INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING, PORTABLE & STATIONARY, Applicant and RAMCO INSTALLATIONS LTD., Respondent

LRB File No. 247-95; January 2, 1996
Chairperson: Beth Bilson; Members: Bill Adams and Bob Todd

For the Applicant: Neil McLeod
For the Respondent: Larry LeBlanc

Practice and procedure - Notice - Board deciding that reconsideration is warranted where defect in notice is partly responsibility of applicant, but not on basis of mistake in identifying employer.

Reconsideration - Whether reconsideration is warranted because employer did not receive notice of certification application - Board deciding to reconsider because defect was partly responsibility of union.

Reconsideration - Whether reconsideration is warranted where application contained partial misidentification of employer - Board deciding this is not ground for reconsideration.

REASONS FOR DECISION

APPLICATION FOR RECONSIDERATION

Beth Bilson, Chairperson: On October 26, 1995, this Board issued an Order certifying the International Union of Operating Engineers as the bargaining agent for a bargaining unit of employees of Ramco Installations Ltd. At the time that Order was issued, no Reply or Statement of Employment had been received from the Employer, and the Order was made on the basis of the uncontested claim of the Union to represent a majority of the employees in the bargaining unit.

The Employer has since requested that the Board reconsider the application on several grounds. The first of these is that the Employer never received a copy of the original application. The reasons for this are not entirely clear. The application filed by the Union named an entity designated as HCS, Inc./Ramco Installations Ltd. as the relevant Employer. Though HCS, Inc. has been named as an Employer in at least one other application filed on behalf of the Union, there is no connection between that company and Ramco Installations Ltd.

The AR card which accompanied the copy of the application, which was sent to the corporate address of Ramco Installations Ltd. in Hamilton, Ontario, appears to have been received by a Ms. Palma Rebellato, the mother of one of the principals of that company. Counsel for the Employer speculated that she might have discarded the application because of the confusion arising from the naming of both companies on the face of the application.

The second point raised by the Employer is that, in any case, they would be entitled to notice of the application in a manner which made it clear that Ramco Installations Ltd. is the employer whose employees are seeking to bargaining collectively through the Union.

The third point made on behalf of the Employer is that the Union failed in its original application to estimate the number of employees who would be included in the bargaining unit, and that it would therefore have been impossible for the Board to decide without other evidence that the Union did indeed have the support of a majority of bargaining unit employees.

Counsel for the Employer made it clear that his client does not oppose the application as such. The Employer has now filed a Statement of Employment containing the names of three employees, and has replied to other recent applications for certification made by other trade unions.

Counsel for the Union said that his client does not oppose the request from the Employer for reconsideration of the application.

The Statement of Employment filed by the Employer contained the name of a person whose normal function was to act as Site Superintendent. At the time of the certification application, this person was filling in for one of the other employees. The Union wished it to be clear that by accepting the inclusion of the name of this person on the Statement of Employment, they were not agreeing to a deviation from the standard bargaining unit description, which would not include Site Superintendents. Counsel for the Employer indicated his agreement that the acceptance of this name would not constitute a precedent for the inclusion of Site Superintendents in the standard bargaining units in the construction industry.

The first point advanced by the Employer as a basis for the reconsideration of the application is that

they did not in fact receive notice that the application had been made and that they were thus denied of any real opportunity to respond. We accept that there was some difficulty in transmitting the application to the party intended to receive it, and that it is likely that the Union must bear some of the responsibility for this because of the confusion over the names. The Union has not suggested any subterfuge on the part of the Employer, or any attempt to evade the application.

At the original hearing of the application, which was typical of the hearings which are conducted by the Board in relation to uncontested certification applications, Mr. Brian Woznesensky, the business agent for the Union, said that there had been a mix-up about the correct name for the Employer, and asked that the name of Ramco Installations Ltd. be used in the certification Order. This amendment at the time of that hearing cannot, however, be said to counteract the fact that the Employer had not in fact received notification of the application.

The Board must, of course, be alert to the possibility that an employer may seek to delay or thwart a certification application by neglecting to respond or by claiming not to have had proper notice. In a case where no Reply or Statement of Employment has been received, and no appearance is made by an employer, the Board ordinarily proceeds to act on the basis of the uncontested claims of the union which are contained in the application, and the evidence of support which has been filed.

The premise of this is, however, that the employer has been given proper notice of the application, and has had an opportunity to raise any questions which may legitimately be put before the Board. In circumstances where it is accepted as a fact that no such notice was received by this Employer, and where the responsibility for the defective notice lies with the Applicant, we are not averse to reconsidering the application, and we are prepared to do so on these grounds.

The second point made by the Employer is closely related to the issue just considered. Counsel argued that an employer is entitled to be given notice under the correct name, and that even if the Employer had received notice of the application as worded, it could not have been regarded as adequate notice.

We are reluctant to accept this as a general proposition. As the Board has pointed out on previous occasions, a trade union cannot always be expected to know what corporate name is the one which most accurately identifies the employer of the employees they seek to represent. This is especially true

in the construction industry, where one employer may use a variety of names for different purposes.

In this case, it is true that the inclusion of HCS, Inc. was made in error, and referred to a corporate entity which was in no way connected to the Employer the Union wished to identify. If the application had named only HCS, Inc., the argument made by counsel might be more persuasive. We are satisfied, however, that it would have been reasonable to expect the Employer to respond to a notice in which Ramco Installations Ltd. was clearly, though not exclusively, identified.

The third basis suggested for reconsideration was the failure of the Union in the application to estimate the number of employees in the bargaining unit. Counsel for the Employer argued that, in the absence of such an estimate, the Union has not presented evidence which might be the basis of a conclusion that they have obtained the support of a majority of employees in the proposed bargaining unit.

Technically, this argument has considerable force, and the Board should perhaps have requested that the Union provide an estimate of the size of the bargaining unit. On the other hand, it must be recognized that what is required of the Union in an application for certification is only an estimate; it must be anticipated that an employer is in possession of the information required to establish the number of employees with precision.

It should further be noted that the application for certification takes the form of a statutory declaration in which a trade union attests that they claim to represent a majority of employees in the bargaining unit of employees they put forward as a basis for collective bargaining. In the absence of any contrary representations from an employer, it is our view that it is appropriate to accept the claim made by the trade union, and that the absence of an estimate of the number of employees does not in itself constitute a fatal flaw in the application.

For the reasons we have given, the Board has reconsidered the application, and has taken account of the information provided by the Employer since the previous Order was issued. On the basis of the evidence of support, we will proceed to reissue the certification Order.

ELAINE WARNE, ERWIN SCHMIDT, JOHN DUNITZ, JOANNE WALKER, JOAN WELLWOOD, MATT SCHABEL, GEORGE TOTTEN, Applicants and REGINA EXHIBITION ASSOCIATION LTD., Respondent

LRB File Nos. 146-95 to 166-95; January 10, 1996
Chairperson: Beth Bilson; Members: Don Bell and Carolyn Jones

For the Applicants: Mervin C. Phillips
For the Respondent: Richard P. Rendek and J. Paul Malone

Practice and procedure - Objection to jurisdiction - Whether objection to Board jurisdiction must be raised prior to hearing - Board deciding objection to jurisdiction can be raised during hearing.

Unfair labour practice - Discrimination - Discharge - Whether termination of employment of supervisors at casino was based on anti-union motive - Board deciding decision was not tainted by anti-union sentiment.

REASONS FOR DECISION

Beth Bilson, Chairperson: The seven Applicants were employed as supervisors in the Casino operated by the Regina Exhibition Association Ltd., until the termination of their employment in May of 1995. They allege in their application that the Employer has committed an unfair labour practice and violation of s. 11(1)(e) of *The Trade Union Act*, R.S.S. 1978, c.T-17 by this termination. Section 11(1)(e) reads 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:*
>
> > *(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 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;*

The Regina Exhibition Association Ltd. began to operate a casino in a limited way in the 1960s. In the last several years, there has been extensive reorganization and restructuring of the Buffalo Bucks Casino (now known as the Silver Sage Casino) in light of changes in the gaming policies of the government of the province, and of the advent of a second casino in the same city. The Employer takes the position that the termination of the employment of the Applicants came about as part of this process of reorganization.

The Buffalo Bucks Casino was opened in the 1960s in connection with the summer fair at the Regina Exhibition Park, and at first it operated only during the week of that event. In time, the Casino was opened during other major events, such as the Western Canadian Agribition and the Farm Progress Show. From 1991 the Casino was open most weekends during the year in addition to the periods of these major events.

The role of the supervisors in the operation of the Casino was to oversee the activities which took place at a group of tables. Their responsibilities included monitoring the number of chips which were in play, ensuring that sufficient dealers and pit bosses were present, and deciding whether there was sufficient activity at any given time to warrant opening or closing tables. As the supervisors might be the senior staff present at certain times, they were expected, also, to take overall responsibility for the Casino during those times. The evidence further suggested that the supervisors were authorized to impose minor discipline, such as verbal warnings, on Casino staff.

At all times when the Casino was open, one of the supervisors would be designated as Games Supervisor. In addition to the ordinary duties performed by supervisors, the Games Supervisor was responsible for calling in staff if there were not sufficient employees present.

As the pattern of operation of the Casino indicates, nearly all the staff of the Casino, including the supervisors, worked on a part-time basis. This was particularly true at the time when the Casino was open only a few weeks in the year, but even when the hours were extended to include most weekends, there were almost no full-time employees.

We alluded earlier to the changes which have occurred in the operation of the Casino over the last several years. In response to the revised gaming policies announced by the government, the Employer

was forced to consider a number of issues, including the question of whether the Casino should survive in any form. As a result of discussions, both internal to the Regina Exhibition Association Ltd. and between the Employer and representatives of the government, it was decided that the Casino should continue to exist and that it should operate on a more extended footing. As a result of these decisions, the hours of the Casino were changed in April of 1994 to cover twelve or more hours each day.

Mr. Les Butler, the Manager of the Casino from early in 1993 until April of 1995, gave evidence about the changes which were taking place during this period. He said that he considered various ways of allocating staff in the new environment; during the period of transition, however, the existing staff were asked to try to cover the extended hours of operation.

There was no dispute between the parties that the result of this was that the Casino supervisors were working greatly extended hours in the period approximating a year from April 1994 until the termination of the employment of the Applicants. In the majority of cases, they were working at least forty hours per week, and in some cases significantly more than that.

According to Mr. Butler, he continued to view them as part-time employees, even though they were generally working full-time hours. His testimony suggested that the situation was viewed as impermanent; and though he had many issues to deal with arising out of the changes in the Casino, he said that he began thinking of ways of restructuring the administration of the Casino within several months of April 1994. He said that he was not satisfied with having to depend on persons who were classified as part-time to carry out supervisory duties, as the Casino was currently operating.

Mr. Butler further said that he concluded that the group of eleven supervisors, all of whom had worked in the Casino for a considerable number of years, would not find it easy to adjust to the new pattern of operation. He said that he found it difficult to engage them in constructive discussion, or to elicit from them imaginative suggestions, with respect to the new direction the Casino was taking.

Mr. Butler recounted a discussion which took place at a meeting with the supervisors in November of 1994. He said that he was trying to introduce a procedural manual which would explicitly describe the duties of various persons in the Casino and lay out the procedures to be followed. He expressed frustration with their resistance to what he regarded as necessary changes. In his evidence, he said that

he had tried to bring home to them the implications of the changes which were going on. He had said that he was contemplating further changes and that "there would be casualties" among the staff when these changes were implemented.

A number of the Applicants who gave evidence said that they had experienced some anxiety during the period after the Casino hours were extended in April of 1994. Most of them were working a large number of hours themselves and, in some cases, this was in addition to full-time jobs elsewhere. They said that they regarded their jobs during this time as full-time jobs, although they conceded that they did not have the benefits which were available to full-time employees. They said that, as far as they knew, there was never a problem with having supervisors available when the Casino was open.

In any case, it was at this time, late in 1994, that they began making overtures to a trade union with respect to their representation.

The evolution of collective bargaining between employees and this Employer has been a somewhat complicated one. It is not necessary to describe it in detail here, though several points are worth noting for their relevance to this situation. With the exception of a bargaining unit of technical employees, who have been represented for some time by the International Alliance of Theatrical and Stage Employees, the efforts of other trade unions to gain the right to bargain on behalf of other employees were largely frustrated until recently by a variety of factors, notably the organizational difficulties inherent in trying to gain the support of large numbers of casual employees. Beginning in 1992, however, the Saskatchewan Joint Board Retail, Wholesale and Department Store Union ("RWDSU") enjoyed some success in obtaining certification Orders from this Board for a succession of bargaining units, which now include the majority of employees of the Regina Exhibition Association Ltd.

The first of these units was composed of the wheelers and dealers in the Casino. At the time that the organizing campaign was going on, a certain amount of ill feeling developed between that trade union and the supervisors, who were characterized by the Union as part of management. During the certification hearing between the RWDSU and the Employer on that occasion, that Union attempted to establish that the supervisors had been guilty of a number of instances of interference in the organizing campaign on behalf of management.

Some of the witnesses at the hearing of this application expressed remnants of this tension. Indeed, the

argument of counsel for the Applicants was based in part on an allegation that the Employer was colluding with the RWDSU to the detriment of the Applicants.

The RWDSU and the Employer had been successful, in October of 1993, in concluding a collective agreement with respect to the original unit of employees in the Casino. One of the issues which was discussed during the course of that round of bargaining was the number of supervisors, and the use which could be made of them to relieve pit bosses. Joan Wellwood, a supervisor who was a member of the negotiating committee of the Employer at that time, recalled that there had been discussion at that time of the elimination of the position of supervisor. Instead, a Letter of Understanding was appended to the collective agreement which restricted the use of supervisors and contemplated a gradual decline in their numbers. The Letter of Understanding read as follows:

> *Re: Scope*
>
> *1. There are too many supervisors for the casino's current needs as set forth in Article 2.01.*
> *2. The surplus of supervisors shall be rectified in one of the following ways:*
> *(a) attrition*
> *(b) increase in hours of operation*
> *(c) increase in the number of tables*
> *3. There shall be one pit boss minimum for every six (6) blackjack tables open, or greater part thereof.*
> *4. There shall be one pit boss minimum for every three (3) roulette tables open, or greater part thereof.*
>
> *5. The function of relieving pit bosses shall be a supervisor's responsibility. As the number of supervisors is reduced through 2. above, the function of relieving pit bosses shall return to the pit bosses.*
>
> *Signed this 4th day of October, 1993.*

The RWDSU subsequently obtained a certification Order respecting the banking staff in the Casino, and when negotiations commenced concerning revisions of the collective agreement, it was proposed that the negotiations should cover both sets of employees. The RWDSU took the opening position in bargaining the new collective agreement that all employees in the Casino, including the supervisors, should be within the scope of the bargaining unit and the collective agreement. The discussion of this issue, to which we shall return later, was of some significance for the developments which gave rise to this application. It is sufficient at this point to note that the RWDSU stated the view, as of December, 1994, that there was an agreement in principle with the Employer that the supervisors should be included in the bargaining unit represented by that Union.

Whatever their own motivation may have been, the supervisors began to discuss the possibility of union representation among themselves in November and December of 1994. Mr. George Young, one of the supervisors, undertook to contact the United Steelworkers of America ("USWA"). Several of the Applicants gave evidence that they had attended an information meeting with a representative of that trade union, and that they had attended a subsequent meeting at which Mr. Chris Banting, a representative of the RWDSU, was present, also.

Mr. Mark Hollyoak, the staff representative of the RWDSU responsible for servicing the two units of Casino employees, testified that the decision had been made that Mr. Banting should attend the meeting because Mr. Hollyoak was aware that there was some personal bad feeling towards him on the part of some of the supervisors. He said, also, he understood that they had some concern about whether their interests would be well served by becoming part of a larger bargaining unit, and that, in part, the purpose of the meeting was to reassure them that it would be possible to give some protection to their interests, just as efforts were being made to deal with the special interests of the dealers and the banking staff.

Mr. Banting stated at the meeting that the RWDSU had reached an agreement in principle with the Employer that the supervisors should be included within the scope of the bargaining unit which included the dealers and the banking staff of the Casino, and that the United Steelworkers of America ("USWA") were being asked to respect this agreement by not pursuing their organizational activities among the supervisors.

The USWA subsequently informed the supervisors that they would not be continuing the organizing campaign.

Following this, Mr. Young contacted the Office and Professional Employees' Union ("OPEIU"). Mr. Larry Sheffer, a staff representative with that trade union, recalled meeting with a group of the supervisors on or about December 30, 1994. He said that he assured them that his Union had considerable experience representing employees whose duties were supervisory or managerial. He said, also, that he cautioned them that the OPEIU would defer to the RWDSU if a jurisdictional question arose, as it had with the USWA.

On the basis of support cards obtained from a number of the supervisors, the OPEIU filed an

application for certification, designated as LRB File No. 007-95, on January 10, 1995.

Mr. Sheffer said that he received a telephone call from the RWDSU the following day saying that the OPEIU should not pursue the application. He met with Mr. Hollyoak, who informed Mr. Sheffer that the RWDSU would regard it as tantamount to a raid if the OPEIU pursued their attempt to represent the supervisors, because of the agreement in principle with respect to scope which the RWDSU claimed to have reached with the Employer.

After this meeting, Mr. Sheffer testified that he instructed counsel for the OPEIU to withdraw the certification application. Mr. Rick Engel, counsel for the OPEIU, wrote the following letter to the office of this Board:

> *January 12, 1995*
>
> *Labour Relations Board*
> *652 - 1914 Hamilton Street*
> *REGINA, Saskatchewan*
> *S4P 4V4*
>
> *Attention: Sandra Leflar*
>
> *Dear Sandra:*
>
> *Re: O.P.E.I.U. and Regina Exhibition Association Ltd.*
> *Our File 0-1037.5 RAE*
>
> *Please be advised that I act as legal counsel on behalf of O.P.E.I.U. The Union has just learned that R.W.D.S.U., who already is the certified agent for other employees at the Regina Exhibition park, recently entered an Agreement in Principle with the Employer concerning representation of the 14 employees covered in our Application.*
>
> *As a result, please withdraw the O.P.E.I.U. Application for Certification, L.R.B. File No. 007-95.*
>
> *Yours truly,*
>
> *RATH JOHNSON HART*
>
> *Per:*
> *RICK A. ENGEL*

The letter indicated that a copy of the letter was directed to the attention of the Employer. Mr. Butler testified that he received a copy of the letter on or about January 12, 1995, and posted it on a notice board in the supervisors' lounge in the Casino. He said that he did this because he thought they should have access to the information contained in the letter. He said, however, that he did not think that the information was accurate, and that he did not feel it incumbent upon him to explain his views on the

issue to the supervisors. In a note on the facsimile cover sheet which accompanied the copy of the letter which was sent to counsel for the Employer, Mr. Butler did note his disagreement with the accuracy of the premise of the letter: "We have in no way entered into any agreement with RWDSU regarding these employees. Clearly RWDSU is protecting a source of potential revenue."

The reason he gave for this was that he did not understand that any "agreement in principle" had been reached prior to January 12 concerning the inclusion of the supervisors within the scope of the collective agreement. His recollection was that the fate of the supervisors was discussed in a different context, which we will discuss presently.

In its February issue, the newsletter of the RWDSU, the *Defender*, contained the following description of the events surrounding the withdrawal from the scene of the USWA and the OPEIU:

> *When the Joint Board began organizing Regina Exhibition employees, most supervisors declined to join R.W.D.S.U. because they believed, or were persuaded, they should not belong to an organization that represented the rank and file workers in the various departments. As a result they were excluded from the original certifications. However, as R.W.D.S.U. successfully negotiated Agreements that resulted in improved wages and conditions for its members, the supervisors decided that unionization was a good idea but that they should join a different Union. They approached the United Steelworkers Union which initially agreed to sign them up. When this became known to the Joint Board, it discussed the matter with the Steelworkers who had no trouble agreeing that the supervisors would be better off as part of the larger R.W.D.S.U. bargaining unit. Some of the supervisors were not satisfied with the Steelworkers' decision and approached the Office and Professional Workers Union [sic] which subsequently filed an application for certification on behalf of the supervisors. Once more R.W.D.S.U. explained the situation to the Office Workers and as a result, the application was withdrawn. R.W.D.S.U. is currently attempting to negotiate the supervisors into the collective agreement.*
>
> *We commend and thank both the Steelworkers and the Office Workers for their co-operation in dealing with what could have developed into a nasty jurisdictional dispute. All too often in the past, Unions have wasted time and money in such scraps to the detriment of the workers involved.*

Mr. Butler said that during the period we have been discussing, that period after his meeting in November with the supervisors, and including the organizing activity which took place, he continued to consider the possible future shape of the Casino. He said that he saw a need to modify the system of staffing the Casino to cover its operation over extended hours. He concluded on the basis of his experience in managing the Casino that the position of supervisor in its existing incarnation was not

adequate to cover the supervisory and managerial tasks which would be required for running the Casino in the future.

In his evidence, Mr. Butler said that he had been considering the kinds of changes which would be necessary for some time, but that they began to crystallize early in 1995. He decided that some of the tasks which were then assigned to the supervisors, such as monitoring the use of chips, could be allocated to the pit bosses, and that a more genuinely managerial position, which was ultimately referred to as floor manager, should be created. One of the implications of this reconfiguration would be that the position of supervisor would be eliminated.

Mr. Butler said that his assessment was that not all of the persons who were in the position of supervisor possessed the necessary skills and qualities to assume the duties of the new floor manager positions, which would in any case be fewer than the supervisor positions. On the basis of an assumption that not all of the supervisors would attain a place as floor manager, and cognizant of their years of service in the Casino, Mr. Butler said that he raised with Mr. Hollyoak the question of whether it would be possible to arrange for the supervisors who were not successful in obtaining floor manager positions to take positions as pit bosses. He said that this conversation took place after January 16, 1995. Mr. Hollyoak did not make any immediate answer to this initiative, but another member of the RWDSU bargaining committee, Ms. Leslie Sil, responded to it at the following negotiating session. She stated the Union position that the supervisors would not be able to move down into pit boss positions "from the top," that is with their accumulated seniority, but that they could apply for vacant positions as dealers, with no seniority, and move up to pit boss positions. According to Mr. Butler, he took this as an indication that the Union was not willing to discuss any more generous accommodation with the supervisors.

Mr. Butler said that he did not recall swearing the representatives of the RWDSU to silence after he mentioned to them his intention to institute changes in the configuration of positions. Both Mr. Hollyoak and Ms. Sil testified that he had asked them not to discuss the matter before the decisions were finally made, and this seems to be confirmed in a facsimile cover sheet which apparently was sent to Mr. Hollyoak bearing the date of February 3, 1995: "I have been directed to <u>not</u> discuss the reorganization of Supervisors until the Government announces the fate of the proposed downtown casino -- life in the Casino is almost entirely on hold."

Mr. Butler said that he discussed the changes he was considering with Mr. Jack Shaw, the Acting General Manager of the Employer, and Mr. Dean Churchill, then the Assistant Manager of the Casino. He said that his understanding was that it lay within his authority as Casino Manager to make this kind of change without the approval of the General Manager or the Board of Directors of the Employer, though he thought it was a good idea to keep Mr. Shaw informed of the direction he was taking.

Mr. Butler said that he decided in the spring of 1995 to move to Edmonton to take up a new job, and that he felt it would be a good idea to take some steps to implement the decision to create the position of floor manager before he left the service of the Employer. In a document dated March 28, 1995, addressed to the supervisors, he announced that the position of supervisor would be eliminated and replaced by the floor manager position:

> *March 28th, 1995*
>
> *Dear Supervisor:*
>
> *It has been almost one year since Regina Exhibition Park's casino opened its doors full-time. In this year we have learned some new lessons. While we knew one year ago that communication is the key to success in any service / leisure-time industry, this business lesson was emphatically underscored repeatedly these last twelve months.*
>
> *Our business is market driven: The customer rules. Our most valuable asset is our work force. People are everything. In the competitive environment we face tomorrow the ability to communicate will dictate success. Communication with employees; Communication with customers.*
>
> *To communicate better, to treat our most valuable resource better, we are moving to permanent employment in our most important and vital positions. Certainly no one will argue that a full-time operation needs full-time dedicated employees.*
>
> *We are eliminating the part-time position of Casino Supervisor. I trust all of you will apply for the new permanent position of Floor Manager.*
>
> *Respectfully yours,*
>
> *BUFFALO BUCK CASINO*
>
> *Les Butler*
> *Casino Manager*
> *Regina Exhibition Park.*

It should be noted that at least one of the supervisors said that they had not received this document directly, but found it on the premises. The supervisors who gave evidence said, however, that they were familiar with its contents. They further stated that they did not understand this document to be a statement that they would lose their employment. They assumed that they would take on the floor

manager positions which were referred to in the document.

A position description was drafted, and an ad was placed on March 27, which appeared in the newspaper on March 29 and 31, according to the evidence of Ms. Kelly Schmidt, a human resources assistant for the Employer. She estimated that the position description and wording of the ad would have been drafted the week before this, on March 23 or 24. According to Mr. Churchill, who was taking over from Mr. Butler as Acting Casino Manager, there were around two hundred applications for the floor manager positions by the deadline of April 4, which was specified both in the newspaper ad and the job posting.

A short list of candidates to be interviewed was prepared, which numbered between twenty and twenty-five. Ten of the eleven supervisors applied, and all ten of them were included on the interview list.

The interviews took place over the dates of April 6, 7, 12 and 13. The composition of the group which conducted the interviews varied somewhat over this period. Mr. Butler was involved in only one of the interviews. The others who took part were Mr. Churchill, Ms. Schmidt, Mr. Doug Mutschler, who had recently become the Manager of Finance and Administration for the Employer, and Ms. Jenny Wakelam. Ms. Wakelam was designated as the Training and Development Co-ordinator, although some of the supervisors who gave evidence said that they understood her status in the Casino to be the same as theirs. Indeed, some of the witnesses said that they thought she was in a supervisor position.

Mr. Churchill was ill on the first day of the interviews, and both Mr. Mutschler and Ms. Schmidt testified that they had been absent for the interviews of some of the candidates. All three of them said that the questioning in the interviews was designed to identify candidates who had strong leadership skills, enthusiasm about the future of the Casino and imagination. They acknowledged that they had not asked questions about any previous experience that candidates might have had which was related to the Casino. Mr. Churchill stated that they thought any lack of specific knowledge about gaming or the procedure followed in the Casino could be made up by training, and that they were seeking a different set of qualities in the candidates.

The supervisors who gave evidence said that they had found the interview process disconcerting. They were not asked about their years of experience in the Casino, but were rather asked what they thought of some aspects of the changes which were taking place. They were required, also, to speculate about

how they would handle various hypothetical scenarios.

As a result of the interviews, seven persons were selected to fill the floor manager positions. Three of these - Mr. George Young, Mr. Dave Taylor, and Mr. Dennis Green - had been supervisors. The other eight supervisors, including the seven Applicants, were contacted and invited to meet with representatives of the Employer one at a time. At these meetings, they were offered a severance package, as well as the services of an outplacement counsellor. Mr. Doug Cressman, who had become the new General Manager of the Regina Exhibition Association Ltd. at the beginning of April, gave evidence that he reviewed the process which was being used to communicate with the supervisors, and assessed that the severance packages being offered were reasonable ones. He said that he understood they had been calculated according to the provisions of *The Labour Standards Act*, R.S.S. 1978, c.L-1.

One of the supervisors, Mr. Neil Fairbairn, decided to accept the severance package which was offered. The other seven declined the severance settlements offered, and decided to challenge the termination of their employment by filing this application and by commencing an action in the Court of Queen's Bench for Saskatchewan.

It will be seen from this outline of the sequence of events leading to the termination of employment of the Applicants that this was not a straightforward tale. The argument put forward by counsel for the Applicants was consequently a complicated one. It may be summarized by saying that the basic allegation is that the termination of the employment of the Applicants was motivated, at least in part, by a desire on the part of Mr. Butler to discourage their attempts to protect themselves by gaining trade union representation, and, in particular, by his wish to avoid having to deal with more than one trade union in the Casino.

It should be noted that counsel for the Employer raised the question, on the basis of the evidence which was put forward at the hearing, of whether the Board has jurisdiction to hear this application. He argued that the evidence suggested the seven Applicants were not in fact "employees" within the meaning of s. 2 of *The Trade Union Act*, and that they could not, therefore, claim relief under s. 11(1)(e).

Counsel for the Applicants argued that this objection could not be made following the presentation of

the evidence, as it had not been raised as a preliminary question.

We agree with counsel for the Employer that an objection with respect to the jurisdiction of the Board can be raised at any time during the proceedings. The fact that such an objection is not made at the outset cannot serve to confer jurisdiction on the Board where it would not otherwise possess it, and any prejudice to either of the parties which might arise by the fact that it is raised late in the day can be addressed by procedural means.

There was not extensive evidence on the point, but, on the basis of the evidence which was presented, we are satisfied that the supervisors were in fact employees within the meaning of *The Trade Union Act*, and are eligible to bring an application such as this one. Though they did perform some managerial functions, these were of a marginal and occasional kind; their general responsibilities were of a supervisory rather than a managerial character.

A further question which counsel for the parties raised in their arguments was that of whether the application should be viewed as resting on the allegations of the Applicants as a group, or whether it is more accurately described as seven individual applications jointly presented. The possibility that individual circumstances may be reflected in an application of this kind cannot be ruled out, nor can the possibility that relief might be appropriate for one applicant but not another. In this case we do not see any basis on the evidence for differentiating between the terminations of the seven Applicants. There is no question that there were some distinctions in the nature of their relationships with Mr. Butler and other members of management. The process which was followed which resulted in the termination of employment of the Applicants was, however, an institutional one, which affected all of the Applicants in the same fashion. We do not think that the evidence supports the theory - vigorously argued by counsel for the Applicants - that the process was manipulated by Mr. Butler in a way which produced such differential results.

In a number of previous decisions, we have outlined the standards which we apply to the assessment of whether the decision to terminate the employment of an employee constitutes a violation of s. 11(1)(e) because of the motivation of an employer. In *Saskatchewan Government Employees' Union v. Regina Native Youth and Community Services Inc.* (1995), 1st Quarter Sask. Labour Rep. 118 at p. 123, the Board made the following comment:

> *It is clear from the terms of Section 11(1)(e) of The Trade Union Act that any decision to dismiss or suspend an employee which is influenced by the presence of trade union activity must be regarded as a very serious matter. If an employer is inclined to discourage activity in support of a trade union, there are few signals which can be sent to employees more powerful than those which suggest that their employment may be in jeopardy. The seriousness with which the legislature regards conduct of this kind is indicated by the fact that the onus rests on the employer to show that trade union activity played no part in the decision to discharge or suspend an employee.*

The Board has also stated the view that the objectives underlying s. 11(1)(e) are not well served if the presence of legitimate reasons for the termination of employment are held to excuse anti-union sentiment. In *United Steelworkers of America v. Eisbrenner Pontiac Asuna Buick Cadillac GMC Ltd.* (1992), 3rd Quarter Sask. Labour Rep. 135 at pp. 139-140, we commented as follows:

> *When it is alleged that what purports to be a lay-off or dismissal of an employee is tainted by anti-union sentiment on the part of an employer, this Board has consistently held, as have tribunals in other jurisdictions, that it is not sufficient for that employer to show that there is a plausible reason for the decision. Even if the employer is able to establish a coherent and credible reason for dismissing or laying off the employee - and we are not persuaded that the reasons put forward by Eisbrenner are entirely convincing - those reasons will only be acceptable as a defence to an unfair labour practice charge under Section 11(1)(e) if it can be shown that they are not accompanied by anything which indicates that anti-union feeling was a factor in the decision.*

In determining whether the reasons which an employer advances as the basis for a decision to terminate can be held to be the exclusive basis for the decision, the Board has found it necessary to assess the justification offered, as its strength may be an indication of whether anti-union animus has been a motivating factor also. In a decision in *The Newspaper Guild v. The Leader-Post* (1994), 1st Quarter Sask. Labour Rep. 242 at pp. 248-249, the Board observed:

> *For our purposes, however, the motivation of the Employer is the central issue, and in this connection the credibility and coherence of the explanation for the dismissal put forward by the Employer is, of course, a relevant consideration. We are not required, as an arbitrator is, to decide whether a particular cause for dismissal has been established. Nor, like a court, are we asked to assess the sufficiency of a cause or of a notice period in the context of common law principles. Our task is to consider whether the explanation given by an employer holds up when the dismissal of an employee and some steps taken in exercise of rights under The Trade Union Act coincide. The strength or weakness of the case an employer offers in defence of the termination is one indicator of whether union activity may also have entered the mind of the Employer.*

There is no doubt that the approach taken by the Board to the issue of discriminatory termination of employment, and the seriousness with which we regard allegations brought under s. 11(1)(e), impose a significant burden on an employer who is attempting to demonstrate that their decision was untainted by any hostility to trade union activity on the part of employees. The imposition of such a demanding standard seems appropriate to us in light of the threat which is posed to the aims of *The Trade Union Act* by the illicit deployment of the power of an employer to terminate employment. The Board has pointed out, however, that this does not mean that an employer can never demonstrate that the decision to terminate was made in a way which did not violate the *Act*. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Versa Services* (1994), 3rd Quarter Sask. Labour Rep. 176 at p. 190, the Board made this comment:

> *Stringent as this test is, it does not and cannot mean that employees who are engaged in protected activity cannot be discharged for just cause. For example, in Metal Fabricating Services Ltd., (1990) Spring, Sask. Labour Rep. p. 70, the Board considered the lay-off of employees for lack of work in circumstances that gave rise to a presumption of anti-union animus. The Board stated:*
>
> > *In our view, even if there is evidence of anti-union animus, that in itself does not mean the employer is thereafter unable to lay off employees in the normal course of business for just cause or for economic reasons. The presumption that arises in such situations is rebuttable, not conclusive.*

Counsel for the Applicants pointed to a number of aspects of the conduct of representatives of the Employer and, also, to parts of the testimony of witnesses on behalf of the Employer as indicating that the termination of the employment of the Applicants was based on an improper motive.

It should perhaps be noted at this point that counsel for the Applicants made extensive efforts to demonstrate inconsistencies in the testimony of various witnesses; on the basis of these he generally impugned the credibility of witnesses called on behalf of the Employer, particularly Mr. Butler. There is no denying that there were important discrepancies in evidence on several major points, which will be the subject of further comment below. We do not accept, however, that counsel succeeded in persuading us as a general matter that we should discount the evidence of these witnesses, notably Mr. Butler, on the grounds of their credibility. To begin with, many of the inconsistencies which were enumerated by counsel for the Applicants were fairly trivial.

In any case, it is common for differences to occur in the recollections of witnesses to the same events,

especially when these events were complicated and took place over a lengthy period of time. We must, of course, assess what version of these events is most likely to be correct. In order to do this, it is not necessary for us to cast aside wholesale the evidence of particular witnesses.

An example of this which may be cited is one to which counsel for the Applicants apparently attached considerable importance. This was the question of whether complete job descriptions for the floor manager position had been completed prior to the time the Applicants were terminated, or whether they were manufactured for the purpose of the hearing of the application. In his testimony, Mr. Cressman rejected the latter interpretation. On the other hand, Ms. Cheryl Whiting, who had been a successful candidate for a floor manager position, said that she understood that job descriptions were being drawn up after the floor managers were hired, and said that she did not see one until August 22. She said, also, that she understood from a conversation with Ms. Wakelam about that time that Mr. Cressman was asking for information so that a "job mandate" could be put together for the hearing of this application.

Whatever differences there were between the testimony of these two witnesses, the most likely explanation seems to be that they were not referring to the same thing. There was clearly a position description of some kind in circulation during the hiring process as Mr. Churchill testified, and it was the basis of the newspaper ad and of the job posting.

Mr. Churchill testified, also, that there was some evolution in the floor manager position over the summer of 1995. In part, this related to the duties which floor managers were called upon to perform in response to industrial action which was taken by Casino employees during the summer, and which interrupted the training program which had been planned for the floor managers. Before and after the industrial action, pit bosses were assigned supervisory duties to allow the floor managers to receive training in gaming procedures. By early September, according to Mr. Churchill, this process had reached its final point, and the floor manager positions were in place. It is clear, however, that there was continuing discussion of the duties which should be assigned to them as part of their new managerial functions.

It is not surprising in this context that Mr. Cressman denied that job descriptions were being manufactured in relation to this application, while at the same time it seems undeniable that there was

continuing discussion of the role of the floor managers. Mr. Cressman and Ms. Whiting may both have been "right" from their respective points of view, and it is not necessary, in our view, to cast aspersions on the truthfulness of either of them.

Counsel for the Applicants placed Mr. Butler at the centre of the allegations that the decision to terminate the employment of the Applicants was made as a response to their trade union activity. He suggested that Mr. Butler gave erroneous testimony with respect to the time when he became aware of the organizing activity and with respect to the "agreement in principle" regarding the scope issue. Counsel pointed, also, to a number of remarks Mr. Butler had made which were coercive and intimidating to the supervisors.

More than one of the supervisors described an occasion on which Mr. Butler had spoken to three of the supervisors when they were standing together in the Casino asking them, "Is this your first union meeting?"

Mr. Butler himself did not mention this conversation; although, he did say that he had pointed out a person in a jacket bearing the logo of the USWA to Mr. Hollyoak and had asked whether they were raiding the RWDSU. Mr. Butler said that he meant nothing more than a joke by this remark as he did not know that there was any organizing going on at the time.

Mr. Butler said, also, that he had mentioned the possibility of unionization specifically to the supervisors as a group on two occasions. On one of these occasions, he said that he suggested to them that it might be in their interest to unionize as he had some concerns about their future in the face of the changes which were taking place. At another time, he speculated that if the government took over the operation of the Casino, they might not appreciate the supervisors being unionized. He seemed to connect this with the fact that they might be seen as management staff.

Some of the comments which were attributed to Mr. Butler could, in a different context, be regarded as a misuse of management authority and a contravention of *The Trade Union Act*. The comments must be seen, however, in the context of the relationship which existed between him and the supervisors. It was not a relationship without its tensions, to be sure. It is clear, however, that the supervisors were viewed, both by the Employer and the RWDSU, as being closely connected with management, and it is

understandable that Mr. Butler was in the habit of conducting more candid exchanges with them than he might with in-scope employees.

The query as to whether the supervisors were having a union meeting was acknowledged, even by the witnesses who described it, as being an "off-the-cuff" remark, and we accept that Mr. Butler intended it to be jocular. We are satisfied that the other comments which he made arose out of a genuine concern about the prospects of the supervisors in the changed environment of the Casino.

In his evidence, Mr. Butler said that he was not aware that the supervisors were in touch with trade union representatives until he received the copy of the letter from Mr. Engel withdrawing the OPEIU certification application on January 12. On the other hand, there was evidence from Ms. Kelly Miner, a staff representative with the RWDSU, that she received a call from Mr. Butler sometime prior to the filing of the OPEIU application, inquiring whether the RWDSU had heard anything about the USWA organizing the supervisors.

There does seem to be a discrepancy between the evidence of Mr. Butler and Ms. Miner on this point. On the other hand, the discrepancy does not necessarily transform the motives of Mr. Butler into anti-union ones. If Mr. Butler did indeed become aware of organizing activity on the part of the USWA, it would make sense for him to ask Ms. Miner what was going on, given that the RWDSU had taken a position at the bargaining table that the supervisors should be included within the scope of the bargaining unit.

It was certainly after January 12 that the representatives of the RWDSU expressed their opinion about the possible inclusion of some of the supervisors in the bargaining unit as pit bosses. Leaving aside the question of whether Mr. Butler was out to discourage organizing activity by the USWA or the OPEIU as opposed to the RWDSU, it suggests that Mr. Butler was not opposed to the supervisors being included in a bargaining unit represented by a trade union as a general proposition.

Counsel for the Applicants suggested that it was in fact the case that Mr. Butler wished to deal with the RWDSU rather than another union, and that there was some kind of collusion with the RWDSU to defeat the aspirations of the supervisors to be represented by another trade union. In this respect, we do not think any significance can be attached to the conversation described by Ms. Miner when Mr.

Butler asked her if the RWDSU was aware of any organizing campaign by the USWA. We see this as a logical inquiry by Mr. Butler, as the representative of the Employer, in circumstances where one trade union was staking a claim to the supervisors at the bargaining table, and another was apparently trying to organize them as a separate group.

It seems clear that Mr. Butler and Mr. Hollyoak had a fairly harmonious relationship. Indeed, Mr. Hollyoak acknowledged that he had been criticized by some employees for being over-friendly with Mr. Butler. Their friendliness, however, did not make them any less effective as vigorous representatives of the interests of their respective principals at the bargaining table. The evidence falls far short of establishing that the fix was in concerning the supervisors. The RWDSU rebuffed the suggestion made by Mr. Butler for the disposition of the supervisors who were unsuccessful, and the fact that the Union resorted to industrial action in the summer of 1995 does not support the suggestion that they were in the pocket of the Employer.

Perhaps the most significant divergence of the evidence given at the hearing concerned the alleged agreement in principle that the supervisors should be included within the scope of the bargaining unit represented by the RWDSU.

Mr. Butler denied that there had ever been such an agreement. His recollection was that the extension of the scope of the agreement to include the supervisors had been part of the opening position of the RWDSU when negotiations began in October of 1994. He said that, aside from the discussion of whether the supervisors could be moved into pit boss positions, there had been no further general discussion of the scope question.

Both Mr. Hollyoak and Ms. Sil said that there was some discussion between the negotiating committee and Mr. Banting in December of 1994, in the face of the organizing initiative taken by the USWA, of the possibility of the inclusion of the supervisors in the unit. According to Ms. Sil, this suggestion had caused some consternation among the Casino employees, in light of the previous tension in their relationship with the supervisors. They ultimately agreed that it would be acceptable as long as they were dealt with as a separate group within the bargaining unit.

Mr. Hollyoak said that it was after this discussion that he broached the issue with Mr. Butler, who said

he could "see no problem" with the proposal. He said this was confirmed in bargaining in mid-January. The mid-January date is confirmed by the evidence of Ms. Sil who said that there was discussion of the position of the supervisors at meetings on January 12 and 19, 1995. What she recalled of these meetings, however, was not a "confirmation" of the extension of scope but a discussion of the proposed reorganization of the Casino and the creation of a floor manager position.

