labour practice by failing to bargain collectively with the Applicant Union with respect to certain employees within the meaning of Section 33 of the Trade Union Act, as alleged;
>
> (2) ORDERS AND REQUIRES the said Jubilee Ford Sales Limited in the City of Saskatoon, Saskatchewan, to refrain from engaging in the aforesaid unfair labour practice."

The applicant asks that the aforesaid order be quashed without the actual issue of the Writ. The applicant sets out nine grounds on which it

bases its application. In brief, the applicant alleges that the Board did not have jurisdiction to make an order under section 33.

The union applied to the Board for an order against "Jubilee" alleging that it was the successor to Dominion Motors (Saskatoon) Ltd. and had failed to bargain collectively. The Board by order dated 6th day of November 1969 had designated the respondent union as the bargaining agent of the employees of Dominion Motors (Saskatoon) Ltd. The union requested the respondent Jubilee to bargain collectively which Jubilee refused to do.

Section 33 of the Act states:

> "Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without restricting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him."

The only question for determination herein is whether or not the Board had jurisdiction to make the finding under section 33. The jurisdiction of this Court pertains only to error on the face of the record going to the jurisdiction of the Board, an error in fact or law within its jurisdiction is not reviewable. There is an error in the application to the Board by the Union paragraph (5) which states:

> "The applicant submits that by reason of the facts hereinbefore set forth, the said employer has engaged in, and/or is engaging in; an unfair labour practice within the meaning of Section 32 of The Trade Union Act."

There is no question that section 33 was intended and no one was misled. The Board can certainly overlook errors of this type without loss of jurisdiction.

The Board is giving its decision also gave "Reasons for Decision". These reasons thus form part of the record. If this Court finds that the decision under section 33 was a decision within the Board's exclusive jurisdiction, this application must be refused. If the Court finds that the question of whether or not Jubilee comes under section 33 is collateral or preliminary or jurisdictional, then the Court would be entitled to consider the evidence on the record to see whether the Board had made an error, thus giving itself jurisdiction.

The question of whether or not a decision of a Board is collateral was discussed in *Galloway Lumber Co. Ltd. and the Labour Relations Board of British Columbia and International Woodworkers of America Local No. 1-405*, [1965] S.C.R. 222;

Regina v. Ontario Labour Relations Board, Ex Parte Mitchener Food Market Ltd., 54 D.L.R. (2d) 219;
Parkhill Furniture & Bedding Limited v. International Molders and Foundry Workers Union Local 174 and Manitoba Labour Board, 34 W.W.R. 13;
Jarvis v. Associated Mechanical Services Incorporated and The Ontario Labour Relations Board, A. M. Brinskill [1964] S.C.R. 497;
Re Lodum Holdings Ltd. Retail Food and Drug Clerks Union, Local 1518 and Bakery and Confectionary Workers' International Union of America Local 468, 67 W.W.R. 38.

The Board herein, of course, could not give itself jurisdiction by a wrong decision on a collateral point. The union respondent alleged an unfair labour practice against the applicant. Under section 5(d), the Board has authority to "determining whether an unfair Labour Practice is being or has been engaged in". The Board is authorized under 5(b).

> "determining what trade union, if any, represents a majority of employees in an appropriate unit of employees"

When the application of the respondent union was made for a determination of whether the applicant was engaging in an unfair labour practice, the Board had to decide whether the applicant being an employer was obliged to bargain with the respondent union. To reach a conclusion, it was necessary for the Board to decide whether section 33 applied to the circumstances herein. The Board did decide and in my view has exclusive jurisdiction to decide the point. In order to reach a decision on matters within its jurisdiction, it must be able to apply section 33 as it sees fit to do. To reach a decision on section 33, in my view, is "of the very essence" of the question before the Board. See Judson J. in the *Galloway Lumber* case, *supra*. Having so decided, it is not open to me to consider the evidence upon which the Board reached its conclusion. The application is dismissed. The respondents will have their costs against the applicant.

DATED at the City of Regina, in the Province of Saskatchewan, this 28th day of September, A.D. 1970.

"R. A. MacDonald"

IN THE COURT OF QUEEN'S BENCH

(CROWN SIDE)

JUDICIAL CENTRE OF SASKATOON

IN THE MATTER OF THE TRADE UNION ACT, R.S.S. 1965, CHAPTER 287 AS AMENDED;

AND IN THE MATTER OF THE CROWN PRACTICE RULES;

AND IN THE MATTER OF A CERTAIN ORDER OF THE SASKATCHEWAN LABOUR RELATIONS BOARD, DATED THE 5TH DAY OF AUGUST, A.D. 1970; AND IN THE MATTER OF A CERTAIN ORDER OF THE LABOUR RELATIONS BOARD DATED THE 5TH DAY OF SEPTEMBER, A.D. 1969; AND IN THE MATTER OF A CERTAIN ORDER OF THE SASKATCHEWAN LABOUR RELATIONS BOARD DATED THE 7TH DAY OF AUGUST, A.D. 1969.

BETWEEN:

HER MAJESTY THE QUEEN, on the relation of The Carpenters Provincial Council of Saskatchewan, a group of Trade Unions chartered by the United Brotherhood of Carpenters and Joiners of America, and LEO FRITZ, of the City of Saskatoon, in the Province of Saskatchewan,

APPLICANTS

— and —

THE LABOUR RELATIONS BOARD of the Province of Saskatchewan, and the INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, Local Union No. 771, a Trade Union chartered by the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO/CLC, and CON-FORCE LIMITED, (formerly Con-Force Products Ltd.), a body corporate, of the City of Calgary, in the Province of Alberta,

RESPONDENTS

BEFORE THE HONOURABLE CHIEF JUSTICE BENCE IN CHAMBERS IN SASKATOON — THURSDAY, THE 31ST DAY OF DECEMBER, A.D. 1970

ORDER

UPON the Application of the Applicant for an Order quashing an Order of the Labour Relations Board of the Province of Saskatchewan dated the 7th day of August, A.D. 1969 whereby the said Labour Relations Board found and determined that certain employees employed by Con-Force Products Ltd. in the Province of Saskatchewan as in the said Order described, constituted an appropriate unit of employees for the purpose of bargaining collectively and directed that a vote by secret

ballot be conducted among all such employees to determine whether or not the said employees wished to be represented by the Respondent Union or the Applicant for the purpose of bargaining collectively; and for an Order quashing an Order of the said Labour Relations Board dated the 5th day of September, A.D. 1969 whereby the said Labour Relations Board determined that the Respondent Union represented a majority of employees in the appropriate unit as in the said Order more particularly described, and required Con-Force Products Ltd. to bargain collectively with the said Union; and for an Order quashing an Order of the Labour Relations Board dated the 5th day of August, A.D. 1970 whereby the said Labour Relations Board amended an Order made by the said Labour Relations Board on the 16th day of October, A.D. 1961 respecting the Applicant Union and Con-Force Limited, in the manner as in the said Order more particularly set out;

AND UPON this matter coming on for hearing on the above date in the presence of GWEN K. RANDALL, of Counsel for the Respondent, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, Local Union No. 771; and Counsel not appearing either for the Applicant or for the Respondent LABOUR RELATIONS BOARD;

AND UPON HEARING what was said by GWEN K. RANDALL, of Counsel for the Respondent, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTUAL AND ORNAMENTAL IRON WORKERS, Local Union No. 771;

IT IS HEREBY ORDERED AND ADJUDGED that the Application be, and it is hereby dismissed without costs.

"Margaret Petersen"
M. Petersen, Chamber Clerk.

SASKATCHEWAN

COURT OF APPEAL

Woods, Brownridge and Maguire JJ.A.

August 20, 1971.

RE CHAUFFEURS, TEAMSTERS & HELPERS, LOCAL UNION NO. 395 AND J & F TRANSPORT LTD.

Labour relations — Certification — Secret vote — Union required to obtain majority vote — Ballots in favour and against union equal in number — One ballot against union signed — Labour Relations Board refusing certification — Whether Board acted within its jurisdiction — Trade Union Act (Sask.), s. 8.

By secret ballot on certification vote, nine of 19 eligible employees voted in favour of certification of the applicant union; nine voted against certification and one employee did not vote. One of the employees voting against certification wrote the name "Harvey" on his ballot. Section 8 of *The Trade Union Act*, R.S.S. 1965, c. 287, requires the union to obtain a majority of the votes cast.

The union requested the Saskatchewan Labour Relations Board to certify it on the ground that the marked ballot should have been disregarded, thereby giving the union the required majority. The Board dismissed the request.

On an application for *mandamus* to direct the Board to exercise its jurisdiction and for a writ of *certiorari* in aid, *held*, the application should be dismissed. The Board determined the question as to whether the union represented a majority of the employees, a question within the jurisdiction of the Board. The question of interpretation of the ballots was one which the Board alone had the right to make. The Board's determination of what constitutes a majority was not restricted by s. 8, and accordingly, not open to review because of error, whether of fact or law.

[*International Woodworkers of America, AFL-CIO/CLC, Region 1, Local Union 184 et al v. Waskesiu Holdings Ltd. et al.* (1970), 73 W.W.R. 260; *R. v. Labour Relations Board of Saskatchewan, Ex p. Tag's Plumbing & Heating Ltd.* (1962), 34 D.L.R. (2d) 128; *Noranda Mines Ltd. v. The Queen et al.*, 7 D.L.R. (3d) 1, [1969] S.C.R. 898, 69 W.W.R. 321, folld]

APPLICATION for *mandamus* directing the Saskatchewan Labour Relations Board to exercise its jurisdiction and for a writ of *certiorari* in aid to quash a decision of the Board refusing certification to the applicant union.

G. J. B. Taylor, Q.C., for applicants.

R. H. McKercher, Q.C., for respondent, J & F Transport Ltd.

J. E. Gebhard, for Saskatchewan Labour Relations Board.

The judgment of the Court was delivered by

WOODS, J. A.: — This is an application by Chauffeurs, Teamsters and Helpers, Local Union No. 395 and George McCullough for a peremp-

tory writ of *mandamus* to command the Labour Relations Board of the Province of Saskatchewan to exercise the jurisdiction conferred upon it under section 5(a), (b), (c) and (k) of *The Trade Union Act*, R.S.S. 1965, Chapter 287, as amended and for a writ of *certiorari* in aid as well as to quash an order of the Board.

By an application dated April 17, 1971, the Chauffeurs, Teamsters and Helpers, Local Union No. 395 applied to the Labour Relations Board for an order determining an appropriate unit of employees for the purpose of bargaining collectively with J & F Transport Ltd. and determining that the applicant trade union represented a majority of the employees in that unit.

After a hearing on May 6, 1971, the Board found and determined the appropriate unit of employees and directed that a vote by secret ballot be conducted among the employees in the unit to determine whether or not they wished to be represented by the applicant union for the purpose of bargaining collectively.

The form of ballot was set out in the directions. It was headed "Secret Ballot", posed the necessary question and had the words "Yes" and "No" each followed by a square. Underneath in capital letters was the instruction:

"Place an "X" or a "Tick" in one square only."

The report of the agent of the Board was completed on May 20, 1971, and contained the following:

"7. The result of the vote was as follows:

No. of Eligible Voters		19
No. of Votes for Applicant	9	
No. of Votes against Applicant	9	
No. of Votes for Intervener		
No. of Spoiled Ballots		
No. of Ballots Cast		18
No. of Employees not Voting		1

"8. Additional Comments one voter signed first name.

The applicant George McCullough, Secretary-Treasurer of applicant union, on May 21, 1971, filed an objection to the result of the vote, stating the following reasons:

"1. On one of the ballots the voter had voted "no" but had also written in his hand writing the name "Harvey" on his ballot.

2. I feel that this ballot should have been marked or listed as a spoiled ballot as it identified the voter and therefore cannot be considered as a secret ballot.

3. Had this ballot been counted as a spoiled ballot then the result of the vote would have indicated a majority for the Applicant Union.

4. I would request that the Labour Relations Board consider the marked ballot as spoiled and certify the Applicant Union."

On June 2, 1971, the Board issued an order stating:

> "THE BOARD found it was not necessary to determine the question of the ballot in question in this particular case, as, in accordance with Section 8 of *The Trade Union Act*, the applicant did not have the required evidence of support in respect of the representation vote held by Order of the Board on May 20, 1971. Therefore, it is HEREBY ORDERED that the application for certification be dismissed."

Counsel for the applicant argued that by refusing to consider the effect of the ballot, or by failing to determine the majority shown by the ballot, the Board refused or declined to exercise its jurisdiction. It was also argued that there was fundamental error in law in that the Board held that a ballot that was invalidly cast should be counted in determining the number whether the applicant union represented a majority of the employees voting.

The Board is empowered under section 7 of *The Trade Union Act* to direct that a vote be taken to determine which trade union, if any represents a majority of employees. Section 8 provides that:

> "8. In any such vote a majority of the employees eligible to vote shall constitute a quorum and if a majority of those eligible to vote actually vote, the majority of those voting shall determine the trade union which represents the majority of employees for the purpose of bargaining collectively."

It is to be noted that under this section, for the purposes of the present problem, the Board was required first to decide whether or not a majority of those entitled to vote actually voted. There is no problem with the answer to this. The next question for decision was whether or not the vote showed a majority of those voting. The Board held that it did not and by so doing, in effect, held that eighteen employees actually voted within the meaning of section 8.

Counsel for the applicant union argued that this finding is wrong in law and cited a number of cases, including *Re Swan River Local Option By-Law*, [1906] 3 W.L.R. 546, and *Re Brown and Township of East Flamborough*, [1911] 23 OLR 533. Counsel invited this Court to hold that these cases represented the law in this jurisdiction.

In my view it is not necessary to consider these cases in the present application. This Court, in its review of the order, is restricted to determining whether the Board acted within its jurisdiction or whether there is an error apparent on the face of the record going to jurisdiction.

Vide: *International Woodworkers of America, AFL-CIO/CLC, Region No. 1, Local Union No. 184 et al v. Waskesiu Holdings Ltd. et al* (1970), 73 W.W.R. 260, and *Regina v. Labour Relations Board of Saskatchewan; Ex parte Tag's Plumbing & Heating Limited* (1962), 34 D.L.R. (2d) 128. Section 8 in no way restricts the jurisdiction of the Board to determine what constitutes a majority. There is no allegation of bias or fraud and there is no denial of natural justice.

The question for determination by the Board was as to whether the applicant union represented a majority of the employees in the designated unit, having regard to the provisions of section 8 of the Act. The Board gave consideration to this issue and the answer arrived at was conclusive of the matter. This question was within the jurisdiction of the Board. This being so, it is not open to review because of error whether of law or fact. Vide: *Noranda Mines Ltd. v. The Queen et al* (1970), 7 D.L.R. (3d) 1, per Martland, J.A. at page 5. The Board alone had jurisdiction to decide how many had actually voted and whether or not the ballots showed a majority. The question of interpretation was one which the Board alone had the right to make.

Counsel for the Board submitted to the Court two documents or papers with the suggestion that they might form part of the record. Acceptance of these for filing was reserved. The Court has not referred to them nor directed that they be filed. In addition, the alleged spoiled ballot was attached to an affidavit of Mr. Gebhard, duly filed. All these documents or papers shall be returned to counsel for the Board after the time for appeal has elapsed unless an appeal is taken. In the event of an appeal from this judgment, they shall be returned on final disposition of such appeal.

The application is dismissed with costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 20th day of August, A.D. 1971.

"Mervyn Woods"
M. Woods, J.A. for the Court.

CORAM: WOODS, BROWNRIDGE and MAGUIRE, JJ.A.

IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

(CROWN SIDE)

IN THE MATTER OF THE TRADE UNION ACT, R.S.S. 1965 CHAPTER 287 AS AMENDED; AND

IN THE MATTER OF A CERTAIN ORDER OR DECISION MADE BY THE SASKATCHEWAN LABOUR RELATIONS BOARD DATED THE 7TH DAY OF JULY, A.D. 1971

BETWEEN:

THE MECHANICAL WORKERS TRADE UNION (NO AFFIL.)

APPLICANT

— and —

THE LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN, SASKATOON MECHANICAL MAINTENANCE AND SERVICE LTD., THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NUMBER 264 AND SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NUMBER 577,

RESPONDENTS

BEFORE THE HONOURABLE MR. JUSTICE A. L. SIROIS, IN CHAMBERS AT SASKATOON — *MONDAY, THE 4TH DAY OF OCTOBER, A.D. 1971*

ORDER

UPON THE APPLICATION of the Applicant; and upon hearing counsel, Mr. H. M. L. Robertson, appearing for the above named Applicant; Mr. P. G. Glendenning, appearing on behalf of the Respondent, THE LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN; and Mr. George J. D. Taylor, Q.C., appearing for the Respondent, THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, LOCAL NUMBER 264; and upon reading the Notice of Motion with proof of service, together with the Affidavits of Garry Kreller and Jack Wathen; this Court was pleased to order that the said Application of the above named Applicant, be and the same is hereby dismissed with costs.

"David J. Sinclair"
D. Sinclair, Local Registrar.

SAS K TCHEWAN

COURT OF QUEEN'S BENCH (CROWN SIDE)

Regina ex reI Revelstoke Building Materials Ltd.

v.

The Labour Relations Board of the Province of Saskatchewan
and
Construction and General Workers' Local Union No. 890.

The Trade Union Act 1965, s. 5 (d) (e) — Board's jurisdiction — Unfair Labour Practice Finding — Applications for Writ of Certiorari.

An application was made for a writ of *certiorari* to quash a finding of the Board that the company was engaging in an unfair labour practice, and the order of the Board requiring the company to refrain from this unfair labour practice.

Held: the application was dismissed as the Board had decided the very question it was required to decide, and having full and complete jurisdiction to do so.

FEBRUARY 7, 1972.

ORDER

The Labour Relations Board under The Trade Union Act, Chap. 287 R S.S. 1965 and amendments thereto and particularly under section 5(d) and (e) clearly had jurisdiction to determine whether an unfair labour practice is being or has been engaged in and to require any person to refrain from violations of this Act or from engaging in any unfair labour practice.

The Board was called upon to determine whether Revelstoke Building Materials Limited had engaged in an unfair labour practice within the meaning of section 32(1) of The Trade Union Act, *supra*, and further to require the said company to refrain from engaging in the said unfair labour practice.

The Boards decision which forms a part of the record shows that the said Board made a clear finding that the company did act contrary to the provisions of section 32 of the said Act in that it has engaged in an unfair labour practice within the meaning of section 32(1) and (2) of the Act, and the Board ordered the company to refrain from engaging in the unfair labour practice it was charged with.

I f nd that the Board decided the very question it was required to decide. It had full and complete jurisdiction to do so. The application for a writ of *certiorari* hereby stands dismissed with costs to the respondents.

"Mr. Justice A. L. Sirois"

SASKATCHEWAN COURT OF APPEAL

Woods, Brownridge and Maguire JJ.A.

Letter Carriers' Union of Canada v. Canadian Union of Postal Workers and M & B Enterprises Ltd.

Trades and trade unions — Cartage company carrying mail under contract with Post Office — Jurisdiction over employees of Saskatchewan Labour Relations Board.

Application to quash, by way of *certiorari*, an order of the Labour Relations Board of Saskatchewan. The order provided, *inter alia*, that respondent union be certified as bargaining agent for certain employees of a company which, pursuant to contract, was delivering mail for the Post Office. The evidence showed that the company's activities consisted, as to 90 per cent, of work in connection with its government letter-carrying contracts and, as to the remaining 10 per cent, of the carriage of household goods under an "A" licence. The question for determination was whether the Labour Relations Board of Saskatchewan had jurisdiction to certify the respondent union or whether jurisdiction vested in the Labour Relations Board constituted under the Canada Labour Code, R.S.C. 1970, c. L-1.

Held that the employees of the contractor were not employees within the meaning of s. 108(1) of the Canada Labour Code; it followed that the application must be dismissed: *Reference re Validity of Industrial Relations and Disputes Investigations Act (Can.)*, [1955] S.C.R. 529, [1955] 3 D.L.R. 721; *Bachmeier Diamond & Percussion Drilling Co. Ltd. v. Beaverlodge District of Mine, Mill & Smelter Workers' Local Union No. 913* (1962), 35 D.L.R. (2d) 241 (Sask. C.A.); *Jessiman Bros. Cartage Ltd. v. Letter Carriers' Union of Canada et al.*, [1972] 1 W.W.R. 289, 22 D.L.R. (3d) 363 (Man. C.A.) applied.

[Note up with 21 C.E.D. (2nd ed.) *Trades and Trade Unions*, s. 8A.]

D. K. MacPherson, Q.C., for applicant.

G. J. D. Taylor, Q.C., for respondents.

J. Gebhard, for Labour Relations Board.

30th October 1972. The judgment of the Court was delivered by

MAGUIRE J.A.: — The applicant has applied to this Court for an order for a writ of *certiorari*, for the return of and to quash a certain order of the Labour Relations Board of the Province of Saskatchewan, made on the 17th day of February, 1972, whereby said Board held that the applicant as intended intervener on an application by the respondent Canadian Union of Postal Workers, did not have status as an intervener and further finding and ordering:

> (1) that all truck drivers employed by M & B Enterprises Ltd., in the Province of Saskatchewan, except a person having and regularly exercising authority to employ or discharge employees and a person regularly acting on behalf of management in a confidential capacity, are an appropriate unit of employees for the purpose of bargaining collectively;

(2) that the respondent union herein, a trade union within the meaning of *The Trade Union Act*, represents a majority of employees in the appropriate unit of employees set out as aforesaid;

(3) that the respondent company, a body incorporated under the laws of Saskatchewan with Head Office in the City of Regina, Saskatchewan, the employer, be required to bargain collectively with the respondent Union with respect to the aforesaid appropriate unit of employees.

The applicant's submission, as set forth in the Notice of Motion, is: —

> "That the Labour Relations Board was without jurisdiction to make the Order hereinbefore referred to because of the provisions of Sections 91 and 92 of the *British North America Act, 1867*, 30 Victoria, Chapter 3, and because the work being done by the respondent company and by the employees of the respondent company within the aforesaid bargaining unit, formed an integral part of or was necessarily incidental to the postal service of Canada; and because of the provisions of Section 108(1) of the *Canada Labour Code*, R.S.C. 1970 Chapter L-1."

Counsel for the Labour Relations Board raised a preliminary objection to the hearing of the application based on a submission that the applicant had no status to apply for the desired relief, in that it had no status before the Board and was not a person aggrieved by the order in question.

There is some authority to the effect that the Court will listen to a stranger when the question raised is the jurisdiction of a tribunal to hear and determine the application or matter brought before it. See the article by *D. C. M. Yardley* in [1955] 71 Law Quarterly Review 388, and cases therein cited.

It is not necessary, however, for me to rest my consideration of this application on such ground. It is clear from the transcript of evidence taken before the Board, and admitted by all counsel, that the applicant had filed with the Board a number of support cards, signed by employees of M & B Enterprises Ltd. It is not clear whether the Board determined that the applicant had no status before it, by reason of the time of filing notice of intervention, or the time of filing the support cards, both possibly contrary to its applicable regulations. The fact of execution of support cards in favour of the applicant by a number of the said employees establishes that the applicant is not a 'stranger' and its application may be heard.

The issue briefly stated is, did the Labour Relations Board of Saskatchewan, in the circumstances here existing, possess jurisdiction

to certify the respondent union as the bargaining agent for the employees of M & B Enterprises Ltd., or did the jurisdiction vest in the Labour Relations Board constituted under the *Canada Labour Code*, R.S.C. 1970, Chapter L-1.

A review of the relevant facts is required. M & B Enterprises Ltd., is a company incorporated under the laws of Saskatchewan, with head office in Regina, Saskatchewan, and operating in and from said city.

This company held seven contracts with Canada Post Office for delivery and collection of mail, of which six may be termed highway service routes running from Regina to a designated urban point and including all intervening post offices. The remaining contract covered the City of Regina.

M & B Enterprises Ltd., owned or provided all motor vehicles used in this contract work, which must meet specifications, including color, and name thereon, as specified by the Postmaster General. Eight employees are engaged on highway routes, and up to fifteen full-time plus some part-time employees in Regina urban duties. Two of the latter are supervisors with power to employ or discharge employees and thus not within the unit of employees for collective bargaining purposes under the Saskatchewan enactment. I am of the opinion, although this is not fully material to the issues to be determined, that they are employees within the meaning of that word as found in the *Canada Labour Code*, Section 108(1), quoted later.

Each employee engaged in performances of these contracts must be acceptable to Post Office official, or officials; be fingerprinted, and take an Oath specified by the Post Office. Duties performed are as follows:

On a highway route, an employee loads mail at the Regina Post Office, and drives the designated route on a schedule set by the Post Office, being provided with keys for which he must sign, to permit entry to any Post Office on his route not staffed at the time of his arrival. He delivers mail, for which he has signed, at each office on his route, and picks up mail for intervening points. On reaching his terminus, after a short layover, he retraces the route, delivering and picking up mail at each point, and he effects final delivery on arrival at the Post Office in Regina. Regina urban drivers have some additional duties: each does his own sorting of green bags for delivery purposes; then delivers these bags to the relay boxes on his route, following which he delivers to addresses all special deliveries, registered letters and C.O.D.'s, collecting amounts due on the latter. A morning's work is concluded by picking up mail at the red letter boxes and carrying same to the Post Office. Deliveries of parcel post mail, registered letters, special deliveries, and C.O.D.'s are again performed in the afternoon, and provision is made for delivery of late special deliveries.

Each company employee termed 'carrier' is provided with an identification card supplied by the Post Office, and is required to carry this

at all times while on duty. In addition, the Post Office supplies to each carrier a book, or pamphlet, of instructions or regulations, covering the performance of his duties.

One other factor of importance must be noted. M & B Enterprises Ltd., in 1969, had acquired from a transport trucker, with the approval of the Highway Traffic Board of Saskatchewan, what is termed an "A" licence, permitting it to transport, provincially or inter-provincially, household goods, oil products and twine. This license had been continued in effect up to the time of the application now under review. The company, under this licence, during summer months, engaged in the transport of household goods, both locally and to points in other Provinces. Vehicles used in this transport included, at times, one or two units used or held in reserve for said mail transport. Employees engaged in this work were usually the two supervisors, but on occasion also one or two employees otherwise normally engaged in the mail transport. These might be engaged during such summer months up to twenty per cent of full time in such "A" class transport. The percentage of what, I take from the evidence, to be gross income of the company from this "A" class transport, was ten per cent or less, and thus ninety per cent — plus comes from the mail contracts.

The *Post Office Act*, R.S.C. 1970, Chapter P-14 section 2(1), provides that a mail contractor, (which term applies to M & B Enterprises Ltd.), and the contractor's employees, are not 'postal employees': the *Post Office Act, (supra)*, section 2(1).

The applicant's submission is:

(1) the Postal Service falls within the exclusive jurisdiction of the Parliament of Canada: *British North America Act*, 1867, Section 91.5, (now found as No. 5, R.S.C. 1970, Appendices):

(2) That M & B Enterprises Ltd.'s relationship with its employees, by reason of it being engaged in a Federal work or undertaking, is governed by *Canada Labour Code*, R.S.C. 1970, Chapter L-1. Section 108(1) thereof reads:

> "108.—(1) This division applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees and in respect of trade unions and employers' organizations composed of such employees or employers."

The respondent union's submission, also, briefly stated, is:

"(1) employer-employee labour relations primarily within the exclusive jurisdiction of the province, being a matter of Property and Civil Rights in the Province: *British North*

America Act, 1867, (*supra*), section 92.13; McRuer, C.J.H.C. in *R. v. Ontario Labour Relations Board; ex-parte Dunn*, [1963] 2 O.R. 301 at 311; *Toronto Electric Commissioners v. Snider et al* (1925), 2 D.L.R. 5; [1925] A.C. 396; [1925] 1 W.W.R. 785;

"(2) that the exclusion of a contractor's employees from Postal employees, (*Post Office Act, supra*), shows that Parliament did not intend to assert juridiction over such a contractor's employees;

"(3) in pith and substance, what is here involved is civil rights within the Province. The contract is performed within the Province, and the contractor is transporting by motor vehicles only a class of article or goods which may be so transported; and there is no distinction, from a constitutional point of view, of the nature of goods or articles so transported.

Argument proceeded on the basis that the *Canada Labour Code*, section 108(1), (quoted above), was valid legislation by Parliament, and the issue for my consideration is therefore limited to the question of its application to the particular facts of this case. It was also common ground that the Postal service is a Federal work, undertaking or business.

The leading authority on the issue is *Re Reference as to the validity of the Industrial Relations and Disputes Investigation Act, R.S.C. 1952, Chapter 152, and as to its applicability in respect of certain employees of the Eastern Canada Stevedoring Company Limited*, (commonly called the "*Stevedores*" case), [1955] S.C.R. 529; 3 D.L.R. 721. In the *Stevedores'* case, both Kerwin, C.J.C., and Taschereau, J., stressed that all the work in which these stevedores were engaged was in respect to operations,

"consisting *exclusively*" of services rendered in connection with the loading and unloading of ships, pursuant to contracts with seven shipping companies to handle all loading and unloading of their ships arriving and departing during the season'. All these ships were operated on regular schedules between ports in Canada and ports outside of Canada."

(italics are mine).

The applicability of the Statute in all cases was not determined. Kerwin, C.J.C., in considering the relevant provision of that Act, at page 535, [1955] S.C.R., said:

"* * * (it) should not be construed to apply to employees who are employed at remote stages, but only to those whose work is intimately connected with the work, undertaking or business."

Kellock, J., at page 556, stated:

> "* * * the words, 'in connection with' * * * * are not to be construed in a remote sense but as limited to persons actually engaged in the operation of the work, undertaking or business * * * *. Just what are the proper limits in this connection of the word 'employees' in the section must be left for determination in particular cases as they arise."

Culliton, J.A., (Now C.J.S.) in *Bachmeier Diamond and Percussion Drilling Co. Ltd. v. Beaverlodge District of Mine, Mill and Smelter Workers' Local Union No. 913*, 35 D.L.R. (2d) 241, expressed his view, at pages 243-4, as follows:

> "to be subject to Federal jurisdiction, the work of the applicant company must form an integral part or be necessarily incidental to the work, undertaking or business of Eldorado."

I am of the opinion that part of the work of the employees here involved meets the tests just expressed, but on the facts as above outlined, can it be said that they are,

> "employees who are employed upon or in connection with the operation of any federal work, undertaking of business * *",

as set out in section 108(1) above? They are not '*exclusively*' so employed in any such federal work or undertaking, nor is the work of the employer so limited.

In view of the foregoing, and applying the principles set forth in the cases referred to, I am of the opinion that these employees are not employees within the meaning of said section 108(1).

Reference was made to the decision of the Manitoba Court of Appeal in *Jessiman Bros. Cartage Ltd. v. Letter Carriers' Union of Canada, et al*, 22 D.L.R. (3d) 363. The issue there involved is similar to that in this case, but with some marked differences in facts. I arrive at the same conclusion as the majority of that Court, but for somewhat different reasons. sons.

The application is dismissed. The respondent Union will have its costs against the applicant.

DATED at the City of Regina, in the Province of Saskatchewan, this 30th day of October, A.D. 1972.

Maguire, J.A. for the Court.

CORAM: WOODS, BROWNRIDGE and MAGUIRE JJ.A.

SASKATCHEWAN

COURT OF QUEEN'S BENCH

RE PIGGOTT CONSTRUCTION LTD. AND UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 1990

November 20, 1972

Labour relations — Certification — Labour Relations Board refusing to grant adjournment of certification hearing — Board acting capriciously — Whether exercise of discretion to refuse reviewable — Whether denial of natural justice.

While the Saskatchewan Labour Relations Board has a discretion to grant or refuse to grant (on proper grounds) an application for an adjournment, it must not act capriciously or in disregard of the rights of others or be motivated by bias towards any interested party. Accordingly, where an application is made in good faith to adjourn a certification hearing for one day, in order that the applicant might be able to produce a witness whose evidence is necessary for its case, and the Board refuses the application but directs the parties to be prepared to proceed in the afternoon of the same day with whatever witnesses can be produced by that time, an application to quash the decision of the Board, will be granted.

[*Jim Patrick Ltd. v. United Stone & Allied Products Workers of America Local No. 189, AFL-CIO* (1959), 21 D.L.R. (2d) 189, 29 W.W.R. 592; *R. v. Saskatchewan Labour Relations Board, Ex p. Brodsky Construction Ltd.* (1967), 63 D.L.R. (2d) 621, 61 W.W.R. 53; affd 60 D.L.R. (2d) 609, 58 W.W.R. 618 *sub nom. Brodsky Construction Ltd. v. Int'l Union of Operating Engineers; R. v. Schumiatcher*, [1966] 2 C.C.C. 76, refd to]

APPLICATION by of way of *certiorari* to quash an order of the Saskatchewan Labour Relations Board.

R. D. Laing, for applicant.

C. F. Tallis, Q.C., for respondent, Labour Relations Board.

P. Glendinning, for respondent, United Brotherhood of Carpenters and Joiners of America.

DAVIS, J.: — This is an application by way of *certiorari* to quash an order of the Labour Relations Board on the ground of denial of natural justice in the refusal by the Board of a request for an adjournment of a hearing before the Board. That such an application to the Courts will lie is well settled; and it is equally well settled that if a denial of natural justice has resulted from the refusal the order of the Board will be quashed.

The application was heard at a sittings of the Board at the City of Regina, in this Province. The Board then sitting was composed of the following: Clifford H. Peet, Q.C., Saskatoon; Charles T. Hazen, manager of

Hazen-Twiss Ltd., Saskatoon; Garth F. Gerecki, representative of International Brotherhood of Electrical Workers Union, Saskatoon; C. C. Cave, railway employee, Moose Jaw; J. R. Ingram, vice-chairman of the Board and representative of Canadian Union of Pubic Employees, Regina; Peter L. Graham, Graham Construction, Moose Jaw.

Fortunately the facts are simple and not in dispute. It is not disputed that a denial of natural justice did in fact result from the refusal to grant the adjournment. The sole position taken by counsel for the respondents is that the Board had a complete and unfettered discretion to refuse the adjournment, and accordingly this Court is without jurisdiction to interfere, notwithstanding the effect of the refusal.

Before considering further the foregoing contention a short discussion of the facts is in order. An application was launched by the above local of the union with the Labour Relations Board for certification as bargaining agents for three men engaged in some construction work at Rabbit Lake, a remote area in the Province, it being alleged that these workmen were employees of the applicant company. It seems that when the application was launched these workmen were in the employ of the applicant company, but that when the application was heard they had ceased to be so employed; at least that was the contention of the applicant company, and this appears to me from the material on file to have been the case. In any event there appears to have been a genuine dispute. And the material satisfies me that the dispute could not have been properly resolved by the Board without hearing the testimony of Neville Piggott, the managing director of the applicant company. These facts were all before the Board; the application for the adjournment being made on the grounds that Mr. Piggott was unavailable until the following day when he would go to Regina for the purpose of testifying on behalf of the applicant company.

The hearing was fixed for Regina at 10:00 a.m., on April 4, 1972, and the applicant company was fully aware of this fact. It so happened that Mr. Piggott was at that time engaged in Prince Albert in finalizing a tender on a $300,000 contract, on which the tenders were to be closed on April 5th. Accordingly, Mr. Piggott instructed his lawyer to appear before the Board on April 4th, state the facts, and request an adjournment of *one day*, namely, to April 5th. This counsel did. Mr. Michael Wytosky, business representative for the above local, at Prince Albert, who appeared on behalf of the local, objected, advancing the rather novel reason (as I gather from his somewhat unclear remarks) that he was asking for certification for the area, that the Board was only concerned with boundaries, and that it was not open to the applicant company to prove it had no employees in the area; and consequently, the presence of Mr. Piggott was not essential. In short, he was asking for (and apparently got) a *carte blanche* order, which I can nowhere find was

authorized by the *Trade Unions Act*, R.S.S. 1965, c. 287. If in fact the three workmen at Rabbit Lake were not at the time of certification in the employ of the applicant company, the Board would have no jurisdiction to grant certification. This however, was not argued before me or advanced as a reason for quashing the order. I merely cite these facts to show an important issue had been raised before the Board.

It seems that on hearing the objection of Mr. Wytosky the chairman recessed for a short time in order to give Mr. MacIsaac (counsel then appearing for the applicant company) an opportunity to discuss the proposed adjournment with Mr. Wytosky. No agreement was reached. From the record it appears that the following discussion then took place, and a ruling made:

> THE CHAIRMAN: Yes, well since you've reached no understanding, we thought it only fair to give each of you an opportunity to reach an understanding as to the date on which this can be heard. The Board has decided that you should be ready to go on this afternoon at three o'clock, if necessary, and hopefully Mr. Glendinning, of course if he gets here, you can speak to him about it. Otherwise we shall expect you to be in a position to go on at three o'clock this afternoon — which will give you an opportunity to arrange for any witnesses from Saskatoon, if necessary — even if Mr. Piggott is not available, probably . . .