It must be said that the testimony of Mr. Hollyoak was somewhat vague with respect to the conversation he said he had with Mr. Butler. If the conversation as he recounted it constituted the "agreement in principle" on which the RWDSU subsequently relied, it is not too surprising that it was the source of a misunderstanding concerning the status of the scope issue between him and Mr. Butler. If, on the other hand, the "agreement in principle" is taken to date from the "confirmation" Mr. Hollyoak referred to in mid-January, this was after the USWA and the OPEIU had already been warned off on the basis that an agreement had been reached.

Ms. Sil and her colleagues on the negotiating committee may well have understood that there was some "agreement" which would see the supervisors included in the bargaining unit as a separate group, and they had certainly been told that by Mr. Hollyoak and Mr. Banting. Ms. Sil said that she felt this was confirmed, also, by the article in the *Defender*, which was alluded to above. If it is examined closely, however, what that says is that, as of when the article was written, probably sometime in January, "RWDSU is currently attempting to negotiate the supervisors into the collective agreement." We do not suggest that the article should be regarded as a definitive statement of the position of the RWDSU at the time. It is indicative, however, that the "agreement" on which the Union claimed to rely does not seem to have stood on a terribly firm foundation.

Exactly what was the state of play regarding the scope question as of the middle of January is thus subject to divergent interpretation. What can be said with certainty is that neither of the parties subsequently acted as though the supervisors were represented by the RWDSU. The supervisors were never contacted by representatives of the Union to explain the situation to them or to ask them to sign union membership cards. No representative of the supervisors was added to the bargaining committee. More seriously, no representative of the Union contacted the supervisors or took any other steps on their behalf when their position was eliminated or when the employment of the Applicants came to an end.

Mr. Hollyoak said that this was because once the Employer announced that the supervisor position would be eliminated, his Union assumed that the scope question was a dead letter, and there was little point in pursuing it further. Such a stance is somewhat puzzling, given the assertion by the RWDSU that there was an agreement in place which would include the supervisors among those employees represented by the Union. It seems, also, an uncharacteristically supine posture for this Union to take in the face of changes initiated by an employer. In any case, we view it as significant that the RWDSU read the elimination of the supervisor positions as a legitimate management decision, which did not touch any collective bargaining interest of employees they claimed to represent.

One further item which might be noted is that three of the supervisors were successful in obtaining floor manager positions, including Mr. Young, who was by all accounts the only one of the supervisors who could be identified as taking an active role in union organizing activity. This cannot, of course, be taken as a foolproof indication that the Employer did not have an anti-union motive in terminating the employment of other supervisors; however, it does support in some respects the assertion of the Employer that the decision to terminate was not motivated by a wish to discourage union activity.

It was suggested by Ms. Joan Wellwood, one of the supervisors who gave evidence, that the success of Mr. Young may have been attributable to his role as an informant to management about union activities. Nothing in other evidence presented would support this allegation.

Part of the argument made by counsel for the Applicants was that the course of objectionable conduct by Mr. Butler, examples of which have been outlined above, culminated in the selection process which resulted in the expulsion of the Applicants from their employment. The plausibility of this scenario depends on the assumption that Mr. Butler had control over the selection process, a premise which is not in our view justified. Mr. Butler did have his opinions about the likely success or failure of some of the candidates, but this does not mean that he was able to determine the outcome. Indeed, we accept that if he had, at least one of the Applicants, Ms. Elaine Warne, might have been hired to a position as floor manager.

We have concluded that the Employer has met the onus of showing that the motivation for terminating the employment of the Applicants was not tainted by any anti-union sentiment. In the context of the upheaval which was taking place concerning the Casino, the explanation for the decision to replace

part-time supervisors with full-time floor managers is a reasonable one. We are persuaded that the process of implementing this decision, which led to the termination of employment for the Applicants, was not influenced by any anti-union motive.

One cannot help but have some sympathy for the Applicants, each of whom had a long history of service with the Employer. It was natural for them to be fearful of the changes which were occurring in the organization with which they were familiar. They felt that the selection process to which they submitted themselves was fundamentally unfair and failed to take into account their experience and their dedication to the Casino in the past.

It is possible, though it is not a matter which lies within our purview, that there were flaws in the selection process, and it is certainly unfortunate that it had such an unhappy outcome for the Applicants. It is unfortunate, also, that, for a variety of reasons, the Applicants had to face this period without representation by a trade union, which they had sought to obtain. None of these reasons, however, can be laid at the door of the Employer.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and RAIDER INDUSTRIES INC., Respondent

LRB File Nos. 274-95 and 275-95; January 11, 1996
Chairperson: Beth Bilson; Members: Carolyn Jones and Don Bell

For the Applicant: Larry Kowalchuk
For the Respondent: Patrick McDonald
For Raider Industries Employee Association: Merv Nidesh

Amendment - Section 5(j)(ii) - Board amending certification order to include second geographical location in order where original vision of employer to create second location as separate entity with separate production and workforce was significantly altered, resulting in integration of production operations and workforce between the two locations - Board had refused to include second location in original certification order based on employer's original vision.

Appropriate bargaining unit - Geographic scope - Board amended certification order to include second location where employer viewed plants at two locations as part of integrated and interwoven operation with employees reallocated from one plant to other.

Reconsideration - Criteria - Board refusing to reconsider certification order in circumstances where first order was appropriate based on information then available.

REASONS FOR DECISION

PRELIMINARY APPLICATION

Beth Bilson, Chairperson: In an Order of this Board dated May 4, 1995, the Saskatchewan Joint Board Retail, Wholesale and Department Store Union was certified as the bargaining agent for a unit of employees of an employer then designated as "Brown Industries (1976) Ltd., Pro-More Industries Inc. or Lo Rider Industries Ltd. or any corporate entity manufacturing products under the name of 'Raider.'"

At the time of the certification application, the Union sought to have the bargaining unit described on a province-wide basis. Alternatively, they asked to have the unit include a projected new centre of operation in the City of Moose Jaw, in addition to the existing plant operated by the Employer at Drinkwater, Saskatchewan. For reasons which were outlined in the Reasons for Decision issued in connection with (1995), 2nd Quarter Sask. Labour Rep. 71, and which will be alluded to presently, the

Board decided that the bargaining unit should be limited to the plant at Drinkwater.

At the time the application for certification was determined, the Employer had not begun production in the Moose Jaw location, although a building had been acquired with this in mind. The Board summarized at pp. 78-79 the conclusions reached about this operation in the following terms:

> *A somewhat more difficult question is presented by the issue of whether the bargaining unit should be defined to include the City of Moose Jaw as well as the current plant location at Drinkwater. The evidence indicated that the Employer has an intention to open a second plant in Moose Jaw, under the auspices of Lo Rider Industries Inc. The purpose of this project is to manufacture product lines which would compete with the current products from the Drinkwater plant, in order to provide access to different areas of the market.*
>
> *The Employer has acquired a building to house the new plant, which is currently being renovated. Only one employee, a caretaker, is currently working there. This building was leased by the Employer for four months in the summer of 1994 so that a subcontracting project could be carried out there; the work in connection with that project was done by employees who have worked the rest of the time at the Drinkwater plant. It is our opinion that the use of these premises in the summer of 1994 and their subsequent acquisition by the Employer are coincidental.*
>
> *In his evidence, Mr. Brown indicated that this plant will open some months from now. It is intended that the employee complement at the new plant will be approximately the same size as the staff at the Drinkwater plant, in the neighbourhood of one hundred ten employees. Mr. Brown was somewhat vague about the plans for managing the new plant. When asked if the same Human Resources Officer would serve both plants, he indicated that he thought it would be impossible for one person to do that, and he thought the new plant would have a separate personnel system.*

The Employer began making modifications in the building in Moose Jaw in late 1994, and began to test new equipment and production systems in June of 1995. Several employees were hired for this purpose, all of whom had previously been working at the Drinkwater plant.

Around the same period, negotiations were completed for the sale of the shares of Lo Rider Industries Ltd., as well as the complete assets of Brown Industries (1976) Ltd. and Pro-More Industries Inc., to a subsidiary of an American corporation; the subsidiary was registered in Saskatchewan as Raider Industries Inc. Mr. Martin Brown, who, along with his father, owned the shares in the three corporate entities named in the certification Order, remained as the President of Raider Industries Inc.

Several months after the first employees began to test the system of production in the Moose Jaw plant, on September 14, 1995, an application, now designated as LRB File No. 238-95, was filed on behalf of the Raider Industries Employee Association, seeking certification for a bargaining unit at the Moose

Jaw location. The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union challenged the standing of the Employee Association, alleging that it was not a trade union within the meaning of *The Trade Union Act*, and also that it had been influenced by the Employer.

The Union also filed two applications, dated September 28, 1995. In one of them, designated as LRB File No. 274-95, the Union, among other things, alleges that the Employer committed an unfair labour practice by refusing to consider an initial proposal to expand the scope of the bargaining unit at Drinkwater to include Moose Jaw, and a subsequent proposal to confer transfer rights on the employees at Drinkwater. In the other, designated as LRB File No. 275-95, the Union sought a determination of successorship under s.37 of the *Act*.

All three of these applications were scheduled for hearing by this Board commencing on January 10, 1996.

On Monday, January 8, 1996, 51 or 52 employees from the Drinkwater plant were offered the opportunity to move to the plant in Moose Jaw. This first came to the attention of the Union on January 10, when they were interviewing their witnesses prior to the commencement of the hearing before the Board. When the Board convened to hear the applications, counsel for the Union initially sought an adjournment to consider the implications of this development, and served notice that he wished the Board to give an early hearing to an application for an injunction based on a number of provisions of *The Trade Union Act*, including the technological change provision, s. 43.

Neither counsel for the Employer nor counsel for the Raider Industries Employee Association opposed the granting of such an adjournment, and both agreed that they would be prepared to make representations concerning the injunction on Thursday, January 11, 1996.

Shortly after the hearing adjourned on this basis, counsel for the Union and counsel for the Employer asked that the Board reconvene on the afternoon of January 10. They wished the Board to determine a single question, that of whether the certification Order for the bargaining unit represented by the Union did or should cover the Moose Jaw location. They agreed that they would be bound by the decision of the Board in this respect, and that such a determination would make it possible for both parties to assess the impact of the recent changes on the applications to be heard by the Board, and on their

relationship in general. Counsel accepted that the determination of this question would be without prejudice to the hearing on the injunction application if that were still appropriate.

The Board reconvened to hear representations on the single question concerning the application of the certification Order to the Moose Jaw plant. Counsel for the Employee Association acceded to this way of proceeding. He acknowledged that this question really concerned an issue which lay between the Union and the Employer, though its outcome would have implications for his client, and he indicated that he would make no representations.

In its original application, the Union had indicated that they would ask the Board to reconsider the original Decision to define the bargaining unit on the basis of the Moose Jaw plant. At the hearing on January 10, counsel for the Union suggested that a reconsideration of the original Decision would be in order. In the alternative, he suggested that the Board should accept the submissions of the Union as an application for amendment of the certification Order under s. 5(j) of *The Trade Union Act*, which reads as follows:

> *5 The board may make orders:*
>
> *(j) amending an order of the board if:*
>
> *(i) the employer and the trade union agree to the amendment; or*
>
> *(ii) in the opinion of the board, the amendment is necessary.*

In deciding how any particular bargaining unit should be defined, the Board is always faced with a number of factors. One of these is the question of how the employees who are to be included within the unit will be described, and whether that group of employees constitute an appropriate bargaining unit in the sense that their interests form a sensible and viable basis for a collective bargaining relationship. We will be alluding to this issue at a later point in these Reasons.

Another issue is how the unit should be described in geographic or physical terms. In dealing with this aspect of the description, the Board has always been cognizant of the need to balance a number of considerations related to the policy of *The Trade Union Act*. On the one hand, the Board has acknowledged that, once the employees have made a choice to be represented by a trade union, as they are entitled to do under s. 3, efforts must be made to prevent that choice from being frustrated or manipulated because of subsequent additions to the work force or reorganizations within the unit. It is

generally accepted that, as long as new employees, or new classifications of employees, can be regarded as reasonably falling within the description of the bargaining unit, they are subject to the requirements established in union security provisions, and the Union does not have to obtain the support of these individual employees.

On the other hand, the Board has also been concerned that bargaining unit boundaries not be cast so wide as to preempt the decisions of future groups of employees who were not or could not be contemplated by the original application of the Union. In a decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Sunnyland Poultry Products Ltd.* (1993), 2nd Quarter Sask. Labour Rep. 213, the Board reviewed the development of our thinking on this issue. In that decision, the Board quoted the succinct statement on this point contained in the Decision of the Canada Labour Relations Board in *National Association of Broadcast Employees & Technicians v. New Brunswick Broadcasting Co.* (1988), 75 di 101 at p. 112:

> *As such, these employees have a legitimate right under the Code to select a bargaining agent of their choice. In these circumstances, it is our respectful opinion that it would run counter to the fundamental principles of the Code to sweep the MITV Halifax employees into NABET's existing bargaining unit in New Brunswick on the strength of the wording of the 1982 certification order. To do so would be to permit NABET to circumvent the majoritarian requirements of the certification process and would tilt the purposes of the Code towards trade unions as institutions rather than for the interest of the employees for which it was intended.*

In *United Steelworkers of America v. Industrial Welding (1975) Ltd.* (1986), February Sask. Labour Rep. 45 at p. 46, this Board commented as follows:

> *However, apart from bargaining units in the construction industry (which are unique for a number of reasons that need not be dealt with here) the geographical area in bargaining unit descriptions should not ignore the actual scope of an employer's operations. One reason is that geography alone may affect the Board's view of whether one group of employees shares a community of interest with another group working at a distant location. Another is that an unreasonably wide area of certification may be inconsistent with the fundamental right of employees to bargain collectively through a trade union of their own choosing, which is protected by Section 3 of The Trade Union Act.*

In our original Decision concerning the application for certification of this Union with this Employer, we summarized our position on p. 78 in the following terms:

> *The Board has sought to draw a balance between encouraging collective bargaining on the widest possible basis for the employees who are employed at the time certification occurs, and recognizing the right of a trade union to represent employees whose employment is purely hypothetical, and who may be*

> *disenfranchised as a result. In special circumstances, such as those which are obtained in the construction industry, the Board has sometimes concluded that the only way to ensure that the rights of employees to engage in collective bargaining are not defeated is to recognize a bargaining unit whose scope is defined to include the entire geographic area of the province. In general, however, the Board has not thought it advisable to approve such bargaining units, and we see no compelling reason to depart from that policy in this case.*

In the decisions which the Board reviewed in the *Sunnyland Poultry* case, it is clear that the Board has tried to draw lines in describing the bargaining unit, both in geographical terms and in terms of the description of the type of employees who are included within it, which will bear a fairly accurate relationship to the operations of an employer at the time, the group of employees among whom the trade union has conducted organizing activities, and a logistical base which will not render collective bargaining unduly difficult. As we have said, in some cases, the result of these considerations is a bargaining unit description which covers a broad geographic scope, although this is somewhat unusual outside the construction industry. In other cases, the geographic description is limited to one location which represents the current geographic status of the operations of the employer, or which seems to us to be the most workable basis for conducting collective bargaining.

The point of our decisions is not to relieve a trade union of any obligation to obtain the support of groups of employees who either were not in existence at the time we first set out the scope of the bargaining unit, or who were excluded from the range of the organizing done by the trade union prior to that. Thus, for example, if the Union now wished to expand the bargaining unit to take in office employees who were expressly excluded from the scope of the original organizing, and the original certification Order, it is likely that the Board would require the Union to demonstrate that they enjoy the support of the majority of this group of employees.

In making these determinations, it is often necessary for the Board to draw some conclusions about how circumstances are likely to evolve in the future, because any determination of what constitutes the appropriate bargaining unit rests on an assessment of what will best serve the parties in developing a sound collective bargaining relationship.

Based on this, we do not think there is any basis for concluding that the original certification Order should be reconsidered. At the time that Order was made, as on this occasion, the Board had the benefit of evidence from Mr. Martin Brown which was clear, complete, and, in our opinion, candid. As

far as he knew, and as far as anyone knew, at the time of that determination, what was anticipated was that the Moose Jaw plant would be an entity quite distinct from the Drinkwater operation. Mr. Brown made it clear that his hope and expectation was that a new and separate workforce would be in place in Moose Jaw. Although he did not rule out the possibility that some employees from Drinkwater might be allowed to move to Moose Jaw, he said that he wanted to retain the existing group of employees, as completely as possible, at the Drinkwater operation in order to prevent disruptions in production there. The expectation was that a new group of employees, more or less equal in size, would be hired in Moose Jaw to undertake the production of distinct lines of products, under a distinct corporate entity.

On the other hand, though we do not think our determination on this basis is in need of correction, we are of the view that circumstances have altered considerably since the certification Order was granted, and we have decided that the application for amendment of the certification Order should be granted, pursuant to s. 5(j) of *The Trade Union Act*.

In his evidence at the hearing, Mr. Brown described significant changes in the evolution of the operation of the company in Moose Jaw. For reasons having to do with the size of the Moose Jaw plant, the extensive renovation which had been made to the building, and the imposition of new sales targets required by the new owners of the company, the Employer had decided that, rather than proceeding with the production of a distinct and limited new line of products at Moose Jaw, a significant part of the production then done at Drinkwater would be moved to Moose Jaw. Mr. Brown said that when they started up the Moose Jaw plant, the system and the equipment were tested in connection with a line of low-cost truck caps which had not been produced at Drinkwater, and the initial group of employees were hired with this in mind. He said that, over a period of some months, a series of decisions were taken concerning production at the Drinkwater and Moose Jaw plants. The implications of these decisions, however, were not all clear at the outset. He testified, for example, that it was only in the week before Christmas of 1995 that the decision was made to move the production of truck caps from Drinkwater to Moose Jaw, along with the large group of employees then connected with their production in Drinkwater. According to Mr. Brown, he now envisages the continued production of truck lids and moulds at Drinkwater, which will necessitate the modification of those premises, and the hiring of additional employees there.

Mr. Brown said that the final shape of the management structure had not been completely worked out,

but that he thought, in addition to himself, there would be a General Manager who would oversee the operation of both plants. There would also be an Operations Manager, a Transport Manager, a Paint Manager, and perhaps others, with responsibilities at both locations. He said that there would also be a Plant Manager at each location. He was hopeful that one Human Resources Manager could serve both plants.

Based on the evidence of Mr. Brown, we have concluded that there has been a significant change in the relationship between the two operations in the mind of the Employer. At the time of the first hearing, it was envisioned that the Moose Jaw plant would develop as a separate entity, with distinguishable goals and an essentially new workforce. It is clear that this vision has been considerably modified, and that the Employer now views the plants at the two locations as being part of an integrated and interwoven operation. This is most dramatically illustrated, perhaps, by the decision to reallocate the existing workforce between the two plants, and to leave a minority of that workforce at Drinkwater.

In delineating bargaining units, the Board has often commented on our responsibility to ensure that the bargaining units which are created under our auspices are appropriate as vehicles for carrying out the policy objectives of *The Trade Union Act*. Counsel for the Employer suggested that there was nothing in the changes which have occurred which would render the continued existence of a separate unit at Drinkwater inappropriate, and we have to agree with this; if this were the only choice available, there is no question that the Board would be reluctant to deny access to collective bargaining to the remaining employees at Drinkwater.

As the Board has pointed out in the past, however, it is part of our responsibility to consider not only whether a proposed unit is an appropriate one, but whether there is a more appropriate way of defining the bargaining unit, one which will be more in keeping with the goals of the *Act*.

In our view, given the developments which have occurred since we issued the certification Order, the appropriate unit would now consist of employees at both locations. The vast majority of employees in Moose Jaw were, prior to this week, among those who selected the Union as their representative for the purpose of bargaining collectively, and the concern of the Board with protecting the rights under s. 3 of a future group of employees not yet in being cannot be said to be of significant force in this situation.

The amended form of s. 5(j) gives the Board considerable flexibility in making decisions with respect to

the amendment of previous orders. We have said that we do not interpret this amendment as obviating the application of open periods in the ordinary course of events; it should not be viewed as an invitation to make applications to the Board without regard for the open periods, which are a useful means of creating order and predictability in most situations.

On the other hand, even prior to the amendment of s. 5(j), the Board indicated, in a decision in *University of Saskatchewan Faculty Association v. University of Saskatchewan* (1986), April Sask. Labour Rep. 34, that there are occasions when the strait-jacket of rigid open periods does not always serve well to support the objectives of the *Act*.

In this case, the parties have reached a critical juncture in their collective bargaining relationship, in large part because of the continuing uncertainty and friction caused by the changes which have been taking place in relation to the Moose Jaw location. We think they are correct in pointing to a determination of the issue of the scope of the certification Order as a means by which other issues outstanding between them might be moved towards a resolution.

Counsel for the Union suggested that, if the Board were to come to this conclusion, it would be appropriate to dismiss the application for certification from the Employee Association. Since counsel for the Association did not participate in this phase of the proceedings, we indicated at the hearing that we were not prepared to dismiss the application at this point. We prefer to give the Employee Association an opportunity to consider the implications of this decision, and to make further representations to the Board if they wish.

For the reasons we have given here, we have decided to allow the application for amendment of the certification Order, and will issue the amended Order.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and PRAIRIE MICRO-TECH INC., REGINA, SASKATCHEWAN, Respondent

LRB File No. 201-95; January 12, 1996
Chairperson: Beth Bilson; Members: Gerry Caudle and Ken Hutchinson

For the Applicant: Larry Kowalchuk
For the Respondent: Dennis Ball, Q.C.

First contract arbitration - Review of principles - Board provides preliminary guidelines indicating approach to first contract arbitration.

Practice and procedure - First contract arbitration - Board provides preliminary guidelines for approach to first contract arbitration.

Practice and procedure - Board agent - Board appointing agent to assist parties with respect to issues raised in application for first contract arbitration.

REASONS FOR DECISION

FIRST CONTRACT ARBITRATION: PRELIMINARY GUIDELINES

Beth Bilson, Chairperson: The Saskatchewan Joint Board Retail, Wholesale and Department Store Union represents a unit of employees of Prairie Micro-Tech Inc. The Union was designated as the bargaining agent for these employees in a certification Order issued by this Board on July 4, 1994.

Prior to the commencement of bargaining between the parties, the Union undertook selective industrial action, and the Employer locked out the employees for a period. More recently, beginning on July 26, 1995, a further lock-out occurred. This lock-out came to an end when the Union filed this application, dated July 27, 1995, asking for first contract arbitration under s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c.T-17, which reads as follows:

> *First collective bargaining agreements*
>
> *26.5(1) Either party may apply to the board for assistance in the conclusion of a first collective bargaining agreement, and the board may provide assistance pursuant to subsection (6), if:*
>
> > *(a) the board has made an order pursuant to clause 5(a), (b) or (c);*
> >
> > *(b) the trade union and an employer has bargained collectively and have failed to conclude a first collective bargaining agreement; and*

(c) any of the following circumstances exist:

(i) the trade union has taken a strike vote and the majority of those employees who voted have voted for a strike;

(ii) the employer has commenced a lock-out; or

(iii) the board has made a determination pursuant to clause 11(1)(c) or 11(2)(c) and, in the opinion of the board, it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement pursuant to subsection (6).

26.5(2) If an application is made pursuant to subsection (1), an employee shall not strike or continue to strike, and the employer shall not lock out or continue to lock out the employees.

26.5(3) An application pursuant to subsection (1) must include a list of the disputed issues and a statement of the position of the applicant on those issues, including the applicant's last offer on those issues.

26.5(4) All materials filed with the board in support of an application pursuant to subsection (1) must be served on the other party within 24 hours after filing the application with the board.

26.5(5) Within 14 days after receiving the information mentioned in subsection (4), the other party must:

(a) file with the board a list of the issues in dispute and a statement of the position of that party on those issues, including that party's last offer on those issues; and

(b) serve on the applicant a copy of the list and statement.

26.5(6) On receipt of an application pursuant to subsection (1):

(a) the board may require the parties to submit the matter to conciliation if they have not already done so; and

(b) if the parties have submitted the matter to conciliation or 120 days have elapsed since the appointment of a conciliator, the board may do any of the following:

(i) conclude, within 45 days after undertaking to do so, any term of terms of a first collective bargaining agreement between the parties;

(ii) order arbitration by a single arbitrator to conclude, within 45 days after the date of the order, any term or terms of the first collective bargaining agreement.

26.5(7) Before concluding any term or terms of a first collective bargaining agreement, the board or a single arbitrator may hear:

(a) evidence adduced relating to the parties' positions on disputed issues; and

(b) argument by the parties or their counsel.

> *26.5(8) Notwithstanding section 33 but subject to subsections (9) and (10), the expiry date of a collective bargaining agreement concluded pursuant to this section is deemed to be two years from its effective date or any other date that the parties agree on.*
>
> *26.5(9) Notwithstanding section 33 not less than 30 days or more than 60 days before the expiry date of a collective bargaining agreement concluded pursuant to this section, either party may give notice in writing to terminate the agreement or to negotiate a revision of the agreement.*

This provision of *The Trade Union Act* was among the amendments proclaimed on October 28, 1994, and this is the first occasion on which this Board has been called upon to apply this new section. A review of the experience which tribunals in other jurisdictions have had in interpreting and applying statutory provisions governing first contract arbitration discloses that there have been a range of approaches to the use of this mechanism for the resolution of disputes.

In light of the variety of possibilities which are available, the panel to which this application has been assigned for determination have concluded that it would be worthwhile to set out some preliminary guidelines to outline the direction which this Board proposes to adopt as a starting point for the consideration of applications filed under s. 26.5.

Our purpose in doing this is twofold. Our first goal, and the one of more general significance, is to set out some clues to the general policy approach we propose to adopt with respect to applications under s. 26.5. The other goal, which is more specifically related to the application involving these particular parties, is to inform those parties of the initial response of the Board to the application, in order to guide them as they respond, in turn, to the direction which we will be making.

The deliberations which have been necessary in order to accomplish this have taken some time, and this has inevitably delayed the taking of specific steps in connection with this particular application. This is unfortunate, but it is our expectation that, in the long run, it will prove valuable to have expended the time in this way.

We should note, in any event, that our decision to proceed in this way was in part inspired by the form of the application itself, which presents in a clear - and perhaps extreme - manner the question of what the essential premises and purposes of first contract arbitration might be. In the application, the Union essentially seeks a first contract arbitration with respect to all proposals which have been made for provisions to be included in their first agreement.

Though this Board is not bound by the decisions which have been made elsewhere concerning this issue, and though the statutory provisions which are in place in other jurisdictions differ significantly from the terms of s. 26.5, it is our view that it is always helpful to look to other jurisdictions in order to benefit from the experience they have had with implementing a statutory initiative.

The first Canadian manifestation of the notion of first contract arbitration occurred in British Columbia in 1973, at a time when the trade union legislation in that province was undergoing considerable change. The idea was formulated in response to a particularly acrimonious dispute which was taking place in British Columbia at the time.

It should be noted that the concept of first contract arbitration was greeted initially with widespread skepticism and hostility. Reservations were expressed even by Professor Paul Weiler, who went on to take a significant part in the drafting and application of the British Columbia provisions, and to become a strong proponent of first contract arbitration in appropriate circumstances. The basis of much of the resistance to the idea of first contract arbitration was a concern that it would involve excessive interference in the collective bargaining relationship between the parties, and in the ability of the parties to such relationships to exercise their bargaining power fully. This resistance, it may be said, emanated from trade unions as well as employers.

The provisions of the British Columbia *Labour Code* which were ultimately enacted appear to have responded to this concern about the potential damage to the collective bargaining relationship both by requiring a ministerial referral to initiate consideration of the first contract arbitration remedy, and by leaving considerable discretion in the hands of the Labour Relations Board to allow them to use the remedy consistently with their stated commitment to healthy collective bargaining.

The jurisprudence of the British Columbia Board from the period following 1973 demonstrates that they took a fairly restrictive approach to the use of first contract arbitration, and that they regarded it as a remedy to be used in exceptional circumstances, circumstances which are encapsulated as follows in the decision of that body in *Miscellaneous Workers', Wholesale and Retail Delivery Drivers and Helpers Union v. London Drugs*, [1974] 1 C.L.R.B.R. 140 at pp. 142-143:

> *A union has made its first appearance with an employer and has organized a relatively small unit. The employer opposed certification by one device or another, perhaps making veiled threats about the consequences of unionization or even*

> *going to the lengths of firing a union supporter. Notwithstanding this opposition, the union receives certification from the Board, but its bargaining authority is tenuous. From that position it must try to negotiate a first contract. The employer may drag these negotiations out, consenting to talk only about the language and structure of the agreement, and refusing to put any monetary offers on the table until all these details are settled. Meanwhile, some members of management may have hinted to employees that they could receive a substantial pay increase without the union. Eventually, the union, unable to secure an agreement, calls a strike. However, some employees, both those originally opposed to the union and those now disenchanted by the lack of tangible results, refuse to go out. Those who do strike are easily replaced because of the small size of the unit and the fact that the employees are not highly skilled. In that situation, the union has no economic leverage to budge the employer, negotiations and mediation are futile, and the employer can wait the union out. Eventually, a decertification application becomes timely and those who are then working may be a sufficient majority to achieve that result.*
>
> *The basic scenario, with variations in some of the details, is a very familiar one. It constitutes a persistent flaw in the actual working-out of the labour relations policy of the legislation. The fundamental premise of the statute is that collective bargaining is to be facilitated when it is the choice of the majority. The reality is that a large number of small units, although organized and certified, never succeed in reaching a collective agreement. There is a specific requirement in s. 6 of the Code that parties should bargain in good faith but experience has shown that this does not cast a fine enough net to deal with the variety of methods by which bona fide and reasonable collective bargaining may be frustrated. What the Legislature has proposed in s. 70 is a positive remedy which it is hoped will do a better job than the standard device of cease and desist orders.*

The decision of the British Columbia Labour Relations Board in *Kidd Brothers Produce Ltd. v. Miscellaneous Workers, Wholesale and Retail Delivery Drivers and Helpers Union*, [1976] 2 C.L.R.B.R. 304, illustrates as well that they thought the first contract remedy worthwhile only where the collective bargaining relationship could reasonably be expected to survive. Though the British Columbia Board found in that case that the Employer had committed a number of unfair labour practices - and awarded a number of other remedies in this respect - they went on to say at pp. 318-319:

> *The fact is that the Union no longer enjoys any support among the employees in the bargaining unit, and there are no real prospects for a rejuvenation of this support. In these circumstances, the imposition of a first collective agreement would be a fruitless exercise, and would not be in keeping with the spirit of the remedy.*

In subsequent commentary on the mechanism of first contract arbitration, in his well-known book *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980),

Weiler identified three goals for its use: the resolution of specific disputes; the institution of a period of "trial marriage" which would allow a collective bargaining relationship which was off to an inauspicious start to become stable and mature; and the prevention of activity on the part of recalcitrant employers which is aimed at undermining the effectiveness of a trade union.

In *Reconcilable Differences*, and in an interview which was described by Constance Backhouse in "The Fleck Strike: A Case Study in the Need for First Contract Arbitration" (1980) 18 Osgoode Hall L.J. 495, Professor Weiler stated his conclusion that first contract arbitration had been relatively successful in relation to the goals of derailing industrial disputes and deterring anti-union conduct on the part of employers. He was less sanguine about the capacity of an imposed first agreement to set a bargaining relationship on a sound footing; though the investigative and interventionary procedures which accompanied an application for first contract arbitration might well induce the parties to reach an agreement themselves, he pointed out the strong correlation between cases in which an agreement had eventually been imposed by the Board and those in which the trade union was ultimately decertified.

For a variety of reasons, there was a lengthy hiatus in the use of first contract arbitration in British Columbia. No cases of this kind were considered between 1980 and 1993, at which time the British Columbia Labour Relations Board considered the implications of revised provisions of the *Labour Relations Code*. In a decision in *Yarrow Lodge Ltd. v. Hospital Employees' Union* (1993), 21 C.L.B.R. (2d) 1, that tribunal reviewed the past jurisprudence in British Columbia, as well as the experience of other jurisdictions. The British Columbia Board also alluded to the report of a Sub-Committee of Special Advisors, which had commented on proposals for statutory reform prior to the amendment of the *Labour Relations Code*.

On the basis of this review, the British Columbia Labour Relations Board drew the following conclusion at p. 29 about the purpose of the first contract arbitration remedy under the amended provisions:

> *It is clear that these criteria go beyond the bad faith/exceptional remedy test which seemed to be simply an extension of the unfair labour practice remedies. Although the bad faith/exceptional remedy test appeared to leave the traditional labour relations ethos intact, it failed to achieve one of the very purposes for which it was enacted - the establishment of enduring collective bargaining relationships. Although this approach was in many respects necessary for the initial acceptance of*

> *first collective agreement policy, the subsequent adoption of this remedy in a majority of jurisdictions in Canada, and our subsequent labour relations experience in regard to this remedy, has moved the policy model from a bad faith/exceptional remedy test to a mediation/breakdown model. Therefore, Section 55 and first collective agreement imposition no longer fall within an unfair labour practice framework. It is instead a remedy which attempts to repair the breakdown in first contract negotiations resulting from the conduct of one of the parties, even if that conduct is not a violation of the unfair labour practices provisions of the Code.*

The British Columbia Board went on to outline on p. 30 the following principles as the basis for dealing with candidates for first contract arbitration:

> 1. *First collective agreement imposition is a remedy which is designed to address the breakdown in negotiations resulting from the conduct of one of the parties. It is not simply an extension of the unfair labour practice remedies for egregious employer conduct.*
>
> 2. *The process of collective bargaining itself, to whatever extent possible, is to be encouraged as the vehicles to achieve a first collective agreement.*
>
> 3. *Mediators should be assigned early into first collective agreement disputes in order to facilitate and encourage the process of collective bargaining and to educate the parties in the practices and procedures of collective bargaining.*
>
> 4. *The timing of the imposition of a first collective agreement (if it is deemed appropriate that one be imposed) should not be at the end of the negotiation process when the relationship has broken down and is irreparable, but rather should take place in a "timely fashion", after the mediator has identified "the stumbling blocks" in the dispute and what is needed in order to "avoid" an irreparable breakdown in the collective bargaining relationship.*

Amendments were made to *The Canada Labour Code* in 1978 to provide for the imposition of a first contract; these provisions were modeled on the British Columbia provisions legislated in 1973, and their purpose was described as follows by the Minister of Labour, the Honourable John Munro, in his comments to the Standing Committee on Labour, Manpower and Immigration:

> *The purpose of Clause 63 is to overcome this short-coming. Under the terms of this proposal, the Minister of Labour would be authorized to refer to the board a dispute arising out of the failure of an employer and newly certified bargaining agent to conclude a collective agreement. The referral would take place only after the time is reached when a lawful strike or lock-out could take place. Once referred, the board would be empowered to settle the terms and conditions of the first collective agreement. The proposed amendment is in no way designed to undermine free collective bargaining, but rather is intended to overcome unethical and unjust bargaining tactics that are undermining the collective bargaining process and creating serious dissatisfaction with the equity of the system.*

In early cases, the Canada Labour Relations Board appear to have interpreted their mandate under s. 171.1 of *The Canada Labour Code* quite narrowly. In *Royal Bank of Canada v. Syndicat des employes de commerce*, [1982] 1 C.L.R.B.R. 16, the Canada Board concluded at p. 33 that a first contract should not be imposed where the parties were both simply using vigorous bargaining tactics to pursue their objectives:

> *If the Board were to impose a first collective agreement to get the parties out of the impasse that they have reached, we would create another avenue which would allow union and employer negotiators to develop the impasse which gives them access to Section 171.1 in an attempt to obtain a little more than they could at the bargaining table. The Board feels that bargaining is essentially a private matter between a union and en employer and we should not encourage the parties to abdicate their responsibilities by encouraging them to turn to a third party who will make the final decision for them.*

In a decision in *CJMS Radio Montreal Limitee et al. v. Syndicat General de la Radio et al.*, [1979] 1 C.L.R.B.R. 332 at p. 367, the Canada Labour Relations Board also commented as follows:

> *The Board also firmly believes that the worst settlement that might be agreed to by a party is worth a hundred times as much as an imposed settlement. There are several maxims which convey the idea that every trader becomes enamoured of the object for which he has bartered, even if it was the worst possible transaction. This is very true in labour relations.*
>
> *The Board is also of the opinion that parties should not anticipate that when the terms and conditions of a collective agreement are imposed, they will be able to persuade the Board to agree to innovative or exceptional clauses.*
>
> *Furthermore, the Board sincerely believes that Parliament has provided itself with a remedy against bad faith and intransigence, and we stress this second term. Finally, this Board also trusts that the main virtue of Section 171.1 rests much more with the dissuasive effect of its existence in the Code that (sic) with its repeated application.*

In a later case, *Union of Bank Employees, Local 2104 v. Canadian Imperial Bank of Commerce* (1986), 86 C.L.L.C. ¶16,023, the Canada Board seems to have relaxed this restrictive approach somewhat, though the Board continued to emphasize that the remedy was not intended for use in routine circumstances. In that decision, the purpose of first contract arbitration was described as follows at p. 14,197:

> *It was not merely coincidence that Parliament took steps to bring in first contract settlement provisions in 1978 while it was shoring up the certification process. The two are intrinsically linked. It can be seen from the foregoing review that section 171.1 has more to do with the reinforcement of the certification process than it has to do with the settlement of contract provisions in a compulsory arbitration sense. The settlement of first collective agreements by the Board was primarily intended to*

> *give support and some meaning to the exercise of the fundamental freedom of association rights of employees. It was not just some aimless governmental intrusion into the free collective bargaining system, nor was it simply a prop for weak unions as some commentators have described the concept of first contract settlements. Parliament had no interest in balancing bargaining powers vis-a-vis the ability of newly organized employees to wrest substantial gains in benefits from their employer. Section 171.1 was aimed at bringing into line those employers who, having been finessed of the opportunity to influence the certification process, decide to turn first contract negotiations into a recognition struggle for the bargaining agent by refusing to participate in any meaningful collective bargaining. That notion is further supported by Parliament's adoption of the British Columbia approach which provides for selective intervention by the Board where the collective bargaining regime is challenged, as opposed to the Quebec model which consists of ad hoc tribunals, two of whom are nominated by the parties, acting in a compulsory interest arbitration role.*

As in British Columbia, the advent in Ontario, in 1986, of provisions for first contract arbitration was greeted with some wariness on the part of labour and employers. Four years later, the then Vice-Chair of the Ontario Labour Relations Board, Ms. Judith McCormack, made the following comment in an article entitled "First Contract Arbitration in Ontario: A Glance at Some of the Issues" (1991) Labour Arbitration Yearbook 241:

> *Four years later, it is possible to say that the legislation has proved to be something less than was either hoped or feared. It has also become clear, however, that it raises more questions than it answers, and that some of the dilemmas and issues which have plagued interest arbitration generally are not resurfacing in this context.*

She went on to outline the Ontario approach in the following terms:

> *The Ontario Board has described section 40a as a "unique facilitative tool" which, while it does not supplant the primacy of the free collective bargaining process, represents the Legislature's acknowledgement of the significance of the first contract to a collective bargaining relationship. It does not conflict with the Canadian Charter of Rights and Freedoms. The legislation is remedial and should be given a liberal construction, according to the Board, but it does not contemplate automatic access to arbitration in all cases where parties are unable to negotiate a first agreement. Rather, there must be a causal connection between one of the conditions specified and the breakdown in negotiations. At the same time, it is not necessary to show that a party has been bargaining in bad faith, and in two cases the Board directed arbitration where bad faith bargaining complaints had been previously dismissed. Moreover, no deliberate intention to harm the bargaining process is necessary, and no anticipathetic animus is required. An arbitration direction is not a penalty of egregious conduct on the part of an employer, but a special mechanism to repair or strengthen a malfunctioning labour relationship which may apply even where a party's conduct stems from ignorance, inexperience or ineptitude.*

> *The Board has recognized that bargaining is a reciprocal, dynamic process and scrutiny must therefore be extended to the totality of that process, including the applicant's conduct. However, there is no threshold test that the applicant's conduct must meet; rather, it is primarily relevant to the extent that it sheds light on whether the conditions for access have been met by the respondent's conduct. The mere fact that a collective agreement has not been reached is not determinative of whether collective bargaining is unsuccessful where it has not been allowed to run its full course, although it is not necessary for a party to bargain where it would be obviously futile.*

This description is consistent with the comment made by the Ontario Labour Relations Board in *Nepean Roof Truss Limited v. United Brotherhood of Carpenters and Joiners of America* (1986), 13 C.L.R.B.R. (N.S.) 64 at p. 69:

> *16. It is clear from these provisions that the legislature has acknowledged the significance to the collective bargaining relationship of the first contract, and has given statutory recognition to the potential difficulties that may be encountered in achieving it. This remedy does not supplant the primacy of the free bargaining process; rather, it recognizes that the negotiation of the first agreement may sometimes be thwarted by unjustified intransigence. Although this is remedial legislation and should be given a liberal construction and interpretation, the scheme of section 40a does not envision the automatically imposed settlement of a first collective agreement in all cases where the parties are unable to negotiate one. What it provides is access to this remedy where certain conditions precedent have been met. These conditions are enumerated in cls. (a) - (d) of s. 40a(2).*

The statutory provisions governing first contract arbitration in British Columbia, Ontario and the federal jurisdiction display considerable variation. As a general proposition, however, these schemes are characterized by the requirement for a decision on the part of the relevant labour relations tribunal that first contract arbitration is warranted, generally because of some fault on the part of one of the parties to collective bargaining, and by a cautious and minimalist approach to the actual imposition of terms and conditions of an agreement.

This may be contrasted with the systems in place in Manitoba and Quebec. In 1982, Manitoba adopted a "no-fault" system, in which the only prerequisite for access to arbitration is the exhaustion of conciliation; the Manitoba Labour Relations Board exercises jurisdiction as the interest arbitrator in these cases, applying a broad set of criteria.