The Board recovened at 3:37 p.m. No agreement had been reached as apparently Mr. Glendinning had not arrived. Counsel for the applicant company renewed the request for an adjournment but to no avail. Thereupon the chairman of the Board made these observations:

> THE CHAIRMAN: Well, we decided this morning that we should go ahead with this this afternoon. We had hoped, of course, that it would be possible for someone else to appear instead of Mr. Piggott. I am not too sure that probably we don't fully appreciate the evidence you wish to put forward to us, Mr. MacIsaac.

I cite this as an indication of the attitude of the Board. Counsel had been granted an adjournment until 3:00 in the afternoon to enable him to discuss the matter with Mr. Glendinning. There had been no previous indication that the hearing would inevitably proceed at 3:00 irrespective of the presence of Mr. Piggott; that would have rendered the adjournment until 3:00 meaningless. And as the Board well knew that only Mr. Piggott could depose to the facts, the suggestion that the Board would give an opportunity to obtain witnesses from Saskatoon seems an idle (and insincere) gesture. It is 165 miles from the centre of Saskatoon to the centre of Regina and how the Board expected counsel to contact witnesses from Saskatoon (even if there were any), interview them, and have them appear before the Board that afternoon is beyond my comprehension. If indeed the suggestion of the Board was genuine it must have intended to hear those witnesses the next day — the very day when Mr. Piggott was prepared to appear. Why then did the Board act as it did? Mr. Wytosky clearly did not want Mr. Piggott to be present, but what justifiable reason did the Board have for its conduct? I can find none. On the application before me I asked this of both counsel for the defendants but neither was able to advance any reason. None was given

by the Board. But I think that a reason may properly be gleaned from the remarks of the chairman when the Board reconvened at 3:37 p.m.:

> THE CHAIRMAN: *I take it, Mr. Wytosky, that you have something else to go on to Prince Albert for?*
>
> MR. WYTOSKY: Yes, I have. I contacted my legal counsel and he advised me to try to proceed with this because there are applications for certifications — this is one, and it is in the proper order; we have the majority of support and we cannot deviate from the boundaries that are spelled out and registered with the proper authorities. I think this is what the contentious point is, and my legal counsel has advised there is no problem, that we should proceed with this as it has been presented to the Board.

(Italics added.) One wonders where the chairman got the information that Mr. Wytosky had other business in Prince Albert. There is nothing in the printed record of the proceedings where Mr. Wytosky or anyone else had imparted that information to the chairman or any member of the Board in open forum. Someone, presumably Mr. Wytosky, must have conveyed this information to someone on the Board *ex curia*. Could it have been that the Board was influenced by this information and wished to accommodate Mr. Wytosky? Boards, like Courts, must act only on evidence given and statements made in open forum. I trust that my suspicions in the present instance are ill-founded but in the absence of any other logical reason I do not think it improper to attach significance to these circumstances.

One may ask why it was that the Board did not out of convenience, or even courtesy, adjourn the hearing to the City of Saskatoon. It will be observed that the chairman and two of the sitting members of the Board resided in Saskatoon; the others residing in Moose Jaw and Regina. Mr. Wytosky himself resides in Prince Albert, and the head office of the applicant company is in the City of Saskatoon. It is a recognized tenet of the law that whenever reasonably possible the administration of the law should be brought to the citizens. The administration of justice made inaccessible may well result in justice denied.

I wish to emphasize that it was at no time suggested that the application for the adjournment was other than genuine; and further, neither counsel for the defendants took the position that the defendants would have been prejudiced by the one-day adjournment. And there is no suggestion that in the material before me that the members of the Board themselves would in any way be inconvenienced, although this should not influence them. Both counsel took refuge, as I have already stated, in the contention that whatever the result the Board's actions were not reviewable by the Courts.

In support of his contention Mr. Tallis cited two cases, both decisions of the Court of Appeal of this Province, namely, *R. v. Saskatchewan Labour Relations Board, Ex p. Brodsky Construction Ltd.* (1967), 63 D.L.R. (2d) 621, 61 W.W.R. 53, and *R. v. Schumiatcher*, [1966] 2

C.C.C. 76. I may say at once that I have just reread the Schumiatcher case and I can find no reference whatsoever to the proposition for which it has been cited. Mr. Tallis did not have the report before him and spoke from memory; evidently he was in error, In the *Brodsky* case the then Board after full inquiry, sent out notices to the Brodsky Construction Co, informing it of the filing of an application for certification, and of the date fixed for the hearing, but received no replies. It so happened that the company had moved its offices and was unaware of the application or hearing until the hearing had been held and an order for certifcation had been made. Everything the Board had done was regular and proper. It waS contended by Brodsky Construction on application to the Courts for relief that by granting the order in the absence of the company there was a denial of natural justice. The application came on for hearing before Bence, C.J,Q.B., of the Queen's Bench Division [60 D.L.R.J (2d) 609, 58 W,W.R. 618 *sub nom. Brodsky Construction Ltd. v. Int'l Union of Operating Engineers*, and was disallowed. On appeal to the Court of Appeal the Chief Justice of that Court confirmed the decision of Chief Justice Bence and reiterated that as everything the Board had done was authorized by statute no denial of natural justice, as that term is known in law, had resulted. The learned Chief Justice took occasion to point out that Brodsky Construction had still the right by statute (the 60-day period for so doing not having elapsed) to seek a rehearing before the Board. No question of improper exercise of a discretion arose in that case, as it does in the application before me. In my respectful view the Brodsky case is not an authority for the proposition for which it has been cited.

True, the Labour Relations Board has the right to grant or refuse to grant (on proper grounds) an application for an adjournment, but in the exercise of that discretion the Court will not permit a Board to act capriciously, or in disregard of the rights of others, or be motivated by bias towards any interested party. And where such conduct appears and results in a denial of natural justice, the Courts will not hesitate to intervene in order that justice may be done. This principle has been repeatedly stated over the years, and as late as 1959 was given effect to by our Court of Appeal in *Jim Patrick Ltd. v. United Stone & Allied Products Workers of America, Local No. 189, AFL-CIO* (1959), 21 D.L.R. (2d) 189, 29 W,W.R. 592. I can see no practical distinction between the facts of that case and those before me. In the course of his judgment in the *Jim Patrick Ltd.* case, Martin, C.J.8., made these observations, at p. 193:

> At p. 132 Viscount Haldane L.C. is reported as follows: "When the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same."

> Viscount Haldane L.C., at p. 133 also quoted with approval Lord Loreburn in *Bd. of Education v. Rice*, [1911] A.C. 179, wherein he said: "In disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on every one who decided anything . . . always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. If the Board failed in this duty, its order might be the subject of *certiorari*."

Cullition, C.J.S., in the *Brodsky* case, *supra*, cited with approval the principles relied on in the *Jim Patrick Ltd.* case, and at p. 624 of the report discussed the principle involved in this manner:

> I think the law is well settled that the Saskatchewan Labour Relations Board is bound, in the exercise of its functions, by the rule expressed in the maxim *audi alteram partem: Alliance des Professeurs Catholiques de Montreal v. Labour Relations Board*, [1953] 4 D.L.R. 161, [1953] 2 S.C.R. 141, 107 C.C.C. 183. In this case Rand, J., at p. 180, said:
>
> > "*Audi alteram partem* is a pervading principle of our law, and is peculiarly applicable to the interpretation of statutes which delegate judicial action in any form to inferior tribunals: in making decisions of a judicial nature they must hear both sides, and there is nothing in the statute here qualifying the application of that principle."
>
> See also *Jim Patrick Ltd. v. United Stone & Allied Products Workers of America, Local 189, AFL-CIO* (1959), 21 D.L.R. (2d) 189, 29 W.W.R. 592.

In the case before me the denial of natural justice was so obvious and the law so clear I might well have disposed of the application summarily, but as the present Board is newly constituted and as yet with little experience, I consider it advisable to restate the principles of law by which it must be guided. The present chairman is himself a lawyer and I feel that I should point out to him, with respect, that although *The Trade Union Act* grants to the Board very extensive powers, these powers must be read subject to the law of the land. I am sure the chairman would readily agree that the Courts of this Province constantly and invariably grant adjournments which are justified (often to its own inconvenience) so that all parties may be heard and justice done. The Courts studiously avoid proceeding in a manner which might result in the transgression of the principle quoted by Culliton, C.J.S., in the *Brodsky* case *supra*, namely, *audi alteram partem* — which has been interpreted to mean that no man should be condemned unheard. But as the *Brodsky* case shows, when the Board does all that the law requires of it, it may proceed in the absence of an interested party; its rights and duties might well be nullified if it were otherwise. And if the Board has just and honest reason to believe that a request for an adjournment were mere stalling tactics it may well refuse an adjournment. But, as I have observed above, in the present case there is no suggestion that the requests for an adjournment were other than genuine, and entirely reasonable. I trust that these *obiter* remarks may be of some value in the future to the chairman and members of the Labour Relations Board.

I find that the refusal of the Board to grant the adjournment requested in the present case was unjustified and resulted in a denial of natural justice and that in consequence the Board was without jurisdiction to make the order complained of. Accordingly, the order will be set aside, without the actual issue of a writ of *certiorari*. The applicant is entitled to its costs against both defendants.

Application granted.

SASKATCHEWAN

COURT OF APPEAL

Culliton, C.J.S., Brownridge and Maguire JJ.A.

Nipawin District Staff Nurses Association v. Nipawin Union Hospital, Service Employees' International Union, Local No. 333 and Saskatchewan Labour Relations Board

Trades and trade unions — Determination by Labour Relations Board that applicant a company-dominated organization — Scope of inquiry — Excess of jurisdiction — The Trade Union Act, 1972 (Sask.), c. 137.

Applicant had applied to the Labour Relations Board for an order determining that all registered and head nurses, with certain exceptions, employed in respondent hospital constituted an appropriate unit for collective bargaining, that the applicant represented a majority of such employees and requiring that the employer bargain collectively with the applicant. Respondent union filed a reply in which it alleged that the applicant was a "company dominated organization"; the Board upheld this contention and dismissed the application.

Held, the application for *mandamus* should be allowed, the Board's order quashed and the matter remitted to be determined according to law; there was no doubt that the Board was entitled to inquire into and determine whether the applicant was a company-dominated organization: whether, in the instant case, it was dominated by the Saskatchewan Registered Nurses Association; but this involved a determination that the Association was either an employer or an employer's agent within the definitions contained in s. 2(g) and (h) of The Trade Union Act. The Board went beyond the jurisdiction conferred by the Act and its decision was not on the provisions of the legislation but rather on the Board's view of what constituted a company-dominated organization. In so doing it exceeded its jurisdiction: *Smith & Rhuland Ltd. v. The Queen*, [1953] 2 S.C.R. 95, 107 C.C.C. 43, [1953] 3 D.L.R. 690; *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147, [1969] 1 All E.R. 208 applied.

[Note up with 21 C.E.D. (2nd ed.) *Trades and Trade Unions*, s. 8A.]

D. K. MacPherson, Q.C., for applicant.

G. J. A. Taylor, Q.C., for union.

J. Gebhard, for Labour Relations Board.

10th April 1973. The judgment of the Court was delivered by

CULLITON C.J.S.: — This is an application by Nipawin District Staff Nurses Association with *certiorari* in aid for a peremptory writ of *mandamus*, directed to the Labour Relations Board of Saskatchewan (hereinafter referred to as "the Board"), commanding it to exercise the jurisdiction conferred upon it by s. 5(a), (b) and (c) of *The Trade Union Act*, 1972 (Sask.), c. 137.

An application was made by Nipawin District Staff Nurses Association to the Labour Relations Board for an order determining that all registered and head nurses employed by the Nipawin Union Hospital in

or in connection with its hospital at Nipawin, except the Director of Nurses, is an appropriate unit for the purpose of bargaining collectively; determining that the applicant represents a majority of the employees in the said unit and requiring the employer to bargain collectively with the applicant trade union.[1] The original application included graduate nurses in the proposed appropriate unit of employees but the application was amended to strike out this group and the application was dealt with by the Board as amended.

A reply was fled by Service Employees' International Union, Local Number 333 which was the trade union duly certified for bargaining collectively on behalf of employees of Nipawin Union Hospital other than those described in the application of the Nipawin District Staff Nurses Association. The only allegation in the reply which I need consider is the following:

> "The organization of the NIPAWIN DISTRICT STAFF NURSES ASSOCIATION was organized, formed and influenced in its administration by the Saskatchewan Registered Nurses Association, which is an organization including many persons regularly acting other than as employees within the meaning of The Trade Union Act, exercising authority and performing functions of a managerial character, or acting in a confidential capacity in respect of labour relations."

The Labour Relations Board dismissed the application on the ground that the applicant was a "company dominated organization" in that it was under the domination of The Saskatchewan Registered Nurses Association. In its reasons for the decision the Board said, in part:

> "The Board concurs, on the evidence presented to it in this application, with the view expressed by Miss Sutherland in the indicated article and feels that an organization under the domination, or control, of the SRNA Council would, or could, in effect be control of the bargaining process by management or management personnel.
>
> Under these circumstances the fitness of the applicant to represent employees for the purpose of collective bargaining is impaired. It has been stated:
>
> > "Statutory policy is clear that unions should be free of employer influence or domination. The lines separating the policies can present neat cases." (see Carrothers "Collective Bargaining Law in Canada" 1965, page 207)
>
> The present application may well be a "neat" case, but nevertheless on a full consideration of all the evidence presented, the

[1] Nipawin District Staff Nurses Association v. Nipawin Union Hospital and Service Employees' Local Union No. 333, Case No. 3.071

Board feels it has no alternative but to hold that the applicant is a company dominated organization and is accordingly not a trade union within the meaning of the Act."

While the notice of motion sets forth six grounds upon which the application is based, I think that the grounds may be summarized as follows:

(1) that in determining that the applicant for certification was a company dominated organization, the Board did so on a basis not authorized by *The Trade Union Act* and therefore acted in excess of its jurisdiction;

(2) that in determining that the applicant for certification was a company dominated organization, the Board did so without finding that The Saskatchewan Registered Nurses Association was either an employer or employer's agent and thus acted without jurisdiction;

(3) that in determining that the applicant for certification was a company dominated organization, the Board was not empowered to act upon its view that it was such an organization because it was dominated by the Council of the Saskatchewan Registered Nurses Association, the members of which were largely made up of persons who, in their personal employment, could not be classified as employees within *The Trade Union Act*; that in so doing, the Board applied a test of its own making and not one authorized by *The Trade Union Act*, and thus exercised a jurisdiction which it did not possess;

(4) that in determining the applicant for certification was a company dominated organization, the Board acted in a manner which must be construed both as acting in excess of its jurisdiction, and as refusing to carry out the jurisdiction cast upon it by *The Trade Union Act.*

There was a great deal of evidence taken at the hearing before the Board and that evidence was filed on this application. I do not find it necessary to say whether it lies within the Court to review that evidence as in my opinion the application can properly be disposed of by a consideration of the record, which the Court has the undoubted right to review. This record consists of the application, the reply of the Service Employees International Union, Local number 333, the decision of the Board, and its reasons therefor: *Rex vs. Northumberland Compensation Appeal Tribunal: ex parte Shaw*, [1952] 1 KB 338.

The powers of the Board in disposing of an application for certification are set out in section 5 of *The Trade Union Act.* The portions of that section relevant to this application are:

"5. The Board may make orders:

(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit, but no unit shall be found not to be an appropriate unit by reason only that the employer of employees in the unit claims that his complement of employees in the unit is at less than full strength;

(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;

(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;
****

(h) determining whether a labour organization is a company dominated organization;"

"Trade union" is defined by section 2(l) and reads:

"2. In this Act:
****

(l) 'trade union' means a labour organization that is not a company dominated organization."

Clearly the Board had the right to determine whether the applicant was a company dominated organization. *The Trade Union Act* contains a privative clause. Thus it is equally clear that if, in the determination of that question, the Board acted within its jurisdiction, the decision cannot be reviewed in *certiorari* or *mandamus* proceedings, even if the decision were wrong in fact or law: *Farrell et al vs. Workmen's Compensation Board*, [1962] S.C.R. 48; and *Noranda Mines Limited and Her Majesty The Queen and Labour Relations Board of Saskatchewan*, [1969] S.C.R. 898.

"Company dominated organization" is defined by section 2(e) as follows:

"2. In this Act:
****

(e) "company dominated organization" means a labour organization, the formation or administration of which an employer or employer's agent has dominated or interfered with or to which an employer or employer's agent has contributed financial or other support, except as permitted by this Act;"

"Employer" and "employer's Agent" are defined in paragraphs (g) and (h) of section 2, which reads:

"(g) "employer" means:

(i) an employer who employs three or more employees;

(ii) an employer who employs less than three employees if at least one of the employees is a member of a trade union that includes among its membership employees of more than one employer;

(iii) in respect of any employees of a contractor who supplies the services of the employees for or on behalf of a principal pursuant to the terms

of any contract entered into by the contractor or principal, the contractor or principal as the board may in its discretion determine for the purposes of this Act;

(h) "employer's agent" means:

(i) a person or association acting on behalf of an employer;

(ii) any officer, official, foreman or other representative or employee of an employer acting in any way on behalf of an employer with respect to the hiring or discharging or any of the terms or conditions of employment of the employees of the employer;"

No authority is needed for the proposition that the Board, being a statutory body, has only those powers and duties granted or imposed by *The Trade Union Act*. Thus in the determination of whether the applicant was a "company dominated organization" the limit of the Board's jurisdiction was to determine whether it was such an organization in accordance with the provisions of *The Trade Union Act*.

As I have already stated, under section 5 (h) of the Act, the Board was entitled to inquire into and determine whether the applicant was a company dominated organization. A company dominated organization is defined in the Act by section 5 (e). The limit of the Board's jurisdiction in such inquiry was to determine whether the applicant was a company dominated organization as so defined.

The Board did find that the applicant was dominated by the Saskatchewan Registered Nurses Association. That finding, however, would not render the applicants a company dominated organization within section 2(e) unless the Saskatchewan Registered Nurses Association was either an employer or an employer's agent. It was incumbent upon the Board, then, to say whether the Saskatchewan Registered Nurses Association was an employer or an employer's agent within these terms as defined by paragraphs (g) and (h) of section 2. Therefore, in this aspect of its inquiry, the Board's jurisdiction was limited to a determination whether the Saskatchewan Registered Nurses Association was an employer or an employer's agent within these statutory definitions.

The nature of the Board's inquiry, and the findings which it made, are to be found in the reasons for judgment delivered by the Board. It is obvious from a review of these reasons, that the Board did not find the Saskatchewan Registered Nurses Association to be an employer as defined in section 2(g). It is equally obvious that the Board did not find the Saskatchewan Registered Nurses Association to be an employer's agent as defined in section 2(h). Nowhere in the reasons of the Board is it suggested that the Saskatchewan Registered Nurses Association, in its association with the applicant, was acting for or on behalf of the employer named in the application, nor that it was acting for or on behalf of any other employer.

The inquiry which in fact the Board did make is apparent in its reasons for judgment and in the decision which it made. The Board inquired

into the personal and private employment of the individual members who constituted the council of the Saskatchewan Registered Nurses Association. Having done so, it found that the members of the council, from time to time, were made up of persons who, in their personal and private employment, could not be classified as employees within *The Trade Union Act*. Having reached this conclusion, it held that the applicant, being under the domination of an organization with a council so constituted, would in effect be controlled by management and management personnel and was therefore a company dominated organization.

The Board, in my opinion, proceeding on this principle, failed to make the inquiry prescribed by the Act — an inquiry to determine whether the applicant was a company dominated organization as defined in the Act. The inquiry which it made and the decision which it reached were not founded on the provisions of the legislation but upon the Board's view of what constituted a company dominated organization. This the Board was not empowered to do and it thus acted in excess of its jurisdiction; *Smith and Rhuland Limited v. The Queen: on the relation of Brice Andrews et al*, [1953] 2 S.C.R. 95; and *Anisminic Limited v. The Foreign Compensation Commission and Another*, [1969] 1 A.E.R. 208, and particularly Lord Reid at page 216.

If it be contended that the judgment of the Board is to be construed as a finding by the Board that the Saskatchewan Registered Nurses Association was an employer's agent, then again that conclusion was reached on the Board's view of what constituted an employer's agent and not upon the definition set forth in the Act. For the Saskatchewan Registered Nurses Association to be an employer's agent, it would be necessary for the Board to make a finding, within the provisions of section 2(h) and this the Board did not do. The Board, if it did make a finding that the Saskatchewan Registered Nurses Association was an employer's agent, did so because it found that from time to time the council of that organization was made up of people who, in their private and personal employment could be classified as management personnel and not as employees within *The Trade Union Act*.

This test is neither authorized by the Act nor is it right in principle. The nature and legal status of the Saskatchewan Registered Nurses Association as an organization lies to be determined from the legislation which created it. Under *The Registered Nurses Act*, and bylaws adopted pursuant thereto, eligibility for election to the council is based upon membership in the Association. When elected, members of the council act for and on behalf of the members of the Association, completely unrelated to their personal and private employment, or to the employers by whom they may be employed. Under the Act and the bylaws, the council is not authorized to do otherwise.

In saying this, I am not to be construed as saying that circumstances might not exist when the Saskatchewan Registered Nurses Association could, by its actions, be held to be an employer's agent. If the Association

were in fact acting for and on behalf of an employer in the organization of a trade union applying for certification, then it would be an employer's agent. The Board, however, made no such finding. If it made any finding that the Saskatchewan Registered Nurses Association was an employer's agent, it did so on its own view of what constituted an employer's agent and not upon the definition thereof as set out in *The Trade Union Act*. In so doing it acted without jurisdiction.

It can be said, as well, that in the manner in which the Board disposed of the application, it not only exceeded its jurisdiction but failed to perform the duties cast upon it by the statute; *Labour Relations Board v. The Queen on relation of F. W. Woolworth Company Limited et al*, [1956] S.C.R. 82.

I therefore order that the decision of the Board be quashed and that a *mandamus* issue requiring the Board to determine the application according to law. The applicant will have its costs of the application to be paid by the Service Employees International Union, Local Number 333.

Learned counsel for the union contended that the application was not in the form required by the rule. I do not think this contention is well founded. If I am wrong, however, leave is granted to the applicant to make such amendment as may be necessary.

DATED at the City of Regina, in the Province of Saskatchewan, this 10th day of April, , A.D. 1973.

"E. M. Culliton,"
E. Culliton, C.J.S., for the Court.

CORAM: CULLITON, C.J.S., BROWNRIDGE and MAGUIRE, JJ.A.

SASKATCHEWAN

COURT OF APPEAL

Nipawin District Staff Nurses Association

v.

Nipawin Union Hospital
and
Service Employees' International Union, Local No. 333,
and
Labour Relations Board of the Province of Saskatchewan.

Application under the Supreme Court Act, s. 67 — Whether transcript included in case — What case includes.

An application was made to the Court of Appeal under section 67 of the *Supreme Court Act* for an order settling the case to be stated on an appeal to the Supreme Court of Canada. It was argued that the transcript of the evidence should be included in the case.

Held: that the transcript was not to be included, as the issues raised in the appeal could be fully and properly considered without reference to the evidence.

H. R. Kloppenburg for the Appellant, APPLICANT.

D. K. MacPherson, Q.C. for the Respondents.

FIAT — *CULLITON, C.J.S.*

An appeal from the judgment rendered by this Court has been taken to the Supreme Court of Canada. This is an application, pursuant to section 67 of the *Supreme Court Act*, for an order settling the Case to be stated.

Learned counsel for the respondents contended that there should be included in the Case a transcript of the evidence, or at least portions of the evidence taken before the Labour Relations Board. He based his contention on the ground that it was open to the respondents to argue before the Supreme Court of Canada that there was no evidence whatever that the respondents were "employers" or "employer's agents" as defined by *The Saskatchewan Trade Union Act.*

This Court, in disposing of the original application, confined its review to a review of the record and did not review the evidence or any part thereof. In my opinion, the issues raised in the appeal, in the judgment of this Court, can be fully and properly considered without reference to the evidence. I therefore direct that the Case stated include:

1. Application for Certification.

2. Reply.

3. Order of the Labour Relations Board, and its reasons for judgment.
4. Notice of Motion.
5. Affidavit of Miss Mills, with the exception of paragraphs 5 and 6 thereof, and the exhibits referred to in such paragraphs.
6. Reasons for judgment of the Court of Appeal for Saskatchewan.
7. Formal judgment.
8. Writ of Mandamus, and
9. such other items as may be prescribed by the Rules of the Supreme Court of Canada.

Costs of this application to be costs in the cause.

DATED at the City of Regina, in the Province of Saskatchewan, this 29th of May, A.D. 1973.

"E. M. Culliton"
E. Culliton, C.J.S.

SASKATCHEWAN

COURT OF APPEAL

Labour Relations Board of Saskatchewan

v.

United Brotherhood of Carpenters and Joiners of America,
Local No. 1990
and
Regina ex rel Piggott Construction Ltd.

Appeal from judgment quashing certification order — Board's refusal to grant adjournment — Denial of natural justice — Onus on applicant — Not restricted to record — Board's discretion — Appeal allowed.

This was an appeal from a judgment quashing without the actual issue of a writ of *certiorari* a certification order of the Board on the grounds that the refusal of the Board to grant an adjournment at the request of counsel for the company was unjustified and resulted in a denial of natural justice. The general manager of the company received notification of the hearing on March 10, 1972 and on March 29, 1972 informed his solicitors that he could not be present at the hearing on April 4, 1972. The company's solicitor appeared at the hearing on April 4, and asked for an adjournment on the grounds that the general manager was unable to attend due to another commitment. The Board adjourned until the afternoon to give the solicitor for the company and the business representative of the union a chance to discuss the matter with a view to arranging another date. They were unable to reach agreement, the representative for the union opposing any adjournment. The Board determined to proceed that afternoon and on April 6 made the certification order.

Held: that the appeal was allowed and the order of the chambers judge quashing the certification order was set aside. The granting of or refusal to grant an adjournment is within the discretion of the Board, and in this case the Board didn't exercise its discretion wrongfully. The company did not act reasonably in waiting until the morning of April 4 before asking for an adjournment. Where an applicant alleges there has been a wrongful refusal to grant an adjournment, it is, as a general rule, for the applicant to show a good reason for the adjournment not attributable to his actions: *R. v. Medical Appeal Tribunal, ex parte Carrarini*, [1966] 1WLR 883.

APPEAL FROM FIAT OF DAVIS, J.Q.B. in Chambers

APPEAL HEARD: April 17, 1973

JUDGMENT OF THE COURT FILED: July 13, 1973

APPEAL ALLOWED: ORDER OF DAVIS, J., SET ASIDE: COSTS OF APPLICATION & APPEAL TO APPELLANT.

REASONS for judgment by: HON. CHIEF JUSTICE E. M. CULLITON

concurred in by: THE HON. MR. JUSTICE MERVYN WOODS, and
THE HON. MR. JUSTICE P. H. MAGUIRE

COUNSEL on the hearing:

for APPELLANT:	Mr. G. J. D. Taylor, Q.C.
for RESPONDENT PIGGOTT:	Mr. R. D. Laing
for RESPONDENT UNION:	Mr. P. W. Glendinning

JUDGMENT OF THE COURT — CULLITON, C.J.S.

This is an appeal by the Labour Relations Board, (hereinafter referred to as the 'Board'), from the judgment of Davis, J., quashing without the actual issue of a writ of *certiorari*, the order of the board dated April 6, 1972, in which it determined that the employees therein named in the geographical area therein set out, constituted an appropriate unit for the purpose of bargaining collectively and determining that the United Brotherhood of Carpenters and Joiners of America, Local 1990, a trade union, represented a majority of employees in the appropriate unit and requiring Piggott Construction Ltd., Saskatoon, Saskatchewan, the employer, to bargain collectively with the trade union. The learned Chambers Judge quashed the order on the ground that the refusal of the Board to grant an adjournment at the request of counsel for Piggott Construction Ltd., was unjustified and resulted in a denial of natural justice.

While the granting of or refusal to grant an adjournment is undoubtedly a matter within the Board's discretion, nonetheless when there has been a wrongful refusal to grant an adjournment, resulting in the denial of natural justice, *certiorari* may lie to quash the order and directions of the Board: *Regina v. Medical Appeal Tribunal (Midland Region); ex parte Carrarini*, [1966] 1 W.L.R. 883; and *Jim Patrick Limited v. United Stone and Allied Products Workers of America, Local 189, and Labour Relations Board* (1959), 29 W.W.R. 592. Whether or not there has been a wrongful refusal to grant an adjournment must be determined in the light of the facts in each case.

Where an applicant alleges there has been a wrongful refusal to grant an adjournment, it is, as a general rule, for the applicant to show a good reason for the adjournment not attributable to his actions. In *Regina v. Medical Appeal Tribunal, ex parte Carrarini, supra*, Lord Parker, C.J., expressed this principle at Page 888 as follows:

> "I understand that point very well; it is in general always for an applicant to show good reason not attributable to his fault for obtaining an adjournment. But it is to be observed in this decision, to which I return, that the medical appeal tribunal did not refuse an adjournment on that ground. If they had said: there appeared to us to be no reason why Mr. Murray's report was not available at the hearing, it must have been the fault of the applicant himself and we are not going to adjourn, that is one thing and a thing which I could understand. But what they say in their decision is nothing of the sort."

Support, too, is found for this view in the judgment of Laskin, J.A. (as he then was), in *Regina v. Botting*, [1966] 2 O.R. 121.

While in *certiorari* proceedings the Court, as a general rule, is restricted to a review of the record, as defined by Denning, L.J., in *Rex v. Northumberland Compensation Appeal Tribunal; ex parte Shaw*, [1952] 1 K.B. 338, where the application to quash is based upon the ground of denial of natural justice, the Court, to ascertain the facts, will look at affidavit evidence filed in support of the application: *McCosham Storage and Distributing Company (Saskatchewan) Limited v. Canadian Brotherhood of Railway Employees and other Transport Workers, Division No. 189* (1958), 28 W.W.R. 422.

The United Brotherhood of Carpenters and Joiners of America, Local Union No. 1990, made application for certification as the trade union representing a majority of all journeymen carpenter foremen, journeymen carpenters, and carpenter apprentices or carpenter tradesmen, who hold a certificate of status in accordance with *The Apprenticeship and Tradesmen's Qualification Act*, employed by Piggott Construction Ltd., of Saskatoon, Saskatchewan, within the area of West to the East boundary of 107° parallel, South to North boundary of Township 41, East to the Manitoba border, and North to the North-West Territories boundary, except in the City of Prince Albert, Saskatchewan, as per the Certification Order dated October 8th, 1946.

The application was dated March 8th, 1972, and was filed with the Board on March 9th, 1972. By letter dated March 9, 1972, the Board wrote to Piggott Construction Ltd., advising:

> (1) that the application for certification had been filed and enclosing a copy of the application;
>
> (2) that the company could reply to the application or give notice of its intention to appear before the Board, but in either case the reply or notification must be in the possession of the Secretary of the Board not later than March 20, 1972; and
>
> (3) enclosing form of statement of employment to be completed and returned to the Secretary not later than March 20, 1972.

The letter then concluded with this paragraph:

> "The application will be placed before the Board on or about April 4, 1972, in the Board room on the Second floor at 2350 Albert Street, Regina. You will be notified in due course as to the exact time and date of the hearing."

As the statement of employment had not been received by the Secretary of the Board by March 20th, 1972, the Secretary wrote to Piggott Construction Ltd., on March 23, 1972, requesting that such statement be forwarded not later than March 28th, 1972. In the same letter the Secretary wrote:

> "The application is now scheduled to be placed before the Board at 10:00 a.m. on Tuesday, April 4, 1972, in the Board room on the Second floor at 2350 Albert Street, Regina. If you wish to make oral representations to the Board, please be present at that time."

Piggott Construction Ltd., completed the statement of employment on March 29, 1972, which was received by the Board on March 30th. In the statement were listed the names of the employees, following which was the following notation:

> "The above employees were hired by Piggott Construction Ltd. through the facilities of Local Carpenters Union No. 1990 due to a project location with union requirements imposed upon Design Management Ltd. who were unable to obtain the necessary union carpenters as the union would not issue a certification to Design Management Ltd. Piggott Constr. Ltd. did not have the actual job contract at Rabbit Lake but merely a hiring agreement with Design Management Ltd., the actual main contractor.
> (signed) N. PIGGOTT"

The affidavit of Neville Piggott, General Manager of Piggott Construction, was filed. In this affidavit Piggott deposed:

(1) that he received on March 10, 1972, the letter of the Board dated March 9, 1972;

(2) that he received on March 23, 1972, the letter of the Board dated the same day;

(3) that on March 14, 1972, the company had retained the firm of Wellman, MacIsaac, Graf and Zarzeczny, Barristers and Solicitors, to represent it in opposing the application;

(4) that on March 29, 1972, he was interviewed at the City of Saskatoon by Mr. Zarzeczny;

(5) that at that meeting he advised Mr. Zarzeczny he could not be present at the Board hearing on April 4, 1972, as he had to be in Prince Albert to complete a tender on a $300,000.00 project, the tender for which closed on April 5, 1972;

(6) that he could not attend on April 4, 1972, as that would necessitate the foregoing of two weeks work on the tender and the loss of the opportunity of tendering on that contract;

(7) that he was the only officer of Piggott Construction Ltd., who had personal knowledge respecting the employees listed in the statement of employment;

(8) that on April 4, 1972, Mr. MacIsaac telephoned to him stating the application had come on for hearing that morning and that the Board had refused an adjournment until April

> 5th, and consequently the hearing would proceed that afternoon; at that time he again advised Mr. MacIsaac that it was impossible to attend that day and 'instructed Mr. MacIsaac to do what he could in the circumstances'.

When the Board opened the sittings on the morning of April 4th, 1972, Mr. MacIsaac appeared as counsel for Piggott Construction Ltd., and Mr. Michael Wytosky, Business Representative of the applicant union, appeared for that union. Mr. MacIsaac applied to the Board for an adjournment of the hearing on the ground that Mr. Neville Piggott was unable to attend because of his commitment in Prince Albert that day. The Chairman of the Board suggested that Mr. MacIsaac and Mr. Wytosky discuss the matter with a view to arranging for an adjournment to a date which would be mutually satisfactory.

Some time later Mr. MacIsaac advised the Board that he and Mr. Wytosky were unable to reach an agreement. At the same time Mr. Wytosky opposed any adjournment. He said he had other commitments. The Chairman then said:

> "Yes, well since you've reached no understanding, we thought it only fair to give each of you an opportunity to reach an understanding as to the date on which this can be heard. The Board has decided that you should be ready to go on this afternoon at three o'clock, if necessary, and hopefully Mr. Glendinning, of course if he gets here, you can speak to him about it. Otherwise we shall expect you to be in a position to go on at three o'clock this afternoon - which will give you an opportunity to arrange for any witnesses from Saskatoon, if necessary - even if Mr. Piggott is not available, probably - "

In the afternoon the hearing proceeded. Wytosky gave evidence on behalf of the applicant union and was cross-examined by Mr. MacIsaac. No evidence was given on behalf of Piggott Construction Ltd., but its position in the matter was placed before the Board by Mr. MacIsaac. At the conclusion of the hearing the Board reserved its decision and, on April 6th, 1972, made the certification order.

The first question for determination is whether or not, viewed in the light of all of the evidence, the refusal of the Board to grant an adjournment was a wrongful exercise of its discretion. If it was, then the second question for determination is whether such refusal resulted in a denial of natural justice. If the refusal to grant the adjournment was not a wrongful exercise of the Board's discretion, the second question, of course, does not arise.

The a f davit of Piggott makes it abundantly clear that he knew for some time that the company would be tendering on the project at Prince Albert and that the tender for that project closed on April 5th, and that he had been working on the tender for some two weeks prior to the closing date. In the letter which was written to the company on March 9th

and received by the company on March 10th, the Board advised the company that the probable date for the hearing would be April 4th in Regina. In this letter the company was advised that a written reply to the application, or notification of intention to appear in person, must be in the possession of the Board not later than March 20th. The company was further advised that the statement of employment must be received by the Board not later than that date.

The company did not reply to the letter of March 20th. On March 23rd the Board wrote a further letter to the company requesting that the statement of employment be forwarded. In the same letter the company was advised that the application was scheduled for hearing at 10:00 o'clock on April 4th in Regina.

The statement of employment was forwarded to the Board by the company on March 29th and received by the Board on March 30th. Apart from the list of employees, the statement included the notation which I have already quoted. Apart from that notation the company made no representations, nor did it notify the Board of its desire for a representative of the company to appear in person on the application.

On March 14th the company retained a firm of solicitors to act on its behalf. On March 29th a member of that firm interviewed Piggott in Saskatoon. At that time both Piggott and the solicitor knew that the hearing was scheduled for April 4th. At that time as well Piggott made it clear to the solicitor that he would be unable to attend in person on April 4th.