The experience in Manitoba has been summarized by Grant Mitchell, in "Private Sector Statutory Interest Arbitration: The Manitoba Experience in the Canadian Context - Imposed First Contracts and

Final Offer Selection" (1992) Can. J.A.L.P. 287, as follows, at pp. 296-97:

> *These characteristics made Manitoba's first contract imposition significantly different from its antecedents in their other jurisdictions. This has led to a number of differences in experience under the Manitoba legislation:*
>
> 1. *it is utilized more (proportionately);*
> 2. *employers are more frequently the applicants, especially in order to avoid what might otherwise have been an effective strike;*
> 3. *more commonly the bargaining relationship survives imposition of the first contract;*
> 4. *there are far fewer allegations of bargaining table misconduct/unfair labour practices, as these are immaterial to an application;*
> 5. *mediation prior to imposition has been used successfully by the board on many occasions; and*
> 6. *some employers have felt sufficiently frustrated to have pursued an attack (unsuccessful) on the legislation under the Charter of Rights and Freedoms that lasted 4 years. (Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832, (1987) 1 S.C.R. 110, (1987) 3 W.W.R. 1; Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832, (1990) 1 W.W.R. 373 (Man. C.A.), leave to appeal to S.C.C. refused (1990), 67 Man. R. (2d) 80 (S.C.C.).*

In Quebec, the parties to collective bargaining have, since 1977, had liberal access to interest arbitration panels, which have the jurisdiction to establish a complete first contract.

We do not claim here to have provided a detailed history of the genesis and use of first contract arbitration as a mechanism for the resolution of problems in collective bargaining prior to the conclusion of a first contract. Rather, we have summarized the evolution and characteristics of the provisions concerning first contract arbitration in other provinces in order to give some idea of the options which have been considered and tried.

As we indicated earlier, it is somewhat difficult to draw general conclusions from the experience in other provinces. One of the factors which contributes to this difficulty is the moderate use which has been made of first contract arbitration, even in jurisdictions such as Manitoba, in which there is direct access to first contract arbitration. In the first three years of the Ontario legislation, for example, 70 applications had been made, but only 14 of these had been the subject of any decision by the Ontario Labour Relations Board, and only eight had actually been submitted to arbitration. The strongest statistical support cited by Professor Weiler for his conclusions with respect to the effectiveness of first

contract arbitration is, indeed, the absence of applications.

A number of features can be identified, however, from examining the experience in other jurisdictions than our own. We can see, for example, that all of the legislative initiatives which have been put in place represent an acknowledgment of the peculiar problems which can arise in the context of an infant collective bargaining relationship. A review of the jurisprudence shows that the problem which most often gives rise to the use of first contract arbitration is the obduracy or illegal conduct of an employer who is determined to thwart or ignore the trade union. Other problems may also threaten to destroy the relationship, such as, for example, the emergence of an insoluble industrial dispute, or roadblocks created by the incompetence or inexperience of negotiators on either side.

We can also discern in the experience of other jurisdictions a continuing effort to draw a sustainable balance between the underlying objective of promoting healthy and independent bargaining by the parties themselves, and that of avoiding a situation where the bargaining process is exposed to the risk of damage or destruction because of the conduct or inexperience of the parties. In attempting to draw this balance, legislatures have adopted one of two general models - one which requires some determination of the necessity for first contract arbitration, and one which allows the parties themselves to decide when to avail themselves of this mechanism. The former model is exemplified by the legislation in British Columbia, Ontario, Newfoundland and the federal jurisdiction, and the latter by the Manitoba and Quebec statutes.

In this context, tribunals and commentators in all jurisdictions have laid great stress on the proposition that first contract arbitration is not intended to replace bargaining between the parties, but to foster and support it.

A third general point which may be made is that, while first contract arbitration has had its fierce critics, and its less fierce proponents, the result of historical experience seems to have been a conclusion that first contract arbitration can be neither an exclusive nor a comprehensive remedy for the problems which may arise early in a collective bargaining relationship. It fills a modest role as an adjunct to other remedies and mechanisms which address related issues.

Over the lifetime of *The Trade Union Act*, this Board has on many occasions interpreted the provisions

of the *Act* in light of what is, in our view, one of its primary objectives - the support of vigorous and sustainable collective bargaining relationships between employers and the trade unions which have been selected to represent their employees. In this connection, the Board has thought it appropriate to refrain from intruding unduly upon the bargaining relationships which lie under our supervisory eye, and from attempting to influence the outcome of the bargaining which takes place.

Our reading of s. 26.5 is that this provision is consistent with the general approach we have taken, in that it is not intended as a substitute for the achievement of a first collective agreement by bargaining between the parties. Of the two models we have described above, it clearly belongs at the end of the spectrum occupied by the legislation in British Columbia, Ontario and the federal jurisdiction. By this we mean, particularly, that s. 26.5 calls upon the Board to make a series of threshold determinations concerning whether and when to intervene to assist the parties by imposing a term or terms of a collective agreement, and that the conduct of the parties and the state of the relationship are relevant considerations in making these determinations.

To use the language of the *Yarrow Lodge* decision, *supra*, of the British Columbia Labour Relations Board, it is our view that it falls within the "mediation/breakdown" region of this end of the spectrum, rather than the "bad faith/extraordinary remedy" area. We draw this conclusion from the definition in s. 26.5(1) of the conditions which may trigger the use of first contract arbitration. Section 26.5(1) reads as follows:

> *26.5(1) Either party may apply to the board for assistance in the conclusion of a first collective bargaining agreement, and the board may provide assistance pursuant to subsection (6) of:*
>
> *(a) the board has made an order pursuant to clause 5(a), (b) or (c);*
>
> *(b) the trade union and an employer have bargained collectively and have failed to conclude a first collective bargaining agreement; and*
>
> *(c) any of the following circumstances exist:*
>
> *(i) the trade union has taken a strike vote and the majority of those employees who voted have voted for a strike;*
>
> *(ii) the employer has commenced a lock-out; or*
>
> *(iii) the board has made a determination pursuant to clause 11(1)(c) or 11(2)(c) and, in the opinion of the board, it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement pursuant to subsection (6).*

The first two conditions permit either party to apply to the Board if bargaining has broken down and a strike is in the offing, or a lock-out has occurred.

The third requires the Board to examine the conduct of either or both of the parties in the light of the obligation to bargain set out in ss. 11(1)(c) and 11(2)(c). Our reading of s. 26.5(1)(c)(iii) is that, even if the Board determines that there has been no violation of the duty to bargain collectively, it is open to us to decide that it would be appropriate to assist the parties in the conclusion of a first collective agreement.

Section 26.5(1) as a whole allows the Board to make the determination as to whether assistance with the first agreement is appropriate. It is our opinion that, in assessing the circumstances of any application, the Board should be mindful of our overall objective of promoting - rather than replacing - collective bargaining. The occurrence of an industrial dispute or the commission of one or more unfair labour practices under s. 11(1)(c) or s. 11(2)(c), do not in themselves confer on either party an automatic entitlement to the imposition of a first contract. Even in the context of the conclusion of a first agreement, an industrial dispute may be a tolerable component of a course of bargaining which is essentially healthy.

In our view, the overall purpose of the provision is to intervene, where the situation warrants it, in an attempt to preserve the collective bargaining relationship, and the ability of the trade union to continue to represent employees.

In reference to a first contract arbitration conducted either by the Board itself or by an arbitrator, s. 26.5(6) and s. 26.5(7) refer to the setting of "any term or terms" of the agreement. It is, of course, possible to conceive of circumstances in which the conduct of an employer has been so egregious or the outlook for the conclusion of an agreement so bleak that it would be appropriate for the Board or an arbitrator to undertake the imposition of an entire collective agreement, and we see nothing in the wording of ss. 26.5(6) or (7) which would rule this out.

On the other hand, this wording suggests that the expectation would be in most cases that the Board or an arbitrator would be concerned with a limited number of terms. We have said earlier that our understanding of the purpose of this provision is that it is intended to allow the Board to reinforce the collective bargaining relationship, and to prevent inroads on the ability of the trade union to represent

employees.

It is perhaps to be expected, if the goal of the provision is seen in these terms, that the focus of the Board in devising terms of a first agreement would be on those types of provisions which support the existence and operation of the bargaining relationship, such as scope provisions, seniority provisions, provisions governing a grievance procedure, and union security provisions, to name several of the issues which might be a particular preoccupation of this Board.

This is not to say that the Board would not become involved in other categories of terms and conditions if circumstances warranted. Under certain conditions, for example, it might seem necessary to us to intervene with respect to wages, if this appeared to be an issue which threatened to prevent the collective bargaining relationship from being given a fair and reasonable chance to survive.

It is impossible to draw any clear line between the terms of a collective agreement which it would be appropriate to consider imposing under s. 26.5 and those which are best left to be worked out between the parties. It is particularly difficult to state such criteria when we are trying to formulate general policies which will serve the Board and the parties to collective bargaining well into the future.

In *Teamsters Union, Local 419 v. Crane Canada Inc.* (1988), 88 C.L.L.C. ¶16,017, an interest arbitrator under the Ontario *Labour Relations Act* outlined general principles for the guidance of those charged with considering the terms appropriate for a first contract, which principles were summarized by the British Columbia Labour Relations Board in *Yarrow Lodge*, *supra* at p. 43 as follows:

> 1. *a first collective agreement should not be a breakthrough agreement. However, it should be a sufficient award as to make collective bargaining attractive to employees;*
>
> 2. *the first agreement should be sufficiently lean to dissuade unions from turning to it as a substitute for bargaining and at the same time be seen as sufficiently generous to the employer to make them realize that it is in their own best interests to fashion their own agreement;*
>
> 3. *first agreements cannot be "the promised land" for unions which would free them from "the obligation and risk inherent in a market sensitive system of free collective bargaining"; and*
>
> 4. *at the same time, the Board in its administration of the first contract provisions must be aware of its role and purpose, which is "to foster the process of collective bargaining".*

In commenting on these and other criteria in the *Yarrow Lodge* decision, *supra*, the British Columbia Labour Relations Board made the following observations at pp. 45-46:

> *The unions in these applications clearly want the Board to impose master or standard agreements on newly certified units. The employers clearly want a collective agreement that reflects the employment status quo. In resolving this policy issue, the Board first returns to the several principles it enunciated in this decision with regard to the interpretation of the first contract provisions as whole: first, Section 55 is a remedy for the breakdown of negotiations, not an unfair labour practice remedy; second, collective bargaining is the preferred vehicle for achieving first collective agreements; third, medication is the policy choice for the resolution of first collective disputes; and fourth, the remedy is to be timely.*
>
> *Although it may seem self-evident or that we are simply stating the obvious, the policy of Section 55 is that the terms and conditions of a first contract are to be negotiated, not arbitrated. If the Board were to adopt the unions' position, as a matter of course, and impose the standard agreement, or adopt the employers' position and impose the status quo, that would be the end of collective bargaining under Section 55.*

Though this passage reflects the particulars of a different statutory regime, notably in the utilization of mediation at every stage of the process, the essential point - that first contract arbitration should reinforce rather than replace collective bargaining - is one which seems as important under our own legislation as under the provisions which are in place in British Columbia.

It is impossible to say how hard or soft this Board would be in its application of these criteria in any particular circumstances. Clearly, the conduct of the parties, the course of bargaining, the effectiveness of third party intervention and other factors would all have an effect on the degree to which it is appropriate to intervene. What we are trying to signal here is that this Board intends to take a cautious approach to providing assistance with the conclusion of first collective agreements, and that we will do everything we can to ensure that the onus continues to rest on the parties to reach a solution through bargaining.

It is our hope that our statement of this stance may have a positive influence on the continued bargaining of the parties in this case. We have conducted a careful comparison of the bargaining positions on all issues which were submitted to us in accordance with s. 26.5. It is clear that the parties have made some headway in bargaining, particularly with respect to the kinds of provisions alluded to earlier, such as union security, scope and a grievance procedure, which form the foundation on which the effectiveness of the Union as a bargaining agent must rely. The parties continue to

disagree about other aspects of the agreement. While we would not rule out undertaking an arbitration with respect to some of these matters in the future, it would in our view be premature for the Board to seize these issues at this point.

This relationship has followed a somewhat unusual course. There was an industrial dispute between the parties at a very early stage, as well as the more recent lock-out which was brought to an end by the filing of this application. In addition, an application was filed by the Union citing several unfair labour practices, and a constitutional challenge to the jurisdiction of this Board to issue the certification Order was mounted by the Employer.

At several points, a conciliator from the Department of Labour has become involved for brief periods, though the filing of this application was not directly a result of the breakdown of conciliation. Prior to undertaking any determination with respect to any terms of a first collective agreement between these parties, the Board has decided, pursuant to our general powers under s. 42 of *The Trade Union Act*, to appoint an agent to undertake two tasks. One of those would be to assist the parties in exploring whether, on the basis of the guidelines we have stated here, any or all of the issues outstanding between them may be resolved.

The other would be to report to the Board on the progress of this process, and to make recommendations to the Board concerning issues which might appropriately be the subject of arbitration by the Board. Though these recommendations would not be binding on the Board, they would clearly be of considerable value in helping the Board to decide at what point arbitration would be appropriate, and what its scope would be.

To carry out these tasks, we hereby appoint Mr. Walter J. Matkowski as an agent of the Board. We intend that it should be open to Mr. Matkowski, in consultation with the parties, to adopt whatever process and whatever methods will, in his judgment, allow the facilitation of the resolution, refinement or modification of outstanding issues by the parties, and the submission to the Board of recommendations which will be useful in taking subsequent steps with respect to this application. We direct the parties to give Mr. Matkowski their cooperation in this context.

We would expect a report on these matters from Mr. Matkowski no later than sixty days from the date

of these guidelines, January 12, 1996.

We are confident that, in light of the guidelines we have set out above, the parties in this case, with the assistance of a conciliator, will be successful in resolving the issues which are outstanding between them. If this does not prove to be the case, the Board will consider what further steps should be taken.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3736, Applicant and NORTH SASKATCHEWAN LAUNDRY AND SUPPORT SERVICES LTD., Respondent

LRB File Nos. 289-95 and 290-95; January 26, 1996
Chairperson: Beth Bilson; Members: Don Bell and Carolyn Jones

For the Applicant: Deborah Hopkins
For the Respondent: Larry Seiferling, Q.C.

Labour Relations Board - Jurisdiction - Whether issues raised in application are within exclusive jurisdiction of arbitration board - Board deciding jurisdiction is concurrent.

Collective agreement - Grievance and arbitration procedure - Whether board should defer to grievance procedure under collective agreement - Board deciding nearly all issues raised in application should be deferred to grievance and arbitration procedure.

Practice and procedure - Deferral to arbitration - Whether board should hear evidence prior to deciding whether deferral is appropriate - Board deciding complexity of issues justified submitting issues to grievance procedure prior to hearing of evidence.

Practice and procedure - Amendment of application - Board deciding amendment should be allowed.

REASONS FOR DECISION

PRELIMINARY ISSUE

Beth Bilson, Chairperson: The Canadian Union of Public Employees, Local 3736, is the bargaining representative of a unit of employees of North Saskatchewan Laundry and Support Services.

The Union has filed an application alleging that the Employer has committed unfair labour practices and violations of ss. 11(1)(a), 11(1)(b), 11(1)(c), 11(1)(e) and 11(1)(i) of *The Trade Union Act*, R.S.S. 1978, c.T-17. These allegations were based on a large number of occurrences, some of them dating back several years. In a letter from counsel for the Union in which she provided particulars of some of these allegations, she also indicated her intention to apply to the Board to amend the application to include an allegation that certain conduct of the Employer constituted a violation of s. 11(1)(g) of the *Act*.

When the hearing convened, counsel for the Employer indicated his intention to raise a preliminary objection to proceeding with the application in its present form. He wished to make the argument that this would be an appropriate case in which the Board should defer to the jurisdiction of the grievance and arbitration process set out in the collective agreement between the parties. These Reasons address this issue, along with one or two subsidiary procedural questions.

Counsel for the Employer argued that all of the allegations contained in the application are the subject of grievances which have been filed by the Union, and that it would be consistent with principles established by the Board in past cases to permit the grievance and arbitration procedure to take its course rather than assuming jurisdiction over this application.

Counsel for the Union argued that though one of the purposes in bringing the application before the Board is to obtain remedies which address particular instances of conduct on the part of the Employer, the major goal of the application is to establish an overall pattern of objectionable and unlawful behaviour by the Employer, and that this could not be demonstrated on the basis of dealing with grievances one at a time through the grievance procedure.

It is perhaps unnecessary to observe that a certain event or instance of conduct may have characteristics which make it at one and the same time a breach of a collective agreement and a violation of a provision of *The Trade Union Act*. In such circumstances, the question may arise of whether the issue raised for determination by the Board is sufficiently independent that it can be heard without reference to the provisions of the collective agreement, or whether it is appropriate that the issue be considered, initially at least, in the context of the grievance procedure.

The Board has made it clear that an arbitrator or arbitration board acting under a collective agreement should not be regarded as a tribunal which is inferior to a labour relations board operating under a collective bargaining statute.

In a decision in *United Food and Commercial Workers, Local 1400 v. Western Grocers, a division of Westfair Foods Ltd.* (1993), 1st Quarter Sask. Labour Rep. 195 at pp. 196-197, the Board made this comment:

> *In Canadian Union of Public Employees v. City of Saskatoon, LRB File Nos. 155-89, 026-90, 043-90, 044-90 and 045-90, the Board laid out a number of principles which might help to determine whether deference to arbitration would be appropriate. The Board considered what would justify deference to a private decision-making tribunal by a labour relations board deriving its mandate from a statute. It found the answer in the nature and objectives of The Trade Union Act itself. Since the primary purpose of the statute is to foster and promote sound collective bargaining, the fruit of that bargaining - a collective agreement in which the parties have set out their respective rights and obligations - should be given a full and expansive role in relation to whatever disputes arise between an employer and a trade union. If the parties have decided in the course of collective bargaining to submit disputes concerning certain aspects of their relationship to a forum of their own creation, it is appropriate that a labour relations board allow that tribunal an opportunity to adjudicate the dispute. Support for this view was found by the Board in United Food and Commercial Workers v. Valdi Inc., (1980) 11 CLLC 729 (Ont. LRB) and St. Anne Nackawic Pulp & Paper Ltd. v. Canadian Paperworkers Union (1986) 86 CLLC 12,184 (S.C.C.).*

In the *Western Grocers* decision at p. 200, the Board went on to make the following observation:

> *The choice made by parties to a collective agreement to resolve their disputes by means of a procedure of discussion culminating in arbitration represents an important stage in the maturing of a bargaining relationship. As pointed out in St. Anne Nackawic, supra, the according of a degree of respect to the private ordering agreed to as the binding mechanism for the resolution of their disputes does not signify a weakening of the force of the statutory scheme under which this bargain is made, but an enhancement of it. It is our view that allegations which amount to charges that the collective agreement has been breached, including allegations that the grievance procedure itself has not been respected, can appropriately be dealt with by a board of arbitration. In this case, the allegations which are made in the application seem on their face to be indistinguishable from allegations of breaches of the collective agreement based on the same conduct. We therefore find that the grievances filed by the Union and this application involve, with one exception which will be noted below, the same dispute.*

This acknowledgement of the significance of the grievance procedure does not provide any obvious criteria for determining which issues should be deferred to the arbitration process. In the *Western Grocers* case at p. 197, the Board alluded to this:

> *It is not, of course, to be expected that in all disputes which appear to raise this question of concurrent jurisdiction, there will be sufficient congruence between the allegations concerning the breach of the collective agreement, and those involving a violation of the statute, that deference to the arbitration procedure is justified. The Board acknowledged this, and therefore made it clear that deference to arbitration under a collective agreement should be neither absolute nor unconditional. There might be circumstances under which the Board would not defer to arbitration;*

> *though these situations could not be exhaustively catalogued, they would include the following:*
>
> > *a) if the resolution of the grievance would not resolve the issues raised on the application before the Board; or,*
> >
> > *b) if the conduct of the employer or trade union represents a total repudiation of the collective bargaining process, including a refusal to recognize the existence of the collective agreement or the grievance/arbitration procedure.*

In commenting on this matter in *U.F.C.W., Local 400 v. Saskatchewan (Labour Relations Board)* (1992), 95 D.L.R. (4th) 541, the Saskatchewan Court of Appeal outlined three criteria which might guide a decision of this Board as to whether deference to arbitration would be appropriate:

> *(i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute; (ii)the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance-arbitration procedure; and, (iii) the remedy under the collective agreement must be a suitable alternative to the remedy sought in the application to the Board.*

Counsel for the Employer referred the Board to two recent decisions of the Supreme Court of Canada, *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 and *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967, and suggested that the powers of an arbitrator must be regarded as being even more expansive given the conclusions of the Court in these cases.

In the *Weber* decision, the majority of the Court pushed the boundaries established in the earlier case of *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers' Union*, [1986] 1 S.C.R. 704. In that case, Estey, J. had characterized the role of arbitration under a collective agreement in the following manner:

> *... The issue is not whether the action, defined legally, is independent of the collective agreement, but rather whether the dispute is one "arising under [the] collective agreement". Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it.*

In *Weber*, the Court reached the following conclusion at p. 963:

> *I conclude that the mandatory arbitration clauses such as s. 45(1) of the Ontario Labour Relations Act generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The*

> *question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to Charter remedies, provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed. The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal. Against this background, I turn to the facts in the case at bar.*

The Court found that it lies within the power of an arbitrator to interpret and apply the general law, interpret the *Charter of Rights and Freedoms* and grant *Charter* remedies, subject to the limitation of statutory jurisdiction, and the availability of judicial review.

Counsel for the Employer argued that the impact of the *Weber* and *O'Leary* decisions on the question we are considering here is that the question is no longer one of concurrent jurisdiction, but one of delineating a broader sphere in which an arbitrator has exclusive jurisdiction.

These two decisions certainly underline the point which was made earlier in these Reasons, that an arbitration tribunal under a collective agreement must be accorded an expansive and plenary role in dealing with questions raised in the context of the obligations set out in collective agreements.

Several things must be noted, however. The first is that what was at issue in the *Weber* and *O'Leary* cases was the respective jurisdiction of the courts of civil jurisdiction and arbitrators, not the respective jurisdictions of arbitrators and labour relations boards addressing issues arising in the context of statutory mandates which are closely related, indeed intertwined. When the issue of deference to arbitration arises in connection with a Board application, the disputed ground is arguably covered by the provisions of *The Trade Union Act*, and also by a collective agreement which articulates obligations which have been undertaken under the auspices of that *Act*.

This has two important implications, in our view. The first is that, though the arbitration procedure occupies a significant, and in many ways autonomous, position in the scheme of labour relations, that scheme itself is regulated by *The Trade Union Act*. Each of the collective bargaining relationships which is brought into being through the offices of this Board is of continuing interest to us insofar as its health and character are a measure of successful attainment of the objects of *The Trade Union Act*. Unlike the courts, whose interest in any aspect of these relationships is of a general nature connected with the advancement of the law in an overall sense, the responsibility of this Board, like that of an

arbitrator, is of a focused and specialized kind.

The second point is that this Board is the source of authoritative interpretation of *The Trade Union Act* as such. Though it is open to an arbitrator to construe and apply the provisions of the *Act*, to the extent that it is necessary to assist in an understanding of the meaning of the collective agreement, such interpretation must be subject to comment or correction by the Board.

It should further be noted that there is a distinction between the wording of the statutory provision which was the subject of the discussion in *Weber* and that which is contained in our own legislation. Section 45(1) of the Ontario *Labour Relations Act*, R.S.O. 1980, c.L.2, reads as follows:

> *45(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any questions as to whether a matter is arbitrable.*

The comparable provision in *The Trade Union Act*, s. 25(1), reads as follows:

> *25(1) All differences between the parties to a collective bargaining agreement or persons bound by the collective bargaining agreement or on whose behalf the collective bargaining agreement was entered into respecting its meaning, application or alleged violation, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective bargaining agreement.*
>
> *(1.1) Subsections (1.2) to (4) apply to all arbitrations pursuant to this Act or any collective bargaining agreement.*
>
> *(1.2) The finding of an arbitrator or an arbitration board is:*
>
> > *(a) final and conclusive;*
> >
> > *(b) binding on the parties with respect to all matters within the legislative jurisdiction of the Government of Saskatchewan; and*
> >
> > *(c) enforceable in the same manner as an order of the board made pursuant this Act.*

It is not really necessary at this juncture to decide how much of the latitude granted to arbitrators by the terms of the judgment of the Supreme Court in *Weber* was attributable to the use of the term "arising out of", as opposed to "respecting," and what the full consequences of this difference might be for the powers of arbitrators in Saskatchewan. The point we wish to make is that this distinction in wording is another indication that the sphere of jurisdiction of arbitrators may not be so broad as to

encompass all facets of the collective bargaining relationships created under the auspices of *The Trade Union Act*.

It is our view that the jurisdiction of this Board and of an arbitrator under a collective agreement must, in many cases, be viewed as concurrent. Consequently, it will continue to be necessary for this Board, depending on the circumstances of each case, to confront the question of when we should exercise our discretion to defer a question to an arbitrator.

Counsel for the Union argued on several grounds that this would be an appropriate occasion for the Board to decline to defer the issues raised in the application to arbitration under the collective agreement.

One of the aspects of the characterization which she gave to the allegations contained in the application is that they concern the affairs of the Union and actions taken with respect to particular representatives of the Union. The Board has commented that, even where the matters in dispute concern the ability of the Union to carry out the role of representing employees, considerable weight must be placed on the mechanisms which the parties have agreed to adopt for resolving these issues. In *Retail, Wholesale and Department Store Union v. Canadian Linen Supply Co. Ltd.* (1990), Fall Sask. Labour Rep. 104 at p. 109, the Board made the following comment, in the context of a dispute concerning access to company facilities for Union representatives:

> *However, where these conflicting rights have been reconciled in the form of a collective bargaining agreement with provisions defining the union's right of access to the employer's premises, The Trade Union Act has served its purpose. Like its counterparts in other jurisdictions, The Trade Union Act makes no attempt to be specific about the right of non-employee union representatives to conduct business on the employer's premises [aside from Section 11(1)(n) of The Trade Union Act which deals with the right of access where the employees live on the employer's premises]. The Legislature was content to leave the specifics to the bargaining process. It is therefore not surprising that the parties have, through their collective bargaining agreements, tried to bring order and certainty to this aspect of their relationship by negotiating more detailed access provisions. These provisions are completely in harmony with the scheme and objects of the Act and will be respected by this Board. Where the collective bargaining agreement contains such provisions, as does the agreement between the parties to this application, the Board will not use the general unfair labour practice provisions of the Act to add to, alter, or vary the arrangement negotiated by the parties and set forth in their collective agreement. There is no purpose of justification for the Board fashioning an access agreement for the parties when they have already negotiated one for themselves.*

In the *Western Grocers* case, *supra*, the Board also commented at pp. 199-200 on the possibility of distinguishing between "individual" and "union" issues as a means of deciding when deference would be justified:

> *The allegations made in the application filed with the Board apparently bear a strong relationship to the events described and the allegations made in the correspondence and grievances filed with the Board at the hearing. Counsel for the Union urged us to recognize a clear distinction in this respect between the grievances, which raised questions of the application of particular provisions of the collective agreement to individual employees, and the unfair labour practice application, which, though it concerned many of the same events, focused to a larger extent on the general relationship between the Union and the Employer. We are unable to agree that this distinction provides a basis for the clear separation argued for between the content of the grievances and the content of the application before this Board.*
>
> *It is true that many provisions of collective agreements have significance largely for their implications with respect to individual employees. It must be remembered, however, that the collective agreement summarizes the results of bargaining between an employer and the trade union representing employees. Though certain aspects of that agreement will have a concrete impact on the working conditions of individual employees, it is not essentially a contract for individuals, but a representation of the relationship between the two parties to collective bargaining; the grievance and arbitration procedure is a means by which the obligations entered into can be interpreted and put into effect. It is not accurate, in our view, to suggest that anything which concerns individual employees is meant for an arbitration board, while anything which is of concern to the trade union is properly dealt with by this Board.*

Counsel for the Union also referred the Board to a decision in *Construction and General Workers v. Con-Force Structures Limited* (1993), 3rd Quarter Sask. Labour Rep. 156 at p. 160, in which the Board made the following comment:

> *It is our view that in order to determine the question of whether deference is appropriate in this particular case according to these criteria, it is necessary for the Board to know considerably more about the nature of the allegations made in these applications than it can glean from an argument on a preliminary objection. It is necessary for the Board to be able to characterize the dispute with some precision. It is also necessary to be able to say with some confidence that the dispute it is being asked to determine, and the dispute as it would be presented to an arbitrator, are the same dispute. Though there may be different ways to determine these questions, the Board has generally heard the case which the parties have to make about the applications as filed before deciding whether the matter is more correctly seen as a grievance.*

She urged the Board to follow this suggested policy in this case, and to hear the evidence concerning all

of the allegations made in the application. She argued that this would allow the Board to consider the overriding allegation that the Employer is actuated by anti-union motives against the backdrop of a large number of examples of improper conduct. She said that, though the Union has filed grievances concerning these issues, the assumption of jurisdiction by the Board would allow the Union to obtain adequate remedies without the cost and complexity of pursuing all of the grievances, and would focus attention on the overall attitude displayed by the Employer.

In this connection, Counsel for the Employer pointed to Article 4 of the collective agreement, which reads as follows:

> *ARTICLE 4 - UNION RIGHTS*
>
> *(a)* *Recognition:*
>
> *The Employer agrees to recognize the Union as the sole collective bargaining agency for the employees covered by this Agreement and hereby consents and agrees to negotiate with the Union or its designated representative in any and all matters affecting the relationship between the Employer and the employees. The Employer also agrees that the Union may have the assistance of a representative of the Canadian Union of Public Employees in any negotiations or discussion between the parties to this Agreement.*
>
> *(b)* *Non-Discrimination:*
>
> *The Employer and the Union agree that there shall be no discrimination, interference, restriction or coercion exercised or practised with respect to any employee in the matter of hiring, wage rates, training, up-grading, promotion, transfer, lay-off, recall, discipline, classification, discharge or otherwise by reason of age, race, creed, colour, national origin, political or religious affiliation, sex or marital status, nor by reason of membership or activity in the Union.*

He argued that the wording of this provision would allow the Union to put before an arbitrator any evidence relating to the anti-union motives of the Employer.

Counsel for the Union argued that it is not clear from the wording of Article 4(b) that all of the grievances which have been filed, such as those which relate to incidents of alleged humiliation or belittlement of employees, would be regarded as falling under this section. She expressed doubt that the term "otherwise" would be interpreted as broadening the scope of the section to cover things other than specific decisions by the Employer concerning the terms and conditions of employment.

This aspect of the argument provides a useful illustration of the hazards which we would anticipate if the Board were to undertake to hear the application in its present form. As the Board pointed out in the *Con-Force* case, *supra*, it is often difficult to tell from bare allegations made in an application whether the dispute described in the application and a dispute presented as a grievance are truly the same dispute. In practical terms, it is often appropriate to reserve decision on this point until the parties have presented evidence, and the full scope of the dispute can be discerned.

For several reasons, we are of the view that it would not be appropriate to proceed in this way in this case. It should first be noted that this application does not concern a coherent and limited number of issues, but an enormous range of incidents and events. One would anticipate that the presentation of evidence in relation to all of these items would occupy a number of days. The possibility that at the end of that time, the Board might still direct that the matter be remitted to an arbitrator or arbitrators would make this, in our view, an unattractive option.

We must also comment on the nature of the allegations which have been made. To take the example of a dismissal which is allegedly motivated by anti-union sentiment, the Board can fairly easily isolate that question from the issue of whether the dismissal is founded on just cause, as an agreement typically requires. In the case of many of the allegations which are included in this application, however, it would be difficult to isolate that aspect which is the basis of an unfair labour practice allegation, and that aspect which alleges some breach of the collective agreement. Without providing an exhaustive list, some examples of this kind of allegation are those which relate to the timing of union meetings, and the restriction of mobility for union representatives. Without knowing what the status of these events is in relation to the agreement the parties have concluded between themselves, it would be difficult, if not impossible, to assess whether the actions of the Employer are suspect under *The Trade Union Act*.

This is particularly the case because the parties have elected in their agreement to address the issue of discrimination based on trade union activity. The argument made by counsel for the Union on this point - that the anti-discrimination provision in Article 4(b) would not cover certain aspects of the application - illustrates the difficulties of trying in these circumstances to isolate those elements of the application which it might be appropriate for the Board to consider. To accept the argument put forward by counsel on this point, it would be necessary for the Board to predict that an arbitrator would see this provision as operating within the limit she suggests.

In general, we cannot see how it would be possible for the Board to evaluate the allegations which are made in the application without having to interpret the collective agreement, and this is clearly a task which the parties have agreed to place in the hands of an arbitration board, rather than this Board.

In our view, nearly all of the specific issues which are raised in the application are based on allegations of breaches of the collective agreement, and could be dealt with fully and adequately by the grievance procedure to which the parties have signified their agreement. If we are wrong about this - if an arbitration board declines jurisdiction concerning any of these allegations, or if the grievance procedure cannot provide an adequate remedy - it would be open to the Union, as always, to return to the Board for determination of any issue. It would also be open to the Union at some future time to point to a pattern of breaches of the collective agreement as posing a more generalized threat to the Union as the bargaining agent for these employees.

We are aware that our decision in this respect poses certain problems for the Union in terms of the expense and complexity of a series of arbitrations on all of the allegations made in the application. While it is not entirely clear where responsibility lies for the accumulation of a backlog of issues which have remained unresolved, it is clear that this has helped to make the friction between the parties resistant to resolution. We do not, however, view these as sufficiently compelling considerations to persuade us that the Board should offer our services as, in effect, a substitute board of arbitration.

The one matter raised by the Union which does seem to us to have a character independent of any alleged breach of the collective agreement is the allegation that Mr. Wayne Nicholson, the manager of this group of employees, made overt attempts to influence decisions of the Union with respect to the choice of representatives for the discussion of grievances, and the creation of a separate local Union as the representative of this bargaining unit.

Counsel for the Union indicated in a letter to counsel for the Employer that she would seek to amend the original application to include the allegation that this conduct constituted an unfair labour practice and a violation of s. 11(1)(g) of *The Trade Union Act*, which reads 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;*

Counsel for the Employer objected to the proposed amendment of the application on the grounds that these events, which are alleged to have occurred in 1992 and 1994, are too far in the past to be raised now.

We have set out elsewhere some of the factors which we think are of importance in relation to the question of delay in bringing an application, and a fair summary of our jurisprudence on this point would be that the circumstances of each case are the significant determinants.

In this case, we do share the general concern expressed by counsel for the Employer that the passage of time may have a deleterious effect on the availability and reliability of evidence. The allegations concern two specific conversations, involving three persons all of whom are presumably available to testify as to their recollections concerning these discussions.

Counsel for the Employer also suggested that the appropriate course would be to require the Union to file a new application containing these allegations, rather than allowing them to be brought forward as an amendment to the existing application.

Normally, we would be concerned about the addition of any more allegations to an application as complex as this one. As we only propose to allow the Union to proceed with this aspect of the application at this time, this does not seem to be a pressing concern. To require the Union to file a new application would, in these circumstances, constitute an unnecessarily technical requirement. We will therefore allow the application of the Union to amend the application.

In addition, however, we will order that counsel for the Employer be provided with particulars specifying the dates of the conversations on which the allegations are based, as well as the identity of the persons present, and a summary of the general nature of the conversation.

It is possible that some of the other matters addressed by counsel for the Union in her letter of

December 9, 1995, would require further amendments to the original applications. We are prepared to allow these amendments, but without prejudice to any argument which the Employer may wish to raise concerning the delay in making these further allegations, either in the context of the grievance and arbitration procedure, or in the event the issues are raised before the Board at a future time.

THE SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE, AND DEPARTMENT STORE UNION, Applicant and SASKATCHEWAN CENTRE OF THE ARTS, Respondent

LRB File Nos. 292-95 and 293-95; January 26, 1996
Chairperson: Beth Bilson; Members: Gloria Cymbalisty and Brenda Cuthbert

For the Applicant: Mark Hollyoak
For the Respondent: Ted C. Zarzeczny, Jr., Q.C.

Practice and procedure - Timeliness - Whether certification application is based on "substantially the same" unit as earlier application - Board deciding two units different, application not dismissed.

Practice and procedure - Evidence - Evidence of support - Whether membership cards are sound basis for deciding application to represent large number of casual employees - Board deciding cards as reliable as any other evidence.

Unfair labour practice - Intimidation and coercion - Communication - Whether letter sent to employees is unlawful - Majority of board deciding letter did not constitute unfair labour practice.

REASONS FOR DECISION

Beth Bilson, Chairperson: The Saskatchewan Joint Board Retail, Wholesale and Department Store Union has filed an application, designated as LRB File No. 292-95, seeking to be certified as the bargaining agent for a unit of employees of the Saskatchewan Centre of the Arts. The Union has also filed a second application, designated as LRB File No. 293-95, alleging that a letter written by the Employer to employees constituted an unfair labour practice and a violation of s. 11(1)(a) of *The Trade Union Act*, R.S.S. 1978, c.T-17, which reads 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:*
>
> > *(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;*

The Employer raised an objection to the certification application filed by the Union on the basis of s. 5(b) of the *Act*, which reads as follows:

> *5 The board may make orders:*
>
> *(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;*

A previous application for certification, appearing in (1995), 4th Quarter Sask. Labour Rep. 52, was dismissed by the Board in an Order dated October 4, 1995.

The Employer operates a year-round facility in which a variety of cultural, educational and theatrical events are offered. Because of the nature of the business carried on by the Employer, the workforce consists almost entirely of a body of casual employees whose numbers fluctuate, and who are called upon to perform a variety of duties. For administrative purposes, and leaving aside the stage trades employees who are represented by a different trade union, the operations of the Employer are organized into seven departments. In the original application, the bargaining unit proposed by the Union included four of these seven departments. The Board concluded that an appropriate bargaining unit could not be defined in these terms, and dismissed the application on that basis. The Board summarized this conclusion in the following terms:

> *In our view, the situation of this Employer differs considerably from that of the Regina Exhibition Association Limited. Though there are large numbers of casual employees involved in both cases, the bargaining units proposed in the Regina Exhibition cases were based on small and distinct groupings of employees. Here, though the seven departments have been designated to serve particular administrative and accounting purposes, it is difficult to draw a line between them in terms of the workforce. There is little to differentiate the employees in different departments in terms of their skills or experience, and there is considerable and growing cross-over of employees from one department to another. Though it was possible to draw a rational boundary around the wheelers and dealers at the casino or the employees in the concessions in the Exhibition cases, it is more difficult to draw a line through the pool of employees in this case in any way which can be defended.*

In our decision with respect to that application, the Board gave the Union an opportunity to make further representations to the Board with respect to the possible amendment of the application or the option that the Board might direct a vote among the employees. The Union advised the Board that they

wished to make no further representations concerning that application. Instead, the Union filed this second application, accompanied by further evidence of support.

Counsel for the Employer argued that the second application should be dismissed because it related to a bargaining unit which is substantially the same as the unit which the Union proposed in the first application, and that the Board should dismiss the application in accordance with s. 5(b).

In *United Food and Commercial Workers v. Canada Safeway Ltd.* (1985), February Sask. Labour Rep. 24 at p. 25, the Board commented on the purpose of this provision as follows:

> *However, the Board considers it advisable to abridge the time limitation period in this case. Section 5(b) of The Act is apparently intended to give employees some "breathing room" and to insulate the workplace from the disruptive effects of a continuing contest between those who favour a particular union and those who oppose it after a majority of the employees in an appropriate unit have once decided that they do not wish to be represented by that union.*

We do not view this rationale as at all relevant to the situation before us in relation to this application. This is not a situation in which a trade union indulges in what might be characterized as harassment of reluctant employees by mounting a succession of unsuccessful organizing campaigns. In this case, the first application was defeated, not because the Union had failed to gain the support of the majority of employees in the unit they proposed to represent, but because the Board decided that that unit was not appropriate. The subsequent organizing by the Union was conducted among a different group of employees who had not been the subject of the original activities by the Union.

In any event, it is difficult to see that the unit which the Union has now proposed can be described as substantially the same as the unit delineated in their previous application. The unit previously proposed was found by the Board to be inappropriate. At that time, the Board intimated that a unit composed of all seven departments would likely be regarded as appropriate, and indeed, we can confirm this as our view. The difference between an inappropriate unit and an appropriate one seems to us to be sufficiently large that s. 5(b) cannot be relied upon as a reason for dismissing this application.

Counsel for the Employer further argued that the most accurate way of determining whether this application enjoys the support of the majority of employees is to direct that a vote be held among all of

the employees who are now working. He suggested that the Board had hinted that they thought this an appropriate means of settling this issue in our decision with respect to the previous certification application. He also said that, if the Union is allowed to rely on the support cards which have been submitted, which may include some of those which were submitted in support of the original application, this would not be a completely accurate reflection of the feeling of the current complement of employees, given the high turnover among this group.

We should perhaps comment on the thinking which led us to offer to the Union an opportunity to request a vote in connection with the first application. Because of the way that the Union had chosen to proceed in that instance, it was conceivable, we concluded, that the Union might wish to test whether they could obtain majority support among all of the employees in the seven departments, even though their organizing had been conducted among the four departments.

The Union chose instead to take what, in our opinion, was a more difficult and perhaps more commendable route, which was that of entering into a new campaign to obtain the support of individual employees in the additional three departments. It is on this basis that they have made their second application.

The determination by the Board of whether an applicant trade union enjoys majority support among the employees in the bargaining unit proposed always entails the use of an informational base which constitutes a picture of the workforce at a particular point. In the normal course, if a trade union submits evidence of support, the Board considers that evidence in relation to the information obtained from the employer about which employees were employed on the date of the application. In some cases, this involves decisions of some complexity concerning what constitutes an employment relationship for these purposes; if there are employees on leave or on lay-off, for example, some determination may have to be made as to whether they should be classified as employees at this point.

If the Board decides that, under the circumstances, a vote should be directed, these questions may become even more complicated, because the Board has in general held that the employees who are considered to have a stake in the representational question are those who were employed both on the date of the application and the date of the vote.

The use of snapshots of this kind as the basis for determining the issue of representation means that there will always be persons included or excluded who would by some other standard be entitled (or disentitled) to have an influence on the outcome. These anomalies are compounded when the workforce is largely composed of casual employees, as is the case here. The Employer has supplied Statements of Employment in response to both applications which were based on a list of employees who had worked at least once in the preceding six months. This criterion is, of course, an arbitrary one, and the Employer made no suggestion that it was otherwise. It does seem, nonetheless, to be as useful a standard as anything else would be.

Counsel for the Employer suggested that a vote would be a way of ensuring that the outcome of the issue would not be unduly influenced by persons who no longer have a tangible employment relationship with the Employer. On the other hand, the Employer conceded that it is difficult to predict whether any of these employees might return at some future time. In any case, the criticisms which counsel for the Employer made of the use of the Statement of Employment would be equally applicable to any voters' list which could be prepared.

With respect to the reliance by the Union on some cards which were also submitted in connection with the earlier application, we would comment that the regulations under the *Act* permit the use of support cards anytime within six months after they are signed. This, again, is an arbitrary choice, but it does ensure that a trade union cannot rely indefinitely on support cards, while allowing for the fact that organizing activities may take some time.

While we acknowledge that it is difficult to establish an accurate base on which to determine the question of whether a majority of employees in a bargaining unit composed almost entirely of casual employees might be determined, we have concluded that the determination of the matter on the basis of the evidence of support submitted by the Union is as reliable as any other method. On the basis that the Union has been successful in demonstrating that they have obtained the support of a majority of employees in the larger bargaining unit, we will issue a certification order accordingly.

The Union also filed an application alleging that a letter sent by the Employer constituted an unfair labour practice. This letter, which was dated October 12, 1995, read as follows:

Re: Information Bulletin - Saskatchewan Centre Unionization

As you may be aware the Retail, Wholesale and Department Store Union has applied to certify (unionize) casual employees employed at the Saskatchewan Centre. You may be approached so sign an application for Union membership by members of the Union or fellow employees. Your signed union membership may then be used by the Union to prove support for unionization of the Centre.

The decision to apply for membership in a Union (and by doing so to support unionization of the Saskatchewan Centre) is a very important one. It will have long term implications for you and the Centre. I ask you to consider this decision very carefully and to discuss it with friends, family and other individuals who have experience with these matters.

In Saskatchewan every employee is free to choose to belong or not to belong to a Union. This is a free democratic choice. You are entitled to make it without any influence, pressure or threats from the Union, any member of Centre management or your fellow employees. You are entitled to say yes and you are entitled to say no. Others must respect this very important decision that you make for yourself and by its consequences, for all other present and future employees of the Centre.

The Saskatchewan Centre, like many other employers, has in recent years experienced serious financial challenges. Even in these difficult times however the Centre has offered you a marvellous [sic] opportunity to gain valuable work experience and references that will hopefully help you establish a solid and long term working future.

I hope that the Centre is a wonderful place for all of us to work together for the benefit of our patrons and the many events we host. You have had the opportunity to meet new people and make new friends through working at the Centre. Currently I am planning changes that will make the Centre an even better place to work.

Whatever your decision about unionization of the Centre I can assure you that your right to make this decision will be respected as will any decision finally made by a majority of employees.

Yours sincerely,

Paul Moulton
Executive Director
The Saskatchewan Centre

This letter was mailed to all of the employees. Mr. Paul Moulton, the Executive Director of the Centre of the Arts, gave evidence that it was customary for the Employer to send out periodic bulletins to the employees for the purpose of commending them or building their morale. He said as well that he wished to emphasize to the employees, many of whom are very young, that the decision with respect to union representation was one which they should take seriously, and one which it was up to them to make themselves.

The representative of the Union argued that this letter was potentially coercive because it contained comments which insinuated that the advent of representation by the Union would not be a favourable development.

The Board has consistently expressed concern about the intimidating potential of communications concerning collective bargaining matters which emanate from an employer. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Brown Industries (1976) Ltd., Pro-More Industries Ltd. and Lo Rider Industries Inc.* (1995), 2nd Quarter Sask. Labour Rep. 71 at p. 85, the Board commented as follows on the significance of employer communication:

> *The proviso which was included in the previous version of Section 11(1)(a) has sometimes been referred to as an "employer free speech" provision. It should be clear from the jurisprudence of this Board that we have never interpreted the issue as one which revolves around a public interest in protecting the right of an employer as a citizen to speak freely. We have taken the position that any communication from an employer to employees must be seen as coloured by the coercive potential present in a relationship where the employer has disproportionate power derived from control over employment, and the terms and conditions of that employment. In this context, we have stressed that an employer is not entitled to influence the decision employees make about trade union representation, and that an employer makes comments on the representation question at their peril.*

In that case, the Board concluded at pp. 85-86 that the amended wording of s. 11(1)(a) could not be interpreted as prohibiting all communication by an employer, but emphasized the dangerous nature of communication concerning the representation question:

> *It is our view that the new wording in Section 11(1)(a) does not place new restrictions on the subject matter of employer communications, or limit all employer communication to matters which might strictly be described as ordinary questions of business. The new section does underline the view which the Board has always taken that the concept of "free speech" is something of a red herring in this context. It stresses that the focus of the section is on interference and coercion, whether the vehicle is communication from the employer or other conduct.*
>
> *As this Board has pointed out, an employer must exercise particular care during an organizing campaign that statements to employees do not have a coercive or intimidating effect, or signal to employees that the employer hopes they will take a particular view with respect to union representation.*

As we have pointed out on a number of occasions, any communication of this kind is risky, and it is difficult to see why employers feel the need to take this risk. We have concluded in this case, however, that this communication was worded in bland enough terms that it would not be coercive to what the

Board has referred to as "an employee of reasonable fortitude" - even a casual employee of reasonable fortitude.

We would, however, commend to this Employer a recent publication of the Board concerning the rights and obligations of employers in the context of the certification process, and we will enclose a copy of this publication with our Order.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant and MADISON DEVELOPMENT GROUP INC., Respondent

LRB File No. 131-95; January 29, 1996
Chairperson: Beth Bilson; Members: Bill Adams and Bob Todd

For the Applicant: Drew S. Plaxton
For the Respondent: Kevin C. Wilson

Unfair labour practice - Intimidation and coercion - Whether barring former employee from premises is intimidating to other employees - Board finding reasons for exclusion not related to union activity.

Unfair labour practice - Duty to bargain - Whether employer had committed unfair labour practice by not giving information concerning wages and employee status to union - Board deciding failure to give information constituted unfair labour practice.

Unfair labour practice - Duty to bargain - Whether pattern of employer conduct constituted breach of duty to bargain - Board deciding employer had failed or refused to bargain.

Unfair labour practice - Duty to bargain - Whether refusal by employer to supply employee addresses and telephone numbers is breach of duty to bargain - Board deciding employer has obligation to assist union in enforcing union security - Employer conduct is unfair labour practice under these circumstances.

Unfair labour practice - Counseling - Whether statements of one manager to another constituted unfair labour practices - Board deciding although was no conduct in connection with employees which constituted unfair labour practices, manager did violate s. 12 of *The Trade Union Act* by counseling unfair labour practices.

Unfair labour practice - Interference - Whether failure of employer to co-operate in enforcement of union security provision constituted unfair labour practice - Board deciding employer did commit unfair labour practice.

Unfair labour practice - Interference - Whether employer questioning of composition of union negotiating team constituted interference - Board deciding employer had committed unfair labour practice.

Unfair labour practice - Intimidation and coercion - Whether notices to employees concerning union security constituted unfair labour practice - Board deciding notices constituted unfair labour practice.

Remedies - Board making remedial orders to address failure of employer to bargain, including provision of facilities for employee meetings, posting of orders, designation of bargaining dates and provision of information.

REASONS FOR DECISION

Beth Bilson, Chairperson: The United Food and Commercial Workers, Local 1400 ("UFCW") was designated in an Order of this Board dated October 7, 1994, as the bargaining representative for a unit of employees of Madison Development Group Inc. at the Madison Inn in the City of Prince Albert.

In an application dated May 15, 1995, the Union alleged that the Employer had committed unfair labour practices and violations of ss. 11(1)(a), 11(1)(b), 11(1)(c), 11(1)(e) and 11(1)(f) of *The Trade Union Act*, R.S.S. 1978, c.T-17. These provisions read 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:*
>
> > *(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten 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;*
> >
> > ...
> >
> > *(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 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;*

The application was a complex one, and it contained a wide range of allegations concerning the conduct of the Employer in the period since the certification Order was issued. Prior to the hearing, the Union gave notice of a desire to make additional allegations of improper conduct on the part of the Employer. At the outset of the hearing, after allowing counsel for the Employer to state his reasons for opposing this amendment, the Board allowed the amendment requested by the Union.

It should also be noted that in an Order dated September 29, 1995, the Board directed the Union to provide the Employer with particulars of the allegations contained in the original application and in the correspondence concerning the amendments which the Union sought to make. The Union complied with this Order in a document dated October 4, 1995.

One of the major allegations made by the Union in this application is that the Employer has been in breach of the duty to bargain collectively, and in support of this allegation the Union cites a considerable number of examples of conduct on the part of the Employer. In order to complete the picture, the Union referred, also, to earlier proceedings before this Board, and we will summarize them briefly here.

The application for certification was scheduled for hearing on September 19, 1994, according to the normal procedures of the Board. Because of the absence of any representative of the Employer, the matter was adjourned to September 22, and again to October 4, 1994, at which time Mr. Steen Hansen, who was present to represent the Employer, sought a further adjournment which was denied by the

Board. The issues which were considered by the Board in the course of those proceedings are described in the Reasons issued by the Board in connection with *Madison Development Group Inc. v. United Food and Commercial Workers, Local 1400* (1995), 1st Quarter Sask. Labour Rep. 88, and it is worth noting the following comment made in these Reasons at pp. 91-92:

> *In this case, we would be placing form over substance if we concluded that there was any difference between Madison Inns and Madison Development Group Inc. for the purpose of these proceedings. Mr. Hansen repeatedly stressed that Madison Inns Corporation was nothing more than a name and we agree with one proviso; it is a name registered exclusively to Madison Development Group Inc. Madison Inns lives and breathes entirely through Madison Development Group Inc. and is inseparable from it and has no existence apart from it. All of the decisions and choices that have been made with respect to these proceedings were made by Madison Development Group Inc. and this is not a case where the procedural rights of Madison Development Group Inc. have been violated in anything other than appearance. Rather, the proper characterization of what happened is of an Employer who is itself attempting to take advantage of and manipulate the Board's process for the purpose of delaying and obstructing these proceedings. No other reasonable conclusion can be drawn from an examination of the Employer's conduct. When a party decides to engage in this kind of high stakes gamesmanship, it either wins or loses and if it loses, it is not entitled to the consideration that might be extended to the inadvertent or even to the negligent.*

The Employer subsequently sought a reconsideration of the Board's decision to grant the application for certification on the grounds that the Employer had been denied natural justice at the first hearing. In a decision dated January 6, 1995, the Board dismissed the request for reconsideration, finding that the Employer had been given ample opportunity to raise before the Board any legitimate issues connected with the application for certification.

In an application appearing in (1995), 1st Quarter Sask. Labour Rep. 94, the Union alleged that the Employer had terminated the employment of an employee, Ms. Marion Engen, based in part on anti-union sentiment. The decision to dismiss was taken by Mr. Claude Eckhoff, the General Manager of the Madison Inn, after he had discussed with Ms. Engen his concerns about the potential certification of the Union, and asked her to report to him about the union activity of other employees. The Board concluded that the dismissal was in violation of *The Trade Union Act*, although Ms. Engen was neither reinstated nor compensated for monetary loss, for unusual reasons.

The Union filed a further application, appearing in (1995), 3rd Quarter Sask. Labour Rep. 113, alleging that the dismissal of Mr. Dave Gulka constituted an unfair labour practice. The Board concluded that

the decision to terminate the employment of Mr. Gulka was not tainted by anti-union sentiment. In the Reasons for Decision, however, the Board made the following comment at p. 121:

> *One final point needs to be mentioned. The Employer has displayed an uncooperativeness and belligerence towards the lawful and ordinary activities of the Union that seems completely unwarranted. For example, when the Union wrote to the Employer requesting the reasons behind Mr. Gulka's termination, the Employer's solicitor at that time, a Mr. Hansen, (who is also one of the Employer's directors) did not give the reasons but instead questioned the Union's right to inquire into the termination. When the Union wrote back, again requesting reasons for Mr. Gulka's termination, this solicitor required that Mr. Gulka provide a written authorization permitting the Employer to review the facts with the Union. The Union under protest obtained and remitted an authorization from Mr. Gulka. The reply from the Employer's solicitor was quite astounding. The essence of the reply was that the Employer would not enumerate the reasons for Mr. Gulka's termination as they did not appear to be relevant. He concluded by saying that the Employer had reviewed the Union's concerns directly with Mr. Gulka and that Mr. Gulka was certainly free to disclose such concerns to his Union representative. This conduct by the Employer may well have been a breach of its duty to recognize the Union as Mr. Gulka's legal representative and to negotiate in good faith with respect to any dispute over Mr. Gulka's termination. However, this issue was not before the Board and we make no finding in this regard.*

The Board went on at pp. 121-122 to make the following observation about the significance of that comment:

> *The Employer's refusal to co-operate with the Union on such routine business matters was not fatal to the Employer's defence to this application, but it was a factor that weighed against it and now forms part of the record that may weigh against it on future applications. For example, this Employer should keep in mind the Board's observations in Water Group Canada Ltd., LRB File No. 033-93, Reasons for Decision dated August 13, 1993. The comments were made in a decision dismissing an application to decertify a newly certified union:*
>
> > *In making this decision the Board is not unmindful that in one sense collective bargaining and The Trade Union Act are about conflict and the use of power. The Act itself contemplates a power struggle between employers and unions that can become quite unpleasant. A certain kind of conflict falls well within the statutory scheme and cannot provide the basis for dismissing an application under s. 9. However, the Act clearly provides limits to this conflict, and in particular the Act makes it clear that this conflict is to be over the content of collective bargaining agreements, not over whether employees are entitled to bargain collectively at all. The Act does not contemplate, and in fact expressly prohibits, any opposition by the employer to the exercise by employees of their s. 3 rights. When the conflict shifts from the content of a collective bargaining*

> *agreement to the employee's right to bargain collectively, the Board must be extremely cautious if the employees attempt to decertify their union during such a conflict.*

Shortly after the certification order was issued, Mr. Don Logan, a staff representative for the Union, approached Mr. Steen Hansen in an attempt to set dates for meeting to bargain. Mr. Hansen is a Prince Albert lawyer who is a director of the corporation which owns the hotel. According to the evidence of Ms. Lise McKenna, the Assistant General Manager, he also performs the role of controller in the operation of the hotel. In a letter dated November 3, 1994, Mr. Hansen replied as follows:

> *Please be advised that I have referred your request for suitable bargaining dates to my client, and have requested that they advise as to whether such dates would be acceptable to them.*
>
> *I note that an Application for Reconsideration is being filed with the Labour Board, and I do not know whether such application will be heard prior to the proposed dates.*
>
> *Please advise as to whether you still wish to schedule dates for bargaining prior to determination of such application.*

On November 8, Mr. Logan responded that he did not wish the commencement of bargaining to be delayed by the application for reconsideration. In his testimony before the Board, Mr. Logan said that he was not sure what Mr. Hansen meant when he said that he had referred the request for meeting dates "to my client;" he therefore asked in his letter of November 8 whether he should be communicating with the General Manager of the hotel, Mr. Eckhoff. He received no specific reply at that time, and his next letter asking whether a bargaining meeting would be held on December 5 was addressed to Mr. Eckhoff.

Mr. Logan telephoned Ms. Lise McKenna, the Assistant General Manager of the hotel, on or about November 29, to ask whether a meeting room had been set aside for a bargaining meeting on December 5. In her evidence, Ms. McKenna said that she did set aside a room for that date. She said further that she understood that this proposed meeting had something to do with the Union, though she was not entirely clear about it; indeed, she said that when she asked him what it might be about, Mr. Eckhoff said that she would be meeting with the Union on that date. It was around this time that Ms. McKenna was told she would be a member of the negotiating committee for the Employer.

According to Mr. Logan, when he talked to Ms. McKenna, he asked her to arrange for time off for the

bargaining unit employees who were at that time members of the Union bargaining team, and she carried out his request.

In the same time period, Mr. Hansen sent two letters to Mr. Logan. The first of these, dated November 23, asked that the first bargaining meeting be scheduled for some time in January, because of the demands on the hospitality industry during the holiday season. The second, dated November 30, was in response to the letter from Mr. Logan dated November 8, and was in the following terms:

> *Your letter of November 16th, 1994 has just been brought to my attention. In such correspondence you make reference to my apparent request that you correspond with my client. I am not sure as to how you arrive at such interpretation of my previous correspondence. In particular, I must insist that these matters be directed through this office.*
>
> *I assume that you are in receipt of our correspondence of November 23rd, 1994 and we trust that a meeting can be scheduled for January.*
>
> *Kindly advise.*

When Mr. Logan and Mr. Glenn Stewart, another staff representative of the Union, appeared at the hotel on December 5, they were informed that no bargaining meeting would be taking place. Mr. Logan telephoned Mr. Hansen to discuss the matter; at this time, it came to light that Mr. Hansen had written the letters of November 23 and 30, which neither Mr. Logan nor Mr. Stewart had received. It became clear some weeks later that they had been sent to an address in Regina from which the Regina office of the Union had recently moved.

In the course of this conversation, according to Mr. Logan, Mr. Hansen reiterated that all communication with the Employer should be conducted through him, rather than through the management at the hotel. Mr. Logan said, also, that Mr. Hansen accused the Union of "setting up" the Employer in order to file more unfair labour practice applications, a theme to which the Employer returned more than once later on.

Mr. Logan sent a letter dated December 11, 1994, to Mr. Hansen listing possible dates for meetings, suggesting January 18, 21 and 25; he subsequently corrected the January 21 date to January 24. In this letter he also said that the Union had been ready to bargain on December 5, and had understood this to be the date for the first meeting as a result of conversation with Ms. McKenna, and a telephone message from Mr. Eckhoff. Mr. Logan further said that he had understood Mr. Hensen was to get

back to him earlier about the January dates.

In a letter dated December 16, 1994, Mr. Hansen replied as follows:

> *We have now had an opportunity to review with our client the proposed dates which you provided for commencement of bargaining sessions. We would suggest that the initial session be scheduled for January 26, 1995, with any additional sessions to be scheduled at such meeting.*
>
> *I subsequently received your letter dated December 11th, 1994 and cannot agree with the comments made therein. I have reviewed the situation with the Assistant General Manager, and I am advised that her discussion was in respect to the availability of a room at Madison Inn, and she merely confirmed that such room could be made available. In particular, she denies that she made any commitment to commence bargaining sessions on December 5th, as she had received no instructions or authorization from her employer to deal with such matters.*
>
> *In respect to Mr. Eckhoff, I understand that he returned a telephone call and only reached an answering machine. We would further advise that Mr. Eckhoff is a relatively inexperienced manager and he is not being designated by the employer to conduct any bargaining sessions. I must further clarify our telephone discussion, and it is my recollection that you provided a list of available dates, and it was your suggestion that we advise as to which date would be reasonable with the initial date to receive proposals, and thereafter additional dates to be arranged as required. There was however no specific dates agreed to as suggested in your letter of December 11th, 1994.*
>
> *There seems to have been substantial miscommunication between the parties to this point, and we certainly do not wish this to continue.*

The parties did agree to meet to commence bargaining on January 26, 1995. On January 24, Mr. Logan wrote to Mr. Hansen asking that arrangements be made for a bargaining unit employee, Ms. Karen Steinke, to be given time off work to participate in negotiations. Mr. Hansen responded on January 25 as follows:

> *Further to your letter of January 24th, 1995, I must advise that I am not prepared to co-ordinate the attendances of your representatives on the bargaining committee. I would suggest that the proper procedure is for the employee in question to deal directly with the management personnel at the hotel, and to provide such management personnel reasonable notice of their requests to be excused from their work commitments. If in fact Karen Steinke has not made any representations to the management, I would not feel that this is reasonable notice, but I have referred the matter on to the management personnel, and I assume they will make every effort to reschedule.*

When the parties met on January 26, 1995, the Union had prepared a package of proposals in the form of a draft collective agreement. Mr. Logan said that this package had been formulated after

discussions with members of the bargaining unit in October, and that it was drawn from various other collective agreements in the hospitality industry. Mr. Logan, as chief spokesperson for the Union, went over these proposals clause by clause to clarify them. Mr. Hansen drew attention to the fact that the package did not contain a wage proposal, and expressed reluctance to enter into negotiations unless a wage proposal were included. Mr. Logan responded that the Union could not formulate a wage proposal unless the Employer provided them with information about the current wage rates for employees. He suggested that they could begin by discussing some of the other issues, but Mr. Hansen was unwilling to proceed on that basis. The meeting lasted just under an hour, and adjourned about 11:00 a.m.

There was some discussion about dates for future meetings at the end of the meeting. The dates of February 8 and 9 were suggested; Mr. Logan said that the Union had an arbitration scheduled for those dates, but would try to release them for bargaining, and would get in touch with Mr. Hansen. Several dates in March were also mentioned.

On January 28, Mr. Logan wrote to Mr. Hansen elaborating the Union request for information about wage rates:

> *This is further to our meeting of January 26, 1995. You advised the Union you would not provide us with a response on our language proposals until the Union provided you with a wage proposal. We told you our preference is to negotiate as much language as possible first. However, we believe you have the right to insist on a complete proposed Collective Agreement, including wages, and the Union must comply, just as we have the right to demand certain information, and the Employer must comply.*
>
> *As indicated at our meeting, we require the following information:*
> - *the names of each employee, each employee's occupational classification, and each employee's wage rate. A list such as this will suffice:*
>
> | | | | |
> |---|---|---|---|
> | *e.g.* | *NAME* | *CLASSIFICATION* | *WAGE RATE* |
> | | *Mary Smith* | *Cook-Restaurant* | *$___ per hour* |
> | | *John Doe* | *Maintenance person* | *$___ per hour* |
> | | *etc.* | | |
>
> *Please provide this as soon as possible in order that we can provide you with our wage proposal prior to our next meeting, and then you can respond to everything at our next meeting.*

In another letter of the same date, Mr. Logan told Mr. Hansen that the Union would be available on

February 8 and 9. Mr. Hansen said that he was no longer available for those dates, and the date of March 16 was chosen for the next meeting. In a letter of February 1, 1995, confirming that date, Mr. Logan mentioned that he was still awaiting information concerning wage rates. Mr. Hansen also confirmed the date in a letter of February 2 in which he reiterated that if any employees were to be involved they should "make the appropriate arrangements with Management" for time off.

On March 13, Mr. Logan sent a letter naming the employees who should be given time off. He received the following reply from Mr. Hansen:

> *Further to your facsimile of March 13th, 1995, we would advise that a meeting is scheduled for March 16th, 1995 at 10:00 a.m. and not March 15th, 1995, as you now suggest.*
>
> *I must further repeat my position for the third time that I am not making arrangements for the individual employees to attend the meeting and that the onus is upon the employees themselves to provide proper notification to their manager.*

In a letter the following day, Mr. Logan expressed his view that the Employer had the responsibility to ensure that the employees got time off for the meeting. He received no response to this letter.

When the parties met on March 16, there was a brief discussion of this issue. According to Mr. Logan, the issue was not really resolved, but he was left with the impression that it would not be such a "big deal" in the future. Mr. Logan repeated, also, that he had not yet received the wage information which had been requested on January 28. His recollection was that Mr. Hansen said the Union could get this information directly from the employees.

At this meeting as well, the Employer presented a package of proposals. Like the earlier package advanced by the Union, it was in the form of a draft agreement. Mr. Logan suggested that the parties should reconvene at 1:00 p.m., which would give the Union committee an opportunity to review the proposals and make an initial response. Mr. Hansen said that the representatives of the Employer were unwilling to "sit around all day," and insisted that they adjourn. Mr. Logan stated that he thought this was not a profitable use of the day which had been set aside, particularly since he and Mr. Stewart had to travel to Prince Albert. Mr. Hansen remained firm, however, and suggested the Union could provide a written response if they wished. This meeting thus consumed under half an hour.

There was a brief discussion of future dates at that time. Mr. Logan suggested that they should set

aside two days; the response of Mr. Hansen was that they were "not ready" for that. A letter from Mr. Hansen dated March 17 confirmed the date of April 28. Mr. Logan sent Mr. Hansen a letter on March 20:

> *I am in receipt of your fax of March 17/95. It is regrettable that once again you will only accept the last date, in the series of dates I suggested, namely, April 28/95. I had also suggested April 10, 21, 24, 26, 27 & 28. If anything is to be accomplished, we expect more attention be paid to this matter by the Employer. We agree to the 10:30 a.m. start time, but we would strongly encourage an earlier time, say 9:00 a.m.*
>
> *We also await the wage information and demand that it be sent to us forthwith.*

In a reply dated March 27, 1995, Mr. Hansen denied that the Employer was not taking negotiations seriously. He concluded by saying, "It is apparent that you have other motives in mind in making this type of comment."

Mr. Logan said that in a conversation with him, Mr. Hansen had accused him of laying a "paper trail" to try and set up the Employer for unfair labour practice allegations. Mr. Logan sent a letter dated April 7 to Mr. Hansen denying that the Union had any motive other than to conclude an agreement with the Employer.

On April 18, 1995, Mr. Logan sent a letter to Mr. Hansen enclosing a document which contained all of the proposals made by both the Union and the Employer as of the March 16 negotiating meeting. In the letter he indicated, also, a number of modifications the Union was prepared to make in certain articles, and concluded by repeating the request for the wage information which had been sought since January 28.

The parties met on April 28, 1995, beginning at 10:30 a.m. Mr. Bill Humeny, a management consultant, was present at this meeting to act as the chief spokesperson for the Employer. Mr. Logan, as well as Mr. Humeny and Ms. McKenna, described this as a fairly unproductive meeting, although it went on for most of the day. At one point, Ms. Sherry McNabb, who was the only bargaining unit employee present, had to leave for personal reasons. Mr. Humeny raised the question of whether the negotiations should continue in her absence. Mr. Logan responded that it was up to the Union to decide who should participate in the bargaining.

There was some discussion of dates at the end of the meeting. Mr. Logan suggested that they might start at 9:00 a.m. instead of 10:30 a.m., but was informed that Mr. Hansen had other commitments. Mr. Logan also suggested that they should think of setting two consecutive days for the next meeting. The matter was left unresolved as Mr. Hansen was unable to commit himself to dates. In a subsequent letter, Mr. Hansen confirmed the date of May 26 for the next meeting.

Frustrated with the slow progress of negotiations and with the failure of the Employer to supply the information requested by the Union, the Union filed this application on May 15, 1995.

On May 16, Mr. Logan sent a new "merged document" to Mr. Hansen showing all of the proposals on the table as of April 28.

On May 23, Mr. Logan informed Mr. Hansen that Ms. McNabb would be replaced on the bargaining team by Mr. Dave Gulka. The Employer had earlier terminated the employment of Mr. Gulka, though there had as yet been no conclusion to the unfair labour practice application which sought his reinstatement.

At the commencement of the meeting of May 26, Mr. Humeny raised the question of whether the Union bargaining team could be regarded as "properly constituted," because no "active employees" were then on it. In his evidence, Mr. Humeny said that the representatives of the Employer thought they had a legitimate interest in ensuring that the Union bargaining committee truly represented the employees. At the meeting, Mr. Logan took the position that it was up to the Union to select the members of the bargaining committee, and said that, as far as he was concerned, the committee had been properly selected. After a brief recess to discuss the issue, the Employer bargaining committee returned to the bargaining table.

According to the evidence of Mr. Logan, the first part of the day was occupied with discussion of the Union position, including some changes the Union was proposing. In his evidence, Mr. Humeny said that this process was rendered more cumbersome than necessary by the fact that the Union did not have these changes available in a form which representatives of the Employer could review, and began by trying to dictate them to the committee. Eventually, it was suggested that the copies Mr. Logan had be photocopied. Late in the day, the Employer presented a response to the Union proposals.

At that point, according to Mr. Logan, he expressed the frustration of the Union with the slow pace of bargaining, and suggested that it might be appropriate to seek the assistance of a conciliator. Mr. Humeny was emphatic in his rejection of this idea, arguing that it would be "premature" to enter into conciliation when there was still such a wide range of issues outstanding.

The meeting ended with a discussion of dates for the next meeting. In a letter dated May 31, 1995, Mr. Hansen confirmed June 14 as the date for the next meeting:

> *This will confirm our conversation of May 26th, 1995 wherein it was agreed that the next bargaining session would be scheduled for June 14th, 1995 at 10:30 a.m. at the Madison Inn. We would further advise that July 7th, 1995 at 10:30 a.m. is acceptable to Management for continuation of bargaining.*
>
> *We further note that you have requested wage information, and we shall attempt to forward such information to you prior to the next scheduled meeting. I note that it was my understanding of our initial session of January 26th, 1995 that it was your usual procedure to leave the wage issues in abeyance pending resolution of the balance of the proposed contract. In our subsequent bargaining sessions we have not had any discussions in respect to the wage aspect, as there are certainly enough other issues to be resolved. It is further my recollection that you had not in fact requested wage information during the actual bargaining sessions, although you now appear to be making an issue in respect to same.*

Mr. Logan responded in a letter which was also dated May 31:

> *This is further to your fax of May 31/95.*
>
> *We agree to meet June 14/95 and July 7/95 at 10:30 a.m. for bargaining as the Employer has refused to accept any earlier dates proposed by the Union, or an earlier start than 10:30 a.m.*
>
> *I also note, with interest, that more than 5 months after our first request for wage information, you now appear prepared to provide same. As you are very well aware, we have orally, and in writing, repeatedly requested this information, and you have steadfastly refused to provide same. Although this matter is now before the Labour Relations Board, we still require this information for bargaining purposes, and request you provide same.*
>
> *Regarding the January 26/95 meeting, I made a comment that it was not unusual to deal with some language matters first, before wages. It was <u>you</u> who stated that the Employer was not prepared to do that and you needed our wage proposal so you could "cost it all out."*

On June 2, Mr. Hansen sent the following letter to Mr. Logan:

> *We have now received information from Management in respect to the current status of wages at Madison Inn. We understand the individual employees are paid in*

accordance with their experience, qualifications and work performance at the hotel. We accordingly provide you with the following as being the current wage ranges:

Front Desk -	*$5.35 to $7.75*
Housekeeping -	*$5.35 to $6.00*
Kitchen -	*$5.35 to $7.25*
Restaurant -	*$5.35 to $7.20*
Maintenance/Security	*$5.35 to $10.00*
Tavern	*$5.35 to $7.50*

We trust this is the information that you requested.

Mr. Hansen sent a further letter dated June 5, 1995:

> *Further to your letter of May 31st, 1995, we must take issue with the contents of such correspondence, and in particular to your suggestion that the Employer has refused to accept any earlier dates proposed by the Union. The fact of the matter is that the Management bargaining team reviewed their personal schedules as to available dates on which they would all be available, and the first possible date was June 14th, 1995. Thereafter we requested additional dates from you as to a second date to continue such bargaining, and again the Management committee reviewed the possible dates and confirmed that July 7th, 1995 was a further date on which the Management team could be available. We regret to advise that the members of the Management bargaining team do have other commitments, and it is not our fulltime job to negotiate labour contracts. We are certainly attempting to bargain in good faith.*
>
> *In respect to the wage information issue, I believe I have previously set out my position on this matter. It appears however that your interpretation of our meeting of January 26th, 1995 differs substantially from my own recollection. You clearly stated that it was the Union's preference to negotiate as much language as possible first, prior to getting into the wage proposals, and such stated preference was in fact confirmed by your letter of January 28, 1995. The Employer's representatives did not at any time state that we were not prepared to negotiate other items in the proposed contract prior to entering into the wage negotiations, and we have in fact proceeded on such course of action.*
>
> *It is regrettable that the Union wishes to continue to file unfair labour practices rather than enter into serious bargaining with the Employer.*

On June 7, Mr. Logan sent a letter to Mr. Hansen noting that the wage information provided in the letter of June 2 did not meet the request from the Union for information in that it did not disclose the wage rate paid to each of the bargaining unit employees, nor their individual job classifications. Also, he forwarded to Mr. Hansen a new "merged document" indicating the bargaining proposals as they stood at the end of the May 26 meeting.

When the parties met on June 14, Mr. Humeny raised the matter of certain inaccuracies in a story

which had appeared in the Union newsletter concerning the relationship between these parties. Mr. Logan, in his evidence before the Board, said that he had already noticed these mistakes, and discussed them with Mr. Stewart. At the meeting, he undertook to see that there was a correction in the newsletter, and also that the bargaining unit employees were specifically informed. The latter undertaking was carried out in a notice to the bargaining unit employees, dated June 16, 1995, over the signature of Mr. Brian Stewart, the President of the local Union. It does not seem that there was ever a correction in the Union newsletter itself.

Mr. Humeny went on to raise again the issue of the composition of the Union bargaining committee, and there was brief discussion of this question. The Union then reviewed the position on all of the items in the merged document and proposed a few changes. Mr. Logan said in his evidence that it was clear that there was a difference between him and Mr. Humeny as to the appropriate procedure to follow in these discussions. Mr. Logan stated that he preferred to review the document as a whole, in order to keep in view the packages of proposals overall, while Mr. Humeny preferred to discuss particular items. This was confirmed by Mr. Humeny in his evidence; he expressed some irritation at the approach taken by the Union, and said he had asked them simply to list the changes they were prepared to make, rather than reviewing all of the proposals. The meeting ended towards 4:00 p.m.

Mr. Logan said that, in the discussion on June 14, it had become clear that the proposal which had been included in the initial Employer package to exclude casual employees from the bargaining unit was one about which they were unexpectedly serious. The Employer proposals also contained definitions of "full-time," "part-time" and "casual" employees. As a result of the discussions on June 14, Mr. Logan wrote to Mr. Hansen asking for information about which bargaining unit employees would fall into each category, according to the Employer.

Mr. Logan sent a letter to Mr. Hansen, dated June 26, which summarized the respective bargaining positions of the parties as a result of the June 14 meeting, and a new merged document was enclosed. In another letter, Mr. Logan identified a bargaining unit employee who was expected to join the negotiating committee. As it happened, this person was unable to participate, and the Union committee continued to consist of Mr. Logan, Mr. Glenn Stewart and Mr. Gulka.

The parties met again on July 7. Mr. Humeny began by pointing out an error which the Union had

made in recording the proposal of the Employer with respect to a management rights clause. He raised again the question of the composition of the Union bargaining committee and asked about the process for forming a bargaining committee. According to Mr. Logan, Mr. Humeny asked for a copy of the Union constitution; Mr. Humeny said that Mr. Logan offered to send him a copy.

There was further mention of the Union newsletter, which had referred to the possibility of first contract arbitration. Mr. Humeny suggested again that the Union was trying to "set up" the Employer.

Mr. Logan mentioned again that the Union had requested information about the status of employees in connection with the definitions proposed by the Employer. Mr. Humeny said that the Union did not need the information at that point, and in any case, they could obtain it from the employees. Though the meeting took much of the day, both parties viewed the discussions as fairly unproductive.

Several days after the meeting, Mr. Logan sent a new merged document to Mr. Hansen, as well as a copy of the Union constitution. In a letter dated August 22, 1995, Mr. Hansen responded as follows:

> *We thank you for a copy of the UFCW Constitution, but it would appear that it does not answer the questions that we had in respect to your requirements in respect to a bargaining committee. We would assume that your Local 1400 would have bylaws or a constitution which would set out your requirements in respect to the establishment of your bargaining committee. We would be pleased to receive your co-operation in providing a copy of such documentation.*
>
> *As previously expressed in bargaining sessions, we maintain that it is appropriate that Management should be in a position to receive proper assurance that it is in fact negotiating with a properly constituted bargaining committee representing its employees.*

The following day, Mr. Logan sent a letter to Mr. Hansen enclosing the bylaws. He stated, also, that there were currently no bargaining unit employees on the Union committee. Mr. Hansen sent a response dated August 25, 1995. In this letter, he expressed the continuing concern of the Employer about the composition of the Union bargaining committee:

> *There is no question that the make-up of the Union Bargaining Committee has been a serious concern to the employer over the past six months, and we are attempting to obtain some assurance that your company is in fact properly constituted under the bylaws of your organization. We point out that a number of complaints have been received from various employees as to the make-up of the Union Bargaining Committee, and in particular as to the*

> *involvement of Mr. Gulka on such Committee. It appears that Mr. Gulka did not make many friends among the employees. The fact that Mr. Gulka appeared on the Bargaining Committee several months after his employment was terminated, raised a great deal of concern among other employees, who did not feel that he would properly represent their position.*

In the last paragraph of the letter, Mr. Hansen inquired as to whether the Union would require an adjournment of the meeting scheduled for August 28 to allow for the selection of employee representatives. Mr. Logan sent a response to this letter, which was sent by facsimile transmission, asking whether Mr. Hansen was suggesting that the meeting should not go ahead unless there were new employee members on the Union bargaining committee. Mr. Hansen responded that if the Union maintained that their committee was properly constituted, the meeting could go ahead. In a final note on that day, Mr. Logan indicated that he and Mr. Stewart were prepared to go ahead with the meeting on August 28.

The meeting of August 28 began with a brief discussion of this issue. The Union then proceeded to review the proposals. Mr. Humeny again asked them simply to pinpoint the changes in their position. In the middle of the afternoon, there was a break of forty minutes or so while the Employer caucused prior to presenting their changed position. According to Mr. Logan, the only change that resulted was the correction of the spelling of one word.

The parties met again on September 22. In the course of these discussions, both sides made some moderate movement. Mr. Logan said that he raised again the possibility of conciliation, and Mr. Humeny said that he still regarded this suggestion as premature. During a brief break during this meeting, Ms. McKenna said that she managed to make a list of the employees who were regarded as casual, part-time and full-time and handed this to Mr. Logan.

The parties planned to meet again on November 15, which fell after the first days of hearings regarding this application. Evidence given by Mr. Humeny when the Board reconvened in December indicated that Mr. Humeny had been unable to attend this meeting and it was canceled. A further meeting had been scheduled for early in the new year.

Over the period when this series of events was occurring, the Union also had exchanges with the

Employer concerning the enforcement of the union security provision requested by the Union. On October 17, 1994, the Union wrote to both Mr. Hansen and Mr. Eckhoff quoting the union security provision laid out in s. 36 of *The Trade Union Act*. Section 36 reads as follows:

> *36(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 30 days after the commencement in 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, assessment 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 initiation 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) Notwithstanding subsection (3), a trade union may assess or fine any of its members who has worked for the struck employer during a strike held in compliance with this Act a sum of not more than the net earnings that employee earned during that strike.*
>
> *(5) No trade union shall require any member to pay an assessment or fine pursuant to subsection (4) unless the constitution of the trade union provides for the assessment or fine prior to the commencement of the strike.*

On October 19, Mr. Logan sent union membership cards to Mr. Eckhoff, asking that new employees be asked to sign them, and that the completed cards be forwarded to the Union.

Mr. Glenn Stewart, the staff representative responsible for servicing this bargaining unit, said that he became aware in January of 1995 that there were no membership cards on file for newly hired employees at the Madison Inn. At the meeting of the negotiating teams on January 26, he said that he asked Ms. McKenna why no union membership cards had been completed in accordance with the earlier request of the Union. She said that she had no cards, and he gave her some at that time. Mr. Stewart said that he also asked Ms. McKenna for the names, addresses and telephone numbers of employees who had been hired since the certification of the Union.

Mr. Stewart said that he subsequently received from someone at the Madison Inn a list of new employees, along with their addresses. Ms. McKenna said that she did not have a hand in supplying this list, and could not say who had supplied it to the Union. On February 14 he sent the list, edited to show those for whom no cards had been submitted, to Ms. McKenna. She said that she did make an effort at this time to assist the employees on the list in completing the cards, and Mr. Stewart was able to collect fifteen or twenty of the cards when he visited the hotel around February 27.

Both Mr. Stewart and Ms. McKenna gave evidence about the high degree of turnover among the employees at the hotel. According to Mr. Stewart, this was one of the factors which made it difficult for him to keep up to date with the membership of the bargaining unit. He said as well that because employees worked at the hotel around the clock, it was difficult to keep track of who would be working at any particular time. Ms. McKenna said in her testimony that she never gave Mr. Stewart any information about the scheduled work times of the employees. Mr. Stewart said, also, that even with the addresses of the employees which he had, it was difficult to make contact with them, because a

number of them moved. He said he had little success tracing them through the telephone directory because many of them did not have telephone numbers of their own.

After checking the cards he received on February 27, Mr. Stewart discovered that some of them were defective. On March 21, he sent another list to Ms. McKenna of employees for whom he still did not have cards. His testimony was that he went to the hotel on or about April 3; Ms. McKenna was not available, and a desk clerk told him there were no cards for him to collect. In a subsequent conversation with Ms. McKenna a day or so later, she informed him that she had given all of the cards to Mr. Hansen.

Mr. Stewart said that he telephoned Mr. Hansen to inquire about the cards. Mr. Hansen denied that he had any cards, and also stated that it was not the responsibility of the Employer to ensure that cards were signed. Mr. Stewart sought advice from counsel for the Union, who sent the following letter to Mr. Hansen, dated April 5:

> *Mr. Stewart of UFCW has contacted me indicating the Union is having some difficulty receiving application for membership cards from the employees at the Madison Inn.*
>
> *I believe the employer has been served with demand for union security. It is a condition of employment that all new hires become members of the union. Without discussing all of the various obligations upon the employer, I would suggest the least the employer can do at present is provide the Union with an up to date list of the present employees within the bargaining unit, together with their addresses and telephone numbers. Further if the employer resists having new hires complete the application for membership forms and dues check off at the time of hire, it should at least provide to the union reasonable access to new hires, so that the Union may have the same completed.*
>
> *There are of course a number of Labour Board decisions concerning the employer's obligations. One decision that may assist is UFCW Local 1400 and Woolco, LRB file #148, 151, 193 and 194 of 93, dealing with the employer's obligation to provide names and addresses of employees.*
>
> *I trust this is satisfactory and trust the employer shall live up to its obligations in this regard.*

Mr. Stewart said that he had not been denied access to the hotel premises, although he did not feel he was given free access to the employees. Mr. Eckhoff accompanied him or kept track of his whereabouts when he was in the hotel, and told him on several occasions that he was not to interrupt the work of the employees. On a visit to the hotel around this time, Mr. Stewart said he saw the

following notice which had been posted by the Employer:

> ***NOTICE TO ALL MADISON INN EMPLOYEES***
>
> *TAKE NOTICE that the United Food and Commercial Workers Local 1400, has given notice to the Madison Inn requiring Union security pursuant to provision 36(1) of The Trade Union Act of the Province of Saskatchewan. This Section provides as follows:*
>
> > *"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 the commencement in 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."*
>
> *It is our understanding of The Trade Union Act that whether or not an employee becomes a member of the Union or not, Management will be required to tender the periodic dues, assessments and initiation fees as uniformly required by the Union from its membership. However, Management will not assume responsibility for processing Union membership applications until a Collective Bargaining Agreement has been entered into with the Union, as we assume that Management's responsibility in respect to employee Union membership will be determined through such bargaining process.*
>
> *DATED this 5th day of April, 1995.*
>
> *MANAGEMENT*
> *MADISON INN*

There was no evidence that the contents of this notice had ever been discussed with the Union.