The time for hearing an application is fixed by the Board. Notwithstanding Piggott knew for a considerable length of time that he was required to be in Prince Albert; that he could not be present at the hearing on April 4th, he never on any occasion advised the Board the date was not satisfactory. As a matter of fact, he never advised the Board that the company desired to make personal representations. It is clear, as well, that his solicitors, although they knew for certain on March 29th that Piggott could not be present, never communicated with the Board advising it that the date of April 4th was not satisfactory.

The first indication the Board had that Piggott Construction Ltd., found April 4th an unsatisfactory date was on the morning of the day when his solicitors appeared and asked for an adjournment. At that time the representative of the applicant was present and ready to proceed. The Chairman, in my opinion, acted quite fairly when he said the Board would adjourn the hearing if the parties could agree on a date. This they were unable to do. The representative of the appellant union stated he was ready to proceed and would not agree to an adjournment until the following day as he stated he had commitments for that day.

The Board was then placed in the position that it had to make a decision — either to proceed with the hearing as requested by the applicant

union or adjourn the same as requested by the company. It resolved this question by refusing the application for an adjournment and proceeded to hear the application.

In so doing, the Board exercised a discretion which it had, and, in my respectful view, did not do so wrongfully. The company, in my opinion, in waiting until the morning of April 4th before asking for an adjournment or asking for another date for the hearing, did not act reasonably. The need for an adjournment was not something that arose unexpectedly. The company had known for a considerable length of time of Piggott's commitment. In spite of this it never at any time, although there was ample opportunity to do so, advised the Board that the date of April 4th was not a satisfactory one for a hearing. Had it done so, the Board might have arranged for a date mutually agreeable to both parties. The Board was not given an opportunity to do so.

After a very careful consideration of all the evidence, and with every deference to the learned Chambers Judge, in my opinion to hold that under the facts as disclosed under this application the Board wrongfully exercised its discretion in refusing to grant an adjournment, would be an improper interference with those discretionary powers vested in the Board. The facts in this case are clearly distinguishable from those in the case of *Jim Patrick Limited v. United Stone and Allied Products Workers of America and Labour Relations Board, supra.* The appeal is therefore allowed and the order of the learned Chambers Judge quashing the certification order is set aside.

The appellant will have its costs, both of the application and of the appeal.

DATED at the City of Regina, in the Province of Saskatchewan, this 13th day of July, A.D. 1973.

"Culliton, C.J.S."
Culliton, C.J.S., for the Court.

CORAM: CULLITON, C.J.S., WOODS and MAGUIRE, JJ.A.

SASKATCHEWAN

COURT OF APPEAL

Morris Rod Weeder Co. Ltd.,

v.

Labour Relations Board of Saskatchewan
and
Retail, Wholesale and Department Store Union, Local 955
and
Yacyshyn et al.

Application by way of certiorari to quash certification order — Board's rejection of petition opposing application for certification — Only record to be considered — Board within its powers under sec. 10, The Trade Union Act — Application dismissed.

Application by way of *certiorari* to quash a certification order of the Saskatchewan Labour Relations Board. The basis of this application is that the Board rejected the petition of a number of employees opposing the original application for certification. The petition had been signed after the application had been filed. The Board had admitted the petition into evidence, but could not accept it as a true expression of the signers' wishes as it found there had been interference by the employer.

Held: Application dismissed. The court need not consider any material other than the record: *Rex v. Northumberland Compensation Appeal Tribunal ex parte Shaw*, [1952] 1KB 338. The Board clearly had the discretionary power to reject the petition under section 10 of *The Trade Union Act*, R.S.S., 1965, c. 287. In the conclusion which it reached, the Board was acting within its jurisdiction, and, when so acting, its decisions, even if they be wrong in fact or law, are not subject to review: *Farrell et al v. Workmen's Compensation Board* (1962) SCR 48.

Appeal from decision of the Labour Relations Board, dated April 6, 1973

Appeal heard August 14, 1973

Judgment of the Court filed August 15, 1973

REASONS for judgment by:	Chief Justice E. M. Culliton
concurred in by:	The Hon. Mr. Justice Mervyn Woods The Hon. Mr. Justice P. H. Maguire
COUNSEL on the hearing:	
for the Applicant:	Mr. R. H. McKercher, Q.C. & Mrs. B. J. Rourke
for the Union:	Mr. George J. D. Taylor, Q.C.
for the Labour Relations Board:	Mr. Jules E. Gebhard
for the opposing employees:	Mr. W. T. Molloy

JUDGMENT OF THE COURT — CULLITON, C.J.S.

This is an application by way of *certiorari* by Morris Rod Weeder Co. Ltd., the employer, to quash the order of the Labour Relations Board of Saskatchewan, dated April 6, 1973, whereby the said Labour Relations Board ordered:

(1) That the appropriate unit in the plant of the respondent employer was:
'All employees employed by Morris Rod Weeder Co. Ltd., in the City of Yorkton, in the Province of Saskatchewan, at its place of business operations located at 85 York Road, Yorkton, Saskatchewan, excepting all those employees employed in the following departments of the employer: (a) Office (b) Research (c) Development Department (d) Service Department (e) Transportation Department (f) Parts Department'.

(2) that the applicant union represented a majority of employees in the appropriate unit;

(3) that the applicant union represented a majority of employees in the appropriate unit;

(4) that the Order of Certification would issue.

While the notice of motion set out a number of grounds upon which the application is based, these grounds may be summarized as follows:

(1) that the Labour Relations Board, in rejecting the petition of a number of employees opposing the application for certification, did so on a principle not authorized by *The Trade Union Act*, S.S. 1972, Chapter 137, and therefore acted either without jurisdiction or in excess of its jurisdiction;

(2) that the Board exceeded its jurisdiction in finding that the employer had interfered in the selection by the employees of the trade union to represent them as there was no evidence to that effect.

At the outset of the hearing, learned counsel for the trade union listed a number of preliminary objections to the application. Because of the conclusion I have reached, I do not find it necessary to consider these preliminary objections. In pursuing this course, I express no opinion as to the validity of such objections but leave the same to be considered on some future occasion when this may be necessary.

In disposing of the application I have not found it necessary to peruse any material other than the record. The record consists of the application, the reply, the decision of the Board, and its reasons therefor. *Rex v. Northumberland Compensation Appeal Tribunal; ex parte Shaw*, [1952] 1 K.B. 338.

Section 10 of *The Trade Union Act*, S.S. 1972, Chapter 137, reads:

> 10. Where an application is made to the board for an order under clause (a) or (b) of section 5, the board may, in its absolute discretion, reject any evidence or information tendered or submitted to it concerning any fact, event, matter or thing transpiring, or occuring after the date on which such application is filed with the board in accordance with the rules and regulations of the board.

At the hearing, the Board admitted in evidence a petition signed by a number of employees opposing the application. This petition has been signed after the application had been filed. Learned counsel for the employer made representations based on the petition. The Board, in disposing of the petition, said it could not accept the petition as a true expression of the wishes of the employees as it found that there had been interference by the employer. Having so found, it rejected the petition in accordance with the discretionary powers it enjoys under Section 10. In so doing, I take the decision to be, not that the petition was inadmissible in evidence, but rather that the Board rejected it as a true expression of the signers' wishes.

It is evident from the reasons for judgment that the Board found that the manager of the employer had addressed the employees at four meetings called by him subsequent to the filing of the application. From these meetings, together with the position taken by learned counsel for the employer at the hearing, the Board concluded there had been interference by the employer.

Clearly the Board had the jurisdiction to determine whether or not there had been interference by the employer. Too, it was solely for the Board to determine what weight, if any, was to be given to the evidence before it. In my opinion the Board did not exceed the bounds of its discretionary powers in rejecting the petition as a true indication of the views of those who signed the same. Nor, in my opinion, can it be said that there was no evidence upon which the Board could find that there had been interference by the employer.

Whether or not the Board was right in its conclusions is not subject to review in these proceedings. In the conclusions which it reached, the Board was acting within its jurisdiction, and, when so acting, its decisions, even if they be wrong in fact or law, are not subject to review: *Farrell et al v. Workmen's Compensation Board*, [1962] S.C.R. 48.

In my opinion effect cannot be given to the grounds upon which the application is based and the same is therefore dismissed with costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 15th day of August, A.D. 1973.

"E. M. Culliton,"
E. Culliton, C.J.S. for the Court.

CORAM: CULLITON, C.J.S., WOODS and MAGUIRE, JJ.A.

SASKATCHEWAN

COURT OF QUEEN'S BENCH (CROWN SIDE)

In the matter of *The Trade Union Act, 1972* and in the matter of the Crown Practice Rules and in the matter of a certain Order or decision made by the Saskatchewan Labour Relations Board, dated the 25th day of May, A.D. 1973.

BETWEEN: Western Cheque Printers Limited, a body corporate, incorporated pursuant to the laws of the Province of Saskatchewan, with head office at the City of Saskatoon, in the Province of Saskatchewan, (applicant)

- and -

Saskatoon Typographical Union Local 663, and the Labour Relations Board, of the Province of Saskatchewan, (respondents)

Before the Honourable Chief Justice A. H. Bence in Chambers at Saskatoon, Saskatchewan } Friday, the 3rd day of August, A.D. 1973.

ORDER

Upon the application of the Applicant, and this motion having come on for hearing before the Honourable Mr. Chief Justice A. H. Bence, on Thursday, the 2nd day of August, A.D. 1973, at the City of Saskatoon, in the Province of Saskatchewan, in the presence of Mr. Robert D. Laing, of counsel for the Applicant, Mr. Wilfrid K. Tucker, of counsel for the Respondent, The Labour Relations Board, and Mr. George Taylor, Q.C., of counsel for the respondent, Saskatoon Typographical Union, Local 663, and upon reading the Notice of Motion with proof of service thereof, together with the A f davit of Urban A. Donlevy Jr., all filed;

It is hereby ordered and adjudged that this application be and the same is herewith dismissed with costs.

Issued at the City of Saskatoon, in the Province of Saskatchewan, this 24th day of August, A.D. 1973.

Local Registrar

SUPREME COURT OF CANADA

LETTER CARRIERS' UNION OF CANADA v. CANADIAN UNION OF POSTAL WORKERS et al.

Before: *Fauteux, C.J.C., Abbott, Martland, Judson, Ritchie, Spence, Pigeon, Laskin and Dickson, JJ. October 2, 1973.*

Constitutional law — Distribution of legislative authority — Labour relations — Certification — Jurisdiction — Company under contract with Post Office to deliver and collect mail — Ten percent of company's business consisting of transport of household goods and other products — Whether employees employed exclusively in connection with federal business — Whether jurisdiction to certify federal or provincial — Canada Labour Code, s. 108(1).

The respondent employer, M & B Ltd., was a mail contractor under contract with the Canada Post Office to deliver and collect mail and in that capacity it used vehicles meeting the specifications as to colour and name as specified by the Postmaster-General. Employees of M & B Ltd. engaged in the performance of these contracts were required to be acceptable to the Post Office, to be finger-printed and to take an oath specified by the Post Office. In addition to these duties, employees of M & B Ltd., engaged in the delivery and collection of mail, transported household goods, oil products and twine in trucks used or held in reserve for mail transport. Over 90% of the gross income of M & B Ltd. was derived from the mail contracts. An application for *certiorari* to quash a decision of the Saskatchewan Labour Relations Board certifying the respondent union as bargaining agent for employees of the respondent M & B Ltd. was dismissed. On appeal, *held*, the appeal should be allowed.

Exclusive employment upon, or in connection with, a federal work or undertaking, *viz.*, the postal service, is not a necessary prerequisite that needs to be established in order that employees be subject in their employment to the jurisdiction of the Canada Labour Relations Board under s. 108(1) of the *Canada Labour Code*, R.S.C. 1970, c. L-1. It is enough that the work performed is an integral part of, or necessarily incidental to, the effective operation of the postal service. Consequently, the fact that the respondent M & B Ltd. required a licence to deliver, *inter alia*, household goods is not, standing by itself, decisive in determining that character of the company's business for the purposes of s.108(1). Rather the question is whether the very limited use made of that licence in transporting goods for others than the Post Office is sufficient to clothe the Saskatchewan Labour Relations Board with jurisdiction. Since the main and principal part of the business of M & B Ltd. was confined to work for the Post Office, the Saskatchewan Labour Relations Board cannot acquire jurisdiction to entertain an application for certification simply because two or three drivers in the unit were occasionally engaged in casual employment driving trucks for the transportation of goods for others than the Post Office.

[*Bachmeier Diamond & Percussion Drilling Co. Ltd. v. Beaverlodge District of Mine, Mill & Smelter Workers' Local Union No. 913* (1962), 35 D.L.R. (2d) 241, apld; *Reference re Industrial Relations and Disputes Investigation Act, etc.*, [1955] 3 D.L.R. 721, [1955] S.C.R. 529, expld; *Toronto Electric Com'rs v. Snider et al.*, [1925] 2 D.L.R. 5, [1925] A.C. 396, [1925] 1 W.W.R. 785; *Reference re Minimum Wage Act of Saskatchewan*, [1948] 3 D.L.R. 801, 91 C.C.C. 366, [1948] S.C.R. 248, refd to]

APPEAL from the judgment of the Saskatchewan Court of Appeal, 31 D.L.R (3d) 508, [1973J 1 W.W.R 254, dismissing an application for *certiorari* to quash an order of the Saskatchewan Labour Relations Board certifying the respondent union as bargaining agent for employees of the respondent company.

D. K. MacPherson, Q.C., for appellant.

G. J. D. Taylor, Q.C., for respondents.

S. F. Froomkin, for Attorney-General of Canada.

K. Lysyk and *D. A. McKillop*, for Attorney-General of Saskatchewan.

The judgment of the Court was delivered by

RITCHIE, J.: — This is an appeal from a judgment of the Court of Appeal for Saskatchewan dismissing the application of the appellant union, by way of *certiorari*, to quash an order made by the Labour Relations Board of Saskatchewan pursuant to s. 5 [am. 1966, c. 83, s. 3] of *The Trade Union Act*, R S.S. 1965, c. 287, which certifed the respondent union as the representative, for the purpose of collective bargaining, of the bargaining unit composed of all the truck drivers employed by M & B Enterprises Ltd., except those acting on its behalf in a confidential capacity and those having authority to employ and discharge other employees.

A notice of intervention had been filed on behalf of the appellant union, prior to the granting of the Board's certification order, wherein it was claimed that: "The Intervening Trade Union is of the view that the employees in question are covered by the Canada Labour Code."

It was when this notice was ignored and certification was granted to the respondent union that the appellant brought its motion to quash before the Court of Appeal based upon the following grounds:

> THAT the Labour Relations Board was without jurisdiction to make the Order hereinbefore referred to because of the provisions of Sections 91 and 92 of the British North America Act, 1867, 30 Victoria, Chapter 3, and because the work being done by the Respondent Company and by the employees of the Respondent Company within the aforesaid bargaining unit, formed an integral part of or was necessarily incidental to the postal service of Canada; and because of the provisions of Section 108(1) of the Canada Labour Code, R.S.C. 1970 chapter L-1.

The section last referred to occurs in Part V of the *Canada Labour Code*, R S.C. 1970, c. L-1, which is entitled "Industrial Relations" and reads as follows:

> 108(1) This Division applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

It has been accepted, at least since the case of *Toronto Electric Com'rs v. Snider et al.*, [1925] 2 D.L.R 5, [1925] A.C. 396, [1925J 1 W.W.R

785, that, generally speaking, legislation respecting employer and employee relationships relates to property and civil rights and is therefore within the exclusive jurisdiction of the provincial Legislature, but under the *Industrial Relations and Disputes Investigation Act*, 1948 (Can.), c. 54, which was the precursor of the present *Canada Labour Code*, and the decision of this Court in the Reference, relating to the validity and application of that statute, it has been established that it is not within the competency of a provincial Legislature to legislate concerning industrial relations of persons employed in a work, business or undertaking coming within the exclusive jurisdiction of the Parliament of Canada. There can be no doubt that the subject-matter of the postal service is expressly assigned to the exclusive legislative authority of Parliament under s. 91(5) of the *British North America Act*, 1867 (U.K.), c. 3, and that employer and employee relations in that service are correspondingly within that authority. If authority were needed for this latter proposition, it is to be found in *Reference re Minimum Wage Act of Saskatchewan*, [1948] 3 D.L.R. 801, 91 C.C.C. 366, [1948] S.C.R. 248, particularly *per* Rinfret, C.J., at pp. 803-4.

In any event, it was common ground between the parties in the present case in this Court and in the Court of Appeal that s. 108(1) of the *Canada Labour Code* was validly enacted by Parliament and that the postal service is a "federal work, undertaking or business" within the meaning of this section, and it follows, in my view, that if the truck drivers employed by M & B Enterprises Ltd. were found to be employees who are employed upon or in connection with the operation of the Post Office, the Saskatchewan Labour Relations Board would be without jurisdiction to entertain the application for certification.

Mr. Justice Maguire, in the course of the reasons for judgment which he delivered on behalf of the Court of Appeal for Saskatchewan, appears to have interpreted the judgment of this Court in *Reference re Industrial Relations and Disputes Investigation Act, etc.*, [1955] 3 D.L.R. 721, [1955] S.C.R. 529 (hereinafter referred to as the *"Stevedores Case"*), as authority for the proposition that s. 108(1) is only applicable to employees who are "exclusively" employed upon or in connection with the operation of any federal work, undertaking or business, and applying this test to the facts of the present case, he concluded that the section did not apply to the truck drivers employed by M & B Enterprises Ltd.

I am satisfied to adopt the following statement of the facts contained in the reasons for judgment of Mr. Justice Maguire [31 D.L.R. (3d) 508 at p. 511, [1973] 1 W.W.R. 254]:

> A review of the relevant facts is required. M & B Enterprises Ltd. is a company incorporated under the laws of Saskatchewan, with head office in Regina, Saskatchewan, and operating in and from said city.

> This company held seven contracts with Canada Post Office for delivery and collection of mail, of which six may be termed highway service routes running from Regina to a designated urban point and including all intervening post offices. The remaining contract covered the City of Regina.
>
> M & B Enterprises Ltd. owned or provided all motor vehicles used in this contract work, which must meet specifications, including color, and name thereon, as specified by the Postmaster-General. Eight employees are engaged on highway routes, and up to 15 full-time plus some part-time employees in Regina urban duties. Two of the latter are supervisors with power to employ or discharge employees and thus not within the unit of employees for collective bargaining purposes under the Saskatchewan enactment. I am of the opinion, although this is not fully material to the issues to be determined, that they are employees within the meaning of that word as found in the *Canada Labour Code*, s. 108(1), quoted later.
>
> Each employee engaged in performance of these contracts must be acceptable to Post Office official, or officials; be finger-printed, and take an oath specified by the Post Office.

Mr. Justice Maguire proceeded to describe the duties performed by the employees of M & B Enterprises Ltd. on behalf of the Post Office and indicated that these duties involved responsibility for delivering and sorting mail, the custody of keys permitting access to Post Offices and the collection of moneys due on C.O.D. parcels. The control exercised over these employees by the Post Office is further indicated in the following paragraph of Mr. Justice Maguire's reasons [at p. 512]:

> Each company employee termed "carrier" is provided with an identification card supplied by the Post Office, and is required to carry this at all times while on duty. In addition, the Post Office supplies to each carrier a book, or pamphlet, of instructions or regulations, covering the performance of his duties.

In my opinion the work so described which is performed by these employees is essential to the function of the postal service and is carried out under the supervision and control of the Post Office authorities, but the Court of Appeal concluded that the truck drivers in question were not employees within the meaning of s. 108(1) because the employer company occasionally used its trucks in the summer time for moving furniture. These later activities are described by Mr. Justice Maguire where he says [at p. 512]:

> One other factor of importance must be noted. M & B Enterprises Ltd., in 1969, had acquired from a transport trucker, with the approval of the Highway Traffic Board of Saskatchewan, what is termed an "A" licence, permitting it to transport, provincially or interprovincially, household goods, oil products and twine. This licence had been continued in effect up to the time of the application now under review. The company, under this licence, during summer months, engaged in the transport of household goods, both locally and to points in other Provinces. Vehicles used in this transport included, at times, one or two units used or held in reserve for mail transport. Employees engaged in this work were usually the two supervisors, but on occasion also one or two employees otherwise normally engaged in the mail transport. These might be engaged during such summer months up to 20% of full time in such "A" class transport. The percentage of what, I take from the evidence, to be gross income of the company from this "A" class transport, was 10% or less, and thus 90%-plus comes from the mail contracts.

In the *Stevedores Case, supra*, upon which the Court of Appeal relies, the question referred to this Court was [at p. 726]:

> (1) Does the Industrial Relations and Disputes Investigation Act, Revised Statutes of Canada 1952, Chapter 152, apply in respect of the employees in Toronto of the Eastern Canada Stevedoring Co., Ltd., employed upon or in connection with the operation of the work, undertaking or business of the company as hereinbefore described?

The description of the work is referred to in the reasons for judgment of the Chief Justice at p. 731 where he says:

> That description is that the Company's operations for the year 1954 "consisted *exclusively* of services rendered in connection with the loading and unloading of ships, pursuant to contracts with seven shipping companies to handle all loading and unloading of their ships arriving and departing during that season . . ."

(Emphasis mine.) In answering this question in the affirmative, the Court was concerned with the meaning to be attached to the language of s. 53 of the Act, which was the precursor of s. 108(1) of the *Canada Labour Code*, and which read, in part, as follows:

> 53. Part I applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada including, but not so as to restrict the generality of the foregoing,
>
> (a) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;
>
> and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

In construing this section, Chief Justice Kerwin observed that [at p. 730]:

> . . . the Act . . . should not be construed to apply to employees who are employed at remote stages, but only to those whose work is intimately connected with the work, undertaking or business. In pith and substance the Act relates only to matters within the classes of subjects within the specific heads of s. 91 of the *B.N.A. Act*.

It was accepted that the seven shipping companies with which Eastern Canada Stevedoring Company had its contracts were engaged in "navigation and shipping" within the meaning of s. 92(10) of the *British North America Act, 1867* and were therefore businesses "within the legislative authority of the Parliament of Canada", and I agree with the test adopted by Mr. Justice Estey at p. 759 in determining that the stevedores in question were employees within the meaning of s. 53 of the *Industrial Relations and Disputes Investigation Act, supra*. Mr. Justice Estey there said:

> If, therefore, the work of stevedoring, as performed under the foregoing contracts, is an integral part or necessarily incidental to the effective operation of

> these lines of steamships, legislation in relation thereto can only be competently enacted by the Parliament of Canada.
>
> That the work of the stevedores is an integral part would seem to follow from the fact that these lines of steamships are engaged in the transportation of freight and the loading thereof, which would appear to be as necessary to the successful operation thereof as the enbussing and debussing of passengers in the *Winner* case [[1954] 4 D.L.R. 657, [1954] A.C. 541]. The loading would, therefore, be an integral part of the operation of these lines of steamships and, therefore, subject to the legislative jurisdiction of Parliament.

As I have indicated, it is beyond dispute that "postal service" is assigned to the exclusive legislative jurisdiction of the Parliament of Canada by s. 91(5) of the *British North America Act, 1867* and it appears to me from the facts which I have recited that the work of the truck drivers of M & B Enterprises Ltd. as performed under its contract with the Post Office was an integral part of the effective operation of the Post Office, and that all the language in the last-quoted passage from Mr. Justice Estey is directly applicable to the task performed by these employees in the business of the Post Office.

In the case of *Bachmeier Diamond & Percussion Drilling Co. Ltd. v. Beaverlodge District of Mine, Mill & Smelter Workers' Local Union No. 913* (1962), 35 D.L.R. (2d) 241, Mr. Justice Culliton, as he then was, speaking on behalf of the Court of Appeal for Saskatchewan at pp. 243-4, adopted the test prescribed by Estey, J., in deciding that the employees of the applicant company in that case were not within the class of employees described in s. 53 of the *Industrial Relations and Disputes Investigation Act*, saying: "The question then is, does the evidence establish that the work of the applicant company constitutes an integral part of, or is necessarily incidental to the work, undertaking or business of Eldorado?" Eldorado Mining and Refining Limited, to which the learned Judge referred in this passage, was a corporation which had been declared to be a work for the general advantage of Canada.

In his reasons for judgment in the present case, Mr. Justice Maguire quoted the passage which I have cited from the judgment of Mr. Justice Culliton, and went on to say [at p. 514]:

> I am of the opinion that the part of the work of the employees here involved meets the tests just expressed, but, on the facts as above outlined, can it be said that they are, "employees who are employed upon or in connection with the operation of any federal work, undertaking or business", as set out in s. 108(1) above? They are not *"exclusively"* so employed in any such federal work or undertaking, nor is the work of the employer so limited.

(Emphasis mine.) It will thus be seen that in dismissing the application of the appellant union the Court of Appeal clearly based its decision on the ground that the *Stevedores Case* had decided that employees could not meet the test prescribed by Mr. Justice Estey unless they were *exclusively* employed upon or in connection with the operation of a federal work.

With the greatest respect for the members of the Court of Appeal, it does not appear to me that the *Stevedores Case* is an authority for any such proposition. It is true that the agreed facts upon which the first question posed to this Court was based included a statement that the operations of Eastern Canada Stevedoring Co. Ltd. consisted *exclusively* of services rendered in connection with the loading and unloading of ships, but there is, in my opinion, nothing in that case which decided that *exclusive* employment upon or in connection with a federal work is a necessary prerequisite to inclusion in the class of employees designated by s. 108(1). Indeed, the language used by Kerwin, C.J.C., at p. 731, appears to indicate that the decision was strictly limited to the agreed facts. He there says:

> In connection with the first question, the fact that the Company by its charter has power "to carry on a general dock and stevedoring business in all its branches" does not require us to consider the possibility of such a power being used, or indeed the possibility of anything except the facts as they are presented to us.

It appears to me to follow from this statement that the fact of M & B Enterprises Ltd. having acquired a licence, "permitting it to transfer . . . household goods, oil products and twine", standing by itself is not decisive in determining the character of the company's business for the purpose of s. 108(1). The sole question here is whether the very limited use made of that licence in transporting furniture for others than the Post Office is sufficient to clothe the Labour Relations Board of Saskatchewan with jurisdiction to certify a bargaining representative on behalf of a unit composed of all truck drivers other than the supervisors who were employed by the company with power to employ and discharge others.

As 90% of the activities of M & B Enterprises Ltd. was confined to work for the Post Office, it is obvious that this work composed the main and principal part of its business and the Labour Relations Board of Saskatchewan cannot, in my opinion, acquire jurisdiction to entertain an application for certification of a bargaining representative on behalf of a unit composed of all truck driver employees of such a company other than supervisors, simply because two or three drivers in the unit were occasionally engaged in casual employment driving trucks for the transportation of furniture for others than the Post Office.

It was contended on behalf of the respondent that the provisions of the *Post Office Act*, R.S.C. 1970, c. P-14, s. 21, providing that a mail contractor and the contractor's employees are not "postal employees" were effective to exclude the truck drivers in question from the class described in s. 108(1), but this contention appears to ignore the fact that the definition of postal employee contained in the *Post Office Act* is effective only for the purpose of construing that statute and, in my view, this in no way

alters the fact that the employment upon which the truck drivers in question were engaged was in connection with the operation of a federal work within the meaning of s. 108(1) of the *Canada Labour Code*.

For all these reasons, I am of opinion that the bargaining unit in the present case was composed of persons employed in the business of the Post Office of Canada and the certification of bargaining agents to represent these employees was assigned exclusively to the Board appointed under the *Canada Labour Code*.

I would accordingly allow this appeal and direct that the aforesaid order of the Labour Relations Board of the Province of Saskatchewan dated February 17, 1972, be quashed without the actual issue of a writ of *certiorari*.

The appellant will have its costs throughout.

Appeal allowed.

SASKATCHEWAN

COURT OF APPEAL

RE WOODLANDS ENTERPRISES LTD. AND INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 1-184 et al.

Woods, Brownridge and Maguire, JJ.A.
October 9, 1973.

Labour relations — Successor rights — Collective agreement entered into by decertified union providing for payments by employer into three trust funds — Whether newly certified union entitled to such payments — Trade Union Act, 1972 (Sask.), s. 33(5).

Labour relations — Collective agreement — Duration — Collective agreement entered into by union subsequently decertified — Second union certified but not concluding new collective agreement with employer — Whether prior agreement terminated — Trade Union Act, 1972 (Sask.), s. 33(5).

The respondent union was certified as sole bargaining agent for certain employees of the respondent company and entered into collective agreements with the company. The last agreement entered into expired on March 31, 1973, and provided for contributions by the company, calculated on the basis of hours worked by the employees, to three particular trust funds. On March 7, 1972, the respondent union was decertified and the appellant union was certified to represent the employees. At all relevant times thereafter no new collective agreement had been entered into between the appellant and the company. On August 1, 1972, *The Trade Union Act*, 1972 (Sask.) c. 137, came into force. Section 33(5) thereof provides, in part, that upon the application of a different union "not less than 30 days or more than 60 days before the anniversary date" of a collective agreement and upon its subsequent certification the prior collective agreement "shall be of no force or effect . . .".

On appeal from an order in interpleader proceedings determining that the money was properly payable to the three trust funds, *held*, the appeal should be dismissed. The appellant was not a party to collective agreement under which payment was to be made and therefore had no rights thereunder. Moreover, the certification of the appellant did not result in its substitution for the respondent union. Section 33(5) of the Act merely provides for the termination of the prior agreement and does not provide for the substitution of one union for another under a collective agreement. There is nothing in s. 33(5) to indicate that it was to have a retrospective effect, but even if that was the case, it could not be said that the prior agreement had been terminated since the appellant had not entered into a new collective agreement with the company. Finally, it could not be said that the appellant, representing the employees, was entitled to the money by way of resulting trust. In the first place, the money had been contributed by the employer, not the employees, and, secondly, the agreement clearly indicated that the money was to be paid into three properly constituted trust funds.

[*Re Printers & Transferrers Amalgamated Trades Protection Society*, [1899] 2 Ch. 184; *Re Hobourn Aero Components Ltd.'s Air Raid Distress Fund, Ryan v. Forrest*, [1946] Ch. 86; *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts*, [1971] Ch. 1 folld; *Raymond v. Doherty et al.* (1965), 49 D.L.R. (2d) 99, [1965] 1 O.R. 593; *Re International Nickel Co. of Canada Ltd., Shedden v. Kopinak*, [1950] 1 D.L.R. 381, [1949] O.R. 765, refd to]

APPEAL from an order disposing of certain money paid into Court in interpleader proceedings.

P. W. Glendinning, for appellant, International Woodworkers of America, Local 1-184.

J. H. W. Sanderson, Q.C., for Woodlands Enterprises Limited.

N. W. Sherstobitoff, for respondents, Laborers' Health & Welfare Trust Fund and Construction & General Workers' Union, Local 890.

R. H. McKercher, Q.C., for respondents, Construction & General Pension Fund and Funds Administration Service.

The judgment of the Court was delivered by

BROWNRIDGE, J.A.: — This is an appeal from an order made by Bence, C.J.Q.B., on interpleader proceedings based upon the material filed without the trial of an issue.

Construction and General Workers' Union, Local 890, was certified under the provisions of *The Trade Union Act*, R.S.S. 1965, c. 287, by order dated May 3, 1967, as sole bargaining agent for certain employees of the applicant.

Pursuant to such order, a collective bargaining agreement was entered into between the applicant and the said Local 890, dated February 1, 1969, and later replaced by a subsequent agreement effective April 1, 1971, and expiring March 31, 1973.

By order dated March 7, 1972, the said order of certification was rescinded by the Labour Relations Board, and International Woodworkers of America, Local 1-184 was certified as the bargaining agent on behalf of the said employees.

At the time of the hearing before Bence, C.J.Q.B., no collective bargaining agreement had been entered into between the applicant and said Local 1-184.

The problem confronting the learned Chambers Judge involved three sections of the collective bargaining agreement made with Local 890, namely, arts. 14:01, 14:02 and 14:03. Under art. 14:01 the employer, Woodlands Enterprises Limited, agreed to pay five cents per hour to the Laborers' Health and Welfare Trust Fund of Alberta and Saskatchewan. Under art. 14:02, it agreed to pay ten cents per hour to the Construction and General Workers' Pension Fund, and under art. 14:03 it agreed to pay two cents per hour to the Construction and General Workers' Union, Local 890 Benevolent and Service Fund.

From March 1, 1972, to March 31, 1973, the applicant has paid the said sums into Court as ordered by Bence, C.J.Q.B., on July 6, 1972.

The appellant claims all of the said money on behalf of the employees in the unit covered by the certification order of March 7, 1972, on the ground that it now represents these employees.

Bence, C.J.Q.B., held that on the date of the decertification of Local 890, there was no statutory provision for the termination of the collective bargaining agreement by a newly certified union, although that defect has now been rectified by *The Trade Union Act, 1972* (Sask.), c. 137, which came into effect August 1, 1972. He held that the said agreement had not been terminated and remains in full force and effect as between the respondent, Woodlands Enterprises Limited, and Local 890, and ordered that the moneys in Court be paid out to the respective funds in the manner set forth in arts. 14:01, 14:02 and 14:03 of the said collective bargaining agreement, and that the moneys thereafter payable under the said clauses be disposed of in the same manner during the life of the agreement.

The Trade Union Act, R.S.S. 1965, c. 287, contained in s. 30(3) the same provision as now appears in the new *Trade Union Act, 1972*, s. 33(5), which reads:

> 33(5) A trade union claiming to represent a majority of employees in the appropriate unit of employees or any part thereof to which a collective bargaining agreement applies may, not less than thirty days or more than sixty days before the anniversary date of the agreement, apply to the board for an order determining it to be the trade union representing a majority of employees in the appropriate unit of employees to which the agreement applies, or in any part thereof, and if the board makes such order the employer shall forthwith bargain collectively with that trade union and the former agreement shall be of no force or effect in so far as it applies to any unit of employees in which that trade union has been determined as representing a majority of the employees.

Section 30 of the Act of 1965 was repealed and substituted by 1966, c. 83, s. 14. In 1969 by c. 66, s. 7., s-s. (5) of s. 30, as enacted in 1966, was repealed. The new Act came into force on August 1, 1972. It was for this reason that the learned Chambers Judge held that on the date of decertification, that is, March 7, 1972, there was no statutory provision in *The Trade Union Act* providing for the termination of the existing collective bargaining agreement by the newly certified union. He held that the effect of the certification order was to stipulate that Local 1-184 represented a majority of the employees in the appropriate unit and required the applicant to bargain collectively with Local 1-184, but it did not terminate the collective bargaining agreement.

The submission of the appellant is that the facts in this case produce two possible consequences:

(1) that the collective bargaining agreement continued in force but subject to statutory amendment effective March 7, 1972, resulting from the substitution of Woodworkers for Construction Workers as bargaining agent for the employees of Woodlands Enterprises Limited. This was effected by the order of the Labour Relations Board of March 7, 1972;

(2) that s. 33 of *The Trade Union Act, 1972*, creates the result that probably as of March 7, 1972, and in any case as of August 1, 1972, the agreement no longer existed.

As to the first submission, it is clear that the appellant is not a party to that agreement and hence can have no rights under it.

Nor was there, on March 7, 1972, any statutory provision which had the effect of substituting Woodworkers for Construction Workers in the collective bargaining agreement. Certainly the order of the Labour Relations Board did not bring about that result.

Article 16 of the agreement itself says:

> This agreement shall take effect on the 1st day of April, 1971, (the effective date) and thereafter this agreement shall remain and continue in full force and effect for a term of operation ending and expiring on the 31st day of March, 1973, and thereafter from year to year, provided that either party may, not less than thirty (30) days or more than sixty (60) days before the said expiry date of the 31st day of March, 1973, give notice in writing to the other party to terminate this agreement or negotiate a revision of this agreement; and where such a notice is given the parties shall forthwith bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.

The relevant statutory provisions then in force on March 7, 1972, were s-ss. (1) and (4) of s. 30 [rep. & sub. 1966, c. 83, s. 14], which are now s-ss. (1) and (4) of s. 33 of *The Trade Union Act, 1972*:

> 33(1) Except as hereinafter provided, every collective bargaining agreement, whether heretofore or hereafter entered into, shall remain in force for the term of operation provided therein and thereafter from year to year.
>
> (4) Either party to a collective bargaining agreement may, not less than thirty days or more than sixty days before the expiry date of the agreement, give notice in writing to the other party to terminate the agreement or to negotiate a revision of the agreement and where a notice is given the parties shall forthwith bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.

Section 33(5) of *The Trade Union Act, 1972*, did not come into effect until August 1, 1972. Even that section does not provide for the substitution of one union for another in the same agreement. It provides for the termination of an existing collective bargaining agreement and the creation of a new one but it does not authorize the substitution of one union for another in the same agreement.

The result is that there is no foundation for the appellant's first submission that the order of the Labour Relations Board had the effect of substituting it for Construction Workers in the existing collective bargaining agreement.