On May 9, 1995, Mr. Hansen sent a letter to Mr. Plaxton concerning this issue:

> *We have now had an opportunity to further review the issue as to the employee information to be provided to the Union. We must point out that we are currently in the process of collective bargaining, and this issue should be resolved through the negotiation process.*
>
> *From the Management's point of view, the Company does have concerns as to the individual rights of its employees, and in particular as to the right of privacy. It is the general policy of the hotel that home phone numbers and addresses are not available to all employees, and certainly not to any external groups or customers. In this day and age a great number of people do insist on having unlisted numbers, and certainly such issue has received a great deal of publicity recently with the problems*

> *encountered by SaskTel. This has been a concern that has been raised by employees over the past years, and well prior to any Union involvement with the hotel.*
>
> *We have taken the position that an individual employee must provide the necessary information to allow the employer to contact the employee, but the employer will attempt to safeguard such information. An employee can provide alternate phone numbers and mailing addresses, and we feel that this should be an individual right.*
>
> *We must further advise that since the involvement of the Union, additional complaints have been received from employees wherein they suggest that they have been approached at their homes and telephoned by Union representatives, and in their words, it has reached the point of harassment. We maintain that the employees should have the right to insist that they not be contacted at their homes, if they so wish.*
>
> *It is therefore our position that the names of new employees, along with the names of any employee that has been terminated or resigned, would be provided to the Union representatives on a monthly basis, and thereafter it should be the responsibility of the Union shop steward to make individual contact with such new employees to obtain whatever address or telephone information they are prepared to provide. As an alternative, if the employee provides a written authorization to the employer to provide such personal information to the Union, we would certainly be prepared to comply.*
>
> *We trust that this arrangement will be acceptable to the Union pending finalization of a contact, which hopefully will provide the appropriate guidelines for future action.*

Mr. Stewart said he thought that this concern for the privacy of the employees had been mentioned before, but this was the first time it was formally raised as a reason for not providing the Union with the information Mr. Stewart had requested. In her evidence, Ms. McKenna expressed a strong reluctance to share this information with the Union; this was based in part on a personal experience she had had with someone making improper use of her telephone number, and she was concerned that she not play any part in exposing employees to similar experiences. She acknowledged in cross-examination that Mr. Hansen had said that the Employer would have to supply the information to the Union "eventually." She stated, however, that she was reluctant to play any part in this.

In October, shortly prior to the commencement of these proceedings, she posted a notice which had been drafted by Mr. Hansen requiring employees to indicate whether they authorized the release of their address and telephone number to the Union. The notice, which had an authorization form attached, indicated that the form should be sent to the Union.

On October 24, Mr. Hansen wrote to the Union enclosing a document which purported to be a list of

employees whose employment had commenced or terminated between August 29 and September 30, 1995. The letter indicated that it was the intent of the Employer to supply a monthly update of this kind to the Union. The letter stated, also, that Ms. McKenna had committed herself to give such information to Mr. Stewart on a regular basis at his request. Mr. Stewart denied that this was an accurate version of his conversations with Ms. McKenna; he said that she had never made a commitment to this effect.

To complete this summary of the events which form the basis for the application, it is necessary to refer to the experiences recounted by two of the witnesses called to give evidence on behalf of the Union.

Ms. Terry Kashewka was the Manager of the restaurant at the hotel from February of 1994 until December 31, 1994. She recounted several conversations which she had had with Mr. Eckhoff, the General Manager. In the course of one of these conversations, Mr. Eckhoff had expressed concern about the advent of the Union in the hotel, and had said that he thought the owners might decide to close the hotel. At a later time, he identified representatives of the Union to her.

Since she had responsibility for hiring employees for the restaurant, he suggested to her that she should ask candidates for employment for their views about trade unions, and she should decline to hire any who expressed support. At another time, he said that she should implement a campaign of aggressive disciplinary measures against employees who supported the Union in order to pave the way for their dismissal.

Ms. Kashewka said that she did not follow any of the instructions given to her by Mr. Eckhoff. She said that after he had talked to her, he began to take part in the interviews she had with potential employees, and she felt he was watching her. She said, also, that during another conversation, in which two other managers were involved, Mr. Eckhoff returned to the theme of the potential harmful effects of the continued presence of the Union. One of the other managers said that he had had some success getting rid of employees who supported the Union. Ms. Kashewka recalled Mr. Eckhoff as saying he had worked too hard to be let down. She also recollected him saying that she was responsible for her choices, and "if you're going to fall, you're going to fall on your own."

Ms. McKenna said that she and Mr. Eckhoff had a number of concerns about the performance of Ms.

Kashewka in her job as Restaurant Manager. Ms. McKenna said that they thought Ms. Kashewka had an inappropriate relationship with the employees under her supervision, that she was too critical of some, and overly friendly with others in a way which made it difficult for her to maintain the correct degree of supervisory detachment. Ms. McKenna said there was an especially high turnover of employees in this area, and she suspected that this was related to the shortcomings of Ms. Kashewka. Ms. Kashewka agreed that there was a high turnover, although she did not agree that her own actions were the cause.

In any event, Ms. McKenna said that she and Mr. Eckhoff agreed that the hiring decisions made by Ms. Kashewka should be more carefully monitored in order to ensure that she was conducting interviews properly. Ms. McKenna also said that she and Mr. Eckhoff expressed their concern to Ms. Kashewka that she should be more systematic and consistent about imposing disciplinary measures on her staff.

The other sequence of events to which the Union referred involved Mr. Dave Gulka. It will be recalled that the dismissal of Mr. Gulka was the subject of earlier proceedings before this Board, and that his status also became an issue when he was a member of the Union negotiating committee for a period of time. Some time after the Board issued a decision dismissing the application of the Union concerning his termination, Mr. Gulka was at the Madison Inn having coffee with a friend when he was told by Mr. Eckhoff that he should leave the hotel and would not be allowed to return. Some time later he returned to the bar with some of his friends to hear a local band and was informed that he could not be served. At another time, he met Mr. Eckhoff in a Prince Albert music store, and Mr. Eckhoff told him that he was no longer welcome at the Madison Inn.

In his evidence-in-chief, Mr. Gulka said that he had been given no reason for the ban on his attendance at the hotel. Ms. McKenna, on the other hand, said that the reason for barring him from being in the hotel was that he continued to make derogatory comments about herself, Mr. Eckhoff and the hotel in general to his friends and others. Under cross-examination, Mr. Gulka conceded that he might have called Ms. McKenna a "backstabber" and a "liar" in conversation with someone he knew. He said, also, that he might have said something to a friend to the effect that "Eckhoff should watch it - he's going to get sick of spending money on me."

Over the vociferous objection of counsel for the Employer, the Board allowed counsel for the Union to recall Mr. Gulka to recount conversations he had with Ms. McKenna in mid-December. Mr. Gulka said that he telephoned Ms. McKenna on December 14. He said that he wished to ask her whether he could attend the staff Christmas party of his current employer, which was being held at the hotel. He also wished to ask her whether his exclusion from the hotel was going to go on indefinitely. Mr. Gulka said that the fact that he was not able to go to the hotel had a financial impact on him, as part of his livelihood was gained from doing audio work for musical groups, and that it created social difficulties for him. He said that Ms. McKenna said that he had cost the company a lot of money, but she did undertake to consult with Mr. Eckhoff.

She telephoned Mr. Gulka within a short time, saying that he would be allowed to attend the Christmas party, but that the overall ban would stay in place. In the course of this conversation, Mr. Gulka asked for written reasons for his exclusion, and said that he had tried to work hard when he was employed at the hotel. According to his evidence, Ms. McKenna then said, "Since you showed what side you were on, what did you expect?" which he took to refer to his involvement in the Union. He said, also, he was tired of fighting, and she said, "You should have thought of that before you became involved with the Union."

Ms. McKenna gave a somewhat different version of these conversations. She said that when he first called she asked him why he needed written reasons for his exclusion, and he said that he was going to pursue the matter with a lawyer; she responded that she was sure he had enough information for this purpose. When she called him back to tell him he could attend the Christmas party, she said that he told her he had nothing further to do with the Union. She said that, in response to his arguments that the ban was having a devastating effect on his life, she said to him, "You made your bed," and, "You live in P.A. - you'll have to deal with it." She denied that she drew any connection between the ban and his involvement with the Union.

Under cross-examination, Mr. Gulka confirmed the version given by Ms. McKenna in some respects. He conceded that he might have said something to the effect that, "The Union have washed their hands of this."

Counsel for the Union argued that the barring of Mr. Gulka from the hotel premises constituted an

unfair labour practice within the meaning of s. 11(1)(a) of *The Trade Union Act*. Counsel argued that the Employer was trying to make an example of someone who had been associated with the Union in order to intimidate other employees, and to punish Mr. Gulka unreasonably for his association with the Union.

We have concluded that this part of the application filed by the Union must be dismissed. We find that the witness for the Employer gave plausible reasons for the determination that Mr. Gulka should be barred from the premises. In this connection, we prefer the account given by Ms. McKenna of her discussions with Mr. Gulka on the telephone; though there is little doubt that she disliked Mr. Gulka, we do not think this dislike had anything to do with his association with the Union. We did not find Mr. Gulka to be a credible witness. His evidence in chief presented a very selective view of events, which he was induced to change considerably in the course of cross-examination.

Perhaps the most important aspect of the application made by the Union is the allegation that the Employer has failed or refused to bargain collectively with the Union. As the Board has observed on many occasions, it is difficult to define the boundaries of the duty to bargain with precision or certainty. Nonetheless, its centrality to our overall mandate of protecting and supervising collective bargaining cannot be doubted. In *Saskatchewan Government Employees' Union v. Government of Saskatchewan* (1993), 1st Quarter Sask. Labour Rep. 261, the Board emphasized at p. 267 the importance of the duty to bargain:

> *The duty to bargain collectively lies at the legal heart of the relationship between an employer and a trade union which comes into being upon the certification of the union as the bargaining agent for a group of employees. It is this duty which gives collective bargaining legislation much of its bite, which endures through any hiatus between collective agreements, and which provides the parties with some direction as to their responsibility in the range of situations they may encounter.*

In that decision, the Board went on to observe, at pp. 268-269:

> *Though the obligation to bargain has been in existence in more or less this form in many North American jurisdictions for nearly sixty years, its significance and implications continue to be questions of great complexity for the tribunals charged with interpreting these issues. In general, labour relations boards have interpreted their role as one of assessing whether true bargaining is taking place, and whether either party is engaging in conduct which will impair the health of such bargaining, rather than to influence the substantive content or outcome of the bargaining process. The responsibility of labour relations boards is to do what they can to ensure that the parties do bargain collectively; it is the responsibility of the parties*

> *to determine what they bargain about and what comes of the bargaining.*
>
> *Though an argument can be made that labour relations boards have in recent years been somewhat readier to evaluate the content of bargaining in certain respects, it is still the case that they are not inclined to become entangled in the complex web of strategy, historical experience and economic give-and-take of which the bargaining process is composed. As the Canada Labour Relations Board expressed this view in CKLW Radio Broadcasting Ltd., [1977] CLLC 16,110, at 16,784:*
>
> > *The Board is not an instrument for resolving bargaining impasses. Proceedings before the Board are not a substitute for free collective bargaining and its concomitant aspect of economic struggle. Therefore, the Board should not judge the reasonableness of bargaining positions, unless they are clearly illegal, contrary to public policy or an indicia, among other things, of bad faith. Because collective bargaining is a give and take determined by threatened or exercised power, the Board must be careful not to interfere in the balance of power and not to restrict the exercise of power by the imposition of rules designed to require the parties to act gentlemanly or in a gentle fashion...*
> >
> > *At the same time, the Board must ensure that one party does not seek to undermine the other's right to engage in bargaining or act in a manner that prevents full, informed and rational discussion of the issues.*

In a decision in *Canadian Union of Public Employees v. Saskatchewan Health-Care Association* (1993), 2nd Quarter Sask. Labour Rep. 74 at p. 83, the Board commented on the inherent dilemma presented by an assessment of an allegation that the duty has been breached:

> *... when an allegation of an infraction under Section 11(1)(c) is brought before us, the Board is faced with the somewhat delicate task of evaluating the bargaining process to determine whether there is any employer conduct which endangers or threatens to subvert that process, while at the same time not intervening so heavy-handedly that the process ceases to reflect the strength, aspirations and historical relationship of the parties themselves. The distinction between process and substance has a will-o'-the-wisp quality at the best of times, but this is particularly the case where a tribunal is trying to discern whether conduct goes beyond the generous limits of the tolerable in collective bargaining, or whether it merely reflects a permissible exploitation of strength or skill by one party to gain advantage over the other.*

In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Ltd.* (1993), 3rd Quarter Sask. Labour Rep. 162, we outlined at some length at pp. 173-175 our general view of the nature of the obligation to bargain:

> *Numerous further illustrations might be given of labour relations boards attempting*

to come to terms with what seems to be a task riddled with anomalies. Labour relations boards are to try to discern procedural niceties, but not to attack the substantive content of the bargaining process. They are to examine proposals for what they might reveal about the motivation of the parties, but not to second guess the priorities or objectives evidenced by those proposals. They are to encourage rational discussion and to prevent the illicit use of power, but not to stand in the way of a free exercise by the parties of their bargaining strength. As the Ontario Board described it in their decision in Summer Press v. Windsor Printing Pressman and Assistants' Union (1991), 13 C.L.R.B.R. (2d) 293, at 295:

> *Collective bargaining law involves an important balance: legal pressure to engage in negotiations and conclude agreements determining the terms of employment, but freedom from legal prescription as to what those terms will be.*

...

In considering an allegation that an employer has failed or refused to engage in collective bargaining as required by the statute, the Board must, of course, take into account a wide range of factual components which are part of the bargaining environment at the time the application is filed, and part of the relationship between the parties, but the essential question which must be asked is whether the picture composed of these factual elements shows that the employer is not trying to conclude a collective agreement.

There are, as we have intimated earlier, no rules for the bargaining process as such. Though the parties may have expectations, based on their past experience, that issues will be discussed in a particular sequence, or that there will be a particular proportionality between proposal and counterproposal, or that one party or the other can always expect to achieve improvements in its favour, there are no sanctions attached to deviations from the anticipated course. The parties may be required to adjust their expectations according to changed conditions or changes in their relative bargaining strength. They may apply any combination of rational persuasion, deployment of economic power, or other inducements which is sanctioned by the law. Each of the parties may combine and recombine their own proposals and those put forward by the other party in an attempt to find the formula which will lead to an agreement. This process may be messy, it may be unscientific, it may be unpredictable, it may on occasion be brutal, but it is bargaining.

The essence of bargaining is that each party is trying to achieve an agreement on terms which are advantageous, and may adopt whatever strategy it considers likely to bring about this result. If one party makes an error in assessing relative bargaining strength, choosing economic weapons, selecting appropriate timing or deciding which combination of proposals might bring about movement in the direction it desires, this in itself is not suggestive that the other party has committed an unfair labour practice. If positions are changed, or proposals withdrawn, or uncompromising resistance adopted, there is not necessarily any infraction of The Trade Union Act. It is only if these clues suggest to the Board an attempt by an employer to avoid reaching an agreement or an actual refusal to recognize the trade union as a bargaining agent that the Board may draw the conclusion that an employer is guilty of failing or refusing to bargain collectively.

It will be seen from the passages we have quoted here that the Board has acknowledged that the process of bargaining, to the extent that it is an economic test of wills, may produce victims, and may inflict wounds. Even mortal wounds, however, are not necessarily a sign that one of the parties has failed to comply with the duty to bargain.

What is required by the duty to bargain is that, however vigorous or bruising the process, the parties are making a genuine effort to conclude an agreement. An employer is not entitled to use the bargaining process as a disguise for what is really an attempt to undermine or defeat a trade union, or for a sustained refusal to accept the legal position of the trade union as the representative of a group of employees.

Though bargaining is not a process for which a code of rules can be articulated, labour relations tribunals have looked for certain minimal procedural features as evidence that the parties are engaged in real bargaining. Some of these criteria were suggested by this Board in a decision in *Construction & General Workers Union, Local 890 v. Midway Sales (1979) Ltd.* (1987), 88 C.L.L.C. ¶16,003 at p.14,009, "Although the duty to negotiate in good faith does not impose a duty to reach agreement, both parties do have an obligation to meet with the other side, to genuinely intend to resolve issues in dispute, and to make every reasonable effort to do so."

In *Canadian Union of Public Employees v. Cheshire Homes of Regina Society* (1988), Fall Sask. Labour Rep. 91 at pp. 93-94, the Board elaborated on this theme:

> *In this case, the employer says that it is under no duty to agree with the union on matters of procedure or substance; that its conduct is an example of hard bargaining; and that if the union doesn't like it then the union's recourse is to use whatever power it has to stop it. That argument, however, ignores the employer's obligation to make every reasonable effort to engage in full and rational discussion. In the Board's opinion, for there to be full and rational discussion, particularly in negotiations for a first collective agreement, each party must have the ability to frame and present its position in words of its own choosing and to have that position fairly considered and discussed. The employer wrongly treated its right to refuse to agree to the union's proposals as if it were a right to refuse to even discuss the union's proposals. Its conduct in that regard was incompatible with its duty to make all reasonable efforts to reach an agreement by engaging in full and frank discussion of the issues.*

What the Board must try to determine, without intervening unduly in the dynamics of the bargaining process, is whether a sincere effort is being made to conclude a collective agreement with a trade union,

or whether the actions of an employer are more indicative of disrespect for the union or a wish to undermine its credibility and effectiveness.

On the basis of the evidence given at the hearing, counsel for the Union conceded that, with one exception, it was difficult to characterize any particular action of the Employer, taken in isolation, as a breach of the duty to bargain. He invited the Board, however, to look at the total pattern of conduct of the Employer, and to conclude that this course of conduct constituted a violation of s. 11(1)(c).

Counsel did suggest that the failure of the Employer to supply the Union with information which it had requested was, by itself, a breach of the duty to bargain in good faith. The Board has, on a number of occasions, stated that an aspect of the duty imposed on an employer to bargain collectively is an obligation to convey to the trade union the information which makes genuine bargaining possible. In *Saskatchewan Government Employees' Union v. Government of Saskatchewan* (1989), Winter Sask. Labour Rep. 52 at pp. 58-59, the Board summarized this aspect of the duty as follows:

> *That duty is imposed by Section 11(1)(c) of The Trade Union Act and its legislative counterpart in every other jurisdiction. It requires the union and the employer to make every reasonable effort to conclude a collective bargaining agreement, and to that end to engage in rational, informed discussion, to answer honestly, and to avoid misrepresentation. More specifically, it is generally accepted that when asked an employer is obligated:*
>
> *(a) to disclose information with respect to existing terms and conditions of employment, particularly during negotiations for a first collective bargaining agreement;*
>
> *(b) to disclose pertinent information needed by a union to adequately comprehend a proposal or employer response at the bargaining table;*
>
> *(c) to inform the union during negotiations of decisions already made which will be implemented during the term of a proposed agreement and which may have a significant impact on the bargaining unit; and*
>
> *(d) to answer honestly whether it will probably implement changes during the term of a proposed agreement that may significantly impact on the bargaining unit. This obligation is limited to plans likely to be implemented so that the employer maintains a degree of confidentiality in planning, and because premature disclosure of plans that may not materialize could have an adverse effect on the employer, the union and the employees.*

In this case, the Union first made a request on January 28, 1995, for a list showing the pay rate and job classification of each employee by name. The Employer purported to comply with this request on June 2, by sending the Union a list of the pay ranges for employees in several general areas of the hotel. The

information in the form requested by the Union has never been supplied.

Ms. McKenna explained the delay in supplying the information which was forwarded to the Union by saying that she did not have time to prepare the information sooner. She said it was made clear to her by Mr. Hansen that, although she would be expected to provide it in due course, it was not a high priority. Mr. Humeny testified that he did not think it necessary to supply the Union with this information because there had been no discussion of wage issues, and he did not anticipate that there would be for some time into the future.

On June 16, 1995, Mr. Logan asked the Employer to supply a list showing which employees were regarded by the Employer as falling into the categories of full-time, part-time and casual. This list was ultimately supplied to the Union on September 22, 1995, after Ms. McKenna had made it during a break in the bargaining session. The initial response of the Employer to this request, as recalled by Mr. Logan, was to suggest that the Union could obtain the information from the employees themselves.

In our view, the conduct of the Employer in responding to the requests by the Union for information was unreasonable, and did constitute an unfair labour practice within the meaning of s. 11(1)(c). There can be no serious argument that the Union is entitled to this information, and that they are entitled to receive this information from the Employer. Though individual employees may be in possession of partial information, it is unlikely that they would know, for example, whether they are regarded as part-time or casual in terms of the definitions proposed at the bargaining table by the Employer, or that they would all be certain of their precise job title or classification.

The defense offered by the Employer - that the provision of this information was not a high priority because the issues were not at a particular stage of discussion at the bargaining table - cannot be accepted. The information sought by the Union with respect both to wage rates and to the categorization of employees was of a basic kind, and it is difficult to see how the Union could expect to formulate an overall bargaining position without it. Whether or not the Employer thought the time was ripe for discussion of these issues as such, the Union was entitled to have the information promptly when it was requested in order to proceed with devising bargaining priorities and a bargaining strategy. We do not accept that there was any complexity or sensitivity about the information which would justify the delay in providing the information, or the failure to provide all of the information which was

sought by the Union.

With respect to the more general issue of whether the overall pattern of conduct of the Employer constituted a breach of the duty to bargain, we have concluded that this conduct was a violation of the *Act* and an unfair labour practice. It is true that it is not an unfair labour practice, in isolation, to cut short a bargaining session, or to agree to meet at infrequent intervals, or to refuse to contemplate conciliation. All of these things may be part of ordinary bargaining.

If one looks at the overall tone and content of the interactions between the parties, however, what emerges is a disturbing picture of an Employer who does not place a high priority on the relationship with the Union, who raises a variety of issues which must be regarded as distractions from genuine bargaining issues, who denies the reasonable requests of the Union for information, and who repeatedly accuses the Union of trying to fabricate unfair labour practices.

The evidence of Mr. Humeny was that it is common for the conclusion of a first collective agreement to take a considerable time. It is certainly the case that there are complexities associated with the negotiation of a first collective agreement which recede in importance once that agreement is in place. This is, in part, because all of the components of a collective agreement must be negotiated. As the Board has frequently commented, however, the position of a trade union prior to the conclusion of a first agreement is a vulnerable one, and it is imperative, if the bargaining relationship is to be given a fair opportunity to survive and to establish a solid foundation, that the bargaining process not be thwarted unreasonably. Taking time to deal with complex issues at the bargaining table is one thing; taking time in a superficial and trivial process whose only effect is to demoralize the employees and undermine the effectiveness of the trade union is quite another.

The representatives of the Employer repeatedly challenged the makeup of the Union bargaining team. Though Mr. Humeny stated that this was not a serious concern, and that it did not occupy much of the time taken at meetings, Mr. Hansen did characterize it as a serious matter. In our view, this was not an issue which was a legitimate subject for more than casual comment on the part of the Employer. The presence or absence of "active employees," as Mr. Humeny referred to them, might, of course, make it more or less difficult for the Union to be sure that the agreement ultimately reached would be acceptable to the employees, but this is a matter for the Union to weigh and resolve without assistance

from the Employer.

The evidence of Mr. Humeny and Ms. McKenna, and the documentation emanating from Mr. Hansen, make it clear that, in general, the Employer did not attach a high degree of importance to the bargaining relationship with the Union. In a number of instances, events were explained by the fact that they did not "have time," were "not ready" or regarded something as "premature." Requests from the Union to prolong meetings or schedule more than one day at a time were brushed aside as though these suggestions constituted an unreasonable imposition.

A brief comment is in order about the refusal of the representatives of the Employer, notably their chief spokesperson Mr. Humeny, to entertain the idea of using the offices of a conciliator. On several occasions he expressed the view that it would be premature to enter into conciliation, and in his testimony he explained that his view is that conciliation is not useful until the parties have reduced the number of outstanding issues to a small number. He said that he still does not think the parties have reached this point.

There is certainly nothing to compel the parties in the course of ordinary bargaining to use the services of a conciliator. In our view, however, Mr. Humeny seems to view conciliation in a very limited and mechanical way, without regard to the possible usefulness of conciliation as a means of facilitating improvements in the bargaining process itself. The refusal of conciliation may not be, in itself, an unfair labour practice, but it seems to us part of the overall pattern of conduct and attitudes on the part of the Employer which we have found to be an unfair labour practice.

We are not uninfluenced in our conclusions on this matter by the previous conduct of the Employer which was the subject of comment in Board decisions. The Board described the game of cat and mouse which the Employer chose to play in relation to the certification application. The Board commented, also, on the position taken by the Employer that they were not required to discuss with the Union their reasons for deciding to terminate Mr. Gulka.

The significance of the duty to bargain in the context of *The Trade Union Act* cannot be overemphasized. Once the employees have chosen to conduct their relationship with their employer through the bargaining agency of a trade union, the union becomes the sole representative of those

employees with respect to the determination of their terms and conditions of employment. The duty to bargain with the certified trade union is a legal obligation, not a responsibility which the employer may take up or not according to whim. The duty to bargain includes, but is not limited to, the conclusion of a collective agreement at the bargaining table. It covers all aspects of the dealings an employer may have with employees with respect to terms and conditions of employment, and requires that the employer deal with the trade union, and only with the trade union, in connection with these questions. It requires that the employer make a genuine and positive effort to resolve issues raised by the trade union on behalf of the employees. The fact that an issue is raised or a request made away from the bargaining table is of no consequence if it concerns a matter which is within the scope of the representational rights of the trade union.

The evidence makes it clear that this Employer has not, from the beginning, appreciated the duty to bargain in these terms. There has been no sign that the Employer is sincere about getting to grips with the issues vital to the conclusion of a collective agreement. The pattern has been one of delays, recalcitrance, distractions, challenges to the right of the Union to manage its affairs and other behaviour which threatens to make it impossible for the Union to continue to represent the employees.

For these reasons, as indicated earlier, we have found the Employer to have committed violations of s. 11(1)(c), and to continue to violate that provision as of the time of the hearing.

The Union also alleged that the Employer committed unfair labour practices within the meaning of ss. 11(1)(a), 11(1)(b), 11(1)(e) and 11(1)(f) of *The Trade Union Act*. The allegations citing ss. 11(1)(e) and 11(1)(f), and some aspects of those related to s. 11(1)(a), were based on allegations that representatives of the Employer instituted a practice of screening prospective employees by asking them for their views about trade unions, and a regime of getting rid of existing employees who were identified as Union supporters.

We have outlined above the evidence given by Ms. Kashewka related to these allegations, as well as that of Ms. McKenna. It is important to note that Ms. Kashewka testified that she never agreed to take part either in discriminatory hiring of employees or in trying to eliminate pro-Union employees. The explanation given by Ms. McKenna for the closer monitoring of the hiring process conducted by Ms. Kashewka, and for the instructions to her to be more systematic in disciplining the employees under her

supervision, was a plausible one, and one which Ms. Kashewka acknowledged to have some foundation in her performance of her duties.

There was insufficient evidence, in our view, to establish that the Employer actually committed unfair labour practices within the meaning of ss. 11(1)(a), 11(1)(e) and 11(1)(f) based on this evidence. There was not evidence, aside from the comment of a colleague of Ms. Kashewka that he had been successful in "getting rid" of Union supporters, that steps were actually taken to put such policies into place.

On the other hand, in the absence of testimony from Mr. Eckhoff, we are inclined to accept the evidence given by Ms. Kashewka of her conversations with him concerning these issues. Given the previous findings of the Board concerning statements and conduct of Mr. Eckhoff, we find credible the account of Ms. Kashewka, which portrayed him urging her to take steps to identify and expel employees who supported the Union, and expressing concern about the possible effects of certification. As Ms. Kashewka was a manager, and out of the scope of the bargaining unit, we do not find the statements made in these conversations to be unfair labour practices within the meaning of ss. 11(1)(a), 11(1)(e) or 11(1)(f). We do find, however, that they were a violation of s. 12 of *The Trade Union Act*, which reads as follows:

> *12 No person shall take part in, aid, abet, counsel or procure any unfair labour practice or any violation of this Act.*

The final set of allegations which must be considered are those which arise from the attempts by the Union to enforce the union security clause. It will be recalled that the Union gave the notice contemplated in s. 36(1) of *The Trade Union Act*, asking the Employer to recognize the union security provision set out in that section, which reads as follows:

> *36(1) ...*
>
> *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 the commencement in 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;*

There has been discussion in past decisions of the Board about the specific obligations which are placed on the Employer by s. 36(1). In *International Union of Bricklayers & Allied Craftsmen, Local 3 v. United Masonry Construction Ltd.* (1980), 80 C.L.L.C. ¶16,027, the basic requirements under this section were described at pp. 608-609 as follows:

> *There is certainly an obligation upon the employer, when he hires a new employee, to advise him that it is a condition of his employment that he join the union within thirty days after the date of commencement of employment. However, in the view of the Board there is no obligation upon the employer to actually require the employee to sign the documents necessary to gain admission to the union, although in many cases employer and union do agree to such an arrangement. There is an obligation of course upon the employee to obtain membership in the union if he wishes to keep his job for more than thirty days. There is an obligation, however, on the part of the employer, in situations where an employer does not wish to sign employees for the union, to give to the union the names of all new employees within thirty days of the commencement of their employment so that the union can arrange to sign them. The question the Board must decide here is what are the obligations when the employee has remained in the employment of the employer in excess of thirty days and not obtained union membership. In the opinion of the Board it is the responsibility of the union to keep track of which employees have not joined the union and when it comes to the union's attention that an employee has remained in the employment of an employer in excess of thirty days and not obtained union membership he can then require the employer to terminate the employee. There is no unfair labour practice on the part of the employer unless, and until, he has been notified by the union that an employee is not a member and must be terminated and the employer declines to terminate the employee.*

In *United Food and Commercial Workers, Local 1400 v. F. W. Woolworth Co. Limited and/or Woolworth Canada Inc. operating under the name of Woolco* (1994), 1st Quarter Sask. Labour Rep. 169 at p. 182, the Board commented on this point:

> *The requirement to provide the Union with the names of new employees appeared to be quite logical and reasonable given the Board's decision in Rite Way Mfg. Co. Ltd. not to interpret Section 36 in a manner that placed an obligation upon the employer to actually ensure that new employees complied with Section 36. It is difficult to pinpoint the actual wording in Section 36, which the requirement to provide the names of new employees was based upon, but it is not difficult to pinpoint the general policy considerations. That policy was expressed in Watergroup Canada Ltd., 1993 3rd Quarter, Sask. Labour Report, p. 131, when the Board stated that the employees' right to join a union and bargain collectively and the union's right to represent these employees are not rights that either the employees or the union should have to fight the employer for. The corollary is that the employer has no inherent right to resist or obstruct the exercise of these rights.*

The evidence given in connection with this application indicated that, while Ms. McKenna at the

beginning undertook the task of ensuring that new employees signed the union cards, she subsequently ceased doing this on the instructions of Mr. Hansen. In her testimony she said that she had told Mr. Stewart she would continue to supply him with the names of new employees, but it is not clear that this was done systematically until after hearings related to the application began. Neither is it clear that Ms. McKenna specifically told new employees that the signing of a union card was a condition of their employment.

For the reasons which Ms. McKenna gave in her testimony, and to which Mr. Hansen alluded in correspondence with the Union, the Employer declined to supply the Union with the addresses and telephone numbers of employees, on the basis that it would compromise the privacy of the employees to do so.

In the *F.W. Woolworth* decision, *supra*, at p. 183, the Board made this comment:

> *The question the present application raises is why the Board should draw a line between providing names and providing addresses and telephone numbers. Having gone so far as to require the production of names for the purpose of facilitating the Union's ability to make contact with these new employees, the logical extension would be that the employer should also provide the addresses and telephone numbers if requested. This would seem to be especially justifiable where the Employer is restricting access at the workplace and the work force is large with a high frequency of turnover.*

Counsel for the Employer argued that this passage should be read as indicating that an employer is only obligated to provide names and addresses under extreme circumstances. It is our view that the Board did not intend this obligation to be so narrowly restricted. Following the passage quoted above, the Board went on to say at p. 183:

> *The Employer argued that disclosure of this information infringes upon the privacy of the employees, but this does not bear scrutiny. As the employees' exclusive bargaining agent, the union has access to their wage rates and often to their performance evaluations, disciplinary records and other highly personal information. The employees are informed when they apply for employment, or are supposed to be, that they must join the Union as a condition of employment. This knowledge, tends to undercut any need to keep this information private from the very organization which the employees have a statutory obligation to join and which has a statutory duty to represent them. Considering this scheme, access by the Union to the names, addresses and telephone numbers of new employees would appear to be compatible with the attainment of these statutory obligations. Furthermore, given that membership in the Union is a condition of employment, it seems more*

> *reasonable to facilitate the Union's ability to solicit and secure compliance from the employees, than to force the Union to get the employees' attention by serving the Employer with a demand that they be dismissed.*

Another important observation made by the Board in the *F.W. Woolworth* decision at p. 182 is relevant to this issue:

> *The adversarial contest of interests which is contemplated by The Trade Union Act is to be confined to the content of the collective bargaining agreement or other legitimate collective bargaining issues. In other words, the Act presumes and expects a certain level of acceptance and cooperation from the employer, and it is in that vein that the courts and boards have required a measure of cooperation from the employer when that is necessary to breathe life into a provision in The Trade Union Act, provided that doing so does not infringe any legitimate interest of the employer. Hence, for example, we have seen the emergence of the employer's obligation to cooperate during bargaining by providing the union with information. In that context, the employer has been obliged to provide, upon request and even to volunteer, various kinds of information required by the union (see: Government of Saskatchewan, 1989 Winter, Sask. Labour Report, p. 52). We can also see the Ontario Court of Appeal in T. Eaton Co., infra, requiring employers to cooperate with unions by providing them with access to the employees on the employer's premises for the purpose of conducting lawful union business. In Time Air Inc. 77 di 55, an employer was required to let the union use the company bulletin boards and pigeon holes. It was in this same vein that the Board in Rite Way Mfg. Co. Ltd. stated that Section 36 required employers to provide unions with the names of new employees. It was an attempt to breathe as much life as possible into Section 36 without prejudicing any legitimate employer interest.*

We accept that, if an employer does not undertake to ensure that union cards are signed, or agree to the inclusion of such an obligation in a collective agreement, they may not be under a specific obligation to ensure that new employees do sign union cards. As the last passage quoted from the *F.W. Woolworth* case suggests, however, the Board does take the position that an employer is obligated to cooperate with the trade union in the protection of the secure position to which the union is entitled under s. 36(1). We regard this as an obligation to take positive steps to facilitate the obtaining of signed membership cards. If the employer wishes to draw the line at having the cards signed - though it is hard to see why this is not the easiest method, from the point of view of all parties, of meeting this objective - the employer has some responsibility to assist the trade union in other ways.

In any case, the trade union is entitled to know the names, addresses and telephone numbers of all the employees in the bargaining unit. Though the concern for the privacy of the employees is in some respects an understandable concern, the refusal to share this information with the trade union is

suggestive of a view that the union is somehow a stranger, an outsider, who does not have a legitimate interest in the affairs of the employees. As their legal bargaining representative, the trade union must be regarded as a party with whom the employer and the employees have a legal relationship. Counsel for the Union referred to the obligations which rest on the Employer to provide information to Revenue Canada or the Unemployment Insurance Commission; though these are, of course, quite different sorts of relationships, they are useful examples of the kind of nexus which is established when the Union obtains a certification Order on behalf of a group of employees.

In this case, after a period in which the Employer made no response to the request for enforcement of the union security provision, Ms. McKenna began to assist new employees in signing union cards. She did not think she had told them that it was a condition of their employment, although she thought she had said they "had to" join the Union. It was subsequently decided, apparently on the instructions of Mr. Hansen, that she should not do this any more, and the employees were notified that the Employer was not responsible for having them sign. Ms. McKenna said that she was willing to supply Mr. Stewart with the names of new employees, but this was done very sporadically; it was another thing which Ms. McKenna acknowledged was not a high priority.

When the Union attempted to proceed to trace the employees, Mr. Stewart was refused information concerning the addresses and telephone numbers which would make it possible for him to contact them. Although Mr. Stewart was allowed to enter the hotel premises, he said that he was escorted or watched by representatives of the Employer. Ms. McKenna and Mr. Hansen subsequently sent a further notice to the employees saying that their addresses and telephone numbers would be released with their consent.

None of this suggests that the Employer was really prepared to cooperate with the Union in the enforcement of the union security provision. It is possible that Mr. Stewart himself might have done more in this respect, but this does not excuse the failure of the Employer to assist the Union in obtaining cards for the employees. Though there may be nothing wrong in the Employer declining to assist in the actual signing of the cards, they refused to take steps which would allow the Union to use an alternative way of getting the cards signed. They did not give the Union regular information about the names of new employees, they refused to share the addresses and telephone numbers, and they did not tell the Union when particular employees would be working.

We have concluded that the approach taken by the Employer did constitute an unfair labour practice and a violation of s. 11(1)(b) of *The Trade Union Act*.

We should further say that we view one aspect of this conduct as a violation of s. 11(1)(a) as well. By issuing notices to the employees indicating the restrictions the Employer was placing on providing information and enforcing the union security provision, the Employer was conveying to the employees in the bargaining unit that the requests being made by the Union were unreasonable or dangerous ones. In our opinion, this must be seen as having the potential to intimidate employees in respect of their relationship with the Union.

There is no question that the attitude and conduct of the Employer since the Union obtained the certification Order has had serious effects on the capacity of the Union to represent the employees vigorously and effectively. In addition to our usual Orders directing the Employer to cease and desist from this course of conduct, we will issue Orders to the following effect:

- That copies of this decision and the accompanying Orders be posted in at least four prominent locations in the hotel where it will be seen by employees.
- That the Employer make available to the Union, at the expense of the Employer, facilities on the premises of the hotel adequate for the Union to hold two informational meetings with the employees at times selected by the Union, conducted by whatever representatives the Union thinks appropriate. The facilities must allow the Union to conduct these meetings without the possibility of surveillance or supervision by representatives of the Employer.
- That the Employer provide the Union forthwith with a current list of the employees with their addresses and telephone numbers.
- That the Employer provide the Union forthwith with a list of employees showing their individual job classifications and pay rates.
- That the Employer designate at least three dates for bargaining meetings, such meetings to take place within the thirty days following the date of the Order.

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant and THE BOARD OF EDUCATION OF THE NORTHERN LAKES SCHOOL DIVISION NO. 64, Respondent

LRB File No. 322-95; January 30, 1996
Chairperson: Beth Bilson; Members: Bob Cunningham and George Wall

For the Applicant: Bill Robb
For the Respondent: Bill Wells

Bargaining unit - Appropriateness - Whether bargaining unit which includes regular bus drivers and excludes spare bus drivers is appropriate - Board deciding proposed unit appropriate.

REASONS FOR DECISION

Beth Bilson, Chairperson: The Canadian Union of Public Employees was designated in a certification Order dated May 5, 1986, as the bargaining agent for a unit of employees described as follows:

> *... determining that all employees of the Board of Education of the Northern Lakes School Division No. 64 of Saskatchewan, except the Director of Education, Secretary-Treasurer, Division Office Executive Secretary, Teachers employed and functioning as such, Bus Drivers and Mechanics*

The Union has filed an application asking to amend this description of the bargaining unit to read as follows:

> *... determining that all employees including unit bus drivers of the Board of Education of the Northern Lakes School Division No. 64 of Saskatchewan, except the Director of Education, Secretary-Treasurer, Division Office Executive Secretary, Teachers employed and functioning as such, other Bus Drivers and Mechanics*

In response to this application, the Employer filed a Reply, as well as a Statement of Employment. In the Reply, the Employer proposed the following alternative description of the bargaining unit:

> *... all employees of the Board of Education of the Northern Lakes School Division No. 64 except the Director of Education, Assistant Director of Education, Secretary-Treasurer, Division Office Executive Secretary, Teachers employed and functioning as such, Driver Trainer Instructor, Contracted Bus Drivers via a separate memorandum of agreement for the conveyance of school children, Transportation Supervisor, Mechanics, Teacher Aide positions not funded by the Board and other professional staff.*

At the hearing, the Union agreed to several of the exclusions proposed by the Employer, those being the Assistant Director of Education, the Driver Training Instructor and the Transportation Supervisor. The parties had been unable to resolve the question of which bus drivers should be included in the bargaining unit.

Both the Union and the Employer were in agreement that the drivers who drove under a separate contractual arrangement, and those who drove students from Indian reserves under another separate agreement, should not be included in the unit. In the Statement of Employment, however, the Employer listed all of the drivers whose services were utilized by the Employer, either as the regular drivers on the seventeen routes which were provided directly by the Board of Education, or as spare drivers. The representative of the Union said at the hearing that the application filed by the Union was intended only to cover the regular route drivers, not the spare drivers.

The facts concerning the status of these spare drivers do not seem to be in dispute. The Board of Education maintains a list of the spare drivers. They are called in to provide services when regular drivers are ill, or when extra drivers are needed to transport students because of extra-curricular activities or for other purposes which fall outside the regular transportation schedule. They may be called in by the regular drivers, or by the Employer. The spare drivers work only occasionally, and the vast majority of them have other employment. Indeed, several of those on the list are full-time teachers at schools in the School Division.

Counsel for the Employer argued that it was not clear from the application filed by the Union that they intended to exclude this group of drivers. He pointed out that the term "unit" is not one which has been in use for some time to describe the administrative districts which are used for the provision of educational services. He further argued that it is difficult to distinguish between the regular bus drivers and the spare drivers for the purpose of their inclusion in the bargaining unit.

The representative of the Union argued that the Union had made it clear what group of employees they wished to add to the bargaining unit, and that a clear distinction could be drawn between the regular drivers and the spare drivers.