I turn then to the second submission, which is that s. 33(5) creates the result that probably as of March 7, 1972, and in any case as of August 1, 1972, the agreement no longer existed. The situation on March 7, 1972, was that the existing agreement continued in effect until March 31, 1973. Was that situation changed on August 1, 1972, when s. 33(5)

came into effect? I do not see how it could be changed. As I read the said subsection, there is nothing in it which automatically makes it retroactive so as to relate back to March 31, 1972. Assuming for a moment that it was intended to so operate, all that it provides is that not less than 30 days nor more than 60 days before the anniversary date of the existing agreement, which would be March 31, 1972, the appellant could apply to the Labour Relations Board for an order determining it to be the trade union representing a majority of employees in the appropriate unit of employees to which the agreement applies, and if the Board makes such an order, as it did in this case, then the employer shall forthwith bargain collectively with that trade union, and "the former agreement shall be of no force or effect in so far as it applies to any unit of employees in which that trade union has been determined as representing a majority of the employees".

If the appellant had been able to conclude a new agreement with the employer before March 31, 1972, it might have argued that the old agreement was then at an end even though it still had one year to run. But the appellant did not conclude an agreement with the employer and had not done so by October 12, 1972, when the learned Chambers Judge delivered his judgment. Not only the agreement itself, but the statutory provisions of *The Trade Union Act*, indicate that under such circumstances, the agreement did not come to an end but continued until March 31, 1973. The appellant's argument is that the agreement suddenly came to an end on August 1, 1972. I cannot accept that suggestion. It is clear to me that the purpose of requiring the 30 to 60 days' notice before the expiry date of the existing agreement is to enable the parties to conclude a new agreement before the old one expires because if they do not, then the statute says that the old agreement will continue in effect for another year.

I conclude, therefore, that the effect of s. 33(5) of the Act was not to terminate the existing collective bargaining agreement as of August 1, 1972.

If, however, the subsection has the effect of terminating the existing agreement, then there is no agreement, and thus no basis whatever for the appellant's claim because if the agreement came to an end on August 1, 1972, from that date forward the employer was under no legal obligation to pay anything or to set aside moneys for any of the funds designated in the former agreement.

The employer, of course, never took the position that the existing agreement came to an end, either on March 7, 1972, or on August 1, 1972. It considered that the agreement was still in effect from March 31, 1972, to March 31, 1973, and from the first day of March, 1972, until March 31, 1973, it continued to set aside the moneys which it had agreed to pay under arts. 14:01, 14:02 and 14:03 of the agreement, and these moneys were paid into Court pursuant to an order of the learned Chambers

Judge on July 6, 1972, and his further order of October 12, 1972. After this appeal was launched, the appellant applied for a stay of payment-out, and, on February 12, 1973, the learned Chambers Judge directed a stay of payment-out until the appeal has been disposed of or further ordered.

This brings us to the final submission on behalf of the appellant. The appellant says that either it, as the representative of the employees, or the employees themselves, is entitled to claim the moneys so set aside by the employer on the basis of a resulting trust for the benefit of the employees.

There are two reasons why I do not think there is a resulting trust as alleged in this case. The first is that the moneys were not contributed by the employees but by the employer. The agreement specifically says that such contributions are to be made solely by the company and that it shall not deduct such contributions or any portion thereof from the employee's wages. It says further: "Such contributions are in excess of the wage rates set out in the agreement and do not constitute a payment of wages or any portion of a payment of wages."

It is true, of course, that the payments by the employer were computed on the basis of five cents, ten cents and two cents per hour respectively, "for each and every hour worked by an employee", but that does not alter the fact that no part of the moneys were contributed by the employees as they were in those cases which held that there was a resulting trust in favour of the contributors: see: *Re Printers & Transferrers Amalgamated Trades Protection Society*, [1899] 2 Ch. 184; *Re Hobourn Aero Components Ltd.'s Air Raid Distress Fund, Ryan v. Forrest*, [1946] Ch. 86; and *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts*, [1971] Ch. 1.

The second reason for rejecting the idea of a resulting trust for the employees in this case is the agreement itself.

Article 14:01 recognizes the Laborers' Health and Welfare Trust Fund of Alberta and Saskatchewan as constituted by a trust agreement dated November 1, 1965, by the respective Contractors Associations of Edmonton, Calgary and Lethbridge, of the first part, and the respective locals for Edmonton, Calgary and Lethbridge of the Laborers International Union of North America of the second part.

Similarly, the Construction and General Workers' Pension Fund is acknowledged by the provisions of art. 14:02 as constituted by a trust agreement in writing dated July 1, 1969, and entered into by all contractors signatory to the agreement and Construction and General Workers' Union, Local 890.

Again, under art. 14:03 of the agreement, the employer agrees to pay to the Construction and General Workers' Union, Local 890, Benevolent and Service Fund. Section 6 of art. XVIII of the Constitution of the

Laborers' International Union, the parent organization of the Construction and General Workers' Union, provides that upon the suspension, dissolution or the cessation of existence of a local, all property and funds of the local become the property of the parent.

The clear effect of these provisions is to make any moneys payable by the employer under the agreement, trust moneys for the benefit of the respective funds. On the basis of the agreement itself, I am of the opinion that Bence, C.J.Q.B., was correct in making the order he did because the moneys do not belong either to the appellant on behalf of the employees, or to the employees themselves, but rather to the funds which they have designated in the agreement. I agree with counsel for the respondent union that there is some support for his view in *Raymond v. Doherty et al.* (1965), 49 D.L.R. (2d) 99, [1965] 1 O.R. 593, and *Re International Nickel Co. of Canada Ltd., Shedden v. Kopinak*, [1950] 1 D.L.R. 381, [1949] O.R. 765.

Finally as counsel for the Pension Fund stated, if the agreement ceased as of August 1, 1972, the basic fact is that the employer has paid these moneys pursuant to the trust arrangement set out in the agreement and no other. All the requirements of a trust exist: *i.e.*, the beneficiaries, the trust *res*, the terms and conditions of the trust and the existence of a board of trustees. As Cohen, J., pointed out in the *Hobourn Aero Components* case, *supra*, at p. 97, the basis upon which contributions are returned to the contributories is that each donor retained an interest in the amount of his contributions "except so far as they are applied for the purposes for which they were subscribed". Or, to use the words of 38 Hals., 3rd ed., p. 862, in discussing the nature of a resulting trust:

> . . . the beneficial interest in the property, *so far as not applicable to any sufficiently expressed or indicated beneficiary or object*, results or reverts to the disposer or purchaser of the property or, in the case of his previous death, to his representatives.

(Italics are mine.)

Mr. George Taylor, Q.C., filed with the Court a memorandum respecting action No. 66 of 1973, in the Court of Queen's Bench, Judicial Centre of Prince Albert, between a group of employees of Woodlands Enterprises Limited, suing on their own behalf and all other employees of the company, represented for the purpose of collective bargaining by International Woodworkers of America, Local 1-184, as plaintiffs, and Woodlands Enterprises Limited, as defendant. This action, commenced March 29, 1973, asks for a declaration that all moneys held or heretofore held by the defendant are beneficially owned by the plaintiffs and such other employees. It was suggested to us by Mr. Taylor that the moneys which were ordered paid out by the learned Chambers Judge and later ordered to be held pending this appeal, should be held in Court pending the result of this new action.

In my view, the issue raised in this action is exactly the same as the issue disposed of in the present appeal and there is, therefore, no reason to order a further stay pending the final disposition of this new action.

The respondents, Laborers' Health and Welfare Trust Fund of Alberta and Saskatchewan, and Construction and General Workers' Union Local 890 Benevolent and Service Fund, fled a notice of intention to vary the judgment below by requiring the appellant to pay the taxfble costs of each of the respondents in the Court below. The order made by Bence, C.J.Q.B., was that the applicant should have its taxed costs payable out of the moneys in court, each fund contributing its proportionate share according to the respective amounts paid in, and that each of the other parties should pay its own costs.

While the learned Chambers Judge did not set out the reasons for his order, it seems clear that he did so on the ground that the points in issue, namely the interpretation of s. 33(5) of *The Trade Union Act, 1972*, and the effect of the order of the Labour Relations Board of the Province of Saskatchewan, made March 7, 1972, had not previously arisen in this jurisdiction, and, under the circumstances, it was fair that each party, other than the employer as stakeholder, should pay its own costs. I am not satisfied that he exercised his discretion on any wrong principle, so his order as to costs should not be disturbed.

The order of the learned Chambers Judge provided that the moneys in Court be paid out to said three claimants and that all moneys thereafter payable be disposed of in the same manner during the life of the collective bargaining agreement. The life of this agreement was not in issue before him nor before this Court, save in one respect, namely, whether it had been terminated by the remedial or retroactive interpretation of said s. 33(5) of *The Trade Union Act, 1972, supra*. It follows that the question of whether the agreement continued beyond March 31, 1973, is not before the Court.

The stay in payment·out granted by the Chambers Judge shall be continued until the expiration of the time for appeal from this judgment, and in the event of an appeal being taken, until the disposition of the appeal.

The appeal, and notice to vary, are dismissed with costs.

Appeal dismissed.

SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL NO. 333 v. NIPAWIN DISTRICT STAFF NURSES ASSOCIATION OF NIPAWIN et al.

Before: *Abbott, Martland, Pigeon, Laskin and Dickson, JJ.*
October 29, 1973.

Labour relations — Certification — Whether respondent a company-dominated organization — Labour Relations Board finding respondent influenced by Saskatchewan Registered Nurses Association (S.R.N.A.) — Board concluding that respondent a company-dominated organization — No finding that S.R.N.A. an employer or employer's agent — Whether Board required to make specific finding — Whether Board acting within its powers — Whether decision of Board reviewable — Role of Court in reviewing decisions of statutory tribunals — Trade Union Act (Sask.), ss. 5(h), 2(e), (g), (h).

Trade unions — Status — Whether applicant for certification a company-dominated organization — Labour Relations Board finding applicant influenced by Saskatchewan Registered Nurses Association — Board concluding that applicant a company-dominated organization — No finding that Saskatchewan Registered Nurses Association an employer or employer's agent — Whether Board conducted inquiry required by Act — Trade Union Act (Sask.), ss. 5(h), 2(e), (g), (h).

The respondent applied to the Saskatchewan Labour Relations Board for an order determining that certain registered and head nurses constituted an appropriate unit for bargaining, determining that the respondent represented a majority of the employees in the unit and requiring the employer to bargain collectively with the respondent. The appellant opposed the application on the ground that the respondent association was not a "trade union" as it was a "company dominated organization". The Board found that the respondent was organized and influenced in its administration by the Saskatchewan Registered Nurses Association (S.R.N.A.), and that as the members of the council of the S.R.N.A. were, in their personal and private employment, not employees within the meaning of *The Trade Union Act, 1972* (Sask.), c. 137, the respondent was a company-dominated organization within the meaning of s. 2(e) of the Act and accordingly not entitled to the orders sought as it was not a trade union. The Court of Appeal held that the Board had failed to conduct the proper inquiry under the Act and had failed to make the finding that the S.R.N.A. was an employer or employer's agent under s. 2(e) and ordered the Board to exercise its jurisdiction. On appeal, *held*, the appeal should be allowed.

If a statutory tribunal ignores the requisites of its constituent statute and decides questions any way it sees fit, it acts beyond the ambit of its powers and judicial intervention is then not only permissible but requisite in the public interest. But if it acts in good faith and if its decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear, then the Court will not intervene. The role of the Court in reviewing decisions of statutory tribunals is supervisory, not appellate.

The question remitted to the Board was whether the respondent association was a trade union, as defined, and the Board made a specific finding that it was

not. While it make no express finding that the S.R.N.A. was an employer or employer's agent, it was not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion. Moreover, it can be accepted that the Board was aware of the statutory definition of "employer" and "employer's agent" and that it neither overlooked nor wilfully disregarded such definitions in concluding that the respondent was a company-dominated organization.

[*Farrell et al. v. Workmen's Compensation Board et al.* (1962), 31 D.L.R. (2d) 177, [1962] S.C.R. 48; *Noranda Mines Ltd. v. The Queen et al.* (1969), 7 D.L.R. (3d) 1, [1969] S.C.R. 898, 69 W.W.R. 321, apld; *Anisminic, Ltd. v. Foreign Compensation Com'n et al.*, [1969] 1 All E.R. 208; *R. v. Quebec Labour Relations Board, Ex p. Komo Construction Inc.* (1967), 1 D.L.R. (3d) 125, [1968] S.C.R. 172; *Metropolitan Life Ins. Co. v. Int'l Union of Operating Engineers, Local 796 et al.* (1970), 11 D.L.R. (3d) 336, [1970] S.C.R. 425; *Toronto Newspaper Guild v. Globe Printing Co.*, [1953] 3 D.L.R. 561, 106 C.C.C. 225, [1953] 2 S.C.R. 18, refd to]

APPEAL from the judgment of the Saskatchewan Court of Appeal, 36—D.L.R. (3d) 440 *sub nom. Re Nipawin District Staff Nurses Ass'n and Nipawin Union Hospital et al.*, [1973] 4 W.W.R. 616, granting an application for a peremptory writ of *mandamus* and directing the respondent Labour Relations Board to conduct an inquiry under *The Trade Union Act, 1972* (Sask.).

G. J. D. Taylor, Q.C., for appellant.

J. E. Gebhard, for the Labour Relations Board of Saskatchewan.

D. K. MacPherson, Q.C., for respondent, Nipawin District Staff Nurses Association.

The judgment of the Court was delivered by

DICKSON, J.: — On September 14, 1972, respondent Nipawin District Staff Nurses' Association (the "Association") applied to the Labour Relations Board of the Province of Saskatchewan (the "Board") for certification in respect of a unit which included all registered nurses and head nurses employed by the Nipawin Union Hospital, except the director of nursing. The appellant, Service Employees' International Union, Local 333 (the "Union") opposed the application and filed a reply in which it was alleged that the Association was not a "trade union" because it was a "company dominated organization", organized, formed and influenced in its administration by the Saskatchewan Registered Nurses' Association ("S.R.N.A."). S.R.N.A. is a statutory body under *The Registered Nurses' Act*, R.S.S. 1965, c. 315, being, as the name implies, an association of those nurses who become registered as members of the Association and thereafter are entitled to be known as registered nurses. The affairs of S.R.N.A. are under the management of a council composed of seven members elected annually. S.R.N.A. has over 6,000 members of whom approximately 4,500 are employed in hospitals or nursing homes in Saskatchewan.

The Association's application was heard by the Board and dismissed. The Association then applied to the Saskatchewan Court of Appeal for

an order of *mandamus* directing the Board to exercise the jurisdiction conferred upon it under s. 5, cls. (a), (b) and (c) of *The Trade Union Act, 1972* (Sask.), c. 137, in respect of the application for certification and for *certiorari* to quash the dismissal order. The Court of Appeal quashed the Board's order and directed that a peremptory writ of *mandamus* issue as applied for by the Association. The appellant Union has now appealed to this Court.

Section 5(a), (b) and (c), so far as applicable, provides as follows:

> 5. The board may make orders:
>
> (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit . . .
>
> (b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;
>
> (c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;

The following section of *The Trade Union Act, 1972* are also relevant:

> 2. In this Act:
>
> (l) "trade union" means a labour organization that is not a company dominated organization.
>
> (e) "company dominated organization" means a labour organization, the formation or administration of which an employer or employer's agent has dominated or interfered with or to which an employer or employer's agent has contributed financial or other support, except as permitted by this Act;
>
> (g) "employer" means:
>
> (i) an employer who employs three or more employees;
>
> (ii) an employer who employs less than three employees if at least one of the employees is member of a trade union that includes among its membership employees of more than one employer;
>
> (iii) in respect of any employees of a contractor who supplies the services of the employees for or on behalf of a principal pursuant to the terms of any contract entered into by the contractor or principal, the contractor or principal as the board may in its discretion determine for the purposes of this act;
>
> and includes Her Majesty in the right of the Province of Saskatchewan;
>
> (h) "employer's agent" means:
>
> (i) a person or association acting on behalf of an employer;
>
> (ii) any officer, official, foreman or other representative or employee of an employer acting in any way on behalf of an employer with respect to the hiring or discharging or any of the terms or conditions of employment of the employees of the employer;
>
> 5. The Board may make orders:
>
> (h) determining whether a labour organization is a company dominated organization;

> 21. There is no appeal from an order or decision of the board under this Act, the board may determine any question of fact necessary to its jurisdiction, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari*, *mandamus*, prohibition, injunction or other proceeding whatever.

In dismissing the Association's application, the Board found that the majority of the members of the council of S.R.N.A. over the years had been what the Board referred to as "management personnel" such as directors of nursing and superintendents of public health nursing employed by various hospitals, many of whom were persons whose primary responsibility in their employment was to exercise authority and perform functions of a managerial character and who regularly acted in a confidential capacity in respect of the industrial relations of their employers.

Evidence was placed before the Board that S.R.N.A. had devoted considerable energy, time and expense during the preceding several years promoting the organization of staff nursing associations throughout the Province of Saskatchewan. The Board accepted evidence placed before it that S.R.N.A. was attempting to dominate such associations with a view to ensuring that nurses would not become members of "non-nurse unions". The organization meeting of the respondent Association was arranged by the employment relations officer of S.R.N.A. and held at the Nipawin Union Hospital. The employment relations officer had a draft agenda with him and a draft write-in constitution for the new organization; his expenses were paid by S.R.N.A. and the application for certification was filed with the Board under a covering letter from him. It was also conceded that counsel representing the Association at the hearing before the Board was engaged and paid by S.R.N.A. The substance of the Board's decision to dismiss the application is found in the following paragraph:

> The Board concurs, on the evidence presented to it in this application, with the view expressed by Miss Sutherland in the indicated article and feels that an organization under the domination, or control, of the SRNA Council would, or could, in effect be control of the bargaining process by management or management personnel.

The "view expressed by Miss Sutherland" is that contained in the April, 1971 issue of the News Bulletin published by S.R.N.A. in which Miss Ann Sutherland, then S.R.N.A. employment relations officer, stated:

> The SRNA council is almost always made up of management nurses so that approval by the council would in effect be control of the bargaining process by management. However, a more formal relationship of the staff nurses' association within SRNA will need to be established.

The reasons for decision of the Board contain a quotation from Carrothers' *Collective Bargaining Law in Canada*, 1965, p. 207, reading: "statutory policy is clear that unions should be free of employer influence or domination", and conclude by holding that the applicant Association was a company-dominated organization and accordingly not a trade union within the meaning of the Act.

The judgment of the Court of Appeal for Saskatchewan delivered by Culliton, C.J.S. [36 D.L.R. (3d) 440 *sub nom. Re Nipawin District Staff Nurses Ass'n and Nipawin Union Hospital et al.*, [1973] 4 W.W.R. 616], acknowledges the right of the Board to determine whether the Association was a "company dominated organization" and affirms that if, in the determination of that question, the Board acted within its jurisdiction the decision could not be reviewed in *certiorari* or *mandamus* proceedings even if wrong in fact or law: *Farrell et al. v. Workmen's Compensation Board et al.* (1961), 31 D.L.R. (2d) 177, [1962] S.C.R. 48, and *Noranda Mines Ltd. v. The Queen et al.* (1969), 7 D.L.R. (3d) 1, [1969] S.C.R. 898, 69 W.W.R. 321. The Court of Appeal held that although the Board found that the Association was dominated by S.R.N.A. that finding would not render the Association a company-dominated organization within s. 2(e) unless S.R.N.A. was either an employer or employer's agent. In the opinion of the Court the Board inquired into the personal and private employment of the individual members who constituted the council of S.R.N.A.; found that the members of the council from time to time were made up of persons who could not be classed as employees under *The Trade Union Act, 1972*; and, having reached that conclusion, the Board held that the applicant, being under the domination of an organization so constituted, would in effect be controlled by management and, therefore, a company-dominated organization. The Court concluded that the inquiry made by the Board and the decision which it reached were not founded on the provisions of the legislation but upon the Board's view of what constituted a company-dominated organization, and thus the Board acted in excess of its jurisdiction. With great respect, I do not agree. There can be no doubt that a statutory tribunal cannot, with impunity, ignore the requisites of its constituent statute and decide questions any way it sees fit. If it does so, it acts beyond the ambit of its powers, fails to discharge its public duty and departs from legally permissible conduct. Judicial intervention is then not only permissible but requisite in the public interest. But if the Board acts in good faith and its decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear, then the Court will not intervene.

A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it. If, on the other hand, a proper question is submitted to the tribunal, that is to say, one within its jurisdiction, and if it answers that question without any errors of the nature of those to which I have

alluded, then it is entitled to answer the question rightly or wrongly and that decision will not be subject to review by the Courts: *Anisminic, Ltd. v. Foreign Compensation Com'n et al.*, [1969] 1 All E.R. 208; *Noranda Mines Ltd. v. The Queen et al., supra; Farrell et al. v. Workmen's Compensation Board et al., supra; R. v. Quebec Labour Relations Board, Ex p. Komo Construction Inc.* (1967), 1 D.L.R. (3d) 125, [1968] S.C.R. 172.

Reference must be made to *Metropolitan Life Ins. Co. v. Int'l Union of Operating Engineers, Local 796 et al.* (1970), 11 D.L.R. (3d) 336, [1970] S.C.R. 425. In that case the union sought certification as bargaining agent of all employees at Metropolitan Life Insurance Company in its building division at Ottawa, with certain exceptions. The company opposed the application on the ground that the constitution of the union could only be interpreted as excluding from membership in the union those persons claimed by the union for certification. The board rejected the company's submission and applied a policy of its own making in dealing with the question whether an employee was a member of a union. That policy permitted a person to be so regarded upon mere application for membership and payment of at least $1 initiation fee or monthly dues. This Court held that it was a condition precedent to the board having power to grant the union's application for certification, that it be satisfied that more than 55% of the employees in the bargaining unit were members of the union; if the board had addressed itself to that question its decision could not have been interfered with by the Court although it appeared that the board, in reaching it, had erred in fact or in law or in both: instead of asking itself that question the board embarked on an inquiry as to whether, in regard to the requisite number of employees, the conditions which the board *ex proprio motu* applied, had been fulfilled; in proceeding in this manner the board failed to deal with the question remitted to it and instead decided a question not remitted to it. The recent judgment of the House of Lords in the *Anisminic* case, *supra*, as well as the judgment of this Court in *Toronto Newspaper Guild v. Globe Printing Co.* (1953), 3 D.L.R. 561, 106 C.C.C. 225, [1953] 2 S.C.R. 18, were relied upon. It would seem to me that in the case at bar the circumstances are very different. In the instant case, the Board dealt with the question remitted to it, *viz.*, whether the Association was a trade union, as defined. That question in turn required determination of the further question whether the Association was a company-dominated organization, as defined. The Board gave its answer to both of these questions. It is contended, however, that in doing so it failed to make a finding that S.R.N.A. was an employer or employer's agent or that the members of the council of S.R.N.A. were employers or employers' agents and the Board thereby acted without jurisdiction. I find it difficult to accept that contention. Section 2(e) of *The Trade Union Act, 1972* defines "company dominated organization" as a labour organization dominated by "an" employer. The proscribed domination need not be that of the employer whose employees are seeking to organize. A labour organization is a company-dominated

organization if *any* employer or employer's agent dominates it or interferes with it or contributes financial or other support to it, except as permitted by the Act. "Employer" means "an employer who employs three or more employees": s. 2(g)(i). The reasons for decision of the Board do not state the number of persons employed by S.R.N.A. and the Board did not expressly find that S.R.N.A. was an employer or employer's agent, but I do not regard this as fatal to the Board's jurisdiction. A tribunal is not required to make an explicit written finding on each constituent element, however subordinate, leading to its final conclusion. The role of the Court in a case such as this is supervisory, not appellate: s. 21 of the Act. The Board made the specific finding that the Association was not a "trade union" as defined by the Act. For myself, I am quite prepared, on the record, to accept that the Board was aware of the statutory definition of "employer" and "employer's agent" found in *The Trade Union Act* and that it neither overlooked nor wilfully disregarded such definitions in concluding that the Association was a company-dominated organization.

I would accordingly allow the appeal and confirm the Board's dismissal of the Association's application, with costs in this Court and in the Court of Appeal. There should be no costs payable to or by the Board.

Appeal allowed.

SASKATCHEWAN

COURT OF QUEEN'S BENCH (CROWN SIDE)

In the matter of the *The Trade Union Act*, R.S.S. 1953, Chapter 259, and amendments thereto, and in the matter of the Crown Practice Rules and in the matter of a certain Order made by the Labour Relations Board of Saskatchewan relating to Domtar Construction Materials Ltd., William Halliwell, and International Woodworkers of America, Local 1-184, CLC, CIO, AFL.

BETWEEN:

Domtar Construction Materials Ltd., a body corporate, incorporated under the laws of Canada and licenced to do business in the Province of Saskatchewan, with offices in the City of Saskatoon, in the Province of Saskatchewan, and William Halliwell, of the City of Saskatoon, in the Province of Saskatchewan, (applicants)

— and —

International Woodworkers of America, AFL, CIO and CLC, Region Number 1, Local Union Number 184, (respondent)

Before the Honourable Mr. Justice R. A. MacDonald, in Chambers at Saskatoon, Saskatchewan } Friday the 11th day of January, A.D. 1974.

ORDER

Upon the application of the Applicants, and this motion having come on for hearing before the Honourable Mr. Justice R. A. MacDonald, on the 11th day of January, A.D. 1974, in the City of Saskatoon, in the Province of Saskatchewan, in the presence of Mr. R. L. Barclay, of counsel for the Applicants, and Mr. George Taylor, Q.C., of counsel for the Respondent, International Woodworkers of America, AFL, CIO and CLC, Region Number 1, Local Union Number 184, and upon reading the Notice of Motion with proof of service thereof, together with the Affidavits of Ronald L. Barclay and William Halliwell with exhibits thereto, all filed;

It is hereby ordered and adjudged that this application be and the same is herewith dismissed with costs.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 5th day of February, A.D. 1974.

Local Registrar

SASKATCHEWAN

COURT OF APPEAL

Before: The Honourable Chief Justice E. M. Culliton
The Honourable Mr. Justice Mervyn Woods
The Honourable Mr. Justice R. L. Brownridge

MODERN PRESS, a Division of the Saskatchewan Wheat Pool, of Saskatoon, Saskatchewan,

v.

SASKATOON TYPOGRAPHICAL UNION, LOCAL NO. 663 AND GRAPHIC ARTS INTERNATIONAL UNION, LOCAL NO. 215, AND THE LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN,

Application for Mandamus and Certiorari — Applicant applied to amend certification order — Application not filed with secretary of Board within period provided — Application dismissed by Board — The Trade Union Act, s. 5 (k)(i) — Jurisdiction of Board — Decision within jurisdiction not open to review — Error on face of record.

The company applied for writs of *mandamus* and *certiorari* to command the Labour Relations Board of Saskatchewan to exercise its jurisdiction under s. 5 (k) (i) of *The Trade Union Act* and to quash the Board's dismissal of its application. The company had applied for an amendment to a certification order made on November 6, 1947. The application was delivered by solicitors for the applicant to the person supplying clerical, secretarial and stenographic services to the Board on January 15, 1974 and it was received by the secretary of the Board on January 17, 1974.

Held: The application was dismissed; the delivery made by solicitors for the applicant on January 15, 1974 was not in compliance with Regulation 14 of the Rules and Regulations of the Board, and therefore the application was out of time under s. 5 (k)(i) of the Act. It is within the jurisdiction of the Board to decide whether or not there had been compliance with the Act and regulations, and the determination made by the Board is therefore not open to review, since *The Trade Union Act* contains a privative clause: *R v. Labour Relations Board of Saskatchewan, ex parte Tag's Plumbing and Heating Ltd.*, 34 DLR (2nd) 128. The court rejected the argument that *certiorari* would lie to quash the order for error on the face of the record, holding that such an error is not a basis for quashing the order in *certiorari* proceedings if that error was made by the Board within the exercise of its jurisdiction.

E. C. Leslie, Q.C., for Modern Press.

G. J. D. Taylor, Q.C., for Saskatoon Typographical Union.

Isadore Grotsky, Q.C., for Graphic Arts International Union.

D. A. McKillop, for the Labour Relations Board.

JUDGMENT OF THE COURT — CULLITON, C.J.S.

This is an application by Modern Press for an order that a peremptory writ of *mandamus* do issue directed to the Labour Relations Board

of Saskatchewan commanding it to exercise the jurisdiction conferred upon it by section 5(k)(i) of *The Trade Union Act*, in respect to an application made by Modern Press dated January 15, 1974, and for an order that a writ of *certiorari* do issue for a return to this Court of the Board's dismissal order dated February 24, 1974, and that the said dismissal order be quashed.

On May 6, 1947, the Labour Relations Board made a certification order in which it designated certain employees of Modern Press Limited to be an appropriate unit of employees for the purpose of bargaining collectively; and in which it held that Saskatoon Typographical Union Local No. 663 represented a majority of the employees and directed Modern Press Limited to bargain collectively with the Saskatoon Typographical Union as the representative of such employees. The applicant and the Saskatoon Typographical Union entered into a collective bargaining agreement for a period of twenty-four months effective on February 15, 1973, and expiring on February 14, 1975. The applicant is also subject to a certification order dated July 28, 1974, affecting the applicant and Graphic Arts International Union.

By an application dated January 15, 1974, Modern Press Limited applied to the Labour Relations Board for an order amending the certification order of November 6, 1947. The amendment sought related to a redesignation of the composing room employees.

Section 17(1) of *The Trade Union Act* reads:

> "17.—(1) The board may, subject to the approval of the Lieutenant Governor in Council, make such rules and regulations, not inconsistent with this Act, as are necessary to carry out the provisions of this Act according to their true intent."

Pursuant to the power granted to the Board by the foregoing section, the Board made regulations which were approved by the Lieutenant Governor in Council. Regulation 14 of such regulations reads:

> "14. Every application, intervention or reply, together with two copies thereof, shall be filed with the secretary."

Section 5(k)(i) of the Act is as follows:

> "5. The board may make orders:
> * * * *
>
> "(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:
>
> (i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than thirty days or more than sixty days before the anniversary of the effective date of the agreement; or"

The Board was holding sittings at the Court House in the City of Saskatoon on January 15, 1974. During that sittings the person supplying clerical, secretarial and stenographic services to the Board was Mrs. Yvonne R. Reid. At about 2 p.m. the Solicitors for the applicant delivered

to Mrs. Reid the original Application for Amendment to the order on November 6, 1947, together with two copies thereof. This application and copies were received by the Secretary of the Board in Regina on January 17, 1974.

The application came on for hearing before the Board in Regina on the 5th and 6th days of February, 1974. Learned counsel for the Saskatoon Typographical Union took the preliminary objection that as the application to amend had not been filed with the Secretary within the period provided for in section 5(k)(i) of the Act, the Board was without jurisdiction to hear the application. The Board gave effect to this preliminary objection and dismissed the application. The present application for *mandamus* with *certiorari* was then made. The grounds for the application as disclosed in the material are:

(1) that the Board refused or declined to exercise its jurisdiction in determining and holding that it did not have jurisdiction to hear the application;

(2) that in dismissing the application, the Board erred in law, which error is apparent on the face of the record;

(3) that the Board erred in failing to hold that the filing of the application with Mrs. Reid was in compliance with regulation number 14.

There are basic facts which are not in dispute. It is common ground that Mrs. Reid was not the Secretary of the Board and that the Secretary was Mr. Stanley N. Cameron. It is also common ground that unless the application to amend is found to have been made on January 15, 1974, there was non-compliance with section 5(k)(i) of the Act.

The validity of the regulations is not questioned. Regulation 14 clearly requires that every application together with two copies thereof, be filed with the Secretary. Admittedly here the application was not filed with the Secretary and it did not come into his hands until January 17, 1974. Under section 5(k)(i) the Board's power to amend an order or decision where there is a bargaining agreement in existence is limited to doing so when the application is made during a period of not less than thirty or more than sixty days before the anniversary of the effective date of the agreement. As the application in the present case was not made until January 17, 1974, it was not made within the period as provided for in section 5(k)(i). Thus on the record there is nothing to indicate error on the part of the Board.

It was contended that the Board should have held that the filing of the application with Mrs. Reid constituted filing with the Secretary. It was a matter for the Board to decide whether or not there had been compliance with the Act and regulations. In the exercise of that jurisdiction, the Board concluded that the application had not been filed with

the Secretary so as to comply with the time requirement of section 5(k)(i). As that was a matter for determination by the Board within its jurisdiction, its decision is not open to review in these proceedings.

It was also argued that there was error on the face of the record and for that reason *certiorari* lay to quash the order for dismissal.

In *Regina v. Labour Relations Board of Saskatchewan, Ex Parte Tag's Plumbing & Heating Limited*, 34 D.L.R. (2d), 128, speaking on behalf of the Court, I said at page 131:

> "Where there is such a privative clause, I think the law is well settled that the Court in *certiorari* proceedings is restricted to determining whether or not the inferior Court or tribunal acted within its jurisdiction (including matters akin thereto, such as bias, denial of natural justice, fraud, etc.), or whether there is error on the face of the record:"

There appears to be some misunderstanding as to when error on the face of the record would be a proper ground for *certiorari*. I want to make it clear, "error on the face of the record" would not be a basis for quashing the order in *certiorari* proceedings if that error was one made by the Board within the exercise of its jurisdiction. In the present case, if there was error and I make no finding as to this, it was made by the Board in the exercise of its jurisdiction and therefore, not open to review in these proceedings.

The application is dismissed with costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 25th day of April A.D. 1974.

"Culliton, C.J.S."
Culliton, C.J.S., for the Court.

CORAM: CULLITON, C.J.S., WOODS AND BROWNRIDGE, JJ.A.

SASKATCHEWAN

COURT OF QUEEN'S BENCH

Regina ex rel. Fluor Utah Ltd.

v.

The Labour Relations Board of Saskatchewan
and
The Construction and General Workers' Union, Local 890.

Application for writ of certiorari to quash Board order finding unfair labour practice — Failure of employer to bargain collectively even in absence of employees — Jurisdiction of Board — basis of Board's decision not reviewable — Evidence extraneous to record admitted — Application dismissed.

Application for a writ of *certiorari* to quash an order of the Saskatchewan Labour Relations Board finding the applicant to have engaged in an unfair labour practice. The basis of this application is that the Board had no jurisdiction to make such a finding. The applicant employer had bargained collectively with the union regarding all of its employees, who were employed in one geographic area covered by the certification order. However, the Board found the employer had failed to bargain collectively with the union regarding the geographic area covered by the certification order other than the area covered by the first collective agreement. There were no employees at work other than in the geographic area covered by the first collective agreement.

Held: Application dismissed. A certification order does not mean that an employer is obligated to bargain only if there is no absence of employees. Once an appropriate unit is determined, then until there comes into being an amending or rescinding order, the unit persists even in the complete absence of employees, and the obligation to bargain collectively continues. There is no right in the employer to go behind the order at any given moment to test the current appropriateness.

The Board had the right to enter into an inquiry to determine whether an unfair labour practice had been committed. The Board's decision regarding the question of whether, in law, a certification order requires an employer to bargain collectively even though there exists an absence of employees, was therefor open to it. Whether it answered that question rightly or wrongly is not reviewable by a court: *Service Employees International Union v. Nipawin District Staff Nurses' Association* 41 DLR (3rd) 6.

Mr. D. E. Gauley, Q.C., and *Mr. P. Foley*, for the Applicants.

Mr. N. W. Sherstobitoff, for the Respondent Union.

Mr. D. A. McKillop, for the Respondent Labour Relations Board.

JUDGMENT — BAYDA, J.

On June 8th, 1972, the Labour Relations Board of Saskatchewan made an order:

> "(a) determining that all construction labourers and labour foremen employed by Fluor Utah Engineering and Construction Inc., ... [the employer] . . . . . from the 51st

parallel to the Northwest Territories when employed as or engaged in general construction work . . . . . are an appropriate unit of employees for the purpose of bargaining collectively;

(b) determining that the Construction and General Workers' Local Union No. 890 [the Union], a trade union within the meaning of *The Trade Union Act* represents a majority of employees in the appropriate unit of employees set out in paragraph (a);

(c) requiring [the Employer] the employer, to bargain collectively with the trade union, set forth in paragraph (b) with respect to the appropriate unit of employees set out in paragraph (a)."

This Order (hereafter "the certification order") is still in effect and its validity is not in question.

Upon the application of the union, the Board, on September 11th, 1973, made an order that:

"(1) . . . . . [the Employer] did engage in an unfair labour practice by failing to bargain collectively with a view to the conclusion of a collective bargaining agreement with representatives of [the Union] with respect to the area covered by Order of the Board dated June 8, 1972, other than for the area covered by the Project Agreement entered into on the 9th day of February, 1972, within the meaning of section 11, subsection (1), clause (c) of *The Trade Union Act, 1972*;

(2) . . . . . [the Employer] did not engage in an unfair labour practice by failing to bargain collectively with a view to the conclusion of a collective bargaining agreement with representatives of [the Union] with respect to the area covered by the Project Agreement entered into on the 9th day of February, 1972;"

And, in addition, the Board made an order requiring;

"(3) . . . . . the said [Employer] to refrain from engaging in the said unfair labour practice referred to in paragraph (1) hereof."

The employer launched an application to this Court for an order directing the issue of a writ of *certiorari* and for an order quashing that portion of the Board's order of September 11th, 1973 which found the employer to have engaged in an unfair labour practice. The grounds relied upon can be summarized as follows:

(1) The Board erred in law in and these errors are manifest upon the face of the record;

(2) The Board exceeded its jurisdiction or alternatively, acted without jurisdiction;

(3) The manner in which the Board conducted its proceedings amounted to a denial of natural justice.

There is nothing to grounds (1) and (3) and at the hearing the employer proceeded only on ground (2).

In support of its position, the Employer through evidence extraneous to the record, (evidence which I admitted for the limited purpose of examining the jurisdiction question, — see: deSmith, Judicial Review of Administrative Action, (2nd), p. 441; Reid, Administrative Law and Practice, at pp. 325-327) established that:

(a) At all material times, the only employees employed by the employer in the geographic area designated in the certification order were those engaged in what is commonly referred to as the "Rabbit Lake Project" (the same project as that referred to in the "Project Agreement" mentioned in the Board's order of September 11, 1973) and no other;

(b) With respect to those employees so employed at that project, the employer bargained collectively with the Union and as a consequence there was entered into a collective bargaining agreement which is still in effect; and in the result all employees now employed by the employer in the geographic area in question are covered by a collective bargaining agreement;

(c) The Rabbit Lake Project covers only a small portion of the total geographic area mentioned in the certification order;

(d) No other collective bargaining with respect to the appropriate unit of employees set out in paragraph (a) of the certification order has taken place notwithstanding requests from the union, and in particular no collective bargaining has taken place with respect to the area outside the Rabbit Lake Project area.

The crux of the employer's argument is this: There was an obligation on the employer to bargain collectively with respect to those employees who were actually working on the job in the geographic area mentioned in the certification order and with respect to those employees, the employer did bargain collectively. It entered into a collective bargaining agreement and has thus fulfilled its obligation. There is no obligation imposed upon the employer by the certification order to bargain collectively with respect to non-existing employees or some possible future employees and the failure to accede to the union's demands to so bargain cannot in law amount to a failure to bargain collectively and for the Board to make a finding of such a failure is to

make a finding not available to it and thus the Board, in making such a finding, exceeded its jurisdiction; and the order is for that reason amenable to *certiorari*.

The argument raises this question: Was it open to the Board to find that, in law a certification order requires an employer to bargain collectively even though at the time of such bargaining, there are no employees who would benefit directly from such bargaining? If it was open to the Board to make such a finding that would end the matter, for, ". . . . . if the Board [acted] in good faith and its decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear, then the Court will not intervene." (Per Dickson, J., speaking for the Supreme Court of Canada in *Service Employees' International Union, Local No. 333, v. Nipawin District Staff Nurses Association, et al*, 41 D.L.R. (3rd) 6, at p. 11).

It is conceded that if it there were one or more employees engaged in the geographic area designated in the certification order outside the Rabbit Lake Project, the employer would be obligated to bargain collectively. The employer's participation in a collective bargaining agreement restricted to the Rabbit Lake Project would not be an answer to an allegation of failure to bargain collectively in the designated geographic area outside the Rabbit Lake Project. It is said that the complete absence of employees outside the Rabbit Lake Project area either suspended the employer's obligation to bargain collectively until there came into being employees who would benefit from such bargaining or such obligation simply never arose. The rationale of this contention is that the whole purpose of bargaining collectively is to conclude an agreement which will reflect the needs and wants of the employees whom a trade union represents and this purpose will not be fulfilled where there are no employees and consequently no need and wants. To put the argument another way, the employer is not an employer with respect to the area outside the Rabbit Lake Project.

A reading of the whole Act — and I particularly refer to ss. 3, 5(a), (b), (c), 11(1)(c) and 37 — leads me to conclude that a certification order such as the order of the Board of June 8th, 1972, may be reasonably construed as unconditional (unless the order otherwise specifies) and one that stands on its own. It is settled, for example, that an order (under s. 5(c) of *The Trade Union Act*, R.S.S. [1953] ch. 259, a predecessor of s. 5(c) of the current Act) requiring an employer to bargain collectively does not mean that he is obligated to bargain collectively only if the trade union continues to represent the majority of the employees in an appropriate unit. (See: *Army & Navy Department Stores Ltd., v. Retail, Wholesale and Department Store Union, A.F.L.-C.I.L./C.L.C.*, [1962], 39 W.W.R. 311, at 313.) Nor does it mean that he is obligated to bargain collectively only if he continues to be an employer. (See: s. 37 of the Act.) It is a logical extension to say that such an order does not mean that an employer is obligated to bargain only if there is no absence of employees.

Once an appropriate unit is determined then until there comes into being an amending or rescinding order, the unit persists even in the complete absence of employees, and the obligation to bargain collectively which arose the instant the order was made, continues. The right of an employer to go behind the order at any given moment to test the current appropriateness, so to speak, of the unit and on the basis of the result of such personal test decide whether to bargain collectively, does not exist.

I find that it was open to the Board to hold that in law, a certification order requires an employer to bargain collectively with a trade union with respect to the appropriate unit of employees even though at that particular time there is an absence of employees who would benefit from such collective bargaining.

The situation then, is this: The Board entered upon an inquiry to determine whether an unfair labour practice had been committed. That it had the right to enter upon such inquiry is beyond doubt. (s. 5(d) of the Act.) In the course of such inquiry and for the purpose of determining the question remitted to it, the Board was required to decide a subsidiary question: Whether in law, a certification order requires an employer to bargain collectively even though there exists an absence of employees. This subsidiary question is one which was within the scope of the inquiry. The Board's decision with respect to that question, was one that was open to the Board. Whether it answered that question rightly or wrongly is not reviewable by this Court. (*Service Employees' International Union v. Nipawin District Staff Nurses Association, supra*).

The application is dismissed with costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 10th day of May, A.D. 1974.

BAYDA, J.

SASKATCHEWAN

COURT OF APPEAL

Before: Culliton, C.J.S., Woods and Hall, JJ.A. November 4, 1974.

Western Publishers Limited (Moose Jaw Times-Herald) v. Moose Jaw Typographical Union No. 627 (International Typographical Union of North America) et al.

Overtime — Refusal to work extra hours to complete newspaper's publication — Alleged to constitute strike action — Repetition resulted in termination of employment — Union sought injunction for breach of collective agreement — Employer's action amounted to lockout — Failure to resort to grievance procedure — injunction continued.

A voluntary collective bargaining agreement was entered into by a newspaper publisher with employees in the composing room which provided for a closed shop. A certification order was subsequently issued which brought all press room employees within the bargaining unit. When the press room employees refused in concert to work overtime in order to complete the printing of that day's newspaper, the employer alleged that their action constituted a strike and warned that their employment would be terminated if the action were repeated. On a subsequent occasion the press room employees were joined by the composing room employees in a similar concerted refusal to work the necessary hours to produce the day's paper, and they were advised that their employment was terminated. The president and other members of the union local refused to sign a letter, presented by the employer, agreeing to carry out "normal work assignments under union jurisdiction in accordance with normal work practices". As a result, no member of the union was employed in the production of the newspaper since that date. When the union successfully sought a restraining order, the employer contended that the lower court should not have granted an injunction to enforce specific performance of a contract when the party seeking redress had wrongfully refused to carry out its part of the contract. The matters in dispute fell squarely within the grievance procedures of the collective agreement. The union had gone into court with "unclean hands".

Held: In contesting the appeal the union sought to continue to restrain the employer from acting in breach of the collective agreement and from employing persons other than members of the union local. On the latter point, counsel for the employer advised that no outside employees had been engaged and that the newspaper had been produced by management and other staff members. In the view of the Court, it "scarcely lies in the mouth of the employer to criticize the union for failure to avail itself of the agreement's procedure when it failed to do so itself". The refusal of management to permit the employees to continue to work because of their refusal to sign the letter amounted to a lockout. The appeal was dismissed with costs.

Donald K. MacPherson, Q.C. for the appellant;

G. K. Randall for the respondents.

[*Injunction appealed by employer*]

CULLITON, C.J.C. (for the Court): This is an appeal from the judgment of Bence, C.J.Q.B., in which he granted an interim injunction *quia timet*, restraining the appellant, Western Publishers Limited,

(1) from acting in breach of the collective bargaining agreement between it and the plaintiff Union, dated April 14, 1972, and more particularly, restraining the defendant corporation from employing persons other than members of the plaintiff Union to perform work within the jurisdiction of the plaintiff Gnion, as that is defined in the said collective agreement; and

(2) from acting in breach of the collective agreement between it and the plaintiff Union dated April·14, 1972, and more particularly, restraining the defendant from acting upon its purported determination, or intention, to determine the employment of members of the plaintiff Union by employing persons who are not members of the plaintiff Union to carry out work within the jurisdiction of the plaintiff Union as defined in the said collective bargaining agreement.

[*Grounds of appeal*]

The grounds of appeal are:

(1) that as the employees of the appellant by being on strike and continuing to refuse to work were in violation of fundamental terms of the collective bargaining agreement, namely: 1.02, 27.01, and 28.01, the learned Chambers Judge should have held that the Court would not grant an injunction to enforce specific performance of a contract so as to prevent the other contracting party securing its performance by other means when the party seeking the Court's aid had wrongfully refused to carry out its part of the contract and is still persisting in so doing;

(2) that the learned Chambers Judge erred in law in not concluding that, as the issues between the parties in the matter were such as fall squarely within the type of cases which must, under the terms of the collective agreement, be dealt with in the manner as therein set forth, there was no right to an injunction;

(3) that the learned Chambers Judge should have held that the respondents have an adequate remedy by virtue of the grievance procedure under the agreement and thus refused the injunction;

(4) that the equitable remedy of injunction should have been refused by the learned Chambers Judge as the respondents had gone into court with "unclean hands";

(5) that the learned Chambers Judge erred in holding that neither party should be allowed to contend that a notice had not been given under Section 33(4) of *The Trade Union Act*, S.S. 1972, Chapter 137;

(6) that the learned Chambers Judge erred in holding, as he appeared to do, that the strike by the employees was legal and proper without evidence of compliance with Section 11(2)(d) of *The Trade Union Act, supra.*

[*Voluntary collective bargaining*]

A collective bargaining agreement, binding upon the appellant, was entered into between Moose Jaw Times-Herald Limited and Moose Jaw Typographical Union, Local No. 627, on April 14, 1972. This agreement was entered into by the Union in respect to all employees engaged in the composing room work. This was the area of jurisdiction of the Union and the agreement provided that the employer would employ only members of the Union to perform all work within the jurisdiction of the Union. While the agreement was dated April 14, 1972, the term of the agreement was for twenty-seven months from February 5, 1972, to May 4, 1974. At the time the collective bargaining agreement was entered into there had not been a certification order by the Labour Relations Board.

[*Unit expanded by certificate*]

On June 3, 1974, the Labour Relations Board issued a certification order, the effect of which was to bring all printing producing employees within the jurisdiction of the Union as their bargaining agent. The practical result was to make the Union the bargaining agent for the employees in the press room, as well as those in the composing room.

[*Refusal to work*]

On September 25, 1974, the press room employees refused in concert to work the overtime necessary to complete the printing of that day's paper. This, according to the appellant, constituted a strike. They returned to work on the 27th and worked the hours required to produce the paper.

On September 28, 1974, the composing room employees and press room employees refused in concert to work the overtime hours necessary to produce that day's paper and this, according to the appellant, was a strike.

Mr. Butler, the publisher of the Times-Herald, on September 27th, and again on September 28th, informed the press room employees that if on any day they refused to continue working until the printing of that day's paper was completed, he would terminate their employment, and when they refused to work until the paper was published on September 28th, he advised them their employment was terminated.

On September 30th, 1974, Butler presented Crozier, the president of the local Union, with a letter, which read:

> I agree to carry out my normal work assignments under Union jurisdiction in accordance with normal work practices.

Crozier refused to sign this letter and requested a meeting of his Union Executive with management. That same day the Executive met Butler and were advised by Butler that unless the members of the Executive of the Union signed the foregoing letter, they would not be allowed to work or perform their normal work assignment. Other members of the Union refused to sign such a letter, with the result that no member of the Union has been employed in the production of the paper since that date.

Clearly the appellant advised the Union of its intention to engage employees to replace them if they did not return to work by October 21st. On the appeal, learned counsel for the appellant advised the Court that, in fact, no outside employees had been engaged; that the paper had been produced by management and other personnel ordinarily employed by the appellant to do other work.

[*Notice to re-negotiate*]

It was admitted that notice was given by the Union to re-negotiate the agreement by notice dated February 17, 1974. That notice was not in accord with Section 33(4), *supra*, which reads:

> 33. (4) Either party to a collective bargaining agreement may, not less than thirty days or more than sixty days before the expiry date of the agreement, give notice in writing to the other party to terminate the agreement or to negotiate a revision of the agreement and where a notice is given the parties shall forthwith bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.

In my opinion, the failure to give the notice as required by Section 33(4) is not material to the disposition of this appeal. That sub-section is permissive and not mandatory. If notice is served in accordance therewith, a mandatory duty arises on the parties to forthwith bargain collectively. When no notice is given, in accordance with the sub-section, that is not a bar to mutual re-negotiation, which, in fact, took place in the present case. Moreover, it is obvious that when the notice is not served in accordance with Section 33(4), under Section 33(1) the agreement would continue in force. What the position would be in regard to the agreement had a notice been served in accordance with section 33(4) need not be considered at this time.

[*Collective agreement breached*]

The appellant contends that the Union is in breach of a fundamental term of the collective bargaining agreement, and, therefore, should be denied equitable relief by way of injunction. Learned counsel for the appellant first argued that the Union was in breach of Section 1.02 of the agreement. In my view, that section is superseded by Section 33(1) and Section 33(4) of *The Trade Union Act, supra*, and I have already considered these Sections.

[*Provision for dispute settlement*]

Lea r ed counsel for the appellant then contended that the Union was in breach of section 27.01 and section 28.01 of the agreement, which read:

Section 27.01

> It is agreed that fruitless controversies must be avoided and every effort made to maintain harmonious relations. To accomplish this, both parties will in every instance give prompt attention to disputes and will in good faith endeavour to settle all differences by conciliation or arbitration. In the event of a difference arising regarding the terms of this contract, all work shall continue without interruption and in the usual manner pending proceedings looking to conciliation or arbitration of such differences, and the wages, hours or working conditions prevailing prior to the cause of the difference shall be preserved unchanged, and work shall continue in the usual manner until a f nal decision of the matter at issue shall be reached. Discharge cases shall be processed in accordance with the provisions of Section 17.01.

Section 28.01

> A standing committee of two representatives of the Employer, and a like committee of two representing the Union, shall be appointed; the committee representing the Union shall be selected by the Union; and in case of vacancy, absence or refusal of either of such representatives to act, another shall be appointed in his place.
>
> To this committee shall be referred within fifteen days of the cause of the complaint all disputes which may arise as to the scale of prices herein provided, the construction to be placed upon any clause of the agreement, or alleged violations thereof, which cannot be settled otherwise, and such joint committee shall meet within a further f fteen days when any question of dif· ference shall have been referred to it for decision by the executive officers of either party to this agreement. Should the joint committee be unable to agree, then either party may refer the matter to a board of arbitration within fifteen days, the representatives of each party to this agreement to select one arbiter, and the two to agree upon a third. The decision of the board shall be final and binding upon both parties.
>
> Time limits provided for herein may be extended by mutual agreement of the parties. The cost of the chairman shall be borne equally by the parties.

In my respectful view, section 27.01 equally applies to both the employer and the Union. It scarcely lies in the mouth of the employer to

criticize the Union for failure to avail itself of the agreement's procedure when it failed to do so itself. Section 28.01 is a procedural section.

In my opinion, whatever may have been the position of the Union prior to September 30, 1974, when Butler, on behalf of the appellant, demanded that the Executive members of the Union and other members of the Union sign the letter which I have already quoted as a condition precedent to return to work, an entirely new situation arose at that time. Butler, in demanding that the employees sign the letter which he produced, was not asking that they comply with the terms of the collective bargaining agreement. He asked that they sign an undertaking to carry out normal work assignments *in accordance with normal work practices.*

[*Lockout for refusal to sign letter*]

I am satisfied, had the Union or employees breached the agreement, the company was free to pursue those remedies which the law permits. The employer had no right to demand that the employees sign the letter Butler produced, as a condition of continuing employment. The refusal to permit them to work unless they did so constituted a lockout and not a strike. While there may have been a strike on September 26th and September 28th, the employees, after September 30th, were absent from work because of the refusal of management to permit them to work. Moreover, management did not refuse them the right to work because of an allegation they had breached the collective bargaining agreement, but simply because they would not sign the letter.

Having reached the foregoing conclusions, it is evident I cannot give effect to the arguments advanced on behalf of the appellant. I am satisfied that the learned Chambers Judge, in granting the interim injunction *quia timet*, properly exercised his discretion, and that there should be no interference therewith.

Having so decided, I do not find it necessary to admit the affidavit which the respondent sought leave to file on the opening of the appeal. In saying this, I leave open the question as to whether or not such an affidavit should be admitted under other circumstances.

[*Appeal dismissed*]

The appeal is dismissed with costs.

PART III

THE TRADE UNION ACT and AMENDMENTS

The Trade Union Act, 1953 Consolidation and Amendments
up to and including 1961

The Trade Union Act, 1965 Consolidation and Amendments
up to and including 1969

The Trade Union Act, 1972

— and —

THE ESSENTIAL SERVICES EMERGENCY ACT and AMENDMENTS

The Essential Services Emergency Act, 1966 and Amendments
up to and including 1971

The Essential Services Emergency Act, 1966. Repealed 1971

In accordance with the Revised Statutes of Saskatchewan, 1953, this is a consolidation of The Trade Union Act as amended by Chapter 108 of the Statutes of 1945, Chapter 98 of the Statutes of 1946, Chapter 102 of the Statutes of 1947, Chapter 92 of the Statutes of 1950, Chapter 93 of the Statutes of 1951 and Chapter 112 of the Statutes of 1953.

1953

CHAPTER 259

An Act respecting Trade Unions and the Right of Employees to organize in Trade Unions of their own choosing for the Purpose of Bargaining Collectively with their Employers.

HER Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

Short title

1 This Act may be cited as *The Trade Union Act.*

Interpretation

2 In this Act:

"bargaining collectively"

1 "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a collective bargaining agreement, the embodiment in writing of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such written agreement and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement;

"board"

2 "board" means the Labour Relations Board mentioned in section 4;

"collective bargaining agreement"

3 "collective bargaining agreement" means an agreement in writing between an employer and a trade union setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions;

"company dominated organization"

4 "company dominated organization" means any labour organization, the formation or administration of which any employer or employer's agent has dominated or interfered with or to which any employer or employer's agent has contributed financial or other support, except as permitted by this act;

"employee" 5 "employee" means any person in the employment of an employer, except any person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, and includes any person on strike or locked out in a current labour dispute who has not secured permanent employment elsewhere;

"employer" 6 "employer" means:

(a) any employer who employes three or more employees;

(b) any employer who employs less than three employees if at least one of the said employees is a member of a trade union which includes among its membership employees of more than one employer;

and includes Her Majesty in right of Saskatchewan;

"employer's agent" 7 "employer's agent" means;

(a) any person or association acting on behalf of an employer;

(b) any officer, official, foreman or other representative or employee of an employer acting in any way on behalf of an employer in respect to hiring or discharging or any of the terms or conditions of employment of the employees of such employer;

"labour organization" 8 "labour organization" means any organization of employees, not necessarily employees of one employer, which has bargaining collectively among its purposes;

"minister" 9 "minister" means the Minister of Labour;

"trade union" 10 "trade union" means a labour organization which is not a company dominated organization. 1944 (2nd. Sess.) c. 69, s. 2; 1947, c. 102, s, 2; 1950, c. 92, s. 2.

Rights of employees 3 Employees shall have the right to organize in and to form, join or assist trade unions and to bargain collectively through representatives of their own choosing, and the representatives designated or selected for the purpose of bargaining collectively by the majority of employees in a unit appropriate for such purpose shall be the exclusive representatives of all employees in such unit for the purpose of bargaining collectively. 1944 (2nd Sess.) c. 69, s. 3.

Labour Relations Board 4(1) There shall be a board to be known as the Labour Relations Board, composed of seven members appointed by the Lieutenant Governor in Council at such salaries or remuneration as he deems ft. The Lieutenant Governor in Council shall name a chairman and a vice-chairman of the board. The members of the board shall be selected so that the board shall be equally

representative of organized employees and employers, and if the Lieutenant Governor in Council deems it desirable, of the general public.

(2) A majority of the members of the board shall constitute a quorum and in the absence or disability of the chairman the vice-chairman shall act as chairman.

(3) A decision of the majority of the members of the board present and constituting a quorum shall be the decision of the board, and in the event of a tie the chairman or acting chairman shall have a casting vote.

(4) All orders, decisions, rules and regulations made by the board and every consent of the board shall be signed by the chairman or vice-chairman thereof, but in the absence or disability of the chairman and vice-chairman any orders, decisions, rules or regulations or any consent may be signed by any one member and when so signed shall have the like effect as if signed by the chairman or vice-chairman.

(5) Where any order, decision, rule or regulation or any consent purports to be signed by a member other than the chairman or vice-chairman, it shall be conclusively presumed that such member has so acted in the absence or disability of the chairman and vice-chairman.

(6) Any order, decision, rule or regulation or any consent purporting to be signed by the chairman, vice-chairman or a member other than the chairman or vice-chairman shall be deemed to have been duly authorized by the board unless the contrary is shown, and it shall not be necessary in or before any court, board, commission or other tribunal of competent jurisdiction to prove the hand-writing or authority of the chairman, vice-chairman or other member. 1944 (2nd. Sess.) c. 69, s. 4; 1945, c. 108, s. 2; 1947, c. 102, s. 3.

Powers of board

5 The board shall have power to make orders:

(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;

(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;

(c) requiring an employer to bargain collectively;

(d) determining whether an unfair labour practice is being or has been engaged in;

(e) requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice;

(f) requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice, or otherwise contrary to the provisions of this Act;

(g) fixing and determining the monetary loss suffered by any employee discharged under the circumstances mentioned in clause (f) or otherwise contrary to the provisions of this Act, and requiring an employer to pay such employee the monetary loss fixed and determined by the board;

(h) determining whether a labour organization is a company dominated organization;

(i) rescinding or amending any order or decision of the board. 1944 (2nd. Sess.) c. 69, s. 5; 1950, c. 92, s. 3; 1951, c. 93, s. 2.

Representation votes

6(1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 15, the board may, in its discretion subject to subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.

(2) The board shall direct a vote to be taken by secret ballot of all employees eligible to vote, upon the application of any trade union which twenty-five per cent or more of the employees in any appropriate unit have, within six months preceding the application, indicated as their choice as representative for the purpose of bargaining collectively, either by membership in such trade union or by written authority, but the board may, in its discretion, refuse to direct such vote if satisfied that another trade union represents a clear majority of the employees in such appropriate unit or if, within six months preceding the application, the board has, upon application of the same trade union, directed a vote of employees in the same appropriate unit. 1946, c. 98, s. 2.

Quorum

7 In any such vote a majority of the employees eligible to vote shall constitute a quorum and if a majority of those eligible to vote actually vote, the majority of those voting shall determine the trade union which represents the majority of employees for the purpose of bargaining collectively. 1944 (2nd. Sess.) c. 69, s. 7.

Unfair labour practices

8(1) It shall be an unfair labour practice for any employer or employer's agent:

(a) to interfere with, restrain or coerce any employee in the exercise of any right conferred by this act;

(b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; provided that an employer shall not be prohibited from permitting the bargaining committee or officers of a trade union representing his employees in any unit to confer with him for the purpose of bargaining collectively or attending to the business of a trade union without deductions from wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purposes of such trade union;

(c) to fail or refuse to bargain collectively with representatives elected or appointed (not necessarily being the employees of the employer) by a trade union representing the majority of the employees in an appropriate unit;

(d) to refuse to permit any duly authorized representative of a trade union with which he has entered into a collective bargaining agreement to negotiate with him during working hours for the settlement of disputes and grievances of employees covered by the agreement, or to make any deductions from the wages of any such duly authorized representative of a trade union in respect of the time actually spent in negotiating for the settlement of such disputes and grievances;

(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or threat of discharge of an employee, with a view to encouraging or discouraging membership in or activity in or for a labour organization or participation of any kind in a proceeding under this Act, and if an employer or employer's agent discharges an employee from his employment and it is alleged by a trade union that such employer or employer's agent has thereby committed an unfair labour practice within the meaning of this clause, it shall be presumed, unless the contrary is proved, that such employer or employer's agent has discriminated against such employee in regard to tenure of employment with a view to discouraging membership in or activity in or for a labour organization or participation in a proceeding under this Act; provided that nothing in this Act precludes an

employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in such trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if such trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;

(f) to require as a condition of employment that any person shall abstain from joining or assisting or being active in any trade union or from exercising any right provided by this Act, except as permitted by this Act;

(g) to interfere in the selection of a trade union as a representative of employees for the purpose of bargaining collectively;

(h) to maintain a system of industrial espionage or to employ or direct any person to spy upon a member or proceedings of a labour organization or the offices thereof or the exercise by any employee of any right provided by this Act;

(i) to threaten to shut down or move a plant or any part of a plant in the course of a labour dispute;

(j) to declare or cause a lock-out or to make or threaten any change in wages, hours, conditions of employment, benefits or privileges while any application is pending before the board or any matter is pending before a board of conciliation appointed under the provisions of this Act;

(k) to bargain collectively with a company dominated organization.

(2) It shall be an unfair labour practice for any employee or any person acting on behalf of a labour organization:

(a) to use coercion or intimidation of any kind with a view to encouraging or discouraging membership in or activity in or for a labour organization; provided that nothing in this Act precludes a person acting on behalf of a trade union from attempting to persuade an employer to make an agreement with that trade union to require as a condition of employment membership or maintenance of membership in such trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if such trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;

(b) to commence to take part in or persude or attempt to persuade any employee to take part in a strike while an application is pending before the board or any matter is pending before a board of conciliation appointed under the provisions of this Act.

(3) For the purposes of this Act, an application shall be deemed to be pending before the board on and after the day on which it is first considered by the board at a formally constituted meeting until the day on which the decision of the board is made, and a matter shall be deemed to be pending before a board of conciliation on and after the day on which the board of conciliation is established by the minister until the day on which its report is received by the minister. 1944 (2nd. Sess.) c. 69, s. 8; 1947, c. 102, s. 4; 1950, c. 92, s. 4; 1951, c. 93, s. 3.

Unfair labour practice prohibited

9 No person shall take part in, aid, abet, counsel or procure any unfair labour practice. 1950, c. 92, s. 5.

Enforcement of orders or decisions of board

10 A certified copy of any order or decision of the board shall within fourteen days be filed in the office of a registrar of the Court of Queen's Bench and shall thereupon be enforceable as a judgment or order of the court, but the board may nevertheless rescind or vary any such order. 1944 (2nd. Sess.) c. 69, s. 9; 1951, c. 93, s. 4.

Court may refer any question to board

11(1) In any application to the court arising out of the failure of any person to comply with the terms of any order filed pursuant to section 10, the court may refer to the board any question as to the compliance or non-compliance of such person or persons with the order of the board.

(2) The application to enforce any order of the board may be made to the court by and in the name of the board, any trade union affected or any interested person, and upon such application being heard the court shall be bound absolutely by the findings of the board and shall make such order or orders as may be necessary to cause every party with respect to whom the application is made to comply with the order of the board.

(3) The board may in its own name appeal from any judgment, decision or order of any court affecting any of its orders or decisions.

(4) Subsection (3) shall come into force on a day to be fixed by proclamation of the Lieutenant Governor. 1944 (2nd. Sess.) c. 69, s. 10; 1947, c. 102, s. 5.

Penalty

12(1) Any person who takes part in, aids, abets, counsels or procures any unfair labour practice is, in addition to any other

penalty which he has incurred or had imposed upon him under the provisions of this Act, guilty of an offence and liable on summary conviction for the first offence to a fine of not less than $25 and not more than $200, if an individual, or not less than $200 and not more than $5,000, if a corporation, and upon a second and subsequent offence, to such fine and to imprisonment not exceeding one year.

(2) Any person who fails to comply with an order of the board, whether heretofore or hereafter made, is, in addition to any other penalty he has incurred or had imposed upon him under the provisions of this Act, gUilty of an offence and liable on summary conviction to a fine of $10, if an individual, or $25, if a corporation, for every day or part of a day on which such failure continues.

(3) No prosecution shall be instituted under this section without the consent of the board. 1944 (2nd. Sess.) c. 69, s. 11; 1947, c. 102, s. 6.

Power to appoint controller

13 In addition to any other penalties imposed or remedies provided by this Act, the Lieutenant Governor in Council, upon the application of the board and upon being satisfied that any employer has wilfully disregarded or disobeyed any order filed by the board, may appoint a controller to take possession of any business, plant or premises of such employer within Saskatchewan as a going concern and operate the same on behalf of Her Majesty until such time as the Lieutenant Governor in Council is satisfied that upon the return of such business, plant or premises to the employer the order of the board will be obeyed. 1944 (2nd. Sess.) c. 69, s. 12.

Power to make regulations

14 (1) The board may, subject to the approval of the Lieutenant Governor in Council, make such rules and regulations, not inconsistent with this Act, as are necessary to carry out the provisions of this Act according to their true intent.

(2) The minister shall provide such technical, clerical and secretarial assistance as the board may require for the purposes of this Act. 1944 (2nd. Sess.) c. 69, s. 13.

Power to take evidence on oath

15 The board and each member thereof and its duly appointed agents shall have the power of a commissioner under *The Public Inquiries Act* and may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissable as evidence in a court of law or not. 1944 (2nd. Sess.) c. 69, s. 14.

Notices, how given

16 Any notice given for any of the purposes of this Act may be given by prepaid registered post addressed to the last known address of the addressee's residence or place of business. 1946, c. 98, s. 4.

No appeal from order or decision of board

17 There shall be no appeal from an order or decision of the board under this Act, and the board shall have full power to determine any question of fact necessary to its jurisdiction, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari*, *mandamus*, prohibition, injunction or other proceeding whatever. 1944 (2nd. Sess.) c. 69, s. 15.

Boards of conciliation

18(1) The minister may establish a board of conciliation to investigate, conciliate and report upon any dispute between an employer or employers and a trade union or trade unions, or, if no trade union has been determined under this Act as representing a majority of the employees concerned, between an employer and any of his employees affecting any terms or conditions of employment of any employees of such employer or affecting or relating to the relations between such employer and all or any of his employees or relating to the interpretation of any agreement or clause thereof between an employer and a trade union.

(2) The chairman of a board of conciliation, or in his absence the acting chairman, shall have the powers of a commissioner under *The Public Inquiries Act* and a board may receive and accept such evidence on oath, affidavit or otherwise as in its discretion it may deem fit and proper. 1944 (2nd. Sess.) c. 69, s. 16; 1945, c. 108, s. 3; 1950, c. 92, s. 6.

Power to make regulations re boards of conciliation

19 The minister may make such regulations as he thinks fit in regard to the establishment of boards of conciliation and the appointment of the members including the chairmen thereof by the nomination of the parties to the dispute or by himself and for the sittings, procedure and remuneration of such boards and publication of the reports of such boards with a view to the rapid disposition of any dispute. 1944 (2nd. Sess.) c. 69, s. 17; 1951, c. 93, s. 5.

Board to determine any dispute on request of parties

20 Any trade union representing the majority of employees in any unit of employees may enter into an agreement with an employer to refer a dispute or disputes or a class of disputes to the board and the board shall hear and determine any dispute referred to it by either party pursuant to such agreement and the finding of the board shall be final and conclusive and shall in regard to all matters within the legislative jurisdiction of the Legislature of Saskatchewan be binding upon the parties and enforceable as an order of the board made in accordance with the provisions of this Act. 1944 (2nd. Sess.) c. 69, s. 18.

Trade union not deemed unlawful

21 A trade union and the acts thereof shall not be deemed to be unlawful by reason only that one or more of its objects are in restraint of trade. 1944 (2nd. Sess.) c. 69, s. 19.

Acts done by two or more members

22 Any act done by two or more members of a trade union, if done in contemplation or furtherance of a trade dispute, shall not be actionable unless the act would be actionable if done without any agreement or combination. 1944 (2nd. Sess.) c. 69, s. 20.

Trade union party to action

23 A trade union shall not be made a party to any action in any court unless such trade union may be made a party irrespective of any of the provisions of this Act. 1944 (2nd. Sess.) c. 69, s. 21.

Collective bargaining agreement subject of action

24 A collective bargaining agreement shall not be the subject of any action in any court unless such collective bargaining agreement might be the subject of such action irrespective of any of the provisions of this Act. 1944 (2nd. Sess.) c. 69, s. 22.

Employer to deduct trade union dues from wages

25 Upon the request in writing of any employee, and upon the request of a trade union representing the majority of employees in any bargaining unit of his employees, the employer shall deduct and pay in periodic payments out of the wages due to such employee, to the person designated by the trade union to receive the same, the union dues of such employee, and the employer shall furnish to such trade union the names of the employees who have given such authority. Failure to make payments and furnish information required by this section shall be an unfair labour practice. 1944 (2nd. Sess.) c. 69, s. 23; 1951, c. 93, s. 6.

Period for which collective bargaining agreements are to remain in force

26(1) Except as hereinafter provided, every collective bargaining agreement, whether heretofore or hereafter entered into, shall, notwithstanding anything contained therein, remain in force for a period of one year from its effective date and thereafter from year to year.

(2) Either party to a collective bargaining agreement may, not less than thirty days nor more than sixty days before the expiry date of such agreement, give notice in writing to the other party to terminate such agreement or to negotiate a revision thereof, and thereupon, subject to subsection (3), the parties shall forthwith bargain collectively with a view to the renewal or revision of such agreement or the conclusion of a new agreement.

(3) Any trade union claiming to represent a majority of employees in the appropriate unit of employees or any part thereof to which any collective bargaining agreement applies may, not less than thirty days nor more than sixty days before the expiry date of such agreement, apply to the board for an order determining it to be the trade union representing a

majority of employees in the appropriate unit of employees to which the agreement applies, or in any part thereof, and if the board makes such order the employer shall forthwith bargain collectively with such trade union and the former agreement shall be of no force or effect in so far as it applies to any unit of employees in which such trade union has been determined as representing a majority of employees. 1946, c. 98, s. 5.

Union security

27(1) Upon the request of a trade union representing a majority of employees in any appropriate bargaining unit, the following clause shall be included in any collective bargaining agreement entered into between such trade union and the employer concerned, and, whether or not any collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by such employer with respect to such employees on and after the date of such trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with such trade union:

> Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within thirty days after the commencement of his employment, apply for and maintain membership in the union as a condition of his employment;

and the expression "the union" in the said clause shall mean the trade union making such request.

(2) Subject to any law or any regulation applicable thereto passed by authority of the Parliament of Canada, failure on the part of any employer to carry out the provisions of subsection (1) shall be an unfair labour practice. 1946, c. 98, s. 6; 1951, c. 93, s. 7.

Transfer of obligations

28 Where an employer sells, leases or otherwise disposes of his business or any part thereof as a going concern and the person acquiring the business or part thereof carries on substantially the same business or substantially the same business as the part of the business acquired by him, as the case may be, any of the employees of such employer at the time of such disposal who thereupon become employees of the person acquiring the business or part thereof, and their new employer, shall be bound by any subsisting collective bargaining agreement and orders made by the board under clauses (a), (b) and (c) of section 5 affecting the former employer and the said employees, and the new employer shall be deemed to be a party to such agreement. 1953, c. 112, s. 2.

Continuation of obligations

29 Where an employer has by an order of the board been required to bargain collectively, he shall, while the order remains in force continue to be subject to the order and to any collective bargaining agreement entered into pursuant thereto notwithstanding that after the making of the order and while a collective bargaining agreement remains in force he at any time or from time to time ceases to be an employer within the meaning of this Act and the collective bargaining agreement shall while it remains in force continue to apply at all times during which he is an employer within the meaning of this Act. 1953, c. 112, s. 3.

Acts of Parliament of Canada

30(1) The Lieutenant Governor in Council may by order declare that any Act of the Parliament of Canada and any order of the Governor General in Council, whether heretofore or hereafter enacted or made, relating to matters dealt with by this Act shall apply in place of this Act in respect of the employees employed upon or in connection with any work, undertaking or business in the province or in any part thereof, and in respect of the employer or employers of such employees, and any such order, upon its publication in *The Saskatchewan Gazette* or upon such later date as may be named therein, shall have the same effect as if enacted herein.