The basic question which arises for determination in this context is, in our view, the issue of whether an

appropriate bargaining unit would be created if the application of the Union were to be granted. As we have often pointed out, this issue must be distinguished from the question of what would be the *most* appropriate bargaining unit.

The Board has always been reluctant to deny groups of employees access to collective bargaining on the grounds that there are bargaining units which might be created, other than the one which is proposed, which would be more ideal from the point of view of collective bargaining policy. The Board has generally been more interested in assessing whether the bargaining unit which is proposed stands a good chance of forming a sound basis for a collective bargaining relationship than in speculating about what might be an ideal configuration.

It is possible that, in the long run, a bargaining unit which included the spare drivers would be a more appropriate one. Counsel for the Employer alluded to situations where such bargaining units have been the basis of certification, and there is little doubt that the Board would be prepared to certify the Union to represent such a bargaining unit here.

This is not, however, the bargaining unit which the Union has proposed here, and the focus of the issue which must be resolved is whether the bargaining unit which they have put forward for consideration is appropriate as the basis for future collective bargaining with the Employer.

We have concluded that the proposed bargaining unit is appropriate. It is possible to draw a meaningful distinction between the terms and conditions of employment which apply to the regular drivers and those of the spare drivers, a distinction which signifies that the regular drivers could be included in the bargaining unit without any negative impact on the industrial relations of the Employer and their employees.

We should note that there was a difference of opinion over the inclusion of two persons on the Statement of Employment who were viewed by the Employer as falling into the category of regular drivers. One of them was hired to take over a regular route as of February 1, 1996. As her employment relationship with the Employer did not exist as of the date the application was filed, we find that her name should not be included on the Statement of Employment.

A more difficult question arises in connection with the other of these two employees, who was injured

in an accident, and has been unable to return to work. There was no evidence presented at the hearing concerning the conditions under which this employee left work, or whether he has any continuing relationship with the Employer. As it does not make any difference to the granting of the application in this case, we will not make any finding on this point, but will leave it to the parties to resolve this issue if necessary.

As the Union has established that it enjoys the support of the majority of regular drivers, we will issue a certification Order on the basis of a bargaining unit described as follows:

> all employees of the Board of Education of the Northern Lights School Division No. 64, except the Director of Education, Assistant Director of Education, Secretary-Treasurer, Division Office Executive Secretary, Teachers employed and functioning as such, Driver Trainer Instructor, Contracted Bus Drivers covered by a separate memorandum of agreement for the conveyance of school children, Spare Bus Drivers, Transportation Supervisor, Mechanics, Teacher Aides in positions not funded by the Board, and other professional staff.

MERIT CONTRACTORS ASSOCIATION INC., Applicant and SASKATCHEWAN PROVINCIAL BUILDING AND CONSTRUCTION TRADES COUNCIL, CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF SASKATCHEWAN INC., SASKATCHEWAN FOREST PRODUCTS CORPORATION, SASKATCHEWAN TRANSPORTATION COMPANY, SASKATCHEWAN GOVERNMENT INSURANCE, SASKATCHEWAN TELECOMMUNICATIONS, SASKATCHEWAN WATER CORPORATION, SASKATCHEWAN POWER CORPORATION, SASKENERGY INCORPORATED, Respondents

LRB File No. 098-95; February 8, 1996
Chairperson: Beth Bilson; Members: Carolyn Jones and Ken Hutchinson

For the Applicant: Larry F. Seiferling
For the Respondents,

Saskatchewan Provincial Building and Construction Trades Council:	Neil R. McLeod
Construction Labour Relations Association of Saskatchewan Inc.:	Alan G. McIntyre
Saskatchewan Water Corporation:	T.J. Waller
Saskatchewan Forest Products Corporation:	T.J. Waller
Saskatchewan Telecommunications:	T.J. Waller
Saskatchewan Transportation Company:	W. Robert Pelton
Saskatchewan Government Insurance:	W. Robert Pelton
SaskEnergy Incorporated:	Larry B. LeBlanc
Saskatchewan Power Corporation:	Brian J. Kenny

Practice and procedure - Standing - Whether applicant organization has standing to ask Board to declare Crown Construction Tendering Agreement illegal - Board deciding applicant does not have standing.

REASONS FOR DECISION

Beth Bilson, Chairperson: The Merit Contractors Association is an organization whose members are non-unionized building contractors. This organization has brought an application naming as Respondents the Saskatchewan Provincial Building and Construction Trades Council, a body which represents trade unions in the construction industry; the Construction Labour Relations Association of Saskatchewan Inc., which has been designated under the provisions of *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. 29.11, as the representative employers' organization for unionized contractors in most trade divisions; Saskatchewan Forest Products Corporation, Saskatchewan Government Insurance, Saskatchewan Power Corporation, SaskEnergy Incorporated, Saskatchewan Transportation Company, Saskatchewan Telecommunications, and Saskatchewan Water Corporation, all of which are Saskatchewan Crown corporations.

All of the Respondents are signatories to the Crown Construction Tendering Agreement which was executed in the spring of 1995. This agreement sets out the terms for the employment of workers on construction projects put out to tender by the Crown corporations. Among other conditions, it provides that all contractors carrying out work on these projects, including non-unionized contractors, must pay wages according to the rates established under the collective agreements concluded between the building trades unions and representatives of the unionized employers in the construction industry. It provides, also, that non-unionized contractors must hire a certain proportion of members of the building trades unions, that they must pay into the health, benefit and training funds maintained by the building trades unions, that they are obliged to pay contract administration fees to the representative employers' organization and that the building trades unions are the representatives of all employees working on the projects for the purpose of administering the agreement.

In the material which was circulated with copies of the Crown Construction Tendering Agreement, the purposes of the agreement were outlined as follows:

- *workers on Crown Construction projects will be treated fairly and be paid wages previously established by tough collective bargaining;*
- *a fair tendering process will be followed by, a process based on contractors bidding for work on the basis of their managerial and business expertise, and* ***non-labour related*** *business expenses.*
- *there is a balance among the objectives of awarding work to the* ***low qualified bidder****, treating workers fairly, providing access for work to small, local contractors, and maximizing use of Saskatchewan workers.*
- *there will be a level playing field, ensuring that union* ***and*** *non-union contractors can bid on work, and that workers can obtain work* ***without being forced to join or quit a union****.*

In the application, the Merit Contractors Association originally sought a variety of remedial orders from the Board. Because of the time which has been consumed in bringing the case before the Board, however, counsel indicated that the Applicant now only seeks to have the Board make a declaration that the Crown Construction Tendering Agreement is illegal. We will be alluding later to the major assertions of the Applicant in this respect.

The Respondents raised a preliminary objection to the hearing of the application on the grounds that the Applicant does not have standing to bring the application.

In part, this objection was made on the basis that the Merit Contractors Association as such can have no status to bring the application because it is not clear who the organization purports to represent. Counsel for the Applicant supplied the names of the contractors who are members of the Merit Contractors Association, and asked to be allowed to bring the application in their names if necessary.

Given the conclusion we have reached, it is not necessary to deal with this aspect of the objection at any length. It is our view, however, that this case is not exactly analogous with the circumstances before the Board in *Carpenters Provincial Council of Saskatchewan v. K.A.C.R. (A Joint Venture)* (1984), May Sask. Labour Rep. 53. That case dealt with whether the Carpenters Provincial Council, which had traditionally been the vehicle for the administration of a number of locals of the International Brotherhood of Carpenters and Joiners, was itself a trade union within the meaning of *The Trade Union Act*, R.S.S. 1978, c.T-17. The Board, after an examination of the constitution and bylaws of the Council, concluded that it was not a trade union, and could not obtain a certification Order.

The question of whether an organization meets the requirements set out in a statutory definition is not precisely the same as the issue of whether a party can establish a sufficient interest of a general nature to be entitled to assert a claim under the statute, although they are certainly related questions.

For our purposes here, we do not think it is of particular consequence whether the application is brought by an organization purporting to represent a group of non-unionized contractors, or by the contractors themselves, though this distinction would be of considerable significance in other conditions.

The more substantive ground which was put forward by the Respondents for objecting to the standing of the Merit Contractors Association to bring this application is that their application discloses no interest which can be framed in terms which would require the interpretation or application of either *The Trade Union Act* or *The Construction Industry Labour Relations Act, 1992.*

It is possible to summarize the arguments put forward by counsel for the Applicant as falling into four basic categories. The first set of arguments concerned those parts of the application which essentially rest on the allegation that the very conclusion of an agreement in these terms by the Respondents amounted to the commission of a number of unfair labour practices. In this connection, the Applicant

alleged, for example, that the non-union employees of the contractors represented by the Applicant would be forced to accept, among other things, representation by the building trades unions for the purpose of the administration of the agreement, the hiring of union members according to the formula set out in the agreement and restrictions on strikes and lock-outs during the term of the agreement. He argued that these features of the agreement in themselves constituted coercion and intimidation of employees within the meaning of both s. 11(1)(a) and s. 11(2)(a) of *The Trade Union Act*.

In addition, we understand him to have taken the position, although this was less clear, that certain features of the agreement, notably those requiring the members of the Applicant organization to pay health and benefit levies and union dues, constituted coercion of those *employers* within the meaning of those provisions of *The Trade Union Act*.

Another set of arguments made by counsel for the Applicant rested on the basis that the employers who are members of the Applicant organization would be required to *commit* unfair labour practices within the meaning of various sections of *The Trade Union Act*. In this respect, he argued, for example, that the hiring formula set out in the agreement would require these employers to discriminate in hiring in violation of s. 11(1)(e) of the *Act*.

The third major argument made by counsel for the Applicant was that the Crown Construction Tendering Agreement must be viewed as illegal because it sweeps the members of the Applicant organization within the scope of the provisions of *The Trade Union Act* and *The Construction Industry Labour Relations Act, 1992*, although their employees have never chosen to become certified. Counsel argued that this is fundamentally unfair to these employers, as it subjects them to the consequences of a statutory scheme which has always been seen as resting on the certification process. He cited as an illustration the requirement that all contractors on the projects covered by the agreement must pay the contract administration and industry development fees contemplated in s. 29 of *The Construction Industry Labour Relations Act, 1992*.

The fourth category of arguments which were made by counsel for the Applicant concern what might be characterized as technical illegalities in the agreement, such as the inconsistency between the five-year term of the agreement and the three-year limit for collective agreements set out in s. 33(4) of *The Trade Union Act*.

In presenting these arguments, counsel urged the Board to proceed with the hearing of the application because there was no apparent alternative means of addressing the impact of the agreement on the rights of his client. He argued that the objection to standing was raised as a technical obstacle to the application, and that the Board should be prepared to ignore this obstacle in order to get to the substantive merits of the application.

In a number of instances, the Board has considered the question of the status of parties to participate in proceedings before us. Regulation 16 of the Regulations under *The Trade Union Act*, which reads as follows, places an onus on the Board to attempt to identify parties who may have an interest in any application:

> *16. Upon the filing of any application, the secretary shall make reasonable efforts to determine the names of persons, trade unions and labour organizations having a direct interest in the application and shall as soon as possible forward a copy of the application to every such person, trade union and labour organization.*

This regulation refers specifically to the responsibility resting on the administrative staff of the Board to identify individuals, trade unions or employers who may have a "direct interest" in the issues raised by an application. The Board has also considered the question of standing when it has been raised on the initiative of a party wishing to make representations to the Board.

In many of the cases where the question of standing has arisen, the issue has been examined in the context of an application to make representations as an intervenor or interested party. In a decision in *Regina Police Association v. Regina Board of Police Commissioners and the City of Regina* (1994), 1st Quarter Sask. Labour Rep. 82 at p. 88, for example, the Board commented as follows on the application by the City of Regina to be allowed to make representations concerning a labour dispute between the principals named in the application:

> *In Regina City Policemen's Association v. Board of Police Commissioners, [1971] 4 W.W.R. 526, the Saskatchewan Court of Appeal held that the City of Regina was bound by the award arising from an interest arbitration between the Employer and the Union.*
>
> *Counsel for the Union argued that this decision addressed the undoubted statutory obligation which rests on the City to establish a police force and to provide it with financial support, but that it does not lend support to the claim of the City to be represented in proceedings which concern the collective bargaining relationship between the Employer and the Union. It is our view, however, that the decision of the Court of Appeal demonstrates that, while the City is not the employer of members*

> *of the police force, it does have responsibilities and interests which are closely enough linked to the employment relationship between the Employer and the Union that they ought to have an opportunity to participate in this application. This does not seem to us to be a case where the interest on which they base their claim for standing is contingent or remote from the question which the Board is being asked to decide. Rather, the City relies on an interest which is directly put in issue by the application and which gives them an undeniable stake in the outcome of these proceedings. They claim that the fine revenue sought by the Board of Police Commissioners rightfully belongs to them. It is impossible to determine, without hearing the case, how their claim and that of the Employer are related.*

In *Regina Police Association Inc. v. Regina Board of Police Commissioners* (1994), 3rd Quarter Sask. Labour Rep. 272 at p. 281, on the other hand, the Board made the following comment concerning an application to appear made on behalf of the Saskatchewan Federation of Labour:

> *The Board ruled that the participation of the Federation in the application should be limited to the filing of a written submission. The interest of the Federation was in the legal and policy issues rather than the factual details of the case. Further, the request to intervene came at a point in the hearing when the Federation could not be guided in its argument by any evidence presented in relation to the case. The Board also expressed the view that the Federation had been unable to demonstrate that it had an interest in this particular application sufficiently direct to justify granting status to intervene, or that its interest in this case was distinct from its general interest in many issues which come before the Board.*

We accept the argument advanced on behalf of the Respondents here that there is a distinction between an application to participate in proceedings in the role of an intervenor or interested party, and an application in which a party proposes to participate as an applicant. The Board has not had many occasions to consider standing in the latter context, although the decision in the *K.A.C.R.* case, *supra*, is an example of a denial of standing for failure to comply with certain specific requirements of *The Trade Union Act*.

In this case, the question of standing is not based on specific technical requirements. It is connected with the broader issue of whether the Applicant can demonstrate an interest which can be asserted under the statutes which this Board has been charged to interpret, namely *The Trade Union Act* and *The Construction Industry Labour Relations Act, 1992*.

These statutes represent an embodiment of public policy, and a wide range of persons may have an "interest," in a broad sense, in bringing to our attention various issues which may arise in connection

with the implementation of these policies. As both the courts and other tribunals like our own have concluded, however, some limits must be set in allowing the assertion of interests which are contingent in nature. In *Canadian Council of Churches v. The Queen*, [1992] 1 S.C.R. 236 at p. 252, the Supreme Court of Canada expressed the concern in this way:

> *...I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the Courts and preserving judicial resources. It would be disastrous if the Courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.*

In commenting on the same issue in *Shiell v. Amok Ltd. and Saskatchewan Mining Development Corp.* (1987), 58 Sask. R. 141 at p. 148, Barclay, J. of the Saskatchewan Court of Queen's Bench made the following observation:

> *I am satisfied that the plaintiff does not have a direct personal interest in the alleged improper granting of the ministerial approval under section 16 of the Environmental Assessment Act. If it was sufficient for the plaintiff to be interested in the sense that she is concerned about the environment and environmental issues, then it is difficult to conceive of cases where this criteria would not be met. In my respectful view, to be afforded standing the plaintiff must be affected in the sense that the issue has some direct impact on her. This is clearly distinguishable from the Finlay case in which the respondent had a direct personal interest in the issue as deductions were being made from his cheques.*

The Nova Scotia Labour Relations Board considered a similar question in *Construction Association Management Labour Bureau v. International Association of Heat & Frost Insulators & Asbestos Workers*, [1978] 2 C.L.R.B.R. 150. The Board commented:

> *To determine whether a complainant has a right under a particular provision of the Trade Union Act and therefore has standing to complain under Section 53(1) requires us to interpret the substantive provision to determine what interests it is intended to protect. Only if the "rights" or interests of the complainant are found to be within the purview of the provision will he have standing to complain of a breach thereof. The courts appear to approach issues of standing on this basis. For instance, "a private person who seeks relief from what is a nuisance to the public must show that he has a particular interest or has suffered injury peculiar to himself if he would sue to enjoin it." (Thorson v. A.G. of Canada) (No. 2) (1974) 43 D.L.R. (3d) 1 (S.C.C.), at p. 10 (per Laskin, J. for the majority).*

We should observe at this point that we do not view the question of standing raised by the Respondents as an objection of a "technical" nature. As the Nova Scotia Board suggested in the passage just quoted, the question of standing in these circumstances goes to the heart of the application, as it raises for consideration the issue of whether the Applicant can claim to rest the application on any rights or interests which it is entitled to assert within the framework of the two statutes.

We have concluded that the Applicant has no such interest, and that the objection must be upheld. Before providing our rationale for this decision, it is perhaps useful to comment briefly on the nature of the Crown Construction Tendering Agreement itself. It was not clear to what extent counsel for the Applicant felt his application to be dependant on the characterization of the agreement as a collective agreement, and a relatively brief part of the arguments before us concerned this point.

We should make it clear that we do not view the agreement as having the status of a collective agreement as such. It is, rather, analogous to other kinds of tendering or project agreements in which an owner who wishes to have construction work done sets out the terms and conditions which must be met by contractors wanting to bid on the work. It is relatively common for agreements of this kind to indicate what terms and conditions will apply to employees who are ultimately hired to work on projects covered by the agreement.

It is also sometimes the case that an agreement of this kind will indicate that only unionized employers are eligible to bid on a project. Unlike agreements of that kind, the Crown Construction Tendering Agreement permits non-unionized contractors to bid on work, and does not require employees who are not members of trade unions to obtain membership as a condition of the agreement.

It is true that some of the terms set out in the agreement may have the effect of either adopting or modifying the terms of collective agreements which have been concluded as the result of a process of collective bargaining between trade unions certified to represent employees and the employers of those employees. This does not mean, however, that the agreement itself is a collective agreement.

Because the Crown Construction Tendering Agreement has in some cases incorporated and in some cases modified provisions of collective agreements between employers in the trade divisions represented by the Construction Labour Relations Association and the trade unions which are members of the

Saskatchewan Provincial Building and Construction Trades Council, the agreement may in the future have some implications in the context of those collective bargaining relationships. To the extent that those employers and the building trades unions have agreed to deviate from the terms set out in their collective agreements, it may at some point prove necessary to resolve questions of the priority of the provisions of this agreement in relation to the collective agreements.

For the members of the Construction Labour Relations Association and the Saskatchewan Provincial Building and Construction Trades Council, the granting of certification orders under *The Trade Union Act* has had a series of legal consequences, and has placed them under a number of legal obligations. These include the obligation on both sides to bargain collectively in good faith, the obligation on the part of the trade unions to represent their members fairly, and the obligation to include no-strike and no-lock-out clauses in any collective agreement, to cite just a few examples.

The fact that the employees in those cases have chosen to deal with their employers through the offices of a trade union has also had the consequence that their employers are bound by the provisions of *The Construction Industry Labour Relations Act, 1992*. Under various sections of that statute, the unionized employers are obligated to be represented by a representative employers' organization, and to submit fees to support their representative.

The effect of the Crown Construction Tendering Agreement is not to bring the members of the Applicant organization within the scope of all of these statutory rights and obligations. There is, for example, no obligation to bargain collectively which could be enforced against those employers through *The Trade Union Act*, for it is only once a trade union has been certified to represent a bargaining unit of employees which this Board has found to be appropriate that such an obligation arises.

There are, of course, provisions in *The Trade Union Act* which have application even when a trade union has not obtained a certification Order. The obligations arising under such provisions, however, are not affected one way or the other by the existence of the Crown Construction Tendering Agreement. It would be an unfair labour practice, for example, for any of the employers who are members of the Applicant organization to try to persuade their employees not to join a trade union, Crown Construction Tendering Agreement or no Crown Construction Tendering Agreement.

The parties to the agreement have adopted standard terms and conditions which will govern all work tendered under the agreement which are derived from the collective agreements which have been concluded in the respective construction trades. They have not precluded non-union contractors from bidding on the work, but they have agreed that any employer who wishes to obtain the work must observe the level of terms and conditions which is represented by the provisions of the collective agreements. In the case of health plans and other benefits, an employer is entitled to continue to offer benefits which are at least the equivalent of those available under the collective agreements.

With respect to the first aspect of the arguments made on behalf of the Applicant - the assertion that the conclusion of the agreement itself constitutes a number of unfair labour practices - one must keep in mind the framework we have just described, as well as the concept of "interest" to which we referred earlier.

These arguments must largely depend on findings that portions of the agreement represent unlawful intimidation or coercion of employees according to particular sections of *The Trade Union Act*. In our view, these provisions of the *Act* are intended to provide protection to employees from certain conduct by their employers, or, in certain situations, by trade unions. It is our opinion that there is no basis on which another employer can assert a claim based on these sections. Such a claim cannot exist in a vacuum, and we have expressed the view before that it is not open to an employer to found a claim that one of these provisions has been violated on the impact which such a violation has or may have on employees. Even supposing there were some feature of the agreement which had an effect which could constitute an infraction of *The Trade Union Act* - and we make no finding to this effect - this group of employers has no standing to advance a claim on this basis.

The same would, in our view, apply to the allegations made in the application that the rights of employees under the *Charter* have been infringed. In *Tricil Limited v. Chauffeurs, Teamsters and Helpers Local Union No. 395* (1986), May Sask. Labour Rep. 48 at p. 50, the Board commented as follows:

> *With respect, Section 24 makes it clear that it is not for the employer to invoke the provisions of The Charter on behalf of future employees who might feel their fundamental freedom under Section 2(d) has been infringed or denied. Rather, it is for the employees themselves to apply to a court of competent jurisdiction for an appropriate remedy. Similarly it is for the employees themselves to advance the argument that their fundamental rights under Section 3 of The Act have been ignored.*

If one examines the terms of ss. 11(1)(a) and 11(2)(a) of *The Trade Union Act*, it is very clear that they are meant for the protection exclusively of employees, and it is therefore impossible to see how the members of the Applicant organization would propose to claim the protection of these provisions themselves.

As we indicated earlier, counsel for the Applicant argued, also, that the provisions of the agreement have the inescapable effect of forcing the employers represented by the Applicant to commit unfair labour practices. In this connection, counsel argued that the hiring formula would require a non-union employer to discriminate in hiring on the basis of membership in a trade union.

As the Board has often pointed out, the essential question which is raised for determination under this provision is the motivation of an employer in making the decisions which are challenged. The hiring formula which is included under the Crown Construction Tendering Agreement does not submit the hiring decisions to be determined according to the inclinations of any employer, but rather presents as a *fait accompli* a formula for the constitution of the workforce of a non-union employer. This does not allow motivation - specifically anti-union motivation - to be a factor which enters into hiring decisions.

As with ss. 11(1)(a) and 11(2)(a), which were discussed earlier, there are circumstances where, as a result of the operation of the agreement in particular instances, it is possible that at some time the Board may have to determine whether an employee or employees have a claim arising under s. 11(1)(e), but the hiring formula does not seem to us open to a wholesale challenge on the grounds that it inherently requires the commission of unfair labour practices.

Another section which was cited by the Applicant in this context is s. 11(1)(b). Counsel argued that, by requiring the payment of union dues by all employers, the agreement forces non-union employers to interfere in the administration of the building trades unions.

In our view, this aspect of s. 11(1)(b) is intended to prevent an employer taking steps to sap the loyalty and undermine the independence of a trade union by rendering the union dependent on employer financial assistance. The requirement in the Crown Construction Tendering Agreement that an employer pay union dues on behalf of employees does not have this effect. Rather it is an attempt to put unionized and non-union employers on an equal footing by recreating the effect which is achieved for unionized employers under *The Trade Union Act* by the dues check-off and union security

provisions in ss. 36 and 32 of the *Act*.

The most general argument made on behalf of the Applicant was that the overall effect of the Crown Construction Tendering Agreement is to sweep the employers represented by the Applicant into the statutory scheme represented by *The Trade Union Act* and *The Construction Industry Labour Relations Act, 1992*, without any certification Orders being obtained on behalf of their employees. He argued that this is an unfair abridgement of the rights of these employers. He pointed, for example, to the requirement that these employers, like the unionized employers, must pay the contract administration and industry development fees mentioned in s. 29 of *The Construction Industry Labour Relations Act, 1992*.

In our view, there is a distinction between the obligations which rest on trade unions or employers as a result of the operation of the two statutes, and the obligations which are outlined in this agreement. The contract administration and industry development fees which were alluded to by counsel for the Applicant provide a useful example of this. Under s. 29 of *The Construction Industry Labour Relations Act, 1992*, all unionized contractors must pay these assessments to the representative employers' organization designated as their representative for collective bargaining purposes. For unionized contractors, this obligation derives from the statute, and is enforceable as a legal obligation in this sense.

For non-union employers, the obligation to pay these fees does not arise from the statute, but from their decision to accept the terms and conditions laid out in this agreement in order to qualify as eligible bidders for construction projects put out to tender by the Crown corporations and falling within the scope of the agreement.

In any tendering process, there may be conditions attached which are unattractive to certain potential bidders. It is open to those who conclude that the conditions are undesirable not to participate.

In this case, the parties who were signatories to the agreement have decided that the baseline for any of the projects falling within its terms will be the level of terms and conditions of employment established in the collective agreements concluded between unionized employers and the building trades unions. The competitive element of the tendering process in these circumstances is restricted to those elements which are not related to labour costs. From this point of view, unionized and non-union contractors are

placed on the same footing from the point of view of bidding for work. If the employers who are represented by the Applicant organization regard these terms as unacceptable, they may opt out of the process. There is nothing in the agreement as such which binds the members of the Applicant organization or requires them to undertake any course of conduct.

We have alluded to some points of a technical nature which were made in the course of the argument made by counsel for the Applicant. He argued that there were inconsistencies between the agreement and the provisions of *The Trade Union Act*. He pointed particularly to the discrepancy between the term of five years provided in the agreement, compared to the maximum term of three years for collective agreements set out in s. 33 of *The Trade Union Act,* and to the prohibition on strikes and lock-outs during the term of the agreement, which may not have precisely the same effect as the restrictions on strikes and lock-outs which are contained in s. 44 of *The Trade Union Act* and ss. 22, 23, 24 and 25 of *The Construction Industry Labour Relations Act, 1992.*

It is conceivable that, when the agreement has been in operation for sufficient time, these differences may make it necessary to determine whether the terms of the agreement or the provisions of the statutes must take precedence, or whether they can be reconciled. These differences, however, could not serve to render the entire agreement "illegal" from the outset.

In any case, the matters to which they refer - collective agreements and industrial disputes - are of primary concern, at least insofar as these statutes are concerned, to the parties to collective bargaining relationships, which would not include non-union contractors. Whatever derivative interest the members of the Applicant organization might have in the outcome of these questions, their interest does not seem to us to be sufficient to confer upon them standing to challenge the legality of the agreement on these grounds.

We have concluded, for these reasons, that the Merit Contractors Association has not been able to demonstrate any basis on which they should be granted standing to ask for a declaration that the Crown Construction Tendering Agreement is an illegal agreement. The application must therefore be dismissed.

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 1400, Applicant and REMAI INVESTMENT CORPORATION, OPERATING AS CORONA REGENCY INN, YORKTON, Respondent

LRB File No. 004-96; February 9, 1996
Vice-Chairperson: Gwen Gray; Members: Ken Hutchinson and Donna Ottenson

For the Applicant: Drew Plaxton
For the Respondent: Larry Seiferling, Q.C.

First contract arbitration - Board concludes that its assistance is not required at this time to conclude a first agreement.

Practice and procedure - First contract arbitration - Board requires employer to file statement of outstanding issues under s. 26.5(5).

Practice and procedure - Board agent - Board appointing agent to assist parties with respect to issues raised in application for first contract arbitration.

***The Trade Union Act*, ss. 26.5 and 42.**

REASONS FOR DECISION

FIRST CONTRACT ARBITRATION: PRELIMINARY GUIDELINES

Gwen Gray, Vice-Chairperson: United Food & Commercial Workers, Local 1400 ("U.F.C.W."), filed an Application requesting the imposition of a first contract under s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c.T-17 at the Corona Regency Inn in Yorkton, Saskatchewan. The Corona Regency Inn is owned and operated by Remai Investment Corporation.

The Board reviewed the Application filed by U.F.C.W., Local 1400, the Summary of Proposals Exchanged between the parties and the Employer's Reply, and heard representations from the parties at a hearing on February 9, 1996. The Board notes that the Employer did not file with the Board a list of issues in dispute and a statement of the position of the Employer on those issues as required by s. 26.5(5). This failure was not critical in this instance. However, for future reference, the Board asks that such statements be filed even in situations where the Employer takes the position that the Application is premature. The material is required by the Board in order to assess and determine the

preliminary issue as to "whether it is appropriate to assist the parties in the conclusion of a first collective agreement" (s. 26.5).

The materials indicate that the parties have negotiated on several occasions, although not frequently. U.F.C.W.'s statement of outstanding issues indicates that many of the non-monetary issues have been agreed to including the union security provisions, dues checkoff, grievance procedures and seniority rights. These provisions constitute the "heart and sole" of the Union's exclusive representation rights that one would expect to be enshrined in a first collective agreement in order to ensure the stability of the relationship between the Union and the Employer and to demonstrate the acceptance by the Employer of the rights of employees to select a trade union of their own choosing and to bargain collectively through such trade union. It appears that the main outstanding issues are monetary issues. We do not underestimate the importance of these issues for either the Union's ability to represent the employees or the Employer's ability to continue in business. However, the Board does not conclude from the material filed that its assistance is required at this time to conclude the first agreement. The Board is of the opinion that further bargaining, with or without the assistance of a conciliator, is in order.

The parties jointly requested that the Board appoint an agent under the Board's general powers in s. 42 to (a) explore with the parties whether, on the basis of the guidelines set down by the Labour Relations Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.* (1996), Sask. L.R.B.R. 36 any or all of the outstanding issues between them may be resolved, and (b) to report back to the Board within 60 days of the date of this Decision on the progress of the bargaining, and what, if any, issues might be the subject of arbitration by the Board. The Board is willing to facilitate bargaining in this manner and will issue an Order appointing an agent for the purposes indicated. In addition, the Board will ask the Agent to recommend in his/her report to the Board if first contract arbitration would be appropriate in the circumstances or if the parties should be left to resolve the dispute using the economic weapons of strike and lock-out that are available to them.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 333, Applicant and NORTH CENTRAL DISTRICT HEALTH BOARD AND NIRVANA PIONEER VILLA, Respondents

LRB File No. 224-95; February 21, 1996
Vice-Chairperson: Gwen Gray; Members: Bob Cunningham and Bob Todd

For the Applicant: T. F. Koskie
For the Respondents: Leo Lancaster

Bargaining unit - Appropriate bargaining unit - Managerial exclusion - Food services supervisor - Supervisor included in bargaining unit as she does not exercise independent decision making or managerial authority.

Bargaining unit - Appropriate bargaining unit - Industry - Health care - District position - Food services supervisor not district position when majority of duties performed in institution are subject to "all employee" certification order.

***The Trade Union Act*, ss. 24 and 2(f)(i).**

REASONS FOR DECISION

Gwen Gray, Vice-Chairperson: As indicated in our Preliminary Ruling on this matter, the parties agreed that the Board may treat this application as a Reference of Dispute under s. 24 of *The Trade Union Act,* R.S.S. 1978, c.T-17. In its Preliminary Ruling, the Board directed the parties to negotiate further with respect to the inclusion or exclusion of the position of Food Services Supervisor. The parties advised the Board that such negotiations did not result in a resolution of this issue. As a result, the Board will render its decision.

There are two issues raised by the application. First, is the position of Food Services Supervisor outside the scope of the certification Orders issued to the Service Employees International Union, Local 333 because it includes responsibilities across the Health District? Second, if the position is not a "District position" is it excluded from the scope of the certification Orders because of its managerial character?

The Applicant's evidence indicated that the position of Food Service Supervisor was initially created by agreement between the Union and the Employer when the Employer hired Mr. Dale White on October 12, 1990. The position reverted to a Cook III position on his departure. In June, 1994, the Union and

the Employer again agreed to the creation of a Food Services Supervisor position at Nirvana Pioneer Villa as a temporary out-of-scope position to replace the Cook III in-scope position. The position was initially created for a period of six months, which was later extended to one year. It was intended that such a position could overcome several problems that had arisen in the Dietetics Department under the leadership of the in-scope Cook III. In May, 1995 the Employer advised the Union that it intended to make the Food Services Supervisor a permanent out-of-scope position.

The Employer's evidence indicated that the Food Services Supervisor works four out of five days per week at the institution known as Nirvana Pioneer Villa, a special care home in Melfort. The incumbent supervises the work of approximately 12 full-time equivalent cooks and aides in the Dietetics Department of the home. In addition, the incumbent spends one day per week at a non-union special care home called Chateau Providence located in nearby St. Brieux. She also relieves the Food Services Supervisors in two other institutions operated by the District, one at the Melfort Hospital and one at the Parkland Regional Care Centre, both of which positions are out-of-scope of their respective union certifications. The Food Services Supervisor reports to the Nutrition Services Coordinator for the District, who works out of the District offices.

There is no doubt that the Food Services Supervisor has an important and central role to play in the smooth operations of the Dietetic Department. The duties of the position include scheduling of staff, hiring of staff, evaluation of staff, granting of leaves of absence in accordance with the collective agreement and other employer policies and providing verbal warnings to staff as the first step of a disciplinary process.

The Food Services Supervisor, however, has limited authority regarding the imposition of discipline beyond a verbal warning. She is expected to consult with her supervisor regarding any other disciplinary matter and has no authority to impose the ultimate discipline of discharge. Her job description requires her to "consult with the Nutrition Services Coordinator whenever changes or developments arise which will affect the institution (i.e. union/management matters), or change in procedure affecting other departments of Nirvana Pioneer Villa or within the District."

In addition, she has little authority with regard to budgeting and staffing within her department. The Supervisor is responsible in this context for developing menus and planning the food production to fall

within the nutritional guidelines, budget guidelines and health and safety guidelines set for the institution. She is responsible for ordering food and for ensuring the timely production of food for the residents of the institution.

In short, the position is concerned with the organization of work in the Dietetics Department - scheduling of work, planning of menus, and ensuring compliance with work rules and budget parameters. There is little room for independent decision making except in the confines of the limits prescribed by the District. The position has little impact on the Employer's labour relations, either through the imposition of discipline or by participating on behalf of the Employer in collective bargaining.

The primary duties are performed at Nirvana Pioneer Villa with incidental but regular duties performed at Chateau Providence and less regular duties at Melfort Hospital and Parkland Regional Care Centre in the District. The Employer argued that these additional duties in other institutions within the District make the position of Food Services Supervisor a "District position." In *Service Employees' International Union, Local 336 v. Southwest District Health Board* (1994), 4th Quarter Sask. Labour Rep. 191, the Board differentiated between positions that are primarily located within a single institution and positions that are located in the District office of a Health District. This differentiation of positions arose out of the consolidation of health care institutions into District Health Boards under *The Health Districts Act*, S.S. 1993, c. H-0.01. The *Act* placed several individual institutions that had previously operated as distinct employers under one employer umbrella known as the District Health Board. The consolidation brought about by *The Health Districts Act* had the effect of amalgamating the Employer side of the labour relations equation into one entity without a corresponding consolidation of the Unions' bargaining rights. As a result, inter-union conflicts have arisen over the intermingling of employees in the reorganization of health care services within a District, the creation of new positions within the District structure, and the assignment of duties which may have to be performed outside the boundaries of the specific facilities which have in the past been the basis of union bargaining rights.

The Board's approach to these issues was summarized in *Southwest District Health Board, supra*, as follows:

> *The Board has expressed a preference, in the City Hospital case and in other decisions, for building on the base provided by existing bargaining relationships, while making whatever changes might be necessary in the context of the changed*

> *environment in health care. By expressing this preference, however, we are not denying that there have been and will continue to be changes which have considerable significance for the nature or configuration of collective bargaining in the health care sector. Nor are we denying that these changes may be productive of confusion, tension and uncertainty among those who are involved in the bargaining process. As we intimated in the City Hospital decision, there have been considerable efforts by all of the parties to collective bargaining in the health care system to identify issues of joint concern, and to match existing relationships to new circumstances. There are issues, however, which may not be susceptible to resolution through this process, and which this Board will be asked to adjudicate.*
>
> *We see this as an issue of that kind. As we have indicated, the predominant basis for the delineation of bargaining units continues to be individual facilities, though it may be anticipated that there will ultimately be applications to consolidate or merge existing bargaining units which may produce a new configuration of bargaining units. While the existing single-facility bargaining units continue to be the basis on which collective bargaining takes place, this does not mean that there has been no shift in the nature of the bargaining relationship which is based on bargaining units so defined, or that there has not been a change in the relationship between existing bargaining units. For example, though the Union described as "all-employee" units the units defined in the certification Orders it has obtained, some going back thirty years, the term "all-employee unit" is of limited use in describing the relationships which must be fostered now that one employer has replaced fifteen separate employers. Though there may be some positions which manifestly belong within a particular bargaining unit, it will be less clear in other cases where a particular position belongs, and how it should be allocated. This may be especially true of positions of the kind we are considering here, where the duties performed by incumbents are not related exclusively to one facility, but cover a number of different facilities. Though there have apparently been isolated cases in the past where employees held more than one position within the district, this is somewhat different from the circumstance where the responsibilities associated with one position relate to more than one facility.*

After reviewing the pattern of work of the four employees in question, which were factually similar to the position of the Food Services Supervisor in the present application in that two of the positions required the incumbent to work at three facilities, one of which was not unionized, the Board concluded at p. 198 as follows:

> *In practice, these employees spend the majority of their time at locations which are fairly far removed from each other and from the central office of the district. Their primary interactions are with other employees at the facilities which fall within the scope of their duties. Three of them do regularly work in more than one place, which does make it difficult to apply literally the suggestion made by Mr. Huculak of the Canadian Union of Public Employees that these employees "should fall within the collective bargaining agreement of the Union certified to represent employees in the facility at which the employees are located." We nonetheless think that there is merit to this as a basic approach, and that these employees should be allocated according to the facility at which they spend the majority of their time.*

The Employer in this instance argued that the position of Food Services Supervisor is a District

position and as such should not be included in the Applicant's "all employee" bargaining unit. The Board disagrees with this analysis. The evidence demonstrates that the incumbent spends the majority of her time at Nirvana Pioneer Home. Her primary responsibilities are located in this institution, and not in the overall operation of Dietetics Services throughout the District. As such, the position is one that may fall within the Applicant's "all employee" bargaining unit.

The Employer also urged the Board to conclude that the position of Food Services Supervisor was managerial in character. The Board, however, has concluded that the position, while it is supervisory in nature, does not have sufficient independent decision making or managerial authority to render it managerial in its essential nature. In *Communications, Energy & Paperworks Union of Canada v. Prince Albert Community Workshop Society Inc.* (1995), 2nd Quarter Sask. Labour Rep. 294, the Board considered a similar position of Food Project Supervisor and concluded at p. 301 as follows:

> *It is clear that Ms. Bannerman has a significant degree of responsibility with respect to the operation of the program which is carried out through the restaurant, and that she enjoys considerable autonomy to make decisions with respect to the administration of that program. She clearly also performs a supervisory role with respect to the work of the Assistant Supervisor, and makes recommendations which have some impact on the employee in that position. We have concluded, however, that she does not exercise significant managerial authority in an industrial relations sense, or authority of a kind which would create an intolerable conflict of interest once the collective bargaining relationship is established.*

The Board concludes that the current incumbent in the position titled Food Services Supervisor actually performs functions that are more akin to the duties performed previously by the Cook III position which is clearly within the scope of the Union's certification order. In reaching its decision, the Board is not commenting on the status of other Food Services Supervisory positions that exist in the District. There was no evidence presented with respect to those positions. As is the case in all applications of this nature, the Board examines the functions and responsibilities of the position in question as it is actually performed and thereby is not particularly concerned with the title assigned to the position.

The Board also notes that in the current climate of health care reform, the structure of collective bargaining is in a state of flux, both with respect to the realignment of bargaining units and the creation of new District management structures. The Board has approached the restructuring issues on a case-by-case basis without radically altering bargaining rights. Perhaps this approach does not always provide simple and clear guidelines for determining all the issues that may arise when new or modified positions are created. It is the Board's hope that this decision will provide some additional guidance to

the parties for their future reference.

The Board therefore determines that this position entitled Food Services Supervisor falls within the certification Order issued to the Applicant Union.

KINDERSLEY CO-OPERATIVE ASSOCIATION LIMITED, Applicant and SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Respondent

LRB File No. 034-95; February 27, 1996
Chairperson: Beth Bilson; Members: Brenda Cuthbert and Bruce McDonald

For the Applicant: Garry Burkart
For the Respondent: Larry Seiferling, Q.C.

Bargaining unit - Amendment - Whether amendment signifies that new relationship is like newly certified unit - Board deciding this is not significance of amendment.

Reconsideration - Whether Board had failed to consider important considerations of policy or unanticipated consequences in original decision - Board deciding original decision had taken these matters into account.

***The Trade Union Act*, ss. 5(a), (b), (c) and (k).**

REASONS FOR DECISION

APPLICATION FOR RECONSIDERATION

Beth Bilson, Chairperson: The Saskatchewan Joint Board Retail, Wholesale and Department Store Union were certified in an Order issued by this Board dated August 14, 1961 as the bargaining representative for a unit of employees of Kindersley Co-operative Association Limited.

In the application designated as LRB File No. 034-95, the Union sought to amend that certification Order to include the employees at the Eatonia outlet operated by the Employer.

The Employer did not oppose the amendment. The parties jointly agreed, however, to raise two questions to be determined by the Board. These were outlined as follows in our original Reasons for Decision, which were dated June 23, 1995:

> *The issue on which the parties sought guidance from the Board was that of whether an amended Order from this Board would override the scope clause contained in the collective agreement between the parties, and the related issue of whether the provisions of the collective agreement apply to the group of employees added to the bargaining unit.*

In response to these questions, the Board concluded that the certification Order did have the effect of overriding the scope clause contained in the collective agreement, and that the provisions of the collective agreement apply to all of the employees in the bargaining unit described in the amended Order, subject to any modifications which the parties may agree on.