(2) The minister, on behalf of the province, with the approval of the Lieutenant Governor in Council, may enter into an agreement with the Minister of Labour of Canada or any other person or persons duly authorized in that behalf by the Parliament of Canada, to provide for the administration of any Act of the Parliament of Canada and of any order of the Governor General in Council described in subsection (1) in regard to the employees and employers in respect of whom such Act or order in council may be declared to apply pursuant to subsection (1). 1947, c. 102, s. 7.

1954

CHAPTER 67

An Act to amend The Trade Union Act.

(Assented to March 31, 1954.)

HER Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

Rev. Stat. c. 259

1 *The Trade Union Act* is amended in the manner hereinafter set forth.

Section 8 amended

2 Subsection (1) of section 8 is amended by adding thereto the following clause:

"(l) to deny or threaten to deny to any employee:

(i) by reason of the employee ceasing to work as the result of a lock-out or while taking part in a stoppage of work due to a labour dispute where such lock-out or stoppage of work has been enforced by the employer or called in accordance with this Act by the trade union representing the employee, as the case may be; or

(ii) by reason of the employee exercising any right conferred by this Act;

any pension rights or benefits, or any benefit whatever which the employee enjoyed prior to such cessation of work or to his exercising any such right".

New section 15a

3 The following section is inserted after section 15:

Evidence concerning matters subsequent to the filing of an application for an order of the board

"**15**a Upon the hearing of an application to the board for an order under clause (a), (b) or (c) of section 5, the board may in its absolute discretion refuse to receive or consider any evidence or information concerning any fact, event, matter or thing that transpired, occurred or happened after the date on which the application was filed with the secretary of the board in accordance with the regulations; provided that this section shall not affect the exercise or performance by the board of any power or duty under section 6".

Coming into force

4 This Act shall come into force on the first day of May, 1954.

1955

CHAPTER 65

An Act to amend The Trade Union Act

(Assented to April 7, 1955.)

HER Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

Rev. Stat. c. 259

1 *The Trade Union Act* is amended in the manner hereinafter set forth.

New section 26a

2 The following section is inserted after section 26:

Power to vary expiry dates of collective bargaining agreements in certain cases

"**26**a Notwithstanding anything contained in section 26, where a trade union is, by its locals, councils or otherwise, a party to two or more collective bargaining agreements affecting employees employed by the same employer in two or more plants or establishments and the expiry dates of the agreements are not the same, the board may, upon application of the trade union or the employer, and having due regard for the interests of all parties affected, by order fix a date as the expiry date of all the agreements, and the date so fixed shall, notwithstanding anything contained in any of the agreements, be the expiry date of each of the agreements".

New section 28

3 Section 28 is repealed and the following substituted therefor:

Transfer of obligations

"**28** Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without restricting the generality of the foregoing, if before the disposal any trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of such order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him".

1956

CHAPTER 54

An Act to amend The Trade Union Act.

(Assented to April 5, 1956.)

HER Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

Rev. Stat. c. 259

1 *The Trade Union Act* is amended in the manner hereinafter set forth.

New section 5a

2 The following section is inserted after section 5:

Power of board to reject or dismiss application in certain circumstances

"**5**a The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent".

New section 24a

3 The following section is inserted after section 24:

Copy of collective bargaining agreement filed with department

"**24**a Each of the parties to a collective bargaining agreement shall forthwith upon its execution file one copy with the Department of Labour".

New section 29a

4 The following section is inserted after section 29:

Change of name of trade union consequent upon amalgamation, etc.

"**29**a Except where otherwise ordered by the board:

(a) no order of the board, no collective bargaining agreement and no proceeding had or taken under this Act shall be rendered void, terminated, abrogated or curtailed in any way by reason only of:

(i) a change in the name of a trade union; or

(ii) the amalgamation, merger or affiliation of a trade union or any part thereof with another trade union; or

(iii) the transfer or assignment by a trade union of its rights or any of its rights under or with respect to any such order, agreement or proceeding to another trade union; and

(b) where a trade union has, as a result of an amalgamation, merger or affiliation with another trade union, changed its name, all such orders, agreements and proceedings and all records pertaining to the trade union shall, on

and from the effective date of the amalgamation, merger or affiliation and without any order of the board, be deemed to be amended by the substitution of the new name of the trade union for the former name wherever the same occurs, and, notwithstanding such change of name, amalgamation, merger, affiliation, transfer or assignment, all such orders, agreements and proceedings shall enure to the benefit of the successor, transferee or assignee, as the case may be, and shall apply to all persons affected thereby".

1958

CHAPTER 11

An Act to amend The Trade Union Act.

(Assented to March 18, 1958.)

HER Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

Rev. Stat. c. 258, section 4 amended

1 Section 4 of *The Trade Union Act* is amended by adding thereto the following subsections:

"(7) The Lieutenant Governor in Council may appoint three alternate members of the board, representative respectively of organized employees, employers and the general public.

"(8) An alternate member may act as a member of the board in the place of a member, similarly representative, who for any reason cannot so act; and where so acting an alternate member shall have all the powers of a member appointed under subsection (1) and the board shall be deemed to be properly constituted and no proceedings, orders or decisions of the board shall be called in question or invalidated by reason of an alternate member so acting.

"(9) Alternate members shall receive remuneration for their services on the same basis as members appointed under subsection (1)".

1961

CHAPTER 48

An Act to amend The Trade Union Act.

(Assented to March 30, 1961.)

HER Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

Rev. Stat. c. 259

1 *The Trade Union Act* is amended in the manner hereinafter set forth.

Section 2 amended

2 Paragraph 1 of section 2 is amended by adding thereto the following:

"or represented by a trade union representing the majority of employees in a unit of employees appropriate for the purpose of so negotiating".

Section 4 amended

3 Section 4, as amended by chapter 11 of the statutes of 1958, is further amended by adding thereto the following subsection:

"(10) Every member and every alternate member of the board shall, before entering upon the duties of his office, take before the Clerk of the Executive Council and file in his office an oath in the following form:

I, , do swear that I will faithfully and impartially, to the best of my judgment, skill and ability, execute and perform the office of member (*or* alternate member) of the Labour Relations Board. So help me God.".

Section 5 amended

4 Clause (i) of section 5 is repealed and the following substituted therefor:

"(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or under clause (a), (b) or (c) in a case where no collective bargaining agreement is in existence, notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;

"(j) amending an order of the board made under clause (a), (b) or (c) in a case where a collective bargaining agreement is in existence, if the employer and the trade union agree to the amendment or the amendment is considered by the board to be necessary for the purpose of clarifying or correcting the order".

Section 8 amended

5 Clause (d) of subsection (1) of section 8 is amended:

(a) by inserting after the word "agreement" in the third line the following:

"or that represents the majority of employees in an appropriate unit of employees of the employer";

(b) by inserting after the word "agreement" in the sixth line the following:

"or of employees in the appropriate unit, as the case may be".

New section 15b

6 The following section is inserted after section 15a as enacted by chapter 67 of the statutes of 1954:

Adding parties to proceedings, striking out names of parties, etc.

"**15**b In any proceedings before it the board may, upon such terms as it deems just, order that the proceedings be amended:

(a) by adding as a party to the proceedings any person or trade union that is not, but in the opinion of the board ought to be, a party to the proceedings;

(b) by striking out the name of a person or trade union improperly made a party to the proceedings;

(c) by substituting the name of a person or trade union that in the opinion of the board ought to be a party to the proceedings for the name of a person or trade union improperly made a party to the proceedings;

(d) by correcting the name of a person or trade union that is incorrectly set forth in the proceedings".

1965

Revised Statutes of Saskatchewan

CHAPTER 287

An Act respecting Trade Unions and the Right of Employees to organize in Trade Unions of their own choosing for the Purpose of Bargaining Collectively with their Employers.

HER Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

Short title

1 This Act may be cited as *The Trade Union Act.*

Interpretation

2 In this Act:

"bargaining collectively"

(a) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a collective bargaining agreement, the embodiment in writing of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such written agreement and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in a unit of employees appropriate for the purpose of so negotiating;

"board"

(b) "board" means the Labour Relations Board mentioned in section 4;

"collective bargaining agreement"

(c) "collective bargaining agreement" means an agreement in writing between an employer and a trade union setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions;

"company dominated organization"

(d) "company dominated organization" means a labour organization, the formation or administration of which an employer or employer's agent has dominated or interfered with or to which an employer or employer's agent has contributed financial or other support, except as permitted by this Act;

"employee"

(e) "employee" means any person in the employment of an employer, except a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity,

and includes a person on strike or locked out in a current labour dispute who has not secured permanent employment elsewhere;

"employer" (f) "employer" means:

(i) an employer who employs three or more employees;

(ii) an employer who employs less than three employees if at least one of the said employees is a member of a trade union that includes among its membership employees of more than one employer;

and includes Her Majesty in right of Saskatchewan;

"employer's agent" (g) "employer's agent" means:

(i) a person or association acting on behalf of an employer;

(ii) any officer, official, foreman or other representative or employee of an employer acting in any way on behalf of an employer in respect to hiring or discharging or any of the terms or conditions of employment of the employees of such employer;

"labour organization" (h) "labour organization" means an organization of employees, not necessarily employees of one employer, that has bargaining collectively among its purposes;

"minister" (i) "minister" means the Minister of Labour;

"trade union" (j) "trade union" means a labour organization that is not a company dominated organization. R.S.S. 1953, c. 259, s. 2; 1961, c. 48, s. 2.

Rights of employees **3** Employees shall have the right to organize in and to form, join or assist trade unions and to bargain collectively through representatives of their own choosing, and the representatives designated or selected for the purpose of bargaining collectively by the majority of employees in a unit appropriate for that purpose shall be the exclusive representatives of all employees in that unit for the purpose of bargaining collectively. R.S.S. 1953, c. 259, s. 3.

Labour Relations Board **4**(1) There shall be a board to be known as the Labour Relations Board, composed of seven members appointed by the Lieutenant Governor in Council at such salaries or remuneration as he deems fit. The Lieutenant Governor in Council shall name a chairman and a vice-chairman of the board. The members of the board shall be selected so that the board shall be equally representative of organized employees and employers, and if the Lieutenant Governor in Council deems it desirable, of the general public.

(2) A majority of the members of the board shall constitute a quorum and in the absence or disability of the chairman the vice-chairman shall act as chairman.

(3) A decision of the majority of the members of the board present and constituting a quorum shall be the decision of the board, and in the event of a tie the chairman or acting chairman shall have a casting vote.

(4) All orders, decisions, rules and regulations made by the board and every consent of the board shall be signed by the chairman or vice-chairman thereof, but in the absence or disability of the chairman and vice-chairman any orders, decisions, rules or regulations or any consent may be signed by any one member and when so signed shall have the like effect as if signed by the chairman or vice-chairman.

(5) Where any order, decision, rule or regulation or any consent purports to be signed by a member other than the chairman or vice-chairman, it shall be conclusively presumed that such member has so acted in the absence or disability of the chairman and vice-chairman.

(6) Any order, decision, rule or regulation or any consent purporting to be signed by the chairman, vice-chairman or a member other than the chairman or vice-chairman shall be deemed to have been duly authorized by the board unless the contrary is shown, and it shall not be necessary in or before any court, board, commission or other tribunal of competent jurisdiction to prove the handwriting or authority of the chairman, vice-chairman or other member.

(7) The Lieutenant Governor in Council may appoint three alternate members of the board, representative respectively of organized employees, employers and the general public.

(8) An alternate member may act as a member of the board in the place of a member, similarly representative, who for any reason cannot so act; and where so acting an alternate member shall have all the powers of a member appointed under subsection (1) and the board shall be deemed to be properly constituted and no proceedings, orders or decisions of the board shall be called in question or invalidated by reason of an alternate member so acting.

(9) Alternate members shall receive remuneration for their services on the same basis as members appointed under subsection (1).

(10) Every member and every alternate member of the board shall, before entering upon the duties of his office, take before the Clerk of the Executive Council and file in his office an oath in the following form:

I, , do swear that I will faithfully and impartially, to the best of my judgment, skill and ability, execute and perform the office of member (*or* alternate member) of the Labour Relations Board. So help me God. R.S.S. 1953, c. 259, s. 4; 1958, c. 11, s. 1; 1961, c. 48, s. 3.

Powers of board

5 The board shall have power to make orders:

(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;

(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;

(c) requiring an employer to bargain collectively;

(d) determining whether an unfair labour practice is being or has been engaged in;

(e) requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice;

(f) requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice, or otherwise contrary to this Act;

(g) fixing and determining the monetary loss suffered by any employee discharged under the circumstances mentioned in clause (f) or otherwise contrary to this Act, and requiring an employer to pay such employee the monetary loss fixed and determined by the board;

(h) determining whether a labour organization is a company dominated organization;

(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or under clause (a), (b) or (c) in a case where no collective bargaining agreement is in existence, notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;

(j) amending an order of the board made under clause (a), (b) or (c) in a case where a collective bargaining agreement is in existence, if the employer and the trade union agree to the amendment or the amendment is considered by the board to be necessary for the purpose of clarifying or correcting the order. R.S.S. 1953, c. 259, s. 5; 1961, c. 48, s. 4.

Power of board to reject or dismiss application in certain circumstances

6 The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent. 1956, c. 54, s. 2.

Representation votes

7(1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 16, the board may, in its discretion subject to subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.

(2) The board shall direct a vote to be taken by secret ballot of all employees eligible to vote, upon the application of any trade union that twenty-five per cent or more of the employees in any appropriate unit have, within six months preceding the application, indicated as their choice as representative for the purpose of bargaining collectively, either by membership in that trade union or by written authority, but the board may, in its discretion, refuse to direct such vote if satisfied that another trade union represents a clear majority of the employees in such appropriate unit or if, within six months preceding the application, the board has, upon application of the same trade union, directed a vote of employees in the same appropriate unit. R.S.S. 1953, c. 259, s. 6.

Quorum

8 In any such vote a majority of the employees eligible to vote shall constitute a quorum and if a majority of those eligible to vote actually vote, the majority of those voting shall determine the trade union which represents the majority of employees for the purpose of bargaining collectively. R.S.S. 1953, c. 259, s. 7.

Unfair labour practices

9(1) It shall be an unfair labour practice for an employer or employer's agent:

(a) to interfere with, restrain or coerce an employee in the exercise of any right conferred by this Act;

(b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; provided that an employer shall not be prohibited from permitting the bargaining committee or officers of a trade union representing his employees in any unit to confer with him for the purpose of bargaining collectively or attending to the business of a trade union without deductions from wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purposes of such trade union;

(c) to fail or refuse to bargain collectively with representatives elected or appointed (not necessarily being the employees of the employer) by a trade union representing the majority of the employees in an appropriate unit;

(d) to refuse to permit a duly authorized representative of a trade union with which he has entered into a collective bargaining agreement or that represents the majority of employees in an appropriate unit of employees of the employer to negotiate with him during working hours for the settlement of disputes and grievances of employees covered by the agreement, or of employees in the appropriate unit, as the case may be or to make any deductions from the wages of any such duly authorized representative of a trade union in respect of the time actually spent in negotiating for the settlement of such disputes and grievances;

(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or threat of discharge of an employee, with a view to encouraging or discouraging membership in or activity in or for a labour organization or participation of any kind in a proceeding under this Act, and if an employer or employer's agent discharges an employee from his employment and it is alleged by a trade union that the employer or employer's agent has thereby committed an unfair labour practice within the meaning of this clause, it shall be presumed, unless the contrary is proved, that the employer or employer's agent has discriminated against the employee in regard to tenure of employment with a view to discouraging membership in or activity in or for a labour organization or participation in a proceeding under this Act but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;

(f) to require as a condition of employment that any person shall abstain from joining or assisting or being active in any trade union or from exercising any right provided by this Act, except as permitted by this Act;

(g) to interfere in the selection of a trade union as a representative of employees for the purpose of bargaining collectively;

(h) to maintain a system of industrial espionage or to employ or direct any person to spy upon a member or proceedings of a labour organization or the offices thereof or the exercise by any employee of any right provided by this Act;

(i) to threaten to shut down or move a plant or any part of a plant in the course of a labour dispute;

(j) to declare or cause a lock-out or to make or threaten any change in wages, hours, conditions of employment, benefits or privileges while any application is pending before the board or any matter is pending before a board of conciliation appointed under this Act;

(k) to bargain collectively with a company dominated organization;

(l) to deny or threaten to deny to any employee:

(i) by reason of the employee ceasing to work as the result of a lock-out or while taking part in a stoppage of work due to a labour dispute where such lock-out or stoppage of work has been enforced by the employer or called in accordance with this Act by the trade union representing the employee, as the case may be; or

(ii) by reason of the employee exercising any right conferred by this Act;

any pension rights or benefits, or any benefit whatever that the employee enjoyed prior to such cessation of work or to his exercising any such right.

(2) It shall be an unfair labour practice for an employee or a person acting on behalf of a labour organization:

(a) to use coercion or intimidation of any kind with a view to encouraging or discouraging membership in or activity in or for a labour organization but nothing in this Act precludes a person acting on behalf of a trade union from attempting to persuade an employer to make an agreement with that trade union to require as a condition of employment membership or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if such trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;

(b) to commence to take part in or persuade or attempt to persuade an employee to take part in a strike while an application is pending before the board or any matter is pending before a board of conciliation appointed under this Act.

(3) For the purposes of this Act, an application shall be deemed to be pending before the board on and after the day on which it is first considered by the board at a formally constituted meeting until the day on which the decision of the board is made, and a matter shall be deemed to be pending before a board of conciliation on and after the day on which the board of conciliation is established by the minister until the day on which its report is received by the minister. R.S.S. 1953, c. 259, s. 8; 1954, c. 67, s. 2; 1961, c. 48, s. 5.

Unfair labour practice prohibited

10 No person shall take part in, aid, abet, counsel or procure any unfair labour practice. R.S.S. 1953, c. 259, s. 9.

Enforcement of orders or decisions of board

11 A certified copy of any order or decision of the board shall within fourteen days be filed in the office of a registrar of the Court of Queen's Bench and shall thereupon be enforceable as a judgment or order of the court, but the board may nevertheless rescind or vary any such order. R.S.S. 1953, c. 259, s. 10.

Court may refer any question to board

12(1) In an application to the court arising out of the failure of any person to comply with the terms of an order filed pursuant to section 11, the court may refer to the board any question as to the compliance or non-compliance of such person or persons with the order of the board.

(2) The application to enforce an order of the board may be made to the court by and in the name of the board, any trade union affected or any interested person, and upon such application being heard the court shall be bound absolutely by the findings of the board and shall make such order or orders as may be necessary to cause every party with respect to whom the application is made to comply with the order of the board.

(3) The board may in its own name appeal from any judgment, decision or order of any court affecting any of its orders or decisions.

(4) Subsection (3) shall come into force on a day to be fixed by proclamation of the Lieutenant Governor. R.S.S. 1953, c. 259, s. 11.

Penalty

13(1) A person who takes part in, aids, abets, counsels or procures any unfair labour practice is, in addition to any other penalty that he has incurred or had imposed upon him under this Act, guilty of an offence and liable on summary conviction for the first offence to a fine of not less than $25 and not more than $200, if an individual, or not less than $200 and not more than $5,000, if a corporation, and upon a second and subsequent offence, to such fine and to imprisonment not exceeding one year.

(2) A person who fails to comply with an order of the board, whether heretofore or hereafter made, is, in addition to any other penalty he has incurred or had imposed upon him under this Act, guilty of an offence and liable on summary conviction to a fine of $10, if an individual, or $25, if a corporation, for every day or part of a day on which the failure continues.

(3) No prosecution shall be instituted under this section without the consent of the board. R.S.S. 1953, c. 259, s. 12.

Power to appoint controller

14 In addition to any other penalties imposed or remedies provided by this Act, the Lieutenant Governor in Council, upon the application of the board and upon being satisfied that an employer has wilfully disregarded or disobeyed an order filed by the board, may appoint a controller to take possession of any business, plant or premises of that employer within Saskatchewan as a going concern and operate the business, plant or premises on behalf of Her Majesty until such time as the Lieutenant Governor in Council is satisfied that upon the return of the business, plant or premises to the employer the order of the board will be obeyed. R.S.S. 1953, c. 259, s. 13.

Power to make regulations

15(1) The board may, subject to the approval of the Lieutenant Governor in Council, make such rules and regulations, not inconsistent with this Act, as are necessary to carry out the provisions of this Act according to their true intent.

(2) The minister shall provide such technical, clerical and secretarial assistance as the board may require for the purposes of this Act. R.S.S. 1953, c. 259, s. 14.

Power to take evidence on oath

16 The board and each member thereof and its duly appointed agents shall have the power of a commissioner under *The Public Inquiries Act* and may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not. R.S.S. 1953, c. 259, s. 15.

Evidence concerning matters subsequent to the filing of an application for an order of the board

17 Upon the hearing of an application to the board for an order under clause (a), (b) or (c) of section 5, the board may in its absolute discretion refuse to receive or consider any evidence or information concerning any fact, event, matter or thing that transpired, occurred or happened after the date on which the application was filed with the secretary of the board in accordance with the regulations but this section shall not affect the exercise or performance by the board of any power or duty under section 7. 1954, c. 67, s. 3.

Adding parties to proceedings, striking out names of parties, etc.

18 In any proceedings before it the board may, upon such terms as it deems just, order that the proceedings be amended:

(a) by adding as a party to the proceedings any person or trade union that is not, but in the opinion of the board ought to be, a party to the proceedings;

(b) by striking out the name of a person or trade union improperly made a party to the proceedings;

(c) by substituting the name of a person or trade union that in the opinion of the board ought to be a party to the proceedings for the name of a person or trade union improperly made a party to the proceedings;

(d) by correcting the name of a person or trade union that is incorrectly set forth in the proceedings. 1961, c. 48, s. 6.

Notices, how given

19 A notice given for any of the purposes of this Act may be given by prepaid registered post addressed to the last known address of the addressee's residence or place of business. R.S.S. 1953, c. 259, s. 16.

No appeal from order or decision of board

20 There shall be no appeal from an order or decision of the board under this Act, and the board shall have full power to determine any question of fact necessary to its jurisdiction, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari, mandamus*, prohibition, injunction or other proceeding whatever. R.S.S. 1953, c. 259, s. 17.

Boards of conciliation

21(1) The minister may establish a board of conciliation to investigate, conciliate and report upon any dispute between an employer or employers and a trade union or trade unions, or, if no trade union has been determined under this Act as representing a majority of the employees concerned, between an employer and any of his employees affecting any terms or conditions of employment of any employees of the employer or affecting or relating to the relations between the employer and all or any of his employees or relating to the interpretation of any agreement or clause thereof between an employer and a trade union.

(2) The chairman of a board of conciliation, or in his absence the acting chairman, shall have the powers of a commissioner under *The Public Inquiries Act* and a board may receive and accept such evidence on oath, affidavit or otherwise as in its discretion it may deem fit and proper. R.S.S. 1953, c. 259, s. 18.

Power to make regulations re boards of conciliation

22 The minister may make such regulations as he thinks fit in regard to the establishment of boards of conciliation and the appointment of the members including the chairmen thereof by

the nomination of the parties to the dispute or by himself and for the sittings, procedure and remuneration of such boards and publication of the reports of such boards with a view to the rapid disposition of any dispute. R.S.S. 1953, c. 259, s. 19.

Board to determine any dispute on request of parties

23 A trade union representing the majority of employees in a unit of employees may enter into an agreement with an employer to refer a dispute or disputes or a class of disputes to the board and the board shall hear and determine any dispute referred to it by either party pursuant to such agreement and the finding of the board shall be final and conclusive and shall in regard to all matters within the legislative jurisdiction of the Legislature of Saskatchewan be binding upon the parties and enforceable as an order of the board made in accordance with this Act. R.S.S. 1953, c. 259, s. 20.

Trade union not deemed unlawful

24 A trade union and the acts thereof shall not be deemed to be unlawful by reason only that one or more of its objects are in restraint of trade. R.S.S. 1953, c. 259, s. 21.

Acts done by two or more members

25 An act done by two or more members of a trade union, if done in contemplation or furtherance of a trade dispute, shall not be actionable unless the act would be actionable if done without any agreement or combination. R.S.S. 1953, c. 259, s. 22.

Trade union party to action

26 A trade union shall not be made a party to an action in any court unless the trade union may be made a party irrespective of any of the provisions of this Act. R.S.S. 1953, c. 259, s. 23.

Collective bargaining agreement subject of action

27 A collective bargaining agreement shall not be the subject of an action in any court unless the collective bargaining agreement might be the subject of such action irrespective of any of the provisions of this Act. R.S.S. 1953, c. 259, s. 24.

Copy of collective bargaining agreement filed with department

28 Each of the parties to a collective bargaining agreement shall forthwith upon its execution file one copy with the Department of Labour. 1956, c. 54, s. 3.

Employer to deduct trade union dues from wages

29 Upon the request in writing of an employee, and upon request of a trade union representing the majority of employees in any bargaining unit of his employees, the employer shall deduct and pay in periodic payments out of the wages due to the employee, to the person designated by the trade union to receive the same, the union dues of the employee, and the employer shall furnish to that trade union the names of the employees who have given such authority. Failure to make payments and furnish information required by this section shall be an unfair labour practice. R.S.S. 1953, c. 259, s. 25.

Period for which collective bargaining agreements are to remain in force

30(1) Except as hereinafter provided, every collective bargaining agreement, whether heretofore or hereafter entered into, shall, notwithstanding anything contained therein, remain in force for a period of one year from its effective date and thereafter from year to year.

(2) Either party to a collective bargaining agreement may, not less than thirty days nor more than sixty days before the expiry date of the agreement, give notice in writing to the other party to terminate the agreement or to negotiate a revision thereof, and thereupon, subject to subsection (3), the parties shall forthwith bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.

(3) A trade union claiming to represent a majority of employees in the appropriate unit of employees or any part thereof to which a collective bargaining agreement applies may, not less than thirty days nor more than sixty days before the expiry date of the agreement, apply to the board for an order determining it to be the trade union representing a majority of employees in the appropriate unit of employees to which the agreement applies, or in any part thereof, and if the board makes such order the employer shall forthwith bargain collectively with that trade union and the former agreement shall be of no force or effect in so far as it applies to any unit of employees in which that trade union has been determined as representing a majority of employees. R.S.S. 1953, c. 259, s. 26.

Power to vary expiry dates of collective bargaining agreements in certain cases

31 Notwithstanding section 30, where a trade union is, by its locals, councils or otherwise, a party to two or more collective bargaining agreements affecting employees employed by the same employer in two or more plants or establishments and the expiry dates of the agreements are not the same, the board may, upon application of the trade union or the employer, and having due regard for the interests of all parties affected, by order fix a date as the expiry date of all the agreements, and the date so fixed shall, notwithstanding anything contained in any of the agreements, be the expiry date of each of the agreements. 1955, c. 65, s. 2.

Union security

32(1) Upon the request of a trade union representing a majority of employees in any appropriate bargaining unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, whether or not any collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date

of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with that trade union:

> Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within thirty days after the commencement of his employment, apply for and maintain membership in the union as a condition of his employment;

and the expression "the union" in the said clause shall mean the trade union making such request.

(2) Subject to any law or any regulation applicable thereto passed by authority of the Parliament of Canada, failure on the part of any employer to carry out the provisions of subsection (1) shall be an unfair labour practice. R.S.S. 1953, c. 259, s. 27.

Transfer of obligations

33 Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without restricting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him. 1955, c. 65, s. 3.

Continuation of obligations

34 Where an employer has by an order of the board been required to bargain collectively, he shall, while the order remains in force continue to be subject to the order and to any collective bargaining agreement entered into pursuant thereto notwithstanding that after the making of the order and while a collective bargaining agreement remains in force he at any time or from time to time ceases to be an employer within the meaning of this Act and the collective bargaining agreement shall while it remains in force continue to apply at all times during which he is an employer within the meaning of this Act. R.S.S. 1953, c. 259, s. 29.

Change of name of trade union consequent upon amalgamation, etc.

35 Except where otherwise ordered by the board:

(a) no order of the board, no collective bargaining agreement and no proceeding had or taken under this Act shall be rendered void, terminated, abrogated or curtailed in any way by reason only of:

(i) a change in the name of a trade union; or

(ii) the amalgamation, merger or affiliation of a trade union or any part thereof with another trade union; or

(iii) the transfer or assignment by a trade union of its rights or any of its rights under or with respect to any such order, agreement or proceeding to another trade union; and

(b) where a trade union has, as a result of an amalgamation, merger or affiliation with another trade union, changed its name, all such orders, agreements and proceedings and all records pertaining to the trade union shall, on and from the effective date of the amalgamation, merger or affiliation and without any order of the board, be deemed to be amended by the substitution of the new name of the trade union for the former name wherever it occurs, and, notwithstanding such change of name, amalgamation, merger, affiliation, transfer or assignment, all such orders, agreements and proceedings shall inure to the benefit of the successor, transferee or assignee, as the case may be, and shall apply to all persons affected thereby. 1956, c. 54, s. 4.

Acts of Parliament of Canada

36(1) The Lieutenant Governor in Council may by order declare that any Act of the Parliament of Canada and any order of the Governor General in Council, whether heretofore or hereafter enacted or made, relating to matters dealt with by this Act shall apply in place of this Act in respect of the employees employed upon or in connection with any work, undertaking or business in the province or in any part thereof, and in respect of the employer or employers of such employees, and any such order, upon its publication in *The Saskatchewan Gazette* or upon such later date as may be named therein, shall have the same effect as if enacted herein.

(2) The minister, on behalf of the province, with the approval of the Lieutenant Governor in Council, may enter into an agreement with the Minister of Labour of Canada or any other person or persons duly authorized in that behalf by the Parliament of Canada, to provide for the administration of any Act of the Parliament of Canada and of any order of the Governor General in Council described in subsection (1) in regard to the employees and employers in respect of whom such Act or order in council may be declared to apply pursuant to subsection (1). R.S.S. 1953, c. 259, s. 30.

1966

CHAPTER 83

An Act to amend The Trade Union Act.

(Assented to April 7, 1966.)

HER Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

Rev. Stat. c. 287

1. *The Trade Union Act* is amended in the manner hereinafter set forth.

Section 2 amended

2(1) Clause (g) of section 2 is repealed and the following substituted therefor:

"employer's agent"

"(g) 'employer's agent' means a person or association acting on behalf of an employer".

(2) Section 2 is further amended by inserting the following clauses after clause (i):

"member of a professional association"

"(i—A) 'member of a professional association' means a person who:

(i) is a member in good standing of a professional association, who is a graduate of a recognized professional school at university level, and who is employed in his professional capacity; or

(ii) is a graduate of a recognized professional school at university level, who:

(A) is a student, apprentice or trainee of a professional association;

(B) is registered with that professional association with a view to becoming a member in good standing of that association; and

(C) is subject to restrictions of that association respecting discipline and conduct;

"professional association"

"(i—B) 'professional association' includes the Law Society of Saskatchewan, the College of Physicians and Surgeons of the Province of Saskatchewan, The Saskatchewan Land Surveyors Association, The Saskatchewan Psychiatric Nurses Association, the Institute of Chartered Accountants of Saskatchewan, The Association of Professional Engineers of Saskatchewan, the College of Dental Surgeons of Saskatchewan, The Saskatchewan Pharmaceutical Association, The Saskatchewan Registered Nurses' Association, the Saskatchewan

Veterinary Medical Association, Saskatchewan Physical Therapists Association and the Saskatchewan Institute of Agrologists;

"trade dispute" "(i—C) 'trade dispute' means any dispute or difference between an employer and one or more of his employees or a trade union with respect to:

(i) matters or things affecting or relating to work done or to be done by the employee or employees or trade union; or

(ii) the privileges, rights, duties or conditions of employment of the employee or employees or trade union".

Section 5 amended **3**(1) Clause (a) of section 5 is amended by adding after the words "plant unit" in the third line the following: "professional association unit".

(2) Clause (c) of section 5 is repealed and the following substituted therefor:

"(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively".

(3) Clause (i) of section 5 is repealed and the following substituted therefor:

"(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court".

(4) Section 5 is further amended by adding thereto the following clauses:

"(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:

(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than *thirty days nor more than sixty days* before the anniversary of the effective date of the agreement; or

(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than thirty days nor more than sixty days before the anniversary date of the order to be rescinded or amended;

notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;

"(l) excluding from an appropriate unit of employees an employee where the board finds, in its absolute discretion, that the employee objects:

(i) to joining or belonging to a trade union; or

(ii) to paying dues and assessments to a trade union;

as a matter of conscience based on religious training or belief during such period that the employees pays:

(iii) to a charity mutually agreed upon by the employee and the trade union that represents a majority of employees in the appropriate unit; or

(iv) where agreement cannot be reached by these parties, to a charity designated by the board;

an amount at least equal to the amount of dues and assessments that a member of that trade union is required to pay to the trade union during such period;

"(m) subject to clause (k) of section 2, determining whether an employee or a member of a class of employees is a member of a professional association".

Section 7 amended

4(1) Subsection (2) of section 7 is repealed and the following substituted therefor:

"(2) Where the board is satisfied that not less than forty per cent and not more than sixty per cent of the employees in an appropriate unit have indicated:

(a) that a named trade union is their choice as representative for the purpose of bargaining collectively on their behalf; or

(b) that they no longer wish to be represented by the trade union representing them;

the board shall direct that a vote be taken by secret ballot of all employees eligible to vote to determine the question as to what trade union, if any, is to represent them".

(2) Section 7 is further amended by adding thereto the following subsection:

"(3) Where a trade union:

(a) applies for a board order determining it to represent the majority of employees in an appropriate unit for which there is an existing board order determining another trade union to represent the majority of employees in the unit; and

(b) shows that twenty-five per cent or more of the employees in the appropriate unit have, within the six months

next preceding the date of the application, indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining;

the board shall direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:

(c) is satisfied that another trade union represents a clear majority of the employees in the appropriate unit; or

(d) if the board has, within the six months next preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit".

New section 7A

5 The following section is inserted after section 7:

Vote by secret ballot

"**7**A(1) All votes directed by the board to be taken shall be by secret ballot and the board or a person appointed by the board shall conduct the taking and counting of the votes cast.

"(2) An employee who has voted at a vote taken under this Act shall not be competent or compellable to give evidence as to how he voted in any court or in any proceedings whatsoever".

New section 8A

6 The following section is inserted after section 8:

Exclusion of members of professional association

"**8**A(1) Where there is an application before the board under clause (a), (b) or (c) of section 5, the board shall:

(a) upon receipt of an application from a member of a professional association who is an employee of the employer; and

(b) if satisfied that a majority of the members of the professional association are in favour of being excluded;

exclude all of the members of the professional association employed by the employer from the appropriate unit of employees.

"(2) Upon receipt of an application from a member of a professional association who is an employee in an appropriate unit, as determined by the board under clause (a), (b) or (c) of section 5, where:

(a) there is no collective bargaining agreement and the application is made not less than thirty days or more than sixty days before the anniversary date of the board's order determining the appropriate unit of employees; or

(b) there is a collective bargaining agreement and the application is made not less than thirty days or more than sixty days before the anniversary of the effective date of the agreement; and

(c) a majority of the members of the professional association in the appropriate unit of employees support the application;

the board shall amend its order determining the appropriate unit of employees by excluding the members of the professional association from the appropriate unit of employees".

Section 9 amended

7(1) Subsection (1) of section 9 is amended by striking out the words "employer or employer's agent" in the second line and substituting therefor the following:

"employer, employer's agent or any other person acting on behalf of the employer".

(2) Clause (a) of subsection (1) of section 9 is amended by adding thereto the following:

"but nothing in this clause shall be deemed to deprive an employer of his freedom to express his views to his employees, as long as in the board's opinion the employer's expression of view does not in itself amount to coercion, a threat, a promise or undue influence".

(3) Clause (e) of subsection (1) of section 9 is amended by striking out all the words commencing with the word "and" in the seventh line down to and including the word "Act" in the seventeenth line and substituting therefor the following:

"and if an employer or employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that an employee exercised a right accorded to him by this Act there shall be a presumption in his favour that he was discharged or suspended because he exercised such right, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer".

(4) Subsection (1) of section 9 is further amended by adding thereto the following clauses:

"(m) where no collective bargaining agreement is in force, to unilaterally change rates of pay, hours of work or conditions of employment without bargaining collectively respecting the proposed change or changes with the trade union representing the majority of employees in an appropriate unit;

"(n) to discharge an employee contrary to subsection (3) of section 32".

(5) Subsection (2) of section 9 is amended by striking out the words "employee or a person acting on behalf of a labour organization" in the first and second lines and substituting therefor the following:

"employee, a person acting on behalf of a labour organization or any other person".

(6) Subsection (2) of section 9 is further amended by adding thereto the following clauses:

"(c) to fail or refuse to bargain collectively with the employer;

"(d) to declare, authorize or take part in a strike until after a vote has been taken by secret ballot of employees who would be called out in the proposed strike as to whether to strike or not to strike, and the majority of the employees eligible to vote have voted in favour of a strike;

"(e) to seek or to take steps to have an employee discharged contrary to the provisions of subsection (3) of section 32".

(7) Section 9 is further amended by adding thereto the following subsection:

"(4) No employer shall be found guilty of an unfair labour practice under clause (c), (d) or (m) of subsection (1) unless:

(a) the board has made an order determining that the trade union making the complaint represents the majority of the employees in the appropriate unit; or

(b) it is shown that the employer knew or had reasonable grounds for believing that the trade union represented the majority of the employees in the appropriate unit when he committed the complained of acts".

Section 11 amended

8(1) Section 11 is amended by adding thereto the following subsection:

"(2) Notwithstanding subsection (1), an order of the board made under clause (c) of section 5 requiring a trade union representing the majority of employees in an appropriate unit to bargain collectively shall not be enforceable as a judgment or order of the Court of Queen's Bench".

(2) Section 11 is renumbered as "11(1)".

New section 13

9 Section 13 is repealed and the following substituted therefor:

Penalty

"**13**(1) Any person who takes part in, aids, abets, counsels or procures any unfair labour practice is, in addition to any other penalty that he has incurred or had imposed upon him under this Act, guilty of an offence and liable on summary conviction for the first offence to a fine of not less than $25 and not more than $200, if an individual, or not less than $25 and not more than $5,000, if a corporation, and upon a second and subsequent offence, to such fine and to imprisonment not exceeding one year.

"(2) A person who fails to comply with an order of the board, whether heretofore or hereafter made, is, in addition to any other penalty that he has incurred or had imposed upon him under this Act, guilty of an offence and liable on summary conviction to a fine of not more than $25 for every day or part of a day on which the failure continues.

"(3) No prosecution shall be instituted under this section without the consent of the board".

Section 14 repealed

10 Section 14 is repealed.

Section 17 repealed

11 Section 17 is repealed.

Section 20 amended

12 Section 20 is amended by striking out the words "and the board shall have full power to determine any question of fact necessary to its jurisdiction" in the second, third and fourth lines.

New sections 23A and 23B

13 The following sections are inserted after section 23:

Arbitration

"**23**A Where a collective bargaining agreement contains a provision for final settlement by arbitration, without stoppage of work, of all differences between the parties to or persons bound by the agreement or on whose behalf the agreement was entered into concerning its meaning, application or violation, the finding of the arbitrator or the board of arbitration shall:

(a) be final and conclusive;

(b) in regard to all matters within the legislative jurisdiction of the Legislature of Saskatchewan be binding upon the parties; and

(c) be enforceable in the same manner as an order of the board made under this Act.

Arbitration procedure where not provided for by agreement

"**23**B(1) Where a collective bargaining agreement provides for final settlement by arbitration but does not provide for an arbitration procedure the procedure set forth in this section shall apply.

"(2) Where:

(a) a violation of an agreement mentioned in subsection (1) is alleged; or

(b) a difference between the parties to the agreement relating to the meaning or application of the agreement, including a difference relating to whether or not a matter upon which arbitration has been sought comes within the scope of the agreement, arises;

a party to the agreement, after exhausting any grievance procedure established by the agreement, may notify the other party in writing that he intends to submit the alleged violation or difference to arbitration.

"(3) The notice mentioned in subsection (2) shall contain the name of the person appointed to the arbitration board by the party giving the notice.

"(4) Within five days of receiving the notice, the party to whom notice is given shall:

(a) name the person whom it appoints to the arbitration board; and

(b) furnish the name of its appointee to the party who gave the notice.

"(5) A person who:

(a) has a pecuniary interest in a matter before the arbitration board; or

(b) is acting or has, within a period of one year prior to the date on which notice of intention to submit the matter to arbitration is given, acted as solicitor, counsel or agent of any of the parties to the arbitration;

is not eligible for appointment as a member of the arbitration board and he shall not act as a member of the arbitration board.

"(6) The two appointees named by the parties to the agreement, within five days of the appointment of the second of them, shall appoint a third member of the arbitration board who shall be the chairman thereof.

"(7) Where:

(a) the party receiving the notice fails to appoint a member of the arbitration board; or

(b) the two appointees of the parties fail to agree on the appointment of a third member of the arbitration board, within the time specified;

any judge of the Court of Queen's Bench, upon the request of a party to the agreement, shall:

(c) appoint a member on behalf of the party failing to make an appointment;

(d) appoint the third member; or

(e) appoint both the member mentioned in clause (c) and the member mentioned in clause (d).

"(8) The arbitration board shall hear:

(a) evidence adduced relating to the alleged violation or difference; and

(b) argument thereon by the parties or by counsel on behalf of either or both of them;

and shall make a decision on the matter or matters in dispute and the decision is binding on the parties and upon any person on whose behalf the agreement was made.

"(9) The decision of:

(a) the majority of the members of an arbitration board; or

(b) where there is no majority decision, the decision of the chairman of the board;

shall be the decision of the arbitration board.

"(10) A judge of the Court of Queen's Bench may, upon application by notice of motion, enlarge the time allowed by this section for giving notice or taking any step in the proceedings, whether the time allowed has or has not expired".

New section 30

14 Section 30 is repealed and the following substituted therefor:

Term of operation of a collective bargaining agreement

"**30**(1) Except as hereinafter provided, every collective bargaining agreement, whether heretofore or hereafter entered into, shall remain in force for the term of operation provided therein and thereafter from year to year.

"(2) Where a collective bargaining agreement:

(a) does not provide for its term of operation;

(b) provides for an unspecified term; or

(c) provides for a term of less than one year;

the agreement shall be deemed to provide for its operation for a term of one year from its effective date.

"(3) Where a collective bargaining agreement provides for a term of operation in excess of three years from its effective date its expiry date for purposes of subsection (4) shall be deemed to be three years from its effective date.

"(4) Either party to a collective bargaining agreement may, not less than thirty days nor more than sixty days before the expiry date of the agreement, give notice in writing to the other party to terminate the agreement or to negotiate a revision of the agreement, and where a notice is given the parties shall forthwith bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.

"(5) Where on the date that the board amends or rescinds an order made under clause (a), (b) or (c) of section 5 and determines that another trade union represents a majority of the employees in an appropriate unit there is an existing collective bargaining agreement with more than one year of its term remaining, the new trade union may not less than thirty days nor more than sixty days from the first anniversary date of the board's order give notice in writing to the employer to terminate the agreement or to negotiate a revision of the agreement, and thereupon the parties shall forthwith bargain collectively with a view to the renewal or revision of such agreement or the conclusion of a new agreement".

Section 31 repealed

15 Section 31 is repealed.

Section 32 amended

16 Section 32 is amended by adding thereto the following subsections:

"(3) Where a membership in a trade union or labour organization is a condition of employment and:

(a) membership is not available to an employee on the same terms and conditions generally applicable to other members; or

(b) an employee is denied membership or his membership is terminated for reasons other than the failure of the employee to tender the periodic dues, assessments and initiation fees uniformly required to be paid by all other members of the trade union as a condition of acquiring or retaining membership;

the employee, if he tenders payment of the periodic dues, assessments and initiation fees uniformly required as a condition of acquiring and maintaining membership:

(c) shall be deemed to maintain his membership for purposes of this section; and

(d) shall not lose his membership for purposes of this section for failure to pay any dues, assessment and initiation fees that are not uniformly required of all members or that in their application discriminate against any member or members.

"(4) Subsection (3) does not apply to an employee who:

(a) has engaged in activity against the trade union; or

(b) has engaged in activity on behalf of another trade union;

if the employer, employers' association or a person acting on behalf of an employer or employers' association has instigated the activity or participated in the activity or contributed financial or other support to the employee in respect of the activity".

New section 35A

17 The following section is inserted after section 35:

Secrecy

"35A(1) Information obtained for the purpose of this Act in the course of his duties by:

(a) a member or alternate member of the board;

(b) a member of a board of conciliation; or

(c) a conciliation officer of the Department of Labour;

shall not be open to inspection by any person or by any court.

"(2) No member or alternate member of the board and no member of a board of conciliation and no conciliation officer of the Department of Labour shall be required by any court to give evidence relative to information obtained for the purpose of this Act in the course of his duties".

Coming into force

18 This Act shall come into force on the thirty-first day of May, 1966.

1968

CHAPTER 79

An Act to amend The Trade Union Act.

(Assented to April 25, 1968.)

HER Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

Rev. Stat. c. 287

1 *The Trade Union Act* is amended in the manner hereinafter set forth.

Section 5 amended

2 Clause (m) of section 5 as enacted by chapter 83 of the *Statutes of Saskatchewan, 1966*, is amended by striking out the letter in brackets "(k)" in the first line thereof and substituting therefor the number and letter in brackets "(i-B)".

Section 7 amended

3 Subsection (3) of section 7 as enacted by chapter 83 of the *Statutes of Saskatchewan, 1966*, is amended by adding thereto immediately after the word "shall" in the thirteenth line thereof the words "subject to clause (k) of section 5".

Section 30 amended

4 Section 30 of the Act as enacted by chapter 83 of the *Statutes of Saskatchewan, 1966*, is amended by adding thereto immediately after subsection (5) thereof the following subsection:

"(6) Where in accordance with subsection (4) either party to a collective bargaining agreement gives notice to terminate the agreement or to negotiate a revision of the agreement, the terms of the agreement remain in force until a new agreement is entered into or until a strike vote as set forth in clause (d) of subsection (2) of section 9 has been taken and the employees are in fact on strike".

New section 35

5 The Act is further amended by striking out section 35 thereof and substituting therefor the following section:

Rights of successor union upon merger, etc.

"35(1) Where a trade union claims that by reason of a merger or amalgamation or a transfer to it by another trade union other than a simple change of name of the trade union, of any of that union's rights under this Act, it is the successor of that other trade union that at the time of the merger, amalgamation or transfer, as the case may be, was the bargaining agent of a unit of employees of an employer and there arises any question as to the right of the trade union to act as the successor, the board may, in any proceeding before it or upon the application of any interested person or trade union concerned, declare that

the successor trade union has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor or the board may dismiss the application.

"(2) Before issuing a declaration under subsection (1), the board may make such inquiry, require the production of such evidence or hold such representation votes as it deems appropriate.

"(3) Where the board makes a declaration under subsection (1) that a successor trade union has acquired the rights, privileges and duties under this Act of its predecessor, the successor trade union shall, for the purposes of this Act be conclusively deemed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize that status of the successor trade union in all respects.

"(4) No person shall make an application and no proceeding shall be commenced by the board under subsection (1) for the purpose of disputing or questioning a merger, amalgamation or transfer of rights within the meaning of that subsection after the expiration of six months from the date of the merger, amalgamation or transfer".

1969

CHAPTER 66

An Act to amend The Trade Union Act.

(Assented to April 3, 1969.)

HER Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

Rev. Stat c. 287

1 *The Trade Union Act* is amended in the manner hereinafter set forth.

Section 2 amended

2 Clause (e) of section 2 is repealed and the following clause is substituted therefor:

"employee"

"(e) 'employee' means any person in the employment of an employer, except:

(i) a person having and regularly exercising authority to employee or discharge employees;

(ii) a person regularly acting on behalf of management in a confidential capacity; or

(iii) an individual having the status of an independent contractor;

and includes a person on strike or locked out in a current labour dispute who has not secured permanent employment elsewhere".

Section 9 amended

3 Section 9 is amended by adding thereto immediately after subsection (4) thereof as enacted by chapter 83 of the *Statutes of Saskatchewan, 1966*, the following subsection:

"(5) It shall be an unfair labour practice for a trade union or an employee or a group of employees for any reason whatsoever to refuse to take delivery of goods from a carrier or to refuse to assist in the loading of a carrier of goods for shipment unless the board is satisfied that the union or the employee or group of employees has a valid trade dispute".

New section 10A

4 The Act is further amended by adding thereto immediately after section 10 thereof the following section:

Vote to return to work

"**10**A(1) Where a strike has continued for thirty days:

(a) the trade union;

(b) the employer; or

(c) any employee of the employer;

involved in the strike, may apply to the board to conduct a vote among the striking employees to determine whether a majority of such employees voting thereon whose ballots are not rejected are in favour of accepting the employer's final offer and returning to work.

"(2) Upon receipt of an application under subsection (1) the board or a person appointed by the board shall forthwith conduct the vote requested by secret ballot.

"(3) Every employee who is involved in the strike and who has not secured permanent employment elsewhere is entitled to vote for the purposes of this section.

"(4) No more than one vote shall be held or conducted under this section.

"(5) Where pursuant to this section employees have voted to accept an employer's final offer and to return to work, the employer shall not withdraw that offer".

Section 11 amended

5 Subsection (2) of section 11 as enacted by chapter 83 of the *Statutes of Saskatchewan, 1966*, is repealed.

Section 13 amended

6 Subsection (3) of section 13 as enacted by chapter 83 of the *Statutes of Saskatchewan, 1966*, is repealed.

Section 30 amended

7 Subsection (5) of section 30 as enacted by chapter 83 of the *Statutes of Saskatchewan, 1966*, is repealed.

Coming into force

8 This Act comes into force on a day to be fixed by proclamation of the Lieutenant Governor.

(Came into force on August 15, 1969.)

NOTE: This Act contains *The Technological Change Rationalization Act, 1972.* See Section 42.

1972

CHAPTER 137

An Act respecting Trade Unions and the Right of Employees to organize in Trade Unions of their own choosing for the Purpose of Bargaining Collectively with their Employers.

(Assented to May 5, 1972.)

HER Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

Short title

1 This Act may be cited as *The Trade Union Act, 1972.*

Interpretation

2 In this Act:

"appropriate unit"

(a) "appropriate unit" means a unit of employees appropriate for the purpose of bargaining collectively;

"bargaining collectively"

(b) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;

"board"

(c) "board" means the Labour Relations Board mentioned in section 4;

"collective bargaining agreement"

(d) "collective bargaining agreement" means an agreement in writing or writings between an employer and a trade union setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions of employees;

"company dominated organization"

(e) "company dominated organization" means a labour organization, the formation or administration of which an employer or employer's agent has dominated or interfered

with or to which an employer or employer's agent had contributed financial or other support, except as permitted by this Act;

"employee" (f) "employee" means:

(i) any person in the employ of an employer except any person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or any person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer;

(ii) any person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining;

(iii) any person designated by the board as an employee for the purposes of this Act notwithstanding that for the purpose of determining whether or not the person to whom he provides his services is vicariously liable for his acts or omissions he may be held to be an independent contractor;

and includes a person on strike or locked out in a current industrial dispute who has not secured permanent employment elsewhere, and any person dismissed from his employment whose dismissal is the subject of any proceedings before the board;

"employer" (g) "employer" means:

(i) an employer who employs three or more employees;

(ii) an employer who employs less than three employees if at least one of the employees is a member of a trade union that includes among its membership employees of more than one employer;

(iii) in respect of any employees of a contractor who supplies the services of the employees for or on behalf of a principal pursuant to the terms of any contract entered into by the contractor or principal, the contractor or principal as the board may in its discretion determine for the purposes of this Act;

and includes Her Majesty in the right of the Province of Saskatchewan;

"employer's agent" (h) "employer's agent" means:

(i) a person or association acting on behalf of an employer;

(ii) any officer, official, foreman or other representative or employee of an employer acting in any way on behalf

of an employer with respect to the hiring or discharging or any of the terms or conditions of employment of the employees of the employer;

"labour-management dispute"

(i) "labour-management dispute" means any dispute or difference between an employer and one or more of his employees or a trade union with respect to:

(i) matters or things affecting or relating to work done or to be done by the employee or employees or trade union; or

(ii) the privileges, rights, duties, terms and conditions, or tenure of, employment or working conditions of the employee or employees or trade union;

"labour organization"

(j) "labour organization" means an organization of employees, not necessarily employees of one employer, that has bargaining collectively among its purposes;

"minister"

(k) "minister" means the Minister of Labour;

"trade union"

(l) "trade union" means a labour organization that is not a company dominated organization.

Rights of employees

3 Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.

Labour Relations Board continued

4(1) There shall continue to be a board known as the Labour Relations Board composed of five members appointed by the Lieutenant Governor in Council at such salaries or remuneration as he deems fit. The Lieutenant Governor in Council shall name a chairman and a vice-chairman of the board. The members of the board shall be selected so that employers and organized employees are equally represented.

(2) A majority of the members of the board shall constitute a quorum and in the absence or disability of the chairman the vice-chairman shall act as chairman.

(3) A decision of the majority of the members of the board present and constituting a quorum shall be the decision of the board, and in the event of a tie the chairman or acting chairman shall have a casting vote.

(4) All orders, decisions, rules and regulations made by the board and every consent of the board shall be signed by the chairman or vice-chairman, but in the absence or disability of the chairman and vice-chairman any orders, decisions, rules or

regulations or any consent may be signed by any one member and when so signed shall have the like effect as if signed by the chairman or vice-chairman.

(5) Where any order, decision, rule or regulation or any consent purports to be signed by a member other than the chairman or vice-chairman, it shall be conclusively presumed that such member has so acted in the absence or disability of the chairman and vice-chairman.

(6) Any order, decision, rule or regulation or any consent purporting to be signed by the chairman, vice-chairman or a member other than the chairman or vice-chairman shall be deemed to have been duly authorized by the board unless the contrary is shown, and it shall not be necessary in or before any court, board, commission or other tribunal of competent jurisdiction to prove the handwriting or authority of the chairman, vice-chairman or other member.

(7) The Lieutenant Governor in Council may appoint alternate members of the board, representative respectively of organized employees and of employers.

(8) An alternate member may act as a member of the board in the place of a member, similarly representative, who for any reason cannot so act; and where so acting an alternate member shall have all the powers of a member appointed under subsection (1) and the board shall be deemed to be properly constituted and no proceedings, order or decisions of the board shall be called in question or invalidated by reason of an alternate member so acting.

(9) Alternate members shall receive remuneration for their services on the same basis as members appointed under subsection (1).

(10) Every member and every alternate member of the board shall, before entering upon the duties of his office, take before the Clerk of the Executive Council and file in his office an oath in the following form:

I, , do swear that I will faithfully and impartially, to the best of my judgment, skill and ability, execute and perform the office of member (*or* alternate member) of the Labour Relations Board. So help me God.

(11) The Lieutenant Governor in Council may appoint an executive officer who shall be an agent of the board and shall perform such duties as the board may from time to time direct.

(12) The Board may delegate to the executive officer any of its powers or functions but any employer, employee or trade union

affected by any act done by the executive officer in the exercise or purported exercise of any such delegated power may apply to the board to review, set aside, amend, stay or otherwise deal with the act and the board upon the application or, of its own motion, may exercise its powers or perform its functions with respect to the matter in issue as if the executive officer had not done such act.

Powers of board

5 The board may make orders:

(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit, but no unit shall be found not to be an appropriate unit by reason only that the employer of employees in the unit claims that his complement of employees in the unit is at less than full strength;

(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;

(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;

(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;

(e) requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice;

(f) requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice, or otherwise in violation of this Act;

(g) fixing and determining the monetary loss suffered by any employee discharged under the circumstances mentioned in clause (f) or otherwise in violation of this Act, and requiring an employer to pay such employee the monetary loss fixed and determined by the board;

(h) determining whether a labour organization is a company dominated organization;

(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or amending an order or decision of the board made under clause (a), (b) or (c) in the circumstances set out in clause (j) or (k), notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;

(j) amending an order of the board made under clause (a), (b) or (c) in a case where a collective bargaining agreement

is in existence, if the employer and the trade union agree to the amendment or the amendment is considered by the board to be necessary for the purpose of clarifying or correcting the order;

(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:

(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than thirty days or more than sixty days before the anniversary of the effective date of the agreement; or

(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than thirty days or more than sixty days before the anniversary date of the order to be rescinded or amended;

notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;

(l) excluding from an appropriate unit of employees an employee whom the board finds, in its absolute discretion, objects:

(i) to joining or belonging to a trade union; or

(ii) to paying dues and assessments to a trade union;

as a matter of conscience based on religious training or belief during such period that the employee pays:

(iii) to a charity mutually agreed upon by the employee and the trade union that represents a majority of employees in the appropriate unit; or

(iv) where agreement cannot be reached by these parties, to a charity designated by the board;

an amount at least equal to the amount of dues and assessments that a member of that trade union is required to pay to the trade union in respect of such period.

Representation votes

6(1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board may, in its discretion, subject to subsections (2) and (3), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.

(2) Where a trade union:

(a) applies for an order of the board determining it to represent the majority of employees in an appropriate unit for

which there is an existing order of the board determining another trade union to represent the majority of employees in the unit; and

(b) shows that twenty-five per cent or more of the employees in the appropriate unit have, within six months preceding the date of the application, indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining;

the board shall, subject to clause (k) of section 5, direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:

(c) is satisfied that another trade union represents a clear majority of the employees in the appropriate unit; or

(d) has, within six months preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit.

(3) Where a trade union:

(a) applies for an order of the board determining it to represent a majority of employees in an appropriate unit for which there is no existing order of the board; and

(b) shows that twenty-five percent or more of the employees in the appropriate unit have within six months preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining;

the board, upon receipt from the trade union of a request that the board direct a vote to determine the question, shall direct a vote to be taken by secret ballot of all employees eligible to vote.

Procedure of voting

7(1) All votes directed by the board to be taken shall be by secret ballot and the board or a person appointed by the board shall conduct the taking and counting of the ballots cast.

(2) An employee who has voted at a vote taken under this Act shall not be competent or compellable to give evidence in any court proceedings whatsoever as to how he voted.

Quorum for vote

8 In any such vote a majority of the employees eligible to vote shall constitute a quorum and if a majority of those eligible to vote actually vote, the majority of those voting shall determine the trade union that represents the majority of employees for the purpose of bargaining collectively.

Dismissal of certain applications

9 The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the appli-

cation is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent.

Rejection of certain evidence, etc.

10 Where an application is made to the board for an order under clause (a) or (b) of section 5, the board may, in its absolute discretion, reject any evidence or information tendered or submitted to it concerning any fact, event, matter or thing transpiring, or occurring after the date on which such application is filed with the board in accordance with the rules and regulations of the board.

Unfair labour practices

11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:

(a) to interfere with, restrain or coerce an employee in the exercise of any right conferred by this Act;

(b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; but an employer shall not be prohibited from permitting the bargaining committee or officers of a trade union representing his employees in any unit to confer with him for the purpose of bargaining collectively or attending to the business of a trade union without deductions from wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purposes of such trade union;

(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;

(d) to refuse to permit a duly authorized representative of a trade union with which he has entered into a collective bargaining agreement or that represents the majority of employees in an appropriate unit of employees of the employer to negotiate with him during working hours for the settlement of disputes and grievances of employees covered by the agreement, or of employees in the appropriate unit, as the case may be, or to make any deductions from the wages of any such duly authorized representative of a trade union in respect of the time actually spent in negotiating for the settlement of such disputes and grievances;

(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coer-

cion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;

(f) to require as a condition of employment that any person shall abstain from joining or assisting or being active in any trade union or from exercising any right provided by this Act, except as permitted by this Act;

(g) to interfere in the selection of a trade union as a representative of employees for the purpose of bargaining collectively;

(h) to maintain a system of industrial espionage or to employ or direct any person to spy upon a member or proceedings of a labour organization or the offices thereof or the exercise by any employee of any right provided by this Act;

(i) to threaten to shut down or to threaten to move a plant, business or enterprise or any part of a plant, business or enterprise in the course of a labour-management dispute;

(j) to declare or cause a lock-out or to make or threaten any change in wages, hours, conditions or tenure of employment, benefits or privileges while any application is pending before the board or any matter is pending before a board of conciliation appointed under this Act;

(k) to bargain collectively with a company dominated organization;

(l) to deny or threaten to deny to any employee:

(i) by reason of the employee ceasing to work as the result of a lock-out or while taking part in a stoppage of work due to a labour-management dispute where such lock-out or stoppage of work has been enforced by the employer or called in accordance with this Act by the trade union representing the employee, as the case may be; or

(ii) by reason of the employee exercising any right conferred by this Act;

any pension rights or benefits, or any benefit whatever that the employee enjoyed prior to such cessation of work or to his exercising any such right;

(m) where no collective bargaining agreement is in force, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in an appropriate unit without bargaining collectively respecting the change with the trade union representing the majority of employees in the appropriate unit;

(n) where one or more employees are permitted or required to live in premises supplied by, or by arrangement with, the employer, to refuse, deny, restrict or limit the right of the employee or employees to allow access to the premises by members of any trade union representing or seeking to represent such employee or employees or any of them for the purpose of bargaining collectively;

(o) to interrogate employees as to whether or not they or any of them have exercised, or are exercising or attempting to exercise any right conferred by this Act;

(p) to discharge an employee for failure to acquire or maintain membership in a trade union, where such membership is a condition of employment, if the employee complies with subsection (3) of section 35.

(2) It shall be an unfair labour practice for an employee, a person acting on behalf of a labour organization or any other person:

(a) to use coercion or intimidation of any kind with a view to encouraging or discouraging membership in or activity in or for a labour organization, but nothing in this Act precludes a person acting on behalf of a trade union from attempting to persuade an employer to make an agreement with that trade union to require as a condition of employment membership or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to

employment, if such trade union has been designated or selected by a majority of employees in an appropriate unit as their representative for the purpose of bargaining collectively;

(b) to commence to take part in or persuade an employee to take part in a strike while an application is pending before the board or any matter is pending before a board of conciliation appointed under this Act;

(c) to fail or refuse to bargain collectively with the employer in respect of employees in an appropriate unit where a majority of the employees have selected or designated the trade union as their representative for the purpose of bargaining collectively;

(d) to declare, authorize or take part in a strike unless a majority of the employees who are members of the trade union selected or designated to represent the employees in the appropriate unit concerned and who are eligible to vote have voted by secret ballot in favour of a strike, but no vote by secret ballot need by taken among employees in an appropriate unit consisting of two employees or less;

(e) to seek or take steps to have an employee discharged for failure to acquire or maintain membership in a trade union, where such membership is a condition of employment, if the employee complies with subsection (3) of section 35.

(3) For the purposes of this Act, an application shall be deemed to be pending before the board on and after the day on which it is first considered by the board at a formally constituted meeting until the day on which the decision of the board is made, and a matter shall be deemed to be pending before a board of conciliation on and after the day on which the board of conciliation is established by the minister until the day on which its report is received by the minister.

(4) No employer shall be found guilty of an unfair labour practice under clause (c), (d) or (m) of subsection (1):

(a) unless the board has made an order determining that the trade union making the complaint represents the majority of the employees in the appropriate unit; or

(b) where the employer shows to the satisfaction of the board that he did not know nor had any reasonable grounds for believing that the trade union represented the majority of the employees, or that the employees were actively endeavouring to have a trade union represent them, in the appropriate unit when he committed the acts complained of.

(5) In any matter or proceeding arising under this Act, an order made by the board shall be binding and conclusive of the matters stated therein.

Certain prohibitions respecting unfair labour practices

12 No person shall take part in, aid, abet, counsel or procure any unfair labour practice or any violation of this Act.

Enforcement of orders and decisions of board

13 A certified copy of any order or decision of the board shall within fourteen days be filed in the office of a local registrar of the Court of Queen's Bench and shall thereupon be enforceable as a judgment or order of the court, and in the same manner as any other judgment or order of the court, but the board may nevertheless rescind or vary any such order.

Court may refer any question to board

14(1) In an application to the court arising out of the failure of any person to comply with the terms of an order filed pursuant to section 13, the court may refer to the board any question as to the compliance or non-compliance of such person or persons with the order of the board.

(2) The application to enforce an order of the board may be made to the court by and in the name of the board, any trade union affected or any interested person, and upon such application being heard the court shall be bound absolutely by the findings of the board and shall make such order or orders as may be necessary to cause every party with respect to whom the application is made to comply with the order of the board.

(3) The board may in its own name appeal from any judgment, decision or order of any court affecting any of its orders or decisions.

Penalties

15(1) Any person who takes part in, aids, abets, counsels or procures any unfair labour practice or violation of this Act is, in addition to any other penalty that he has incurred or had imposed upon him under this Act, guilty of an offence and liable on summary conviction for the first offence to a fine of not less than $50 of more than $500, if an individual, or not less than $500 or more than $5,000, if a corporation, and upon a second and subsequent offence, to such fine and to imprisonment not exceeding one year.

(2) A person who fails to comply with an order of the board, whether heretofore or hereafter made, is, in addition to any other penalty that he has incurred or had imposed upon him under this Act, guilty of an offence and liable on summary conviction to a fine of $25 for every day or part of a day on which the failure continues.

Board may rescind order obtained by fraud

16(1) Where the board has by order determined that a trade union represents a majority of employees in an appropriate unit for the purposes of bargaining collectively:

(a) any employee in the appropriate unit;

(b) the employer; or

(c) any trade union claiming to represent any employees in the appropriate unit;

who alleges that the order was obtained by fraud may apply to the board at any time to rescind the order.

(2) Upon an application under subsection (1) the board shall, upon being satisfied that the order was obtained by fraud, rescind the order.

(3) Any person who takes part in, aids, abets, counsels or procures the obtaining by fraud of an order mentioned in subsection (1) is guilty of an offence and liable on summary conviction to the penalties set out in section 15.

Board may make rules and regulations

17(1) The board may, subject to the approval of the Lieutenant Governor in Council, make such rules and regulations, not inconsistent with this Act, as are necessary to carry out the provisions of this Act according to their true intent.

(2) Without limiting the generality of subsection (1), the Lieutenant Governor in Council may make rules and regulations:

(a) providing for the disposition of applications to the board *ex parte* ;

(b) prescribing terms and conditions to which dispositions of applications to the board *ex parte* shall be subject.

(3) An employer, employee or trade union affected by any act done on an *ex parte* application may apply to the board to review, set aside, amend, stay or otherwise deal with such act and the board, upon such application or upon its own motion, may exercise its powers with regard to the matter in issue as if the act had not been done.

(4) The minister shall provide such technical, clerical and secretarial assistance as the board may require for the purpose of this Act.

Certain powers of board and members

18 The board and each member thereof and its duly appointed agents have the power of a commissioner under *The Public Inquiries Act* and may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not.

Proceedings not invalidated by irregularities, etc.

19(1) No proceedings before or by the board shall be invalidated by reason of any irregularity or technical objection, but the board may, at any stage of proceedings before it, allow a party to alter or amend his application, reply, intervention or other process in such manner and upon such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy in the proceedings.

(2) The board may at any time and on such terms as the board may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.

(3) For greater certainty but without limiting the generality of subsections (1) and (2), in any proceedings before it, the board may, upon such terms as it deems just, order that the proceedings be amended:

(a) by adding as a party to the proceedings any person or trade union that is not, but in the opinion of the board ought to be, a party to the proceedings;

(b) by striking out the name of a person or trade union improperly made a party to the proceedings;

(c) by substituting the name of a person or trade union that in the opinion of the board ought to be a party to the proceedings for the name of a person or trade union improperly made a party to the proceedings;

(d) correcting the name of a person or trade union that is incorrectly set forth in the proceedings.

(4) The board may at any time correct any clerical error in any order or decision made by the board or any officer or agent of the board.

Notices, how given

20 A notice given for any of the purposes of this Act may be given by prepaid registered mail addressed to the last known address of the addressee's residence or place of business.

No appeal from order or decision of board

21 There is no appeal from an order or decision of the board under this Act, the board may determine any question of fact necessary to its jurisdiction, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari*, *mandamus*, prohibition, injunction or other proceeding whatever.

Boards of conciliation

22(1) The minister may establish a board of conciliation to investigate, conciliate and report upon any dispute between an

employer or employers and a trade union or trade unions, or, if no trade union has been determined under this Act as representing a majority of the employees concerned, between an employer and any of his employees affecting any terms or conditions of employment of any employees of the employer or affecting or relating to the relations between the employer and all or any of his employees or relating to the interpretation of any agreement or clause thereof between an employer and a trade union.

(2) The chairman of the board of conciliation or in his absence the acting chairman, has the powers of a commissioner under *The Public Inquiries Act* and a board may receive and accept such evidence on oath, affidavit or otherwise as in its discretion it may deem fit and proper.

Regulations by minister respecting boards of conciliation

23 The minister may make such regulations as he thinks fit in regard to the establishment of boards of conciliation and the appointment of the members including the chairman thereof by the nomination of the parties to the dispute or by himself and for the sittings, procedure and remuneration of such boards and publication of the reports of such boards with a view to the rapid disposition of any dispute.

Board to determine any dispute on request of parties

24 A trade union representing the majority of employees in a unit of employees may enter into an agreement with an employer to refer a dispute or disputes or a class of disputes to the board and the board shall hear and determine any dispute referred to it by either party pursuant to such agreement and the finding of the board shall be final and conclusive and shall in regard to all matters within the legislative jurisdiction of the Legislature of Saskatchewan be binding upon the parties and enforceable as an order the board made in accordance with this Act.

Powers of arbitration board, binding effect of findings of, etc.

25(1) Where a collective bargaining agreement contains a provision for final settlement by arbitration, without stoppage of work, of all differences between the parties to or persons bound by the agreement or on whose behalf the agreement was entered into concerning its meaning, application or violation, the finding of the arbitrator or the board of arbitration shall:

(a) be final and conclusive;

(b) in regard to all matters within the legislative jurisdiction of the Legislature of Saskatchewan be binding upon the parties; and

(c) be enforceable in the same manner as an order of the board made under this Act.

(2) An arbitrator or the chairman of an arbitration board, as the case may be, may:

(a) summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath in the same manner as a court of record in civil cases;

(b) administer oaths;

(c) accept such oral or written evidence as the arbitrator or the arbitration board, as the case may be, in his or its discretion considers proper, whether admissible in a court of law or not;

(d) enter any premises where work is being done or has been done by the employees or in which the employer carries on business or where anything is taking place or has taken place concerning any of the differences submitted to him or it, and inspect and view any work, material, machinery, appliance or article therein, and interrogate any person respecting any such thing or any of such differences; and

(e) authorize any person to do anything that the arbitrator or arbitration board may do under clause (d) and report to the arbitrator or the arbitration board thereon.

(3) Where an arbitrator or arbitration board determines that an employee has been discharged or otherwise disciplined by an employer and the collective agreement governing in whole or in part the employment of the employee by the employer does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbitrator or arbitration board may substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in the circumstances.

(4) *The Arbitration Act* does not apply to any arbitration under this Act.

Application of arbitration procedure of Act in certain cases

26(1) Where a collective bargaining agreement provides for final settlement by arbitration but does not provide for an arbitration procedure, the procedure set forth in this section shall apply.

(2) Where:

(a) a violation of an agreement mentioned in subsection (1) is alleged; or

(b) a difference between the parties to the agreement respecting the meaning or application of the agreement, including a difference as to whether or not a matter upon which arbitration has been sought comes within the scope of the agreement, arises;

a party to the agreement, after exhausting any grievance procedure established by the agreement, may notify the other party in writing that he intends to submit the alleged violation or difference to arbitration.

(3) The notice mentioned in subsection (2) shall contain the name of the person appointed to the arbitration board by the party giving the notice.

(4) Within five days of receiving the notice, the party to whom notice is given shall:

(a) name the person whom it appoints to the arbitration board; and

(b) furnish the name of its appointee to the party who gave the notice.

(5) A person who:

(a) has a pecuniary interest in a matter before the arbitration board; or

(b) is acting or has, within a period of one year prior to the date on which notice of intention to submit the matter to arbitration is given, acted as solicitor, counsel or agent of any of the parties to the arbitration;

is not eligible for appointment as a member of the arbitration board and he shall not act as a member of the arbitration board.

(6) The two appointees named by the parties to the agreement shall, within ten days of the appointment of the second of them, appoint a third member of the arbitration board who shall be the chairman thereof.

(7) Where:

(a) the party receiving the notice fails to appoint a member of the arbitration board; or

(b) the two appointees of the parties fail to agree on the appointment of a third member of the arbitration board within the time specified;

the chairman of the board shall, upon the request of a party to the agreement:

(c) in the case mentioned in clause (a), appoint a member on behalf of the party failing to make an appointment;

(d) in the case mentioned in clause (b) or when the members appointed under clause (e) fail to agree on the appointment of a third member, appoint the third member and the member so appointed shall be the chairman of the arbitration board; or

(e) appoint both the member mentioned in clause (c) and the third member mentioned in clause (d).

(8) The arbitration board shall hear:

(a) evidence adduced relating to the alleged violation or difference; and

(b) argument thereon by the parties or by council on behalf of either or both of them;

and shall make a decision on the matter or matters in dispute and the decision is binding on the parties and upon any person on whose behalf the agreement was made.