The Employer has now applied to the Board to reconsider this decision. Counsel referred to the decision of the Board in *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Sharon Ruff* (1993), 3rd Quarter Sask. Labour Rep. 103, in which we suggested a number of criteria which would assist us in deciding whether it would be appropriate to reconsider one of our decisions. The Board alluded to the standards outlined in the decision of the British Columbia Industrial Labour Relations Council in *Overwaitea Foods v. United Food & Commercial Workers Union, Local 2000* (1990), 90 C.L.L.C. ¶16, 049 at p.14,417:

> *In [Western Cash Register v. International Brotherhood of Electrical Workers, [1978] 2 CLRBR 532], the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRB No. 61/79, [1979] 3 Can LRBR 153), added a fifth and sixth ground:*
>
> 1. *if there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
> 2. *if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
> 3. *if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
> 4. *if the original decision turned on a conclusion of law of general policy under the Code which law or policy was not properly interpreted by the original panel; or,*
> 5. *if the original decision is tainted by a breach of natural justice; or,*
> 6. *if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

Counsel for the Employer cited two of these criteria as the basis for his request that the earlier decision

be reconsidered. He said that the decision would have labour relations consequences which were unanticipated, or which the Board must not have taken into account in arriving at the original Decision. In addition, he said that this Decision had significant implications from a policy point of view, and would have important precedential value; in this context, he argued that it was essential for the Board to consider carefully the potential results of the Decision.

The representative of the Union pointed to other portions of the decision in the *Sharon Ruff* case, *supra*, in which the Board downplayed the significance of those two criteria in comparison to the requirement that a party requesting reconsideration be able to put forward new evidence or evidence which they did not have an opportunity to present at the first hearing.

In that decision, the Board did say that the criteria which have been cited by counsel for the Employer on this occasion were likely to be of lesser significance in the Saskatchewan context than in a setting where large and complex labour relations tribunals must devise formal means of maintaining consistency in implementing the policy set out in a statute. We did not mean to suggest that there would be no occasions when it would be appropriate to reconsider one of our decisions on the grounds that we had failed to take into account an important policy consideration, or that we had failed to anticipate certain important consequences.

The Board must proceed cautiously in the case of a request for reconsideration, in order to prevent this becoming an avenue which is too easily available to parties who simply wish to have a second opinion from the Board, or an opportunity to make additional arguments which were not put before the Board in the first instance. We must also, however, remain able to respond to consequences, in either a policy or a practical sense, which were truly unforeseen by us.

In any event, the circumstances in the *Sharon Ruff* case were of a kind which may naturally have led to a preoccupation on our part with questions of evidence.

In this case, we are of the view that counsel for the Employer has raised an argument worthy of comment, although we have decided to stand by our original Decision.

The starting point for the argument made on behalf of the Employer was a series of decisions

concerning the effect of an application brought under s. 5(k) of *The Trade Union Act*, R.S.S. 1978, c.T-17 to amend or rescind an Order made under ss. 5(a), 5(b) or 5(c). These sections confer upon this Board the following powers:

> 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, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;*
>
> *(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:*
>
> > *(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 30 days or more than 60 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 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;*
>
> *notwithstanding a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*

In the case of *Canadian Union of Public Employees, Local 1975 v. University of Saskatchewan*, LRB File No. 132-74, the Board ordered an amendment to the certification Orders affecting the staff

employees of the University of Saskatchewan. Though the main objective of the application was to consolidate a number of bargaining units, the proposed bargaining unit would also include a significant number of administrative and supervisory employees who had been excluded from all of the previous certification Orders.

The decision of the Board was upheld by the Saskatchewan Court of Queen's Bench, and by the Saskatchewan Court of Appeal. The Supreme Court of Canada, however, in *University of Saskatchewan v. Canadian Union of Public Employees*, [1978] 2 S.C.R. 834, approved the reasons given in dissent by Bayda, J.A. in the Court of Appeal at (1978), 22 N.R. 316, and quashed the decision of the Board.

In that dissenting judgment, Bayda, J.A. said that, although the Board had jurisdiction to order the consolidation of bargaining units under s. 5(k) of *The Trade Union Act*, the addition of a group of employees to the bargaining unit thus created posed a separate question. He made the following comment at p. 325:

> *If, however, the scope of the order containing the amendment extends beyond a consolidation of bargaining units (or some like simple amendment) and embraces matters which properly fall under Section 5(a), (b) and (c) of the Act, then the Board has no jurisdiction to make that order on an application under Section 5(i) or 5(k) of the Act, unless the Board deals with the application as if it were one under Section 5(a), (b) and (c) and considers those matters which are relative to the applications under Section 5(a), (b) and (c) of the Act.*

In a decision in *Wascana Rehabilitation Centre and Physical Therapists Association v. Saskatchewan Government Employees' Union* (1993), 1st Quarter Sask. Labour Rep. 167, this Board commented at pp. 172-173 on the consequences of the Supreme Court ruling in the *University of Saskatchewan* case:

> *As the University of Saskatchewan case itself turned on the jurisdictional issue, the possible significance of the requirement that the union must establish majority support on such an application was not fully explored. In the case of Retail, Wholesale and Department Store Union v. Prince Albert Co-operative Association Ltd., LRB File No. 535-81, however, the Board did consider this issue. A previous Court of Appeal decision, in Army and Navy Department Store Ltd. v. Retail, Wholesale and Department Store Union (1962) 39 W.W.R. 311, had approved a finding of the Board to the following effect:*
>
> > *So long as a certification order of the labour relations board is valid and subsisting, the status of the union so certified as representing a*

> *majority of employees in the appropriate unit for the purpose of bargaining collectively cannot be questioned and the labour relations board, before making an order that the employer has engaged in an unfair labour practice contrary to sec. 8(1) of The Trade Union Act, RSS, 1953, ch. 259, by refusing to bargain collectively with the union, is not obliged to enter into an inquiry as to whether the union so certified continues to represent a majority of the employees.*
>
> *The Board held in the Prince Albert Co-operative Association case that the result in the University of Saskatchewan case had not disturbed this principle. They decided, therefore, that the Union only needed to demonstrate that they enjoyed majority support among the group of employees who they were asking to add to the bargaining unit, and did not need to recanvass support among members of the existing unit, a finding which was upheld by the Court of Appeal, at [1983] 1 W.W.R. 549. This seems consistent with other Board decisions involving the addition of new groups of employees to existing bargaining units, such as University of Saskatchewan Faculty Association v. University of Saskatchewan, LRB File No. 070-85, and Canadian Union of Public Employees v. Saskatoon Public Library Board, LRB File No. 257-88.*

Counsel for the Employer in this case underlined the requirement stated at p. 325 by Bayda, J.A. that the Board consider an application for amendment under s. 5(k) "as if it were one under Section 5(a),(b) and (c)." He argued that the implication of this is that when an amendment is made to a certification order, the situation which is created is indistinguishable from the situation which exists when the Board has made the initial certification order under ss. 5(a), (b) and (c).

He went on to elaborate his view of the consequences which, according to this line of cases, would follow for the situation which was created by the amendment which was granted as a result of this application. He argued that, for the employees at the Eatonia location, the major result of the amendment is that the Employer is now obliged to bargain with the Union concerning their terms and conditions of employment. Their terms and conditions are frozen at the existing level, and they would only be changed when a collective agreement is concluded. In the interim, this group of employees is in a position to strike, and the Employer is in a position to lock them out.

Indeed, counsel for the Employer went farther, and argued that the effect of the amendment is to put the employees at the Kindersley location in the same position they were immediately after their certification Order was issued in 1961. This would mean that, though they too are entitled to bargain with the Employer through the Union, and their terms and conditions of employment are frozen at the level of

the last collective agreement, the Employer would ultimately be entitled to make unilateral changes in those terms and conditions of employment unless a new collective agreement is reached.

He argued that there is nothing to prevent the existence of groups of employees with two sets of conditions within one bargaining unit, and separate conditions concerning strikes and lock-outs.

The alternative would be that a group of employees who had not been covered by the collective agreement would have access to terms and conditions which had not initially been bargained on their behalf.

A related argument made on behalf of the Employer was that, by saying that the certification Order should be viewed as superseding the scope clause in the collective agreement, and by saying that the provisions of the collective agreement apply to all of the employees in the broader bargaining unit, the Board is interfering in the bargaining process, and assuming responsibility for matters which are best left up to the parties to resolve through bargaining, and, if necessary, through the grievance and arbitration procedure set out in the collective agreement.

We have concluded that we cannot accept the view put forward by counsel for the Employer of the implications of s. 5(k) and of the cases cited above in which that provision was discussed. It is true that much of the interpretation of this Section has hinged on the observation that this Board must view an application under s. 5(k) "as if it were one under Section 5(a), (b) and (c)."

By this, we understand the Courts to have meant that, in considering an application for amendment of a certification Order, this Board must be mindful of the considerations which were the basis of granting the original Order. This means, for example, that the Board must reassess the question of whether the bargaining unit will be an appropriate one, once the amendment is granted, with the same seriousness which it applied to the evaluation of the original bargaining unit. It means that, in order to decide whether a trade union should be designated as the bargaining agent, the Board must consider whether the trade union has established that it represents a majority of employees, including a majority of the employees who are proposed to be added to the bargaining unit if the amendment represents a change in that respect. It means that the Board must consider whether there are any impediments to sound collective bargaining on the basis of the amended Order in comparison with the original Order.

These issues are not at the root of the dispute between the parties here. The Union proceeded in the proper fashion to obtain the support of the group of employees they proposed to add to the unit, and the Employer did not contest the appropriateness of the bargaining unit which would be created as the result of the amendment.

On the other hand, the notion of amendment imports a connotation of revision or addition, not of erasure or obliteration. In our view, the effect of an amendment is not to turn back the clock to the time when the original Order was granted, but to make modifications with that Order as the baseline. The major implication of this is that the new group of employees must be seen as coming into a collective bargaining relationship which has been in place for a considerable time, and where the terms and conditions of employment for employees have been set to a considerable degree by the collective bargaining process. The amendment to the certification Order does more than impose a naked obligation to the Employer to bargain with respect to the additional employees; it introduces those employees into a setting which has already been considerably affected by the bargaining relationship.

With respect to the scope clause itself, we have already stated in our original Decision that we see such provisions as inherently subject to our supervision:

> *It is common for the parties to collective bargaining relationships to continue to discuss questions of bargaining unit scope after a certification Order has been issued, and the Board has generally taken the position that it will not easily interfere in the agreements which have been negotiated between the parties concerning questions of scope. In a decision in Service Employees' International Union v. Town of Shaunavon, LRB File No. 151-87, the Board made this point in the following terms:*
>
> > *Although the appropriateness of a bargaining unit is always a matter for the discretion of the Board, the Board's view has been that if the parties themselves agree that a particular bargaining unit is appropriate, then their agreement should be a most important factor in the Board's determination of the same question (see, for example, City of Lloydminster, LRB File No. 011-84 Reasons dated November 27, 1984). The Board's practice, with certain stated exceptions, has been to give full recognition to scope clauses in collective agreements which are at variance with certification orders of the Board.*

With respect to the provisions of the collective agreement as a whole, we have concluded that to say the agreement covers the employees who have been added to the bargaining unit is not to usurp the

responsibility of the parties to engage in bargaining, but simply to state the logical result of the amendment process. If there are parts of the existing collective agreement which are genuinely unsuitable or maladapted to the group of employees being added, it is open to the parties to bargain whatever transitional or separate provisions they think appropriate. The example we cited in our original Decision was the possibility that there are job classifications in existence at Eatonia which are not included in the wage scales in the collective agreement. Though the parties did not apparently engage in any preliminary discussions of such issues in preparation for this application, there is nothing to prevent such bargaining taking place now.

Counsel for the Employer argued that it would be unreasonable to impose the provisions of the collective agreement on the Employer with respect to the group of newly-added employees. In our view, it would be equally unreasonable to think of the employees as two separate groups once they are included within one bargaining unit. Though it is not outside the realm of possibility that parties to a collective bargaining relationship would decide to have two separate agreements, or two sets of strike provisions, it is almost inconceivable that this would be a reasonable configuration in the context of a unit of employees this small.

If the Employer were to hire new employees into existing job classifications, they would be obliged to pay the wage rates set out in the collective agreement, unless they could persuade the Union that there was a justification for departing from that. Insofar as the new employees fit into the existing job classifications, or other criteria set out in the collective agreement, it is our view that the provisions of the agreement apply to them. If there are genuine difficulties in applying the collective agreement, the parties are free to agree on whatever modifications they wish. In the meantime, the new employees must be regarded as full members of the bargaining unit, with access to whatever parts of the collective agreement may apply to them, including the grievance procedure.

It is our view that the process of amendment contemplated in s. 5 of *The Trade Union Act* should be implemented in a way which advances the objectives of the *Act* as a whole. If we were to accept the argument put forward by counsel for the Employer, we would be forcing trade unions to put at risk gains they have made, often over a considerable period of time, any time they express a desire to consolidate or make additions to the bargaining units they represent. This would provide a powerful

disincentive to trade unions to pursue that path which results in the evolution of bargaining units in a more inclusive and less fragmented direction.

For the reasons we have given, we reiterate those conclusions which we expressed in our initial Decision on this issue.

Counsel for the Employer pointed out at the beginning of the hearing that the amended certification Order issued by the Board failed to reflect a managerial exclusion which the parties had agreed to, that of the Bulk Manager at Eatonia. We undertake to correct this error, which was the result of oversight.

SASKATCHEWAN GOVERNMENT EMPLOYEES UNION, Applicant and SPI MARKETING GROUP, Respondent

LRB File No. 129-95; February 27, 1996
Chairperson: Beth Bilson; Members: Carolyn Jones and Don Bell

For the Applicant: Bill Belof
For the Respondent: Gary Semenchuk, Q.C.

Collective agreement - Grievance and arbitration procedure - Whether dispute between parties involved interpretation or application of collective agreement - Board deciding dispute appropriate for submission to arbitration.

Unfair labour practice - Duty to bargain - Whether refusal of employer to proceed to arbitration on grievance constituted failure to bargain - Board deciding refusal of employer constituted unfair labour practice.

***The Trade Union Act*, ss. 11(1)(c) and 25(1).**

REASONS FOR DECISION

Beth Bilson, Chairperson: The Saskatchewan Government Employees' Union has been certified by this Board as the bargaining representative for a unit of employees of SPI Marketing Group. In this application, the Union alleges that the Employer has committed unfair labour practices and violations of ss. 11(1)(a), 11(1)(c), 11(1)(d) and 11(1)(e) of *The Trade Union Act*, R.S.S. 1978, c.T-17. The application of these provisions was not argued in detail at the hearing, and we are of the view that the only one which was identified as relevant to the circumstances was s. 11(1)(c), which reads 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:*
>
> > *(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 parties filed an Agreed Statement of Facts which succinctly outlined the events which preceded the filing of this application. On January 30, 1995, the Employer issued a notice of lay-off to an employee, Ms. Judy LaBrash.

Representatives of the Union and the Employer met and exchanged correspondence concerning this lay-off, but no steps were taken to reverse the notice.

On March 1, 1995, Ms. LaBrash sent a letter to the Employer indicating that she was resigning her position rather than accepting the lay-off, apparently so that she would receive severance pay.

On March 22, the Union filed a grievance claiming that Ms. LaBrash had been terminated without cause. This grievance was denied by the Employer, in a letter dated March 24, 1995:

> *March 24, 1995*
>
> *Mr. Bill Belof*
> *S.G.E.U.*
> *1114 - 22nd Street West*
> *Saskatoon, Saskatchewan*
> *S7M 0S5*
>
> *Dear Mr. Belof:*
>
> *In regard to your Grievance #95-02-0175 regarding Judy LaBrash please note the following:*
>
> *Judy was laid off due to a shortage of work and was given notice in accordance with Article 7.2 of the Collective Bargaining Agreement.*
>
> *My letter to you dated February 14, 1995 simply explained that the layoff was not a contemplated cut back, an abolition of position or re-organization.*
>
> *Since there was a shortage of work the layoff is justified.*
>
> *Yours truly,*
>
> *Larry Walker*
> *Controller*

The Union subsequently filed an "SGEU policy grievance," dated March 27, 1995, in which the impugned conduct of the Employer was described as follows: "Controvention [sic] of Article 7.1. The Employer did not advise the Union in accordance with Article 7.1 of lay-offs and reduction of hours until after notices were given to the employees."

A series of letters between the parties followed. The Employer consistently denied the grievances, taking the position that Ms. LaBrash had originally been laid off for lack of work and had subsequently resigned, and that the Employer had therefore not committed any breach of the collective agreement. The Union ultimately requested that an arbitration board be appointed to hear both of the grievances. The Employer replied as follows, in a letter dated May 8, 1995:

May 8, 1995

Mr. Bill Belof
S.G.E.U.
1114 - 22nd Street West
Saskatoon, Saskatchewan
S7M 0S5

Dear Mr. Belof:

RE: File #95-02-017S & 95-02-018S

Further to your letter dated April 27, 1995 regarding the grievance for Judy LaBrash and the policy grievance, we wish to restate our position as follows:

1. *Judy LaBrash was laid off due to a shortage of work.*
2. *Judy LaBrash chose to resign rather than go on the layoff list.*
3. *Since Judy LaBrash resigned from her employment she has no status to grieve or arbitrate this issue.*
4. *The Union does not have independent status to raise grievances of its own volition unrelated to a specific employee or group of employees.*

Yours truly,

J.B. Morris
Controller

The argument presented by counsel for the Employer before the Board essentially confirmed the position taken by the Employer in this letter. He argued that the circumstances under which Ms. LaBrash left her employment constituted either a lay-off for lack of work or a voluntary resignation. In neither case could the conduct of the Employer be characterized as a breach of the terms of the collective agreement between the parties. He said that the refusal on the part of the Employer to accede to the appointment of an arbitration board was based on the view that the label of "termination" which the Union put on the departure of Ms. LaBrash had no foundation in fact, and, in this context, the insistence of the Union on putting the matter before an arbitration board was unreasonable.

Counsel further argued that the Employer was entitled to take the position that there was no provision of the collective agreement which would permit the consideration of a "policy grievance," and to refuse to proceed to arbitration on the basis of an impermissible grievance.

The representative of the Union argued that all of the matters which were raised by the Employer to justify the refusal to proceed to arbitration could - and should - properly be placed before a board of

arbitration for determination, and that for the Employer to refuse to allow the grievances to go forward constituted an unfair labour practice. He argued that the Employer is not entitled to decide unilaterally that the collective agreement does not apply to particular situations, or that certain issues are not appropriate for consideration by an arbitration board appointed pursuant to the collective agreement.

The mechanisms by which the parties to collective bargaining relationships agree to resolve the disputes which arise in the course of those relationships are an important component of the scheme of collective bargaining which is protected and regulated by the provisions of *The Trade Union Act*. This Board has often commented that the mechanisms which the parties choose for the resolution of their disputes should not be regarded as an inferior by-product of the jurisdiction we exercise under the *Act*, but as an important indication of the health and self-sufficiency of the bargaining relationship. In this context, we have generally deferred to the grievance and arbitration procedure set out in a collective agreement where the issues which are raised before us may properly be the subject of arbitration proceedings. The most recent example of this may be found in our decision in *Canadian* Union of Public Employees, Local 3736 *v. North Saskatchewan Laundry and Support Services*, [1996] Sask. L.R.B.R. 54.

This does not mean that this Board takes no further interest in the efficacy and success of the grievance and arbitration process once the parties have enshrined such a procedure in the collective agreement between them. We have a continuing and general responsibility to ensure that both parties observe their duty to bargain collectively, and this duty extends beyond the obligation to negotiate a collective agreement, and even beyond the obligations which are incurred under the agreement itself. The definition of "bargaining collectively" which is contained in s. 2(b) of *The Trade Union Act* makes this clear:

> *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;*

It will be noted that the parties have an ongoing obligation, as part of the bargaining relationship, to make some provision for the resolution of "disputes and grievances" which arise as an employer and a trade union carry out their respective roles with respect to the terms and conditions of employment for a group of employees. In our view, this is a general obligation, which is not limited to the processing of grievances as such.

Prior to the amendments to *The Trade Union Act* which were proclaimed on October 28, 1994, arbitration had no special significance under the statute, even in relation to grievances under a collective agreement, although it was ubiquitous as the accepted method for determining grievances. Under the amended *Act*, however, arbitration has been identified as the mechanism by which disputes concerning the collective agreement should ultimately be determined, if they cannot be resolved by the parties through the grievance procedure which is set out in their agreement. Section 25(1) of *The Trade Union Act* now reads as follows:

> *25(1) All differences between the parties to a collective bargaining agreement or persons bound by the collective bargaining agreement or on whose behalf the collective bargaining agreement was entered into respecting its meaning, application or alleged violation, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective bargaining agreement.*
>
> *(1.1) Subsections (1.2) to (4) apply to all arbitrations pursuant to this Act or any collective bargaining agreement.*
>
> *(1.2) The finding of an arbitrator or an arbitration board is:*
>
> > *(a) final and conclusive;*
> >
> > *(b) binding on the parties with respect to all matters within the legislative jurisdiction of the Government of Saskatchewan; and*
> >
> > *(c) enforceable in the same manner as an order of the board made pursuant this Act.*

Section 25(1) requires that all "differences" between the parties to a collective agreement concerning its "meaning, application or alleged violation, including a question as to whether the matter is arbitrable" must be settled by arbitration as the culmination of any grievance procedure provided under the agreement.

It is our view that all of the issues raised by the Employer as objections to the grievances filed by the Union fall within the categories of dispute listed in s. 25(1) which should be settled by arbitration if

they are not amenable to resolution by the parties through the grievance procedure. The questions of whether Ms. LaBrash was laid off, resigned or was terminated involve disputes over the "meaning, application or alleged violation" of the collective agreement. The questions of arbitrability which have been put in issue by the Employer are also among the types of dispute which should be submitted to arbitration according to s. 25(1).

The Employer has taken the firm position that the circumstances under which the employment of Ms. LaBrash came to an end do not call for the application or interpretation of the provisions of the collective agreement, and they regard it as unreasonable for the Union to insist on pursuing it in those terms. The Union, on the other hand, views this as a situation in which the conduct of the Employer can be characterized as constituting a breach of the provisions of the collective agreement. It seems to us that the parties are clearly in dispute on this issue, and that it is a dispute of a kind which the legislature, in enacting s. 25(1), thought should appropriately be settled by arbitration.

In our opinion, it is not open to the Employer to make a unilateral decision that the collective agreement does not apply, or that this is not the type of dispute which should go to arbitration. The interests of the Employer in this connection are sufficiently protected in the arbitration process. The Employer is entitled to raise matters of arbitrability or the applicability of certain provisions of the collective agreement before an arbitration board, and the board has full jurisdiction to determine those issues.

We have concluded that, by refusing to contemplate proceeding to arbitration on these issues, the Employer has committed a breach of the duty to bargain which is set out in s. 11(1)(c) of *The Trade Union Act*. If there is not further possibility of resolution of the matter through the grievance procedure, we will direct the Employer to accede to the Union request to appoint an arbitration board.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 529, Applicant and A-LERT CANADA LTD., Respondent

LRB File No. 294-95; March 4, 1996
Vice-Chairperson: Gwen Gray; Members: Bruce McDonald and Terry Verbeke

For the Applicant: Gus Gerecke
For the Respondent: Brad Tilling

Bargaining unit - Appropriate bargaining unit - Construction industry - Welders are not included in standard electrician unit without evidence that welders are performing work incidental to electrical work.

Bargaining unit - Appropriate bargaining unit - Construction industry - Painters are not included in standard electrician unit.

Bargaining unit - Appropriate bargaining unit - Managerial exclusion - Construction industry - Foremen and lead hand are not excluded as are not involved in managerial decisions.

Bargaining unit - Appropriate bargaining unit - Casual and part-time employees - Persons working on casual basis with employer lack reasonably tangible employment relationship with employer and are not included in bargaining unit.

***The Trade Union Act*, ss. 5(a),(b),(c), 2(f)(i) and 10.**

REASONS FOR DECISION

Gwen Gray, Vice-Chairperson: The Applicant applied for the standard craft unit of "journeymen electricians, electrical apprentices, electrical workers, and electrical foremen" employed by A-Lert Canada Ltd., North of the 51st Parallel in the Province of Saskatchewan. The Application was filed with the Board on October 18, 1995.

The Applicant disputed the Statement of Employment filed by the Employer and established the following facts through cross-examination of the deponent of the Employer's Statement of Employment, Mr. William Cohey, General Manager of A-Lert Canada Ltd.:

(1) Leslie D. Larson was employed on October 18, 1995, the date of filing the application for certification;

(2) Andy Casper operated an electrical contracting business. As a result, he worked only on a

casual basis at this employer's site and was not at work on October 18, 1995;

(3) Lloyd Shear who was employed as a foreman and Roger Shear who was employed as a lead hand, performed the normal work of construction foremen. They did not hire, fire, or discipline employees. They also did not have input into wages or working conditions of the employees;

(4) Dennis Magnusson and Dave Magnusson were both employed with a different employer on a full-time basis and worked with A-Lert on a casual basis when they were able. They were not present at work on October 18, 1995;

(5) Mark Tokarski and Amanda Muench were not employed by the Employer on October 18, 1995;

(6) Dave Magnusson, M. Tokarski and Cole Sametts were employed as welders, with Wayne Dale and Cole Sametts employed primarily as welders' helpers;

(7) C. Pape and L. Lange were employed as painters.

On the re-examination of Mr. Cohey by his counsel, the following additional facts were established:

(8) Troy Behiel and Jeremy McConnell were both employed on October 18, 1995, and were inadvertently missed from the Statement of Employment filed with the Board;

(9) Leslie Larson was employed as a welder.

In *Construction and General Workers', Local Union 890 v. International Erectors & Riggers, A Division of Newbery Energy Ltd.*, [1979] Sept. Sask. Labour Rep. 37; LRB File No. 114-79, the Board initially established at 38 the standard unit in the electrical trade as, "all journeymen electricians, electrician apprentices, and electrician foremen employed by [name of company] within [boundary]."

This standard unit was amended by the Board in the subsequent decision of *The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and*

Canada, Local No. 179 v. ICS Western Construction Ltd., [1980] May Sask. Labour Rep. 62; LRB File No. 135-79, at 63, to include "electrical workers" for the following reasons:

> *The Board has also found it necessary to change the unit description with respect to the electrical trade. The unit had been defined as follows: all journeymen electricians, electrician apprentices, and electrician foremen. The terms used are defined in legislation and in practice and are well understood in the industry. However, it was found that there are other employees engaged in electrical work who do not fall within these definitions. These may be employees with "grandfather rights" under apprenticeship regulations or who have not yet become apprenticed as required by law. They are persons who are permitted to work without a journeyman's licence under Sections 14(4) and (6) of the Electrical Inspection and Licensing Act, R.S.S. 1978, Chapter E-7, as well as persons who have been traditionally included in electrician's union certifications pursuant to a long series of jurisdictional decisions and agreements. In order to be sure that these persons are included it was deemed necessary to add the classification "electrical workers" to the electricians certification order so that it will be as follows: all journeymen electricians, electrician apprentices, electrical workers, and electrician foremen.*

The unit applied for in the present application conforms with this description. The Employer, however, argued that the construction foremen and lead hand should be excluded from the bargaining unit under s. 2(f)(i) of *The Trade Union Act*, R.S.S. 1978, c.T-17 as they performed functions of a managerial character. As noted above, the standard construction bargaining unit includes foremen. Generally, construction foremen perform work of a supervisory nature, but do not perform duties that are truly managerial in nature so as to exclude them from the definition of "employee" under s. 2(f)(i) of the *Act*. The evidence indicated that the two foremen did not perform managerial functions and the Board therefore concludes that the two foremen, Lloyd Shear and Roger Shear, are properly included on the Statement of Employment.

There was some confusion at the hearing as to whether or not welders and their helpers should be included in the bargaining unit. Welders are recognized as part of many trades. In the *Newbery Energy Ltd.* decision, *supra*, the Board dealt with the assignment of "helpers, welders and riggers" on 40 as follows:

> *At the special hearing, representations were made by a number of unions with respect to classifications of employment which are common to more than one trade such as helpers, welders, and riggers. The representations, in most cases, suggested that these classifications be specifically mentioned in the unit descriptions. The Board has declined to do so because, to do so would defeat the purpose of the Board in defining the new unit descriptions. It is the view of the Board that these and similar classifications of employment are incidental to the trade in question and when the work so performed is incidental to the trade, the person performing the function will naturally fall into the trade unit with which the work is connected.*

Applying the *Newbery Energy Ltd.* test, the Board must determine if the work performed by the welders and their helpers was incidental to the work performed by the electrical trade. In the present case, the Employer was engaged in a variety of projects on the site which involved a number of trades, including electrical, plumbing, carpentry and painting. There was no evidence on the question of whether the welders' work was incidental to the electrical work to justify the inclusion of welders and their helpers into the electrician bargaining unit. The Board therefore declines to include welders and welders' helpers in the unit and directs that Dave Magnusson, M. Tokarski, Cole Sametts, W. Dale and Clay Sametts should be removed from the Statement of Employment because they fall within the welders' classification.

The Union argued that two employees should be excluded from the Statement of Employment because they primarily performed work associated with the painters' trade. Painters are recognized as a separate craft bargaining unit under the *Newbery Energy Ltd.* case, *supra*, and are not merely incidental to the electrical trade. The Board therefore holds that C. Pape and L. Lange should be removed from the Statement of Employment as they performed work in the painting trade.

The Employer acknowledged that two employees, Mark Tokarski and Amanda Muench, listed on the Statement of Employment, were not in fact employed by it on the date the application was filed by the Board. The Employer also argued that the names of T. Behail and J. McConnell should be added to the Statement of Employment as they were employed on October 18, 1995 in the bargaining unit, but had been inadvertently omitted from the Statement. Section 10 of *The Trade Union Act* allows the Board to restrict the evidence of support on an application for certification to the date the certification application is filed with the Board. Employees hired after this date are generally not included on a Statement of Employment or a Voters' List, if a vote is ordered. The Board therefore orders that the names of Mark Tokarski and Amanda Muench be deleted from the Statement of Employment as they were not employed on the date of filing this application. Similarly, the Board orders the names of T. Behail and J. McConnell to be added to the Statement as they were employed on the date in question.

The Union argued that employees who worked on a casual basis with this Employer should not be included on the Statement of Employment. In *Canadian Union of Public Employees, Local 3077 v. Lakeland Regional Library Board in the Lakeland Library Region*, [1987] Oct. Sask. Labour Rep. 74; LRB File No. 116-86, the Board stated at 74 as follows:

> *However, the Board has also applied the principle that before anyone will be considered to be an "employee", that person must have a reasonably tangible employment relationship with the employer. If it were otherwise, regular full-time employees would have their legitimate aspirations with respect to collective bargaining unfairly affected by persons with little real connection to the employer and little if any monetary interest in the matter.*

Three construction workers, Andy Casper, Dennis Magnusson and Dave Magnusson, lacked a "sufficiently regular and substantial connection" with this Employer: *Service Employees' International Union, Local 333 v. Metis Addictions Council of Saskatchewan, Inc.*, [1993] 3rd Quarter Sask. Labour Rep. 49; LRB File No. 002-93 at 63. They worked for A-Lert only when they were available or wished to do so on a casual basis and were not present on the day the application for certification was filed. For these reasons, the Board holds that they should not be included in the bargaining unit. The Board would therefore direct that the names of Andy Casper, Dennis Magnusson and Dave Magnusson be removed from the Statement of Employment.

In summary, the Board concludes that the following names should be deleted from the Statement of Employment: Andy Casper, Dennis Magnusson, Dave Magnusson, Mark Tokarski, Amanda Muench, C. Pape, L. Lange, Cole Sametts, W. Dale and Clay Sametts. Leslie D. Larson will not be added as he was employed as a welder on October 18, 1995. In addition, T. Behail and J. McConnell should be added to the Statement of Employment for the reasons outlined above.

The Applicant has filed support for a majority of the employees determined by the Board to be included in the bargaining unit and an Order under ss. 5(a), (b) and (c) of the *Act* will issue.

GRAIN SERVICES UNION (ILWU - CANADIAN AREA), Applicant and HEARTLAND LIVESTOCK, Respondent

LRB File No. 287-95; March 14, 1996
Vice-Chairperson: Gwen Gray; Members: Bruce McDonald and Don Bell

For the Applicant: Hugh Wagner
For the Respondent: Dennis Ball, Q.C.

Unfair labour practice - Union security clause - Section 36(2) - Not unfair labour practice for employer to refuse to incorporate union security clause into voluntary recognition agreement - Union must establish representative capacity through certification order.

Voluntary recognition - Union security clause - Voluntary recognition agreement does not establish union's representative capacity needed to invoke union security provision contained in s. 36(1) of *The Trade Union Act*.

Sections 36(1) and (2) of *The Trade Union Act*.

REASONS FOR DECISION

Gwen Gray, Vice-Chairperson: This case raises the interesting issue of whether an employer who has extended voluntary recognition to a trade union can be found guilty of an unfair labour practice for refusing to include in its collective agreement the union security provisions contained in s. 36(1) of *The Trade Union Act*, R.S.S. 1978, c.T-17.

Heartland Livestock Division was established in 1994 as the result of a merger of the Livestock Divisions of Saskatchewan Wheat Pool and Manitoba Pool. For some 20 years prior to the merger, the Saskatchewan Wheat Pool extended voluntary recognition to Grain Services Union ("G.S.U.") covering the Livestock Division, except for casual employees. Heartland Livestock Division continued the bargaining relationship with G.S.U. by concluding a Memorandum of Agreement on September 18th, 1994, which amended the previous collective agreement between the Saskatchewan Wheat Pool and G.S.U. and extended its term for the period of February 1, 1994 to January 31, 1996.

The collective agreement contained the following provisions with respect to the scope of the Union's bargaining authority and the maintenance of union membership:

ARTICLE 1 - SCOPE AND DEFINITION

> *The Company recognizes the Union for the duration of this Agreement as the sole bargaining agent for the purpose of collective bargaining in respect to wages and other conditions of employment on behalf of the employees of the Livestock Division employed in the Province of Saskatchewan, except those who are casual employees and those who are incumbents of the following positions [list of managerial exclusions]*
>
> *ARTICLE 5 - MAINTENANCE OF MEMBERSHIP*
>
> 1. *The Company agrees upon receipt of signed authorization cards from members of the Union to deduct from the salaries payable to such members the amount of membership dues payable by such members.*
>
> 2. *The Company agrees that as a condition of employment, membership dues or sums in lieu will be deducted from the wages of all newly-hired employees, hired on or after September 1, 1974, as of their first complete pay period following their commencement of their employment.*
>
> 3. *Membership dues or sums in lieu so deducted from salaries shall be paid monthly to the Secretary-Manager of the Union within fifteen calendar days following completion of the last payroll period in the calendar month, remittance to be supported by information with respect to each individual employee, including the period covered by the remittance for that employee.*
>
> 4. *The Company shall furnish the Secretary-Manager of the Union with staff change lists weekly, which shall include the name, location, classification, grade, salary, and effective date of all staff changes, including new hires.*

The parties advised the Board that the "Maintenance of Membership" provisions had been contained in the collective agreements respecting this group of employees since 1974, hence the reference in Article 5, Paragraph 2 to September 1, 1974, as the grandfathering date for dues deduction. The evidence further indicated that the Union did not provide the Employer, or the previous employer, with Authorization Cards from Union members as required under Article 5, Paragraph 1.

On June 1, 1995, the Union wrote to the Employer to invoke the union security provisions in s. 36 of *The Trade Union Act*. The parties exchanged several letters which did not produce agreement on the issue. Finally, the Employer turned the matter over to its legal counsel, Mr. Dennis Ball, Q.C., who explained the Employer's position in a letter to the Union as follows:

> *It is our view that the union cannot invoke the union security clause contained in Section 36(1) of The Trade Union Act. Section 36(1) states:*

> *36(1) Upon the request of a trade union representing a majority of employees in any appropriate unit...*
>
> *The application of Section 36(1) is, therefore, dependent upon*
>
> *(i) the existence of an appropriate unit, and*
>
> *(ii) union representation of a majority of employees in that unit.*
>
> *The Labour Relations Board has decided that "appropriate unit" means a unit described in an order under Section 5, clause (a) of The Trade Union Act. There is no such order in this case.*
>
> *Moreover, there is no reason to believe that Grain Services Union represents a majority of the employees. In fact, without evidence of majority support, Heartland Livestock Services has every reason to believe that the majority do not support the union as their bargaining representative. That evidence is quite simple: the majority of Heartland Livestock Services' employees continued to work during the strike called by Grain Services Union in 1994.*
>
> *There are two ways in which a trade union might conceivably demonstrate that it represents a majority of employees in an appropriate unit. The first is to obtain a certification order from the Labour Relations Board pursuant to Section 5, clause (a), (b) and (c) of The Trade Union Act. As you will know, to obtain such an order, the union can file confidential evidence of majority employee support with the Board. The Board order establishes an appropriate unit within the meaning of the Act and constitutes conclusive evidence of majority employee support as long as the order remains in existence.*
>
> *The second method of demonstrating support could be to provide the employer with evidence of support from a majority of the employees. Obviously, obtaining a certification order would be a more permanent and desirable approach.*
>
> *We can assure you that Heartland Livestock Services is prepared to accept either of the above means of establishing majority support.*

At the hearing, the Union called Mr. Larry Hubick, a Union officer in charge of membership and finances, to testify that a majority of the employees employed under the terms of the collective agreement were members of the trade union.

There is no suggestion on the facts presented that the Union enjoys a "sweetheart" arrangement with the Employer, the Union having engaged in strike action in September, 1994, which was commented on by the Board in *Alcorn and Detwiller v. Grain Services Union*, [1995] 2nd Quarter Sask. Labour Rep. 141; LRB File No. 274-94.

Relevant Statutory Provisions

The relevant provisions in *The Trade Union Act* include the following:

> *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.*
>
> ...
>
> *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.*
>
> ...
>
> *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 30 days or more than 60 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 insofar as it applies to any unit of employees in which that trade union has been determined as representing a majority of the employees.*
>
> ...
>
> *36(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 30 days after the commencement*

> *in 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, assessment 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 initiation 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) Notwithstanding subsection (3), a trade union may assess or fine any of its members who has worked for the struck employer during a strike held in compliance with this Act a sum of not more than the net earnings that employee earned during that strike.

(5) No trade union shall require any member to pay an assessment of fine pursuant to subsection (4) unless the constitution of the trade union provides for the assessment or fine prior to the commencement of the strike.

(6) A fine imposed on a member pursuant to subsection (4) with respect to an action that takes place after the coming into force of this subsection is deemed to be a debt due and owing to the trade union and may be recovered in the same manner as a debt owed pursuant to a contract in a court of competent jurisdiction.

Arguments of the Union

Mr. Wagner for the Union argued that the Union is entitled to invoke the union security provisions contained in s. 36(1) of *The Trade Union Act* without first obtaining a certification Order. The Union's status as the exclusive bargaining agent arises from the provisions of s. 3 of the *Act*, which he argued does not require certification before conferring an exclusive bargaining status. Further, he indicated that the evidence before the Board established that the Union enjoyed majority support, first, through the uncontradicted evidence of Mr. Hubick, and second, although he did not state it in quite this fashion, through an inference from the lengthy bargaining relationship enjoyed by the Union and the predecessor of the Employer, and the final agreement. He pointed out the contradiction in the Employer's position in that it agrees to require employees to join a jointly-administered Saskatchewan Wheat Pool/G.S.U. Pension Plan in Article 9 of the collective agreement, but it does not require employees hired after the date of the s. 36(1) request to join the Union which co-administers the fund.

Arguments of the Employer

Mr. Ball, Counsel for the Employer, repeated the argument which he had previously provided to the Union in his letter which is quoted extensively above. He argued that the invocation of the mandatory union security provision is a back-door method for a voluntarily recognized trade union to gain majority support in order to make application to the Board for a certification Order. Mr. Ball pointed out the risks of permitting a union to organize in this fashion; namely, that employees' freedom of choice which is enshrined in s. 3 of the *Act* will be usurped by an employer granting recognition to a trade union of its choosing. He argued that the Board should not permit the *Act* to be used in a manner that might dilute the rights of employees to select a trade union. Mr. Ball took the position that the Union had to obtain a certification Order before a request for union security could be made under s. 36(1) or, at least, the Union had to provide the Employer with proof of its support in the form of authorization cards as required under Article 5 - Paragraph 1 of the collective agreement, which had not been provided to the Employer in this case. On the latter position, the Employer expressed some doubt as to whether it was permissible under s. 36(1) to accept authorization cards as evidence of majority support because the *Act* requires the request to be made by "the trade union representing a majority of employees in *any appropriate unit*" [emphasis added]. "Appropriate unit" is defined in s. 2(a) as "a unit of employees appropriate for the purpose of bargaining collectively". Mr. Ball argued that until the Board has heard and determined an application for certification, there is no "appropriate unit". Mr. Ball cited the following decisions in support of his argument: *Bird Machine Co. of Canada*

v. U.S.W.A., [1991] 1st Quarter Sask. Labour Rep. 39; LRB File No. 111-90; *Saskatchewan Government Employees' Union v. Saskatchewan Institute of Applied Science and Technology*, [1989] Summer Sask. Labour Rep. 39; LRB File No. 131-88; *International Union of Operating Engineers et al. v. Henuset Pipeline Construction Ltd.*, [1991] 4th Quarter Sask. Labour Rep. 64; LRB File Nos. 146-91, 188-91 & 195-91; *Construction & General Workers Union, Local 180 v. SWB-Wright Construction Inc.*, [1994] S.L.R.B.D. No. 47 (Q.L.); LRB File No. 051-94; and *Saskatchewan Construction Labour Relations Council Inc. v. Construction Labour Relations Association of Saskatchewan Inc. and Saskatchewan Provincial Building and Construction Trades Council*, [1994] 2nd Quarter Sask. Labour Rep. 190; LRB File No. 023-94.