(9) The decision of:

(a) the majority of the members of an arbitration board; or

(b) where there is no majority decision, the decision of the chairman of the board shall be the decision of the arbitration board.

(10) An arbitrator or arbitration board, or a board of conciliation established under subsection (1) of section 22, or the board acting under section 24 may enlarge the time allowed by this section or by the terms of any collective bargaining agreement for giving any notice or taking any step in the proceedings, whether the time allowed for the giving of the notice or the taking of the step has or has not expired.

(11) Where the chairman of the board has appointed an arbitrator or the third member of a board of arbitration under subsection (7), each of the parties shall pay one-half the remuneration and expenses of the person so appointed.

Trade union not deemed unlawful

27 A trade union and the acts thereof shall not be deemed to be unlawful by reason only that one or more of its objects are in restraint of trade.

Acts done by two or more members

28 An act done by two or more members of a trade union, if done in contemplation or furtherance of a trade dispute, shall not be actionable unless the act would be actionable if done without any agreement or combination.

Trade union party to action

29 A trade union shall not be made a party to an action in any court unless the trade union may be made a party irrespective of this Act.

Collective bargaining agreement subject of action

30 A collective bargaining agreement shall not be the subject of an action in any court unless the collective bargaining agreement might be the subject of such action irrespective of this Act.

Copies of collective bargaining agreements, amendments, to be filed with minister

31 Each of the parties to a collective bargaining agreement or any document altering, modifying or amending a collective bargaining agreement or any provision thereof or contained therein shall forthwith upon execution of the agreement or document file one copy thereof with the minister and the copies so filed shall be made available by the minister for inspection by any person.

Employer to deduct trade union dues from wages

32(1) Upon the request in writing of an employee, and upon request of a trade union representing the majority of employees in any bargaining unit of his employees, the employer shall deduct and pay in periodic payments out of the wages due to the employee, to the person designated by the trade union to receive the same, the union dues, assessments and initiation fees of the employee, and the employer shall furnish to that trade union the names of the employees who have given such authority.

(2) Failure to make payments and furnish information required by subsection (1) is an unfair labour practice.

Period for which collective bargaining agreements are to remain in force

33(1) Except as hereinafter provided, every collective bargaining agreement, whether heretofore or hereafter entered into, shall remain in force for the term of operation provided therein and thereafter from year to year.

(2) Where a collective bargaining agreement:

(a) does not provide for its term of operation;

(b) provides for an unspecified term; or

(c) provides for a term of less than one year;

the agreement shall be deemed to provide for its operation for a term of one year from its effective date.

(3) Where a collective bargaining agreement hereafter entered into provides for a term of operation in excess of two years from its effective date, its expiry date for the purpose of subsection (4) shall be deemed to be two years from its effective date.

(4) Either party to a collective bargaining agreement may, not less than thirty days or more than sixty days before the expiry date of the agreement, give notice in writing to the other party to terminate the agreement or to negotiate a revision of the agreement and where a notice is given the parties shall forthwith bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.

(5) A trade union claiming to represent a majority of employees in the appropriate unit of employees or any part thereof to which a collective bargaining agreement applies may, not less

than thirty days or more than sixty days before the anniversary date of the agreement, apply to the board for an order determining it to be the trade union representing a majority of employees in the appropriate unit of employees to which the agreement applies, or in any part thereof, and if the board makes such order the employer shall forthwith bargain collectively with that trade union and the former agreement shall be of no force or effect in so far as it applies to any unit of employees in which that trade union has been determined as representing a majority of the employees.

Power to vary expiry dates of collective bargaining agreements in certain cases

34 Notwithstanding section 33, where a trade union is, by its locals, councils or otherwise a party to two or more collective bargaining agreements affecting employees employed by the same employer in two or more plants or establishments and the expiry dates of the agreements are not the same, the board may, upon application of the trade union or the employer, and having due regard for the interests of all parties that might be affected, by order fix a date as the expiry date of all the agreements, and the date so fixed shall, notwithstanding anything in any of the agreements, be the expiry date of each of the agreements.

Union security

35(1) Upon the request of a trade union representing a majority of employees in any appropriate unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, whether or not any collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with that trade union:

> Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within thirty days after the commencement of his employment, apply for and maintain membership in the union, and maintain membership in the union as a condition of his employment, provided that any employee in the appropriate bargaining unit who is not required to maintain his membership or apply for and maintain his membership in the union shall, as a condition of his employment, tender to the union the periodic dues uniformly required to be paid by the members of the union;

and the expression "the union" in the clause shall mean the trade union making such request.

(2) Failure on the part of any employer to carry out the provisions of subsection (1) shall be an unfair labour practice.

(3) Where membership in a trade union or labour organization is a condition of employment and:

(a) membership in the trade union is not available to an employee on the same terms and conditions generally applicable to other members; or

(b) an employee is denied membership in the trade union or his membership is terminated for reasons other than the failure of the employee to tender the periodic dues, assessments and initiation fees uniformly required to be paid by all other members of the trade union as a condition of acquiring or maintaining membership;

the employee, if he tenders payment of the periodic dues, assessments and initation fees uniformly required as a condition of acquiring and maintaining membership:

(c) shall be deemed to maintain his membership in the trade union for purposes of this section; and

(d) shall not lose his membership in the trade union for purposes of this section for failure to pay any dues, assessments and initiation fees that are not uniformly required of all members or that in their application discriminate against any member or members.

(4) Subsection (3) does not apply to an employee who has engaged in activity against the trade union.

(5) For the purposes of subsection (4), activity on behalf of another trade union does not alone constitute activity against the trade union.

Transfer of obligations

36 Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.

Continuation of obligations

37 Where an employer has by an order of the board been required to bargain collectively, he shall, while the order remains in force continue to be subject to the order and to any collective bargaining agreement entered into pursuant thereto notwithstanding that after the making of the order and while a collective bargaining agreement remains in force he at any time or from time to time ceases to be an employer within the meaning of this Act and the collective bargaining agreement shall while it remains in force continue to apply at all times during which he is an employer within the meaning of this Act.

Change of name of trade union consequent upon amalgamation, etc.

38 Except where otherwise ordered by the board:

(a) no order of the board, collective bargaining agreement or proceeding had or taken under this Act shall be rendered void, terminated, abrogated or curtailed in any way by reason only of:

(i) a change in the name of a trade union;

(ii) the amalgamation, merger or affiliation of a trade union or any part thereof with another trade union; or

(iii) the transfer or assignment by a trade union of its rights or any of its rights under or with respect to any such order, agreement or proceeding to another trade union; and

(b) where a trade union has, as a result of an amalgamation, merger or affiliation with another trade union changed its name, all such orders, agreements and proceedings and all records pertaining to the trade union shall, on and from the effective date of the amalgamation, merger or affiliation and without any order of the board, be deemed to be amended by the substitution of the new name of the trade union for the former name wherever it occurs, and, notwithstanding the change of name, amalgamation, merger, affiliation, transfer or assignment, all such orders, agreements and proceedings shall inure to the benefit of the successor, transferee or assignee, as the case may be, and shall apply to all persons affected thereby.

Certain information, etc., privileged

39(1) Information obtained for the purpose of this Act in the course of his duties by:

(a) a member or alternate member of the board;

(b) a member of a board of conciliation;

(c) the executive officer of the board;

(d) a conciliation officer of the Department of Labour;

shall not be open to inspection by any person or by any court.

(2) No member or alternate member of the board or the executive officer of the board and no member of a board of conciliation and no conciliation officer of the Department of Labour shall be required by any court to give evidence about information obtained for the purpose of this Act in the course of his duties.

Application of Acts of Canada, etc., to certain employees and employers

40(1) The Lieutenant Governor in Council may by order declare that any Act of the Parliament of Canada and any order of the Governor General in Council, whether heretofore or hereafter enacted or made, relating to matters dealt with by this Act shall apply in place of this Act in respect of the employees employed upon or in connection with any work, undertaking or business in the province or in any part thereof, and in respect of the employer or employers of such employees, and any such order, upon its publication in the *Gazette* or upon such later date as may be named therein, shall have the same effect as if enacted in this Act.

(2) The minister, on behalf of the province with the approval of the Lieutenant Governor in Council, may enter into an agreement with the Minister of Labour of Canada or any other person or persons duly authorized in that behalf by the Parliament of Canada, to provide for the administration of any Act of the Parliament of Canada and of any order of the Governor General in Council described in subsection (1) in regard to the employees and employers in respect of whom such Act or order in council may be declared to apply pursuant to subsection (1).

Powers and duties of board

41 The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any rules or regulations made under this Act or with any decision in respect of any matter before the board.

Technological change in employers' businesses, etc.

42(1) In this section "technological change" means:

(a) the introduction by an employer into his work undertaking or business of equipment or material of a different nature or kind than that previously utilized by him in the operation of the work, undertaking or business;

(b) a change in the manner in which the employer carries on the work, undertaking or business that is directly related to the introduction of that equipment or material; or

(c) the removal by an employer of any part of his work, undertaking or business.

(2) An employer whose employees are represented by a trade union and who proposes to effect a technological change that is likely to affect the terms, conditions or tenure of employment of a significant number of such employees shall give notice of the technological change to the trade union and to the minister at least ninety days prior to the date on which the technological change is to be effected.

(3) The notice mentioned in subsection (2) shall be in writing and shall state:

(a) the nature of the technological change;

(b) the date upon which the employer proposes to effect the technological change;

(c) the number and type of employees likely to be affected by the technological change;

(d) the effect that the technological change is likely to have on the terms and conditions or tenure of employment of the employees affected; and

(e) such other information as the minister may by regulation require.

(4) The minister may by regulation specify the number of employees or the method of determining the number of employees that shall be deemed to be "significant" for the purpose of subsection (2).

(5) Where a trade union alleges that an employer has failed to comply with subsection (2), and the allegation is made not later than thirty days after the trade union knew, or in the opinion of the board ought to have known, of the failure of the employer to comply with that subsection, the board may, after affording an opportunity to the parties to be heard, by order:

(a) direct the employer not to proceed with the technological change for such period not exceeding ninety days as the board considers appropriate;

(b) require the reinstatement of any employee displaced by the employer as a result of the technological change; and

(c) where an employee is reinstated pursuant to clause (b), require the employer to reimburse the employee for any loss of pay suffered by the employee as a result of his displacement.

(6) Where a trade union makes an allegation pursuant to subsection (5), the board may, after consultation with the employer and the trade union, make such interim orders under subsection (5) as the board considers appropriate.

(7) An order of the board made under clause (a) of subsection (5) is deemed to be a notice of technological change given pursuant to subsection (2).

(8) Where a trade union receives notice of a technological change given, or deemed to have been given, by an employer pursuant to subsection (2), the trade union may, within thirty days from the date on which the trade union received the notice, serve notice on the employer in writing to commence collective bargaining for the purpose of revising the existing provisions of the collective agreement that relate to terms and conditions or tenure of employment, or for including new provisions in the collective agreement relating to such matters, to assist the employees affected by the technological change to adjust to the effects thereof.

(9) The board may, upon application by an employer, make an order relieving the employer from complying with the requirement of the notice served under subsection (8) or denying a trade union the right under that subsection to serve on the employer a notice to commence collective bargaining where the board is satisfied that:

(a) the employer has given to the trade union a notice in writing in accordance with subsection (2);

(i) prior to the day on which the employer and the trade union entered into the collective bargaining agreement by which they are bound; or

(ii) not later than the first date on which either party to a collective bargaining agreement could give notice in writing to terminate or negotiate a revision of the agreement under subsection (4) of section 33 of *The Trade Union Act, 1972*; or

(b) the collective agreement between the employer and the trade union contains provisions specifying procedures by which any matters that relate to terms and conditions or tenure of employment likely to be affected by a technological change may be negotiated and finally settled during the term of the agreement.

(10) Where a trade union has served notice to commence collective bargaining under subsection (8), the employer shall not effect the technological change in respect of which the notice has been served unless:

(a) the board has made an order under subsection (9) relieving the employer from the requirement of bargaining collectively with the trade union;

(b) an agreement has been reached as a result of collective bargaining; or

(c) the parties have bargained collectively but have failed to enter into or revise a collective bargaining agreement and the minister has been served with notice in writing informing him of such failure.

Rev. Stat. c. 287 repealed

43 *The Trade Union Act* is repealed.

Coming into force

44 This act comes into force on a day to be fixed by proclamation of the Lieutenant Governor.

1966

(Second Session)

CHAPTER 2

An Act Respecting the Continuation of Services Essential to the Public.

(Assented to September 8, 1966.)

HER Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

Short title

1 This Act may be cited as *The Essential Services Emergency Act, 1966*.

Interpretation

2 In this Act:

"certification" "decertification"

(a) "certification" means an order of the Labour Relations Board made pursuant to *The Trade Union Act* determining that a trade union represents a majority of employees in an appropriate unit of employees of an employer and "decertification" means the revocation of such an order pursuant to section 10;

"collective bargaining agreement"

(b) "collective bargaining agreement" means an agreement in writing between an employer and a trade union setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions;

"employee"

(c) "employee" means any person in the employ of an employer;

"employer"

(d) "employer" means the person engaged in the supply of the service or services mentioned in a proclamation made pursuant to section 3;

"hospital services"

(e) "hospital services" includes services provided in any hospital, geriatric centre, nursing home or any similar institution;

"labour dispute"

(f) "labour dispute" means any dispute or difference between an employer and one or more of his employees or a trade union with respect to:

(i) matters or things affecting or relating to work done or to be done by the employee or employees or trade union; or

(ii) the privileges, rights, duties or conditions of employment of the employee or employees or trade union;

"lock-out" (g) "lock-out" means the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, done to compel his employees, or to aid another employer to compel his employees, to agree to terms or conditions of employment but does not include the dismissal by an employer of employees who have failed to return to work;

"strike" (h) "strike" includes a cessation of work, refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;

"trade union" (i) "trade union" means a trade union as defined in *The Trade Union Act* and which has been mentioned in a proclamation made pursuant to section 3.

Emergency procedures in labour disputes

3 Where at any time in the opinion of the Lieutenant Governor in Council a state of emergency exists in the province or in any area of the province in such circumstances that life, health or property could be in serious jeopardy by reason of a labour dispute involving:

(a) employees engaged in the operation of any system, plant or equipment for furnishing or supplying water, heat, electricity or gas service to the public or any part of the public; or

(b) employees engaged in the provision of hospital services anywhere in the province;

the Lieutenant Governor in Council may by proclamation declare that from and after a date fixed in the proclamation all further action and procedures in the dispute are to be replaced by the emergency procedures provided in this Act.

Emergency procedures arbitration

4(1) Where a proclamation is made under section 3 a board of arbitration shall be established consisting of three members appointed in the manner provided in this section to settle the matters in dispute unless the labour dispute is settled by the date so fixed.

(2) Within five days of the date fixed in the proclamation the employer and the trade union shall each:

(a) name the person whom he or it appoints to the arbitration board; and

(b) furnish the name of his or its appointee to the other party.

(3) A person who:

(a) has a pecuniary interest in a matter before the arbitration board; or

(b) is acting or has, within a period of one year prior to the date of the proclamation, acted as solicitor, counsel or agent of any of the parties to the arbitration;

is not eligible for appointment as a member of the arbitration board and he shall not act as a member of the arbitration board.

(4) The two appointees named by the parties, within five days of the appointment of the second of them, shall appoint a judge of one of the courts of the province as the third member of the arbitration board who shall be the chairman thereof.

(5) Where:

(a) a party fails to appoint a member of the arbitration board within the time specified; or

(b) the person appointed by either party is unable or unwilling to act; or

(c) the two appointees of the parties fail to agree on the appointment of a third member of the arbitration board, within the time specified;

the Lieutenant Governor in Council, upon the request of a party, shall:

(d) appoint a member on behalf of the party failing to make an appointment;

(e) appoint a member in place of the member who is unable or unwilling to act;

(f) appoint the third member who shall be a judge of one of the courts of the province and such member shall be the chairman; or

(g) appoint the members mentioned in clauses (d), (e) and (f) or any of them.

(6) The arbitration board shall hear:

(a) evidence adduced relating to the matters in dispute; and

(b) argument thereon by the parties or by counsel on behalf of either or both of them;

and shall make a decision on the matter or matters in dispute.

(7) The decision of:

(a) the majority of the members of an arbitration board; or

(b) where there is no majority decision, the decision of the chairman of the board;

shall be the decision of the arbitration board.

(8) The decision of an arbitration board under this Act shall be binding upon the employer and the trade union and the employees on whose behalf the trade union is entitled to bargain with the employer under *The Trade Union Act.*

(9) Upon receipt of the decision of the arbitration board under this Act the employer and the trade union shall put the decision into effect within thirty days after the decision and shall consummate a collective bargaining agreement incorporating therein the terms of such decision.

(10) Each party shall assume its own costs of the arbitration and shall share equally the cost of the chairman and any other general expenses of the arbitration board.

Enforcement of decision

5 Upon the filing in the office of the registrar of the Court of Queen's Bench of a copy of the decision of a board of arbitration, exclusive of the reasons therefor, the decision shall be entered in the same way as a judgment or order of that court and is enforceable as such.

Powers of arbitration board

6(1) The chairman of an arbitration board shall have the powers of a commissioner under *The Public Inquiries Act* and a board may receive and accept such evidence on oath, affidavit or otherwise as in its discretion it may deem fit and proper.

(2) The chairman shall fix the time and place of the sittings of the board after consultation with the members thereof and he shall immediately notify the parties of the time and place so fixed.

(3) The board may determine its own procedure but shall give full opportunity to both parties to give evidence and make representations.

Lock-outs, strikes, etc., prohibited

7 Notwithstanding any other Act, upon a proclamation being made pursuant to section 3 then from the date of the proclamation:

(a) the employer shall not call or authorize a lock-out of any employee on whose behalf the trade union is entitled on the date of the proclamation to bargain with the employer under *The Trade Union Act*; and

(b) the trade union shall not call or authorize a strike or the continuation of a strike of any such employees; and

(c) no officer, official or agent of either the employer or the trade union shall counsel, procure, support or encourage any such lock-out or strike or the continuation thereof;

(d) no employee on whose behalf the trade union is entitled on the date of the proclamation to bargain with the employer under *The Trade Union Act* shall strike or remain on strike.

Working conditions may not be altered

8 The employer shall not during the period commencing with the date of the proclamation and ending on the day the decision of the board of arbitration is given, alter the rate of wages or any other term or condition of employment of the employees on whose behalf the trade union is entitled to bargain with the employer under *The Trade Union Act* that were in effect on the day prior to the day that the proclamation was made.

Trade union to give notice to members

9(1) Notwithstanding any other Act, upon a proclamation being made pursuant to section 3 the trade union shall forthwith give notice to its members:

(a) that any call, authorization or direction to go on strike given to them before or after the proclamation was made is revoked; and

(b) that if they fail to return to work forthwith then the employer may dismiss them.

(2) Every person:

(a) who on the date of the proclamation was authorized on behalf of the trade union to call or authorize a strike of any of the employees of an employer; or

(b) who has called a strike thereof; or

(c) is an officer of the trade union or a person employed by the trade union other than an employee employed to perform duties of a clerical, accounting or stenographic nature only;

is responsible to see that the notice provided for in subsection (1) is given.

(3) The burden of proving that the notice mentioned in this section was given or that an employee of the trade union is employed to perform duties of a clerical, accounting or stenographic nature only shall be on the person charged.

Lieutenant Governor in Council may rescind order of Labour Relations Board

10(1) Where pursuant to section 3 a proclamation has been made in respect of a service furnished by an employer and:

(a) the employees of that employer are on strike on the date of the proclamation or go on strike thereafter and do not return to work within ten days after the date fixed in the proclamation and in the opinion of the Lieutenant

Governor in Council the trade union or any officer or employee of the trade union has not done everything reasonably possible to end the strike; or

(b) the employees of that employer go on strike at any time within the period commencing nine days after the date fixed in the proclamation and ending twelve months thereafter and in the opinion of the Lieutenant Governor in Council the trade union or any officer or employee of the trade union has not done everything reasonably possible to prevent the strike; or

(c) the employees of that employer have gone on strike at any time after the date of the proclamation and have returned to work and go on strike again within ten days after the date fixed in the proclamation and in the opinion of the Lieutenant Governor in Council the trade union or any officer or employee of the trade union has not done everything reasonably possible to prevent the strike;

the Lieutenant Governor in Council may by order rescind the order made by the Labour Relations Board pursuant to *The Trade Union Act* determining that the trade union represents a majority of the employees in the appropriate unit of employees of that employer and upon such order of decertification being made any arbitration proceedings commenced or concluded pursuant to section 4 shall thereupon cease and be null and void and of no effect and any decision of the arbitration board shall be null and void and of no effect.

(2) Where a trade union has been decertified pursuant to subsection (1) then, for a period of one year from the date of the order:

(a) the union so decertified shall no longer be eligible to represent any of the employees of the employer; and

(b) no other local or emanation of the trade union of which the trade union was a local at the date of the proclamation shall be eligible to represent such employees or any of them.

(3) Where a trade union has been decertified pursuant to subsection (1) the trade union, its officers and members shall with respect to offences committed prior to decertification continue to be liable to any penalty that has been or may be imposed under this Act as if the trade union had not been decertified.

(4) Where a trade union has been decertified pursuant to subsection (1) and as long as it continues to be decertified:

(a) it shall cease to represent the majority of the employees in the appropriate unit of employees of the employer engaged in the supply of the service in respect of which the proclamation has been made;

(b) it shall be no longer a condition of employment that an employee of that employer be a member of that trade union.

(5) Where a trade union has been decertified pursuant to subsection (1), any other trade union as defined in *The Trade Union Act* not ineligible by reason of subsection (2) may, notwithstanding anything contained in *The Trade Union Act*, apply to the Labour Relations Board for an order determining it to represent a majority of employees in the appropriate unit of employees, and the Labour Relations Board if satisfied that it is not ineligible and that it represents the majority of the employees in the appropriate unit may issue such an order, and where the order is so issued the trade union to which it applies shall then, subject to the provisions of *The Trade Union Act*, represent the employees in the appropriate unit.

Offences and penalties

11 (1) Every person who calls or authorizes or counsels or procures a strike or lock-out contrary to this Act or fails to give the notice mentioned in subsection (1) of section 9 is guilty of an offence and on summary conviction is liable to a fine of not more than $1,000 for each day or part of a day during which the strike exists.

(2) Where default is made in payment of a fine imposed pursuant to this section, the convicting provincial magistrate or justice of the peace shall upon request furnish the Attorney General with two certified copies of his order of conviction.

(3) The Attorney General may file a certified copy of the order in the office of the local clerk of the district court at any judicial centre and when so filed the copy of the order shall be entered as a judgment of the district court and may be enforced as such.

Consent to prosecute

12 No prosecution shall be instituted under this act without the consent of the Attorney General.

Prosecution of trade union

13 A prosecution for an offence under this Act may be brought against a trade union in the name of the trade union and for the purpose of such a prosecution a trade union shall be deemed to be a person, and any act or thing done or omitted by an officer or agent of a trade union shall be deemed to be an act or thing done or omitted by the trade union.

Restraint by action

14 (1) Where it appears that any person, trade union or association of persons is acting or is likely to act in violation of any

provision of this Act, such violation may, in addition to any other remedy or penalty under the law, be restrained by action in the Court of Queen's Bench at the instance of the Attorney General, and in any such action the court has power to grant an injunction, interim injunction or such other relief as it deems just.

(2) Any action or proceeding authorized by this section may be brought against a trade union in the name of the trade union.

(3) No injunction, interim injunction or other relief sought by action under this section shall be granted *ex parte*.

Act applies to Crown

15 This Act applies to the Crown and to any of its departments, boards, commissions and agencies and to a Crown corporation.

Provisions of Act to prevail

16 This Act applies notwithstanding anything in *The Trade Union Act* or regulations made thereunder or in any other Act or regulations made thereunder or in any collective bargaining agreement.

Coming into force

17 This Act shall come into force on a day to be fixed by proclamation of the Lieutenant Governor.

1970

(Second Session)

CHAPTER 1

An Act to amend The Essential Services Emergency Act, 1966.

(Assented to June 30, 1970.)

Her Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

1966, (2nd Sess.) c. 2

1 *The Essential Services Emergency Act, 1966,* is amended in the manner hereinafter set forth.

Section 2 amended

2 Section 2 is amended by adding thereto immediately after clause (b) thereof the following clause:

"construction services"

"(b—A) 'construction services' means labour, skills and materials, necessary for the construction, reconstruction, erection, alteration, decoration, demolition or repairs of any building or structure".

New section 3

3 Section 3 is repealed and the following section is substituted therefor:

Emergency procedures in labour disputes

"**3**(1) Where at any time in the opinion of the Lieutenant Governor in Council a state of emergency exists in the province or in any area of the province in such circumstances that:

(a) life, health or property could be in serious jeopardy by reason of a labour dispute involving:

(i) employees engaged in the operation of any system, plant or equipment for furnishing or supplying water, heat, electricity or gas service to the public or any part of the public; or

(ii) employees engaged in the provision of hospital services anywhere in the province; or

(b) the economic welfare of the province or any area of the province could be in serious jeopardy by reason of a labour dispute involving employees engaged in the provision of construction services in the province or in any area of the province;

the Lieutenant Governor may by proclamation declare that from and after a date fixed in the proclamation all further action and procedures in the dispute are to be replaced by the emergency procedures provided in this Act.

"(2) Where at any time in the opinion of the Lieutenant Governor in Council there are two or more labour disputes involving employees mentioned in:

(a) subclause (i) of clause (a) of subsection (1);

(b) subclause (ii) of clause (a) of subsection (1); or

(c) clause (b) of subsection (1);

the proclamation of the Lieutenant Governor under subsection (1) may declare that all further action and procedures in any or all of the labour disputes involving employees referred to in clause (a), (b) or (c) shall be replaced by the emergency procedures provided in this Act and that the labour disputes specified in the proclamation shall be decided by one board of arbitration".

Section 4 amended

4 Subsection (1) of section 4 is amended by striking out the word and number "section 3" in the first line thereof and substituting therefor the words and numbers "subsection (1) of section 3,".

New section 4A

5 The Act is further amended by adding thereto immediately after section 4 thereof the following section:

Emergency procedures in certain arbitration cases

"**4**A(1) Notwithstanding section 4, where a proclamation made under subsection (1) of section 3 contains a declaration that the labour disputes specified in the proclamation shall be decided by one board of arbitration, a board of arbitration shall be established consisting of three members appointed in the manner provided in this section to settle the matters in dispute involved in the labour disputes that are not settled by the date so fixed.

"(2) Within five days of the date fixed in the proclamation the employers or, where they cannot agree with respect to the naming of a person to be appointed by them to the arbitration board, the majority of such employers shall:

(a) name the person whom they appoint to the arbitration board; and

(b) furnish the name of their appointee to each of the trade unions named in the proclamation.

"(3) Within five days of the date fixed in the proclamation the trade unions or, where they cannot agree with respect to the naming of a person to be appointed by them to the arbitration board, the majority of such trade unions shall:

(a) name the person whom they appoint to the arbitration board; and

(b) furnish the name of their appointee to each of the employers named in the proclamation.

"(4) A person who:

(a) has a pecuniary interest in a matter before the arbitration board; or

(b) is acting or has, within a period of one year prior to the date of the proclamation, acted as solicitor, counsel or agent or any of the employers or trade unions that are parties to the arbitration;

is not eligible for appointment as a member of the arbitration board and he shall not act as a member of the arbitration board.

"(5) The two appointees named by the employers and the trade unions, within five days of the appointment of the second of them, shall appoint a judge of one of the courts of the province as the third member of the arbitration board who shall be the chairman thereof.

"(6) Where:

(a) the employers or the majority of the employers or the trade unions or the majority of the trade unions or both fail to appoint a member of the arbitration board within the time specified;

(b) the member appointed by the employers or the trade unions is unable or unwilling to act; or

(c) the appointees of the employers and the trade unions fail to agree on the appointment of the third member of the arbitration board within the time specified;

the Lieutenant Governor in Council shall, upon the request of the employers or the trade unions or may, without such request:

(d) in the case mentioned in clause (a), appoint a member on behalf of the employers or the trade unions or both as the case requires;

(e) in the case mentioned in clause (b) appoint a member in place of the member who is unable or unwilling to act;

(f) in the case mentioned in clause (c), appoint the third member who shall be a judge of one of the courts of the province and such member shall be the chairman.

"(7) The arbitration board shall hear:

(a) evidence adduced relating to the matters in dispute; and

(b) argument thereon by the employers and the trade unions or by counsel on their behalf;

and shall make a decision on the matter or matters in dispute.

"(8) The decision of:

(a) the majority of the members of an arbitration board; or

(b) where there is no majority decision, the decision of the chairman of the board;

shall be the decision of the arbitration board.

"(9) The decision of an arbitration board under this section is binding on the employers and the trade unions and the employees on whose behalf the trade unions are entitled to bargain with the employers under *The Trade Union Act*.

"(10) Upon receipt of the decision of an arbitration board under this section the employers and the trade unions shall put the decision into effect within thirty days after the decision and shall consummate collective bargaining agreements incorporating therein the applicable terms of such decision.

"(11) The employers and the trade unions shall assume their own costs of the arbitration and shall share equally the cost of the chairman and any other general expenses of the arbitration board".

Section 10 amended

6 Subsection (1) of section 10 is amended by adding thereto immediately after the number "4" in the seventh line after clause (c) thereof the word and number "or 4A".

Application of certain provisions

7 Where a board of arbitration is established pursuant to section 4A of *The Essential Services Emergency Act, 1966*, sections 5 to 16 of that Act apply, *mutatis mutandis*, to the arbitration board and to each of the employers and trade unions that are parties to the arbitration.

Coming into force and expiration of Act

8 This Act comes into force on the day of assent and shall expire on the first day of July, 1973; and upon the expiration of this Act *The Essential Services Emergency Act, 1966*, shall be construed and read as if this Act had not been passed.

1971

CHAPTER 11

An Act to amend The Essential Services Emergency Act, 1966.

(Assented to April 16, 1971.)

Her Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

1966 (2nd Sess.) c. 2

1 *The Essential Services Emergency Act, 1966*, is amended in the manner hereinafter set forth.

Section 2 amended

2(1) Clause (b—A) of Section 2, as enacted by chapter 1 of the *Statutes of Saskatchewan, 1970* (second session) is repealed.

(2) Clauses (c), (d) and (e) of section 2 are repealed and the following clauses are substituted therefor:

"employee"

"(c) 'employee' means any person in the employ of an employer and includes any member of a police force or fire department;

"employer"

"(d) 'employer' means an employer as defined by section 2 of *The Trade Union Act* and includes:

(i) with respect to the members of a police force of a municipality, the council of the municipality and the board of police commissioners, if any, of the municipality;

(ii) with respect to the members of a fire department of a municipality, the council of the municipality and any board, commission or other body established to manage, control and operate the fire department".

(3) Clause (g) of section 2 is repealed and the following clause is substituted therefor:

"lock-out"

"(g) 'lock-out' means:

(i) the closing of a place of employment;

(ii) a suspension of work by an employer;

(iii) a refusal by an employer to continue to employ one or more of his employees during a strike; or

(iv) a refusal by an employer to allow one or more of his employees to resume employment following the termination of a strike;

done to compel his employees, or to aid another employer to compel his employees, to agree to terms or conditions of employment but does not include the dismissal by an employer of employees who have failed to return to work".

New section 3

3 Section 3, as enacted by chapter 1 of the *Statutes of Saskatchewan, 1970* (second session) is repealed and the following section is substituted therefor:

Emergency procedures in labour disputes

"**3**(1) Where at any time in the opinion of the Lieutenant Governor in Council a state of emergency exists in the province or in any area of the province by reason of a labour dispute in such circumstances that the public interest or welfare may be in jeopardy, the Lieutenant Governor may by proclamation declare that on and from a date to be fixed in the proclamation all further action and procedures in the dispute are replaced by the emergency procedures provided in this Act.

"(2) Where at any time in the opinion of the Lieutenant Governor in Council there are two or more labour disputes in the province or in any area of the province, the Lieutenant Governor may, in the proclamation under subsection (1), declare that all further action and procedures in any or all of the labour disputes are replaced by the emergency procedures provided in this Act and that the labour disputes specified in the proclamation shall be decided by one board of arbitration".

Section 4 amended

4(1) Subsection (4) of section 4 is amended by striking out the words "a judge of one of the courts of the province as" in the third line thereof.

(2) Clause (f) of subsection (5) of section 4 is amended by striking out the words "who shall be a judge of one of the courts of the province" in the first and second lines thereof.

Section 4A amended

5(1) Subsection (5) of section 4A, as enacted by chapter 1 of the *Statutes of Saskatchewan, 1970* (second session) is amended by striking out the words "a judge of one of the courts of the province as" in the third and fourth lines thereof.

(2) Clause (f) of subsection (6) of section 4A, as enacted by chapter 1 of the *Statutes of Saskatchewan, 1970* (second session) is amended by striking out the words "who shall be a judge of one of the courts of the province" in the second and third lines thereof.

New section 4B

6 The Act is further amended by adding thereto immediately after section 4A thereof, as enacted by chapter 1 of the *Statutes of Saskatchewan, 1970* (second session) the following section:

Application of certain provisions

"**4**B Where a board of arbitration is established pursuant to section 4A, sections 5 to 16 apply, *mutatis mutandis*, to the arbitration board and to each of the employers and trade unions that are parties to the arbitration".

Section 10 amended

7(1) Subsection (1) of section 10, as amended by chapter 1 of the *Statutes of Saskatchewan, 1970* (second session) is further amended by striking out the words "a service furnished by an employer and" in the second and third lines thereof and substituting therefor the following words:

"a labour dispute involving an employer and his employees and".

(2) Clause (a) of subsection (4) of section 10 is amended by striking out the words "engaged in the supply of the service" in the third line thereof.

New section 10A

8 The Act is further amended by adding thereto immediately after section 10 thereof the following section:

Order to prohibit certain employers from carrying on business

"**10**A(1) Where an employer who is required to put into effect a decision of an arbitration board fails to put the decision into effect within thirty days after the decision is made, the Lieutenant Governor in Council may issue an order prohibiting the employer from carrying on business in the province after a date to be specified in the order.

"(2) Where an employer in respect of whom an order has issued under subsection (1) carries on business contrary to the order, the Attorney General may apply to the Court of Queen's Bench to have the order made an order of the court".

Section 11 amended

9 Subsection (1) of section 11 is repealed and the following subsections are substituted therefor:

"(1) Every person who calls, authorizes, counsels or procures a strike or lock-out contrary to this Act or who fails to give the notice mentioned in subsection (1) of section 9 is guilty of an offence and liable on summary conviction to a fine not exceeding $1,000 for each day or part of a day during which the strike, lock-out or failure continues.

"(1A) Every employer who fails to put into effect a decision of an arbitration board as required by subsection (9) of section 4 or subsection (10) of section 4A is guilty of an offence and liable on summary conviction to a fine not exceeding $1,000 for each day or part of a day during which the failure continues.

"(1B) Every employer who carries on business in contravention of an order issued under subsection (1) of section 10A is guilty of an offence and liable on summary conviction to a fine not exceeding $1,000 for each day or part of a day during which the employer so carries on business.

"(1C) Every director, officer or agent of a company who directed, authorized, assented to, acquiesced in or participated

in the commission of an offence by the company under subsection (1), (1A) or (1B) is guilty of an offence and liable on summary conviction to a fine not exceeding $1,000 for each day or part of a day during which the offence continues whether or not the company has been prosecuted or convicted.

"(1D) The conviction of an employer or a director, officer or agent of an employer that is a company:

(a) of an offence under subsection (1A) does not relieve the employer from putting into effect the decision of the arbitration board in respect of which the conviction was made;

(b) of an offence under subsection (1B) does not relieve the employer from complying with the order of the Lieutenant Governor in Council in respect of which the conviction was made".

New sections 14A and 14B

10 The Act is further amended by adding thereto immediately after section 14 thereof the following sections:

Non-liability of Crown, etc.

"**14**A Neither Her Majesty the Queen in right of Saskatchewan nor any member of the Executive Council nor any person acting under the authority of this Act is in any way liable for any loss or damage suffered by any person by reason of anything in good faith done under the authority or supposed authority of this Act.

Certain procedure

"**14**B An application made under this Act shall be by notice of motion and the rules of the Court of Queen's Bench apply to such application and to any proceedings arising thereout or therefrom".

1970 (2nd Sess.) c. 1, sections 7 and 8 repealed

11 Sections 7 and 8 of *An Act to amend The Essential Services Emergency Act, 1966*, being chapter 1 of the *Statutes of Saskatchewan, 1970* (second session) are repealed.

1971

(Second Session)

CHAPTER 2

An Act to repeal The Essential Services Emergency Act, 1966.

(Assented to August 11, 1971.)

Her Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

1966 (2nd Sess.) c. 2 repealed

1 *The Essential Services Emergency Act, 1966*, is repealed.

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