Reasons for Decision

The status of a trade union that has engaged in voluntary collective bargaining with an employer has not received a great deal of attention by the Board. *The Trade Union Act* does not refer to voluntary recognition agreements, unlike s. 2(s)(ii) of *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. 29-11, which defines "unionized employers" to include:

> *2(s) "unionized employer" means an employer in a trade division with respect to whom a trade union has established the right to bargain collectively on behalf of the unionized employees in that trade division:*
>
> > *(i) pursuant to an order of the board made pursuant to clause 5(a), (b), or (c) of The Trade Union Act; or*
> >
> > *(ii) as a result of the employer's having recognized the trade union as the agent to bargain collectively on behalf of those unionized employees.*

The Board noted in the *Construction Labour Relations Association of Saskatchewan* case, *supra*, on 200 as follows:

> *Under The Trade Union Act, the status of voluntary recognition has been shrouded in uncertainty and remains one of the few significant issues on which there has been no extensive comment by the Board. The Board has provided no exact definition of what constitutes voluntary recognition. Though there have been some cases in which voluntary recognition has been viewed as conferring very limited status under the Act, it is clear from the decision in United Food and Commercial Workers v. Canada Messenger Transportation Systems Ltd., LRB File No. 091-90, that neither a voluntary recognition, nor a collective agreement concluded as a result, can withstand a challenge from a duly certified trade union. The inclusion of relationships based on voluntary recognition among those which have formal implications under The Construction Industry Labour Relations Act, 1992 thus presents the Board with a question of some novelty, that of what is necessary to establish that a voluntary recognition actually exists.*

As indicated in the above quote, the Board in *United Food and Commercial Workers v. Canada Messenger Transportation Systems Ltd.*, [1990] Fall Sask. Labour Rep. 93; LRB File No. 091-90, held that a collective agreement reached between a voluntarily recognized trade union and an employer did not constitute a bar pursuant to s. 33(5) to an application for certification by another union. The Board reasoned as follows at 95:

> *Where genuine ambiguity exists, as it does here, over the meaning of some portion of The Trade Union Act, the Board's policy has always been to prefer that interpretation which is most in harmony with the objects of the Act. The objects of the Act, or at least one of the fundamental objects of the Act is to place into the hands of employees the right to choose whether or not they wish to be represented by a union and, if so, which union. Numerous provisions in the Act are also designed to prohibit any attempt by the employer to participate in the representation question. It would therefore be completely incongruous with those objects if the Board interpreted Section 33(5) in a manner that allowed unions and employers to completely bypass the wishes of the employees; recognized the participation of the employer in the selection of the employees' bargaining representative and actually barred employees from exercising their right to bargain collectively through a union of their choice. This is not to suggest that voluntary recognition is prohibited by the Act, but only that much clearer language than is present in Section 33(5) would be necessary before it will be interpreted in the manner suggested by the intervenor.*

Similarly, in *Henuset Pipeline Construction Ltd.*, *supra*, the Board refused to allow a collective agreement which had been entered into voluntarily for a bargaining unit which the Board found to be inappropriate to act as a bar to an application for certification by another trade union. The Board commented on 69 on the effect of voluntary recognition as follows:

> *Where a union has been certified pursuant to the provisions of the Act, all of the threshold questions with respect to the appropriateness of the unit or employee support are, by definition, answered by the certification order. However, in voluntary recognition situations those questions remain open and, when raised, the Board should not invoke the provisions of The Trade Union Act to provide protection for a voluntarily recognized bargaining relationship which cannot meet the fundamental requirements of Section 3. This does not mean that voluntary agreements that do not meet these standards are ineffectual. Rather, it means that if a union wishes to rely on voluntary recognition, and the consequent collective bargaining agreement, as a Section 33(5) shield to counter the certification application of another union it must, at a minimum, show that the agreement upon which it relies has the support of the "majority of employees" in "the appropriate unit of employees" as referred to in Section 33(5).*
>
> *To interpret the provisions of Section 33(5) otherwise would be inconsistent with the intent of The Trade Union Act and would, in fact, leave the door open for employers and union representatives to bypass the statutory right of employees to be represented by a union of their own choosing in an appropriate unit.*

In *Saskatchewan Institute of Applied Science and Technology, supra*, the Board considered in a general context the effect of a voluntary recognition agreement and concluded at 14,293-14,294 as follows:

> *SIAST submits that a loss of bargaining rights necessarily negates a collective agreement. However, it is clear that a collective bargaining relationship may be established between an employer and a trade union independently from and without regard to the provisions of The Trade Union Act. An employer may enter into a collective bargaining agreement with a union, and the parties may govern their affairs according to that agreement, whether or not the union is ever certified. That type of arrangement, common in the construction industry but unusual in other industries, demonstrates that a collective bargaining agreement can exist independently from, and does not depend upon, the existence of a Board order.*
>
> *In Beverage Dispensers et al v. Terra Nova Motor Inn Ltd. 74 CLLC 14253 at p. 448, Laskin C.J. observed:*
>
> > *It is notorious that long before labour relations legislation was enacted in British Columbia, compelling employers to bargain collectively with trade unions which obtain certification thereunder as bargaining agents for employees of those employers, there were collective bargaining relations between employers and trade unions which were the product of voluntary recognition of such trade unions by employers. The introduction of compulsory collective bargaining legislation did not exclude voluntary recognition, and consequent voluntary bargaining, other than to require proof, if an issue arose thereon, that a collective agreement which resulted from voluntary negotiation was supported by a majority of the employees covered thereby.*
>
> *Certification of a trade union as bargaining agent qualifies it to compel an employer to bargain collectively with it on behalf of employees for whom the union has been so certified.*
>
> *Unlike labour legislation in most other Canadian jurisdictions, The Trade Union Act makes little mention of voluntary recognition arrangements. It does not purport to give a voluntarily recognized union status as exclusive bargaining representative, or render the union, the employer, or the employees subject to the same duties and obligations that arise on certification. Exclusivity under the Act is founded upon the union's ability to demonstrate that it represents a majority of employees in an appropriate unit. Proof of majority support is not a prerequisite of voluntary recognition.*

It can be concluded from the cases quoted that the status of a trade union holding a voluntary recognition agreement is a tenuous one. While some rights in relation to that agreement may be enforceable under the provisions of *The Trade Union Act*, the right of the trade union to exclusively represent the employees is not statutorily guaranteed under s. 3 of the *Act*. It is in this context that the Union's request to invoke the union security provisions in s. 36(1) must be judged.

Prior to requesting the inclusion of the statutory union security clause into its collective agreement, the trade union must establish its representative capacity as s. 36(1) reads in part, "Upon the request of a trade union representing a majority of employees in any appropriate unit". The Board is prepared to accept, for the sake of this argument, that the bargaining unit set out in the Scope and Definition provision in the collective agreement is an appropriate bargaining unit. The question to determine is what indicia of representative capacity are acceptable under s. 36(1)? The Union argues that its representative capacity can be inferred from its lengthy bargaining relationship with the Employer and its predecessor or from the evidence of Mr. Hubick which was presented at the time of the hearing to the effect that the majority of employees in the bargaining unit were members of the trade union. The Employer's principal position is that the Union must apply for certification in order to establish its capacity.

It can be argued that the ratification by employees of a voluntary recognition agreement provides a sufficient indication of majority support for a trade union. In this case, such ratification could be inferred in this instance from the Memorandum of Agreement filed as Exhibit 2 to the Agreed Statement of Facts, the first paragraph of which states, "The parties agree that the following sets out the revisions made to the collective agreement coming into effect on date of ratification and that each of the parties will recommend the settlement to their respective principals for ratification."

The presence or absence of ratification and a reasonable ratification process has developed as a criteria in other jurisdictions to determine whether an agreement entered into between a trade union and employer is in fact a "collective agreement". This issue primarily arises in cases where a voluntary agreement is asserted as a contract bar under provisions similar to our s. 33(5), to a certification application brought by another trade union. Unlike the decisions of the Saskatchewan Board, other labour relations boards allow agreements reached through voluntary recognition to constitute contract bars if the union can establish through other indicia its representative capacity at the time the agreement was signed. As indicated, ratification through a proper ratification process has been accepted as one indicator of such capacity. In *Delta Hospital and H.L.R.A. of B.C. v. H.E.U., Local No. 180 and I.U.O.E., Local 882*, [1978] 1 C.L.R.B.R. 356, the British Columbia Labour Relations Board applied the following principles at 371:

> *In our view, as we suggested earlier, the Code contemplates that an agreement between an employer and an uncertified trade union will enjoy the legal status of a "collective agreement", and will thus be binding on the employees, only if one may*

> *reasonably judge that the trade union is in some way actually representative of the group of employees affected. If the facts unmistakably indicate otherwise, then the Board will hold under Section 34(1) of the Code that there is no collective agreement in full force and effect, and that the contract bar under Section 39(2)(b) of the Code does not obtain.*
>
> ...
>
> *The issue of whether an uncertified trade union is representative of employees more often arises in the industrial setting where the work force is already there and where the trade union, without consulting the employees at all, persuades the employer for one reason or another to enter into a collective agreement. In those circumstances, if a dispute arises as to whether the agreement really is a collective agreement, the trade union should be prepared to offer evidence that it is representative of a majority of the employees affected. There is no set way in which this will have to be done. The trade union can meet this requirement by showing that a majority of the employees are members, or by establishing that a reasonable ratification procedure was followed and the employees elected to be bound by agreement, or by any other means adequate in the circumstances.*

Similarly, in *Sheet Metal Workers' International Union, Local 8 v. Sheet Metal Contractors of Alberta*, [1988] Alta. L.R.B.R. 326, the Alberta Labour Relations Board suggested that ratification of an agreement by the employees covered by the terms of a voluntary agreement would confirm the representative capacity of the trade union. It stated at 350:

> *When a Union approaches an employer with a request to bargain it is claiming to be, and asking to be recognized as, the bargaining agent for the employees. This means it is claiming to represent those employees and to have their support for its acting in that role. When the employer accepts the Union's request it is accepting the proposition that the Union has that degree of support. This support is usually confirmed, after the initial round of bargaining, by the ratification of a collective agreement.*

The Ontario Board approached the issue in a similar fashion in *United Steelworkers of America v. Niagara Crushed Stone (Humberstone) Ltd. and International Union of Operating Engineers*, [1958] C.L.L.C. ¶18,118 where the Board held at 1736 as follows:

> *The term "collective agreement" is defined in Section 1(1)(c) in part as "an agreement in writing between an employer ... on the one hand, and a trade union that ... represents employees of the employer ... on the other hand...". In other words, an agreement between an employer and a trade union that does not represent employees of an employer cannot be treated as a collective agreement and would not therefore serve as a bar to an application under Section 40 [See 60,365], since the bar created by that section is dependent on the existence of a collective agreement, not merely an agreement. Can it be said in the circumstances outlined above that the intervening union "represents" the employees of the employer? No evidence has been presented to the Board to show that on the date when the agreement was*

> *executed, probably August 12, 1958, the intervening union had any authority from the employees in the appropriate bargaining unit to represent them. Consequently, the agreement was not a collective agreement at the time it was executed.*

These principles were adopted by the Alberta Labour Relations Board in *Construction and General Workers, Local Union No. 1111 et al. and Sie-Mac Pipeline Contractors Ltd. et al.*, [1991] Alta. L.R.B.R. 847 where the Board concluded:

> *First, a trade union cannot conclude a valid collective agreement unless it represents employees at the time of recognition. We believe the B.C. and Ontario cases provide helpful guidance on what test a union, seeking to uphold such a voluntary agreement under Alberta's statutory provisions, must meet.*

Similar conclusions were reached by the Alberta Board in *Westfair Foods Ltd. v. Teamsters, Local 987 (Alberta)* (1992), 16 C.L.R.B.R. (2d) 1, where the Board held among other things that an agreement entered into between the Employer and the Teamsters' Union covering employees of Superstore was not a collective agreement. At 32 the Board stated:

> *Sie-Mac and Delta Hospital provide that the agreement signed November 13, 1991 could not become a collective agreement until the employees chose the Teamsters as their bargaining agent. Reasonably, in the circumstances, the employees could do so by ratification. They could join the Teamsters before the agreement was signed and give the Teamsters a clear mandate to bargain on their behalf. The Teamsters had no representative capacity at the time of signing on November 13th. The employees did not give any mandate before November 13th. There was no subsequent ratification. Counsel for the Teamsters and Superstore conceded there was no collective agreement as of November 13, 1991. We agree.*

On the other hand, labour relations boards have also rejected the view that membership cards obtained as a result of the mandatory membership in a voluntary recognition agreement can be used to establish the representative capacity of the trade union (see *Westfair Foods Ltd., supra*). Membership evidence obtained from employees who join the union under the "legal" duress of a union membership clause cannot be viewed as a reliable expression of the employee's s. 3 rights to "join a trade union of their own choosing" where the original selection of the trade union did not arise from the free exercise of the s. 3 rights.

Applying these cases to the present facts, the inference of majority support that could arise from the fact of ratification of an agreement entered into voluntarily between the Union and the Employer may be a sufficient indication of employee support to bring the agreement within the meaning of the term "collective agreement" as used in *The Trade Union Act*. Proper ratification would generally be

sufficient to permit the Employer to continue the voluntary arrangement with the Union without fear that it was engaged in conduct that might otherwise amount to interference in the selection of the trade union. However, the membership evidence that is generated by such an agreement through a union security provision is of dubious value in assessing the true wishes of the employees hired after the agreement is entered into. On this analysis, it would be pointless for the Union from the point of view of establishing its representative capacity to request the inclusion of s. 36(1) into the agreement.

There is, however, a more purposive analysis that can be applied to the facts and the *Act*. The union security provisions, the dues checkoff provisions and the provisions granting exclusive bargaining agent status to trade unions function primarily to provide institutional security to trade unions. Before the advent of *The Wagner Act* and the labour legislation that was modelled on it, unions won recognition through the recognition strike, membership in the trade union was voluntary, and dues were collected directly by the trade union officers. The development of institutional security in modern Canadian labour legislation was explained by Professors Fudge and Glasbeek in "The Legacy of PC 1003" (1995) 3 Can. Lab. & Emp. L.J. 357 at 374-375:

> *The Ford strike was, in many ways, a microcosm of some of the broader tensions and conflicts which shaped the labour movement and industrial relations during the decade following the end of World War II. What it is most famous for is having given birth to the "Rand formula", which was named after the judge of the Supreme Court of Canada, Ivan Rand, who wrote the award that settled the strike. Although there already was a tendency for other conciliators to grant trade unions a compulsory dues check-off clause, Rand's award was truly innovative in that it provided employers with a reason for supporting this form of union security. As a quid pro quo for the compulsory dues check-off, Rand decreed that unions were to behave responsibly. What this meant derived from Rand's appreciation of what collective bargaining both assumed and entailed.*
>
> *Rand's major premise was that "[a]ny modification of relations between the parties here concerned must be made within the framework of a society whose economic life has private enterprise as its dynamic." His minor premise was that the federal government had accepted the social desirability of the collectivization of workers and collective bargaining where workers sought them. In his view, unions needed to become strong institutions in order to "secure industrial civilization within a framework of labour-employer constitutional law based on rational economic and social doctrine." Rand believed that unions needed institutional security and that a compulsory dues checkoff would provide this. Moreover, this solution was fair to individual employees, since all employees, unionized or not, benefited from the union's representation.*

The authors conclude that the *quid pro quo* imposed by the Rand Report for the implementation of

partial institutional security for the trade union was the strike vote requirement and the ban on industrial action during the life of a collective agreement both of which became cornerstones of labour legislation throughout Canada, with the exception of *The Trade Union Act* of Saskatchewan, which did not contain a strike ban during the life of a collective bargaining agreement until the addition of s. 44 of the *Act* by Bill 104 (*An Act to amend The Trade Union Act*, S.S. 1983, c.81, s. 14, amending *The Trade Union Act*, R.S.S. 1978, c.T-17). In Saskatchewan, institutional security for trade unions was expressed as an underlying value of *The Trade Union Act* through the mandatory dues checkoff (s. 32), compulsory membership (s. 36(1)) and exclusive representative status (s. 3), all of which have been in place since the enactment of *The Trade Union Act, 1944*. Correspondingly, the *Act* secured recognition of the bargaining agent through the certification process in which the representative capacity of the trade union is determined by the Labour Relations Board through the administrative process of an application for certification. The trade off of institutional security with state supervised recognition has produced a labour relations environment that is seldom marred by fundamental disputes over union security or dues checkoff. Although the *Act* did not expressly end voluntary trade unionism, it did establish a competing regime for the regulation of labour relations.

The present case poses squarely the question as to whether or not the *Act* should be interpreted to extend such institutional security to a trade union which has not opted into the administrative scheme established by the *Act* for determining the representative capacity of the trade union. The Board in the past has not extended exclusive recognition to such voluntary arrangements. For similar reasons, the Board in the present case concludes that the union security provision contained in s. 36(1) of *The Trade Union Act* cannot be invoked by a trade union who claims representative capacity through a voluntary recognition agreement. To hold otherwise would be to permit a trade union to pick certain aspects of the administrative scheme established by the *Act* which may be beneficial to the trade union without testing the union's fundamental support in the manner required by the *Act*. On our analysis of the structure and purpose of the *Act*, the statutory provisions which provide institutional security to the trade union are the counterpart to state regulated representation. Although there is little doubt that Grain Services Union enjoys the support of a majority of the employees that it represents, which can be inferred from its long standing bargaining relationship and from the ratification of its last agreement, this evidence of representative capacity does not bring the Union within the scheme of the *Act*. The evidence does not meet the evidentiary standards that are imposed by the Board in determining representative capacity on an application for certification. Similarly, the direct evidence provided by

Mr. Hubick that a majority of the employees are members of the Union also does not meet the standards of proof that are required on an application for certification. It would be inconsistent with the overall administrative scheme of the *Act* to interpret the opening phrase of s. 36(1) which reads "upon the request of a trade union representing a majority of employees in any appropriate bargaining unit" as requiring any less than an existing certification order. The Union's application is therefore dismissed.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3862, Applicant and HARVEST COMMUNITY OF THE PRAIRIES INC. (SARCAN REGINA DIVISION), Respondent

LRB File No. 303-95; March 15, 1996
Vice-Chairperson: Gwen Gray; Members: Tom Davies and Hugh Wagner

For the Applicant: Mike Keith
For the Respondent: Kevin Wilson

Bargaining unit - Appropriate bargaining unit - Managerial exclusion - Assistant manager - Performs managerial functions and has access to confidential labour relations information - Board holds that position is excluded from appropriate bargaining unit.

Bargaining unit - Appropriate bargaining unit - Managerial exclusion - Depot supervisors - Do not exercise managerial functions or have access to confidential labour relations information that would create labour relations conflict with participation in trade union - Board holds that positions are included in appropriate bargaining unit.

Vote - Certification - Employees with mental disabilities - In absence of evidence suggesting that trade union engaged in conduct that may constitute "interference" under s. 11(2)(a) or "fraud" under s. 16 of *The Trade Union Act*, the Board will not accede to Employer's request made on ground of mental disability of majority of employees to conduct vote with special conditions attached.

Sections 2(f), 5(a)(b)(c), 6, 11(2)(c) and 16 of *The Trade Union Act*.

REASONS FOR DECISION

Gwen Gray, Vice-Chairperson: The Union applied for a bargaining unit comprised of all employees except the manager and accountant of Harvest Community of the Prairies Inc. (SARCAN Regina Division) in the City of Regina. The Employer requested the additional exclusion of the positions of assistant manager and depot supervisors on the grounds that the two positions are managerial in nature and/or that they act in a confidential capacity with respect to the Employer's labour relations. The Employer also requested that a vote be ordered with special conditions attached which will be expanded on later in these Reasons.

The Employer is a non-profit agency whose main objective is to provide employment opportunities to persons with mental disabilities. The agency is authorized by statute to collect and recycle refundable

beverage containers and it operates four depots in Regina. At each depot, employees receive refundable beverage containers from the public, sort and tally the types of containers, pay cash to the customer for the containers received, package the containers and send them to a processing plant for the final recycling. The agency employs 36 people in Regina. The positions include a manager, assistant manager, accountant, three depot supervisors, assistant depot supervisors (cashiers), junior cashiers and receivers.

The Employer called Mr. Melvin Bjerland, manager, and Ms. Rebecca Milo, executive director of Help Home, to give evidence to the Board. The Union called Mr. Brent Weeres, depot supervisor, to give evidence.

The two themes of the Employer's case were (1) the exclusion of the assistant manager and the depot supervisors, and (2) the need for a specially supervised vote among the employees, especially those employees with mental disabilities.

EVIDENCE

Status of the Assistant Manager and Depot Supervisors

Mr. Bjerland testified as to the duties of the assistant manager. He described the process of discipline in the agency and explained that the agency seldom terminates the employment of its employees. The agency's mandate is to make employment opportunities available to persons with mental disabilities. Managers are therefore expected to go to what might be viewed in other employment settings as extreme lengths to help employees adjust to the requirements of work. He indicated that the assistant manager does have input into decisions that are made to end the employment of staff. In addition, he is involved in the hiring and on-going training of staff and the correction of inappropriate behaviour at work. He has suspended employees and has issued written warnings to them. He is also involved in the evaluation of staff, including the assessment of employees for work readiness. The assistant manager assigns work loads, deals with employee complaints, administers employees' benefit plans, and schedules vacations and staff rotations. He has access to confidential employee information. He also is involved in salary recommendations and it is anticipated that he would be involved in the negotiation of grievances and disputes on behalf of management should the Union be certified. He replaces the manager when he is away from work which occurs one day of each week.

In cross-examination, Mr. Bjerland acknowledged that the assistant manager was not solely responsible

for staff training - he does this function in conjunction with the manager. He indicated that the assistant manager and the manager perform some of the same functions in the organization. Further, he testified that the assistant manager is responsible for the scheduling of staff, recording of attendance, WCB and accident forms, and is an employer representative on the Occupational Health and Safety Committee. He explained the assistant manager's role in terminating the employment of an employee and acknowledged his participation in that decision. Further, he agreed with a suggestion of Mr. Keith that the position of assistant manager was in large part an administrative position, as opposed to a production position.

With respect to the depot supervisors, Mr. Bjerland testified that there are three depot supervisors and one currently in training. The depot supervisors are responsible for the operation of the depot including the direct supervision of staff. They provide the manager and assistant manager with input on staff performance but have little impact on salary or wages paid which are set by the Board of Directors of the Employer. The depot supervisors do have authority to call extra help into work, to assign work loads and record hours of work, and to assist staff with benefit plans and forms. Mr. Bjerland described the depot supervisors as the "eyes and ears of the depot" providing the data for the choices to be made by the manager. He forecasted that the depot supervisors would have some role to play in the handling of employee grievances under a collective agreement. He indicated that further the depot supervisors are not required to be physically able to perform all of the work that is performed in the depot. He described their primary function as supervisory, as opposed to performing actual physical work.

Mr. Bjerland acknowledged in cross-examination that the depot supervisors do not have authority to hire, fire or discipline the staff whom they supervise. He indicated that depot supervisors are able to send employees home, if the employee is unable or unwilling to perform work properly or if the safety of co-workers or the public is threatened. However, he would expect the depot supervisor to consult with him before, if possible, and to report the incident to him.

Mr. Weeres, depot supervisor, testified that he does not hire, fire, discipline, promote or schedule the staff who work in his depot. He indicated that he does not have input into budget discussions. As most employees complete their probationary period prior to being sent to the smaller depots, he has no input into probationary decisions. He will discuss problems with the manager and provide his opinion but he

does not prepare performance evaluations or salary reviews. He indicated that on one occasion he sent an employee home for disciplinary reasons with the prior approval of the manager. He described his main duties as overseeing the operation of the depot with responsibility to report conflicts, to secure the premises and to handle the money properly. Otherwise, Mr. Weeres testified that he spends approximately 90 per cent of his time on actual physical work in the depot. He described his work as lead hand work and denies that he has any access to confidential personnel files.

In cross-examination, Mr. Weeres acknowledged that part of his job is to correct inappropriate work behaviours or conduct of staff. He does this by pointing out the inappropriate behaviours exhibited and by reminding staff of the behaviour that is expected of them. He confirmed that the method of evaluating staff was informal and expected that the manager would rely on his opinion of staff performance. In this manner, he agreed that he may have some indirect effect on the wages paid to staff. He acknowledged that the manager or assistant manager spend very little time in the depot.

Board's Discretion to Order a Vote

The second branch of the Employer's evidence related to its position that the Board ought to exercise its discretion to order a vote among the employees of the agency even if the Union has filed sufficient membership evidence with the Board to permit a certification Order to issue without a vote. Mr. Wilson, counsel for the Employer, indicated that the Employer was concerned that employees who are mentally disabled would not be able to form a reliable opinion on whether or not they should join the trade union if they were not given the opportunity to make that decision in a supportive environment with the assistance of their families or other significant adults.

To this effect, Mr. Bjerland testified as to his experiences with employees who are mentally disabled. He indicated that approximately 22 of the employees have some degree of mental disability. They are primarily employed in the positions of receivers and junior cashiers. Mr. Bjerland described the methods used to train employees with mental disabilities, which include the use of "model workers" who work alongside an employee to demonstrate the proper methods of performing the work. Mr. Bjerland agreed with his counsel that the 22 employees are properly described as "moderately developmentally delayed" which may include one or more of such attributes as low formal education, poor communication skills, low literacy levels, difficulty with comprehension and short term memory, naiveté and suggestibility, and emotional instability. He described some typical difficulties that are encountered by the employees, such as purchasing unnecessary and expensive consumer goods. He

indicated that these employees display great trust in their family members and co-workers and would avoid displeasing them.

On cross-examination, Mr. Bjerland agreed with Mr. Keith that persons with average intellectual abilities are often duped by cellular phone salespersons, video clubs and the like. He also acknowledged that he was not aware of the Union's organizing drive with the employees and he had no knowledge of the methods used by the Union to obtain employee support.

The Employer also called Rebecca Milo, executive director of Help Home, as a witness. Help Home is a group home facility for persons with mental disabilities. Ms. Milo has a degree in Social Work and has worked in Help Home for 5 years. She acts as an advocate for persons with mental disabilities and has extensive experience both personally and professionally working with persons with mental disabilities. Ms. Milo also assisted in a union organizing drive in her workplace prior to becoming the executive director. Her testimony focused on two issues: (1) the ordinary method of union organizing, and (2) the decision-making processes that are most helpful for persons with mental disabilities.

In the first branch of her evidence, Ms. Milo indicated that organizing in her workplace occurred by word of mouth from one employee to another.

In the second branch, she testified as to the vulnerability of persons with mental disabilities that results from their high levels of trust of other people and the risk of that trust being abused. She indicated, as did Mr. Bjerland, that persons with mental disabilities are more easily influenced by their peers and are more anxious to please others in order to be accepted by them. In her opinion, it was likely that a person with mental disabilities would sign a union card if asked to do so by his or her supervisor without fully understanding the importance of the act of signing the card. It was also her opinion that the employee could make the decision in a more informed manner if they were assisted in doing so by a neutral but supportive person.

Ms. Milo described the theory of supported decision making and was referred by Mr. Wilson, Counsel for the Employer, to two articles. The first article was prepared by the Saskatchewan Association for Community Living entitled The Right Stuff - A Plain Language Book About Basic Human Rights which describes the social, economic, physical and political rights of persons with mental disabilities, including their right to vote. The article's basic premise is expressed in the following quote from 5:

The first rights you should know about are:

The right to make your own choices

This means that you can make decisions about your own life.

Sometimes you make decisions by yourself. Sometimes you make decisions with other people. Parents, friends, supervisors or caregivers can help you understand what your choices are. They can give you ideas and help you decide.

But you still have the right to decide what is best for you.

Ms. Milo described this process of decision making as assisted decision making, as opposed to substituted decision-making wherein guardians or other significant adults make decisions for the person with mental disabilities.

The second article, Coming Home - Staying Home, was prepared by the Roeher Institute, an advocacy group for persons with disabilities, and it describes the principles of supported decision-making and the legal and social reasons for preferring supported decision-making for adults with mental disabilities over the traditional method of substituted decision-making.

To summarize Ms. Milo's evidence, she was of the opinion that if a process similar to the assisted decision-making model had not been adopted by the trade union in soliciting the support of employees who have mental disabilities, their true wishes may not be reflected in the signed cards.

On cross-examination, Ms. Milo admitted that she did not know what process the Union had used in the present organizing campaign.

Mr. Weeres testified for the Union that some of the individuals with whom he works are challenged in some ways, some are physically challenged and not all are mentally challenged. He estimated that of the entire group of employees in Regina, approximately three would have difficulty functioning on their own.

EMPLOYER'S ARGUMENT

Mr. Wilson argued for the exclusion of the assistant manager and the depot supervisors. He argued that the evidence was clear with respect to the managerial authority of the assistant manager. He is involved in employee discipline and salary determinations and substitutes on a regular basis for the manager. Mr. Wilson argued that the position fundamentally affects the economic lives of the

bargaining unit members and should be excluded on that basis.

With respect to the position of depot supervisor, Mr. Wilson emphasized the supervisory functions of the position, the fact that the supervisor is the eyes and ears of management in the depots, and the role that the position may play in the labour relations that develops if the Union is certified. He indicated that the evidence did not support Mr. Weeres' claim that 90 per cent of his work was "hands on" work and he preferred instead the evidence of Mr. Bjerland who indicated that the position could be filled by a person with physical disabilities thereby implying that it was not primarily a "hands on" position. On the confidential capacity side of the definition of employee, Mr. Wilson argued that it should be analyzed from the point of view of the labour relations that will develop after a certification order is issued. He argued that the position of depot supervisor will be key to senior management in regard to the disciplining of employees, to grievance handling and the like. In addition, he argued that the depot supervisors currently have access to confidential labour relations information in the form of access to personal information regarding the employees. He also noted that the depot supervisors record hours of work on time sheets.

Mr. Wilson cited the following cases on the issue of the managerial and confidential exclusions: *Saskatoon Interval House Inc. v. Saskatchewan Government Employees' Union*, [1990] Fall Sask. Labour Rep. 63; LRB File No. 033-90; *Royal Canadian Legion Regina (Sask.) No. 1 Branch v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1989] Spring Sask. Labour Rep. 56; LRB File No. 067-88; *Remai Investment Co. Ltd. v. Saskatchewan Joint Board Retail, Wholesale and Department Store Union*, [1991] 4th Quarter Sask. Labour Rep. 56; LRB File No. 143-91; *Westfair Foods Limited v. United Food and Commercial Workers*, [1981] Feb. Sask. Labour Rep. 66; LRB File No. 085-80; *Saskatchewan Housing Corporation v. Saskatchewan Government Employees' Union*, [1983] July Sask. Labour Rep. 34; LRB File No. 437-82; *Regina District Health Board v. Canadian Union of Public Employees, Local 176*, [1994] 1st Quarter Sask. Labour Rep. 232; LRB File No. 263-93; *International Brotherhood of Electrical Workers, Local 636 v. Caledon Hydro-Electric Commission*, [1979] 3 C.L.R.B.R. 495; *The Corporation of the District of Burnaby v. Canadian Union of Public Employees, Local 23*, [1974] 1 C.L.R.B.R. 1 (B.C.L.R.B.).

On the question of the Board's discretion to order a vote among the employees, Mr. Wilson argued that a vote should be ordered to allow for a process of supported decision making among those employees who are mentally disabled. He asked the Board to consider structuring the vote by providing notices to

the parents and guardians of the employees and inviting them to attend an information session conducted by the Board prior to a secret ballot vote. Mr. Wilson argued that based on the evidence of Mr. Bjerland and Ms. Milo, and in the absence of evidence on the point by the Union, the Board could infer that the Union's method of conducting its organizational campaign did not meet the requirements of supported decision making for those employees who are mentally disabled. He compared this alleged failure of the Union to improper organizing tactics and relied for an authority on the decision of the British Columbia Labour Relations Board in *Duncan Restaurants Inc. v. I.W.A., Local 1 - 424* (1993), No. B255/93:

> *The Board concluded that as a general rule, a representation vote should not be the standard vehicle for obtaining certification, but gave some exceptions to this general principle. One of the exceptions considered by the Board was where there was evidence which cast doubt on the reliability of membership cards.*
>
> ...
>
> *Because membership evidence cannot be subjected to the same scrutiny as other evidence presented to the Board, it is important that the Board exercise additional caution in relying on membership cards as evidence. The Board must insist on a high degree of integrity and precision in the cards presented to it as evidence of membership in a union.*
>
> *It is also relevant that the employers and other parties opposed to the union's application for certification will generally not be privy to the methods used by a union in its organizational drive. The Board may, at best, be presented with circumstantial evidence of improprieties in the union's organizational campaign. The Board will not require in all cases the best evidence of such improprieties before it will inquire or investigate them further....*
>
> *The Board must, of course, be satisfied that the allegations cast a reasonable doubt on the integrity or validity of the membership evidence.*

Mr. Wilson also cited *Hotel Employees & Restaurant Employees Union, Local 767 v. Regina Exhibition Association Ltd.*, [1986] Oct. Sask. Labour Rep. 43; LRB File No. 015-86; *Royal Guard Vinyl Co.* (1994), No. 3193 (Ont. L.R.B.); *Re Davis* (1977), 4 A.R. 339 (Surr.Ct.); and *Wannamaker v. Livingston* (1917), 43 O.L.R. 243 (C.A.) on the issue of the Board's discretionary power to order a vote in circumstances of fraud, improper or questionable organizing tactics that call into question the validity of the support evidence.

UNION'S ARGUMENT

On the issue of the status of the depot supervisor, Mr. Keith, National Staff Representative for the Union, pointed out to the Board that it is not uncommon for Union members to be the only employees at a work site. He disagreed with the exclusion of the depot supervisor from the bargaining unit on this

basis. He noted that the position description did not contain any managerial functions. It contained no reference to discipline and indicated that the depot supervisor was to "work along side employees." He relied on the Board's decisions in the *City of Regina v. Canadian Union of Public Employees, Local 21 and Regina Civic Middle Management Association*, [1995] 3rd Quarter Sask. Labour Rep. 153; LRB File No. 268-94 and *Communications, Energy & Paperworkers Union of Canada v. Prince Albert Community Workshop Society Inc.*, [1995] 2nd Quarter Sask. Labour Rep. 294; LRB File No. 019-95, where the Board stated at 301:

> *It is clear that Ms. Bannerman has a significant degree of responsibility with respect to the operation of the program which is carried out through the restaurant, and that she enjoys considerable autonomy to make decisions with respect to the administration of that program. She clearly also performs a supervisory role with respect to the work of the Assistant Supervisor, and makes recommendations which have some impact on the employee in that position. We have concluded, however, that she does not exercise significant managerial authority in an industrial relations sense, or authority of a kind which would create an intolerable conflict of interest once the collective bargaining relationship is established.*

Mr. Keith argued as well that the position of assistant manager did not perform functions that were independent in relation to the right to hire, fire, discipline or otherwise affect the terms of the employment contract. He noted that the position was primarily administrative in nature and, as such, should not be excluded from the bargaining unit.

With respect to the Employer's request that a vote be held, Mr. Keith pointed out that there was no evidence before the Board as to any impropriety in the Union's organizing campaign. He indicated that, in his experience, there is no "normal" method of organizing a trade union and that each campaign is different. He argued that the Employer is asking the Board to come to a conclusion that is based solely on speculation as to how the organizing campaign was conducted. He argued that it was counterproductive for a union to dupe employees in the process of obtaining certification and quoted Paul Weiler in Reconcilable Differences: New Directions In Canadian Labour Law (Toronto: Carswell, 1980) at 44, to make the point that, "Unions do themselves no good by flimflamming a group of employees into "instant unionism" which they will shortly regret."

Mr. Keith noted that there was no guarantee that a vote would better represent the true wishes of the employees in question and may, in itself, have a chilling effect on the employees by raising some doubt as to the legitimacy of their original decision.

RELEVANT STATUTORY PROVISIONS

The relevant provisions in *The Trade Union Act* include the following:

> *2 In this Act:*
>
> *(f) "employee" means:*
>
> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or*
>
> *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer.*
>
> ...
>
> *5 The board may make orders:*
>
> *(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;*
>
> ...
>
> *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 subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.*
>
> ...
>
> *11(2) It shall be an unfair labour practice for any employee, trade union or any other person:*
>
> *(a) to interfere with, restrain, intimidate, threaten or coerce an employee 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;*
>
> ...
>
> *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.*

REASONS

Managerial Exclusions

The determination of the status of a person as an employee is made on the particular facts of each case. As the Board has indicated in previous decisions, it is preferable from an evidentiary point of view to have the incumbent give his or her evidence as to the nature of the work performed. In this instance, there was not a significant disagreement between the parties as to the functions performed by the assistant manager and we were fortunate to have Mr. Weeres, a depot supervisor, testify before the Board.

Section 2(f)(i)(A) of the *Act* requires the Board to exclude those persons "whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character" from the scope of the appropriate bargaining unit. The determination of employee status must balance the interest of the Employer to have a loyal group of managers available to carry out its mandate and implement its labour relations policies, with the interest of the employees who desire access to collective bargaining. In *City of Regina*, *supra*, at 158-159, the Board outlined the rationale for the

distinction between managers and employees and undertook a general review of the principles for drawing such distinction between managers and employees as follows:

> *The rationale for drawing a distinction between those who should be inside and those who fall outside a bargaining unit has often been discussed. In a passage which has often been quoted from the decision in Canadian Union of Public Employees v. Corporation of the District of Burnaby, [1974] 1 C.L.R.B.R. 1, the British Columbia Labour Relations Board outlined this rationale in the following terms:*
>
> > *The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, the employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand, an employee equally dependent on the enterprise for his livelihood, but on the other hand, wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.*
>
> *In one of our previous decisions, in City of Regina v. Regina Professional Fire Fighters' Association, LRB Files No.255-93 and 268-93, the Board alluded to the tension which exists between our interest in ensuring the existence of an arms' length relationship of the kind outlined in the District of Burnaby case, supra, and our interest in ensuring that access to collective bargaining is not unreasonably restricted:*
>
> > *This Board has on many occasions acknowledged that the decision whether someone should be excluded from a bargaining unit of employees is an important one, both from the point of view of the integrity of the bargaining relationship and from the point of view of the rights of individuals to engage in collective bargaining. On the one hand, both parties to collective bargaining need to be confident that the pursuit of their legitimate objectives will not be frustrated by divisive conflicts of interest or confusion over the nature of those interests. On the other hand, this Board has been alert to the possibility that exclusion from the bargaining unit of persons who do not genuinely meet the criteria set out in Section 2(f) of The Trade Union Act may unfairly deny them access to union representation and weaken the strength of the bargaining agent.*
>
> *At the heart of the decision the Board must make is the question whether in any particular case the duties which are attached to a position are of a kind and extent*

which would create an insoluble conflict between the responsibility which someone performing managerial functions owes to an employer, and the interests of that person and his or her colleagues as members of a bargaining unit. Because such a conflict is in many cases a matter of degree, it is impossible to state any one test which can be used to determine whether a particular person falls on one side of the line or the other. In International Brotherhood of Electrical Workers v. Caledon Hydro-Electric Commission, [1979] 3 C.L.R.B.R. 495, the Ontario Labour Relations Board made this point:

> *Because the Act does not contain a definition of the term "managerial functions", the task of developing criteria which can identify members of management has fallen to the Board and, in recognition of the fact that the exercise of managerial functions can assume different forms, in different work settings, the Board has evolved a number of "tests" to assist it in its enquiry. However, there are no magic formulae or rules of thumb which are universally applicable and dictate the result in every situation. The Board has consistently held that it must have due regard to the nature of the industry, the nature of the particular business, and the employer's organizational scheme. Essentially, the determination is a factual one, but the Board must always bear in mind that the purpose of its inquiry is to determine whether the functions of the challenged individual are such that his inclusion in the bargaining unit would be incompatible with collective bargaining. In the case of so-called "first line" managerial employees, the important question is whether the individual can fundamentally affect the economic lives of his fellow employees so that he is inevitably put in a position that creates a conflict of interest with them. The right to hire, fire, promote, demote or discipline employees are manifestations of managerial authority and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit...*

There is little doubt in this instance that the assistant manager performs functions that impact directly on the economic lives of the employees in the bargaining unit. He is involved at the same level of decision-making as the manager and substitutes for the manager when he is not at work. His duties include the hiring, evaluation, disciplining and termination of staff, as well as the overall management of staff time, scheduling, vacations and the like. The performance by him of these functions makes it incompatible for the assistant manager to be part of the bargaining unit and the position is therefore excluded by the Board.

The Board, however, does not believe that the depot supervisors exercise functions that would make it incompatible for them to belong to the bargaining unit. Although the depot managers perform important supervisory functions, they do not perform functions that "fundamentally affect the economic

lives of his fellow employees so that he is inevitably put in a position that creates a conflict of interest with them": *Caledon Hydro-Electric Commission, supra* at 497. The depot supervisors do not have authority to hire, fire, discipline, set hours of work, authorize absences from work nor do they have input into financial decisions with respect to employees. They fall within the category of first line supervisors whose role is to guide other employees primarily by example, words of correction and encouragement, but who do not possess a level of disciplinary authority that would make their participation in the bargaining unit inconsistent with their job functions. The depot supervisors are not regularly acting in a confidential capacity with respect to the labour relations of the Employer to bring them within the second exception in clause (f), subclause (i) of s. 2 of the *Act*. They have minimal access to confidential employee files and no regular involvement or handling of information relating to the confidential labour relations matters of the Employer. Unlike the duties that will attach to the assistant manager under a collective agreement, it is unlikely that the depot supervisors will have a significant role in the handling of grievances, other than to forward them to the manager or assistant manager for decision.

The Board is not persuaded by the argument that the fact that the depot supervisors are the "eyes and ears" of management on the site is sufficient to take them outside the definition of "employee." In this regard, the Board adopts the rationale of the Canada Labour Relations Board as expressed in *United Steelworkers of America v. Cominco Ltd. et al.*, [1980] 3 C.L.R.B.R. 105 where the Board stated on 118:

> *In this context it is no longer apposite to view the conflict of interest rationale for the managerial exclusion in terms of sworn oaths of membership in unions and unswerving loyalty to the brotherhood of membership. These terms are clearly outdated. The potential conflict of interest to be considered is one between employment responsibilities and the union as an instrument for collective bargaining in a climate where there is legal protection for the individual in his relationship to the union both as bargaining agent and organization. To say because a person is the sole supervisor present at a time or place creates a conflict because he must be the "management presence" is to think of conflicting loyalties in an outdated framework. Many employees in innumerable circumstances act alone and perform responsible tasks. The fact they also engage in collective bargaining has no impact on their loyalty to their employer or dedication to their job. Supervision by its nature has always required persons to act as the final on-the-site authority.*

The Board therefore finds that the depot supervisors are "employees" within the meaning of the *Act* and are included in the bargaining unit.

Discretion to Order a Vote

The Employer does not allege that the Union engaged in any improper conduct that would cast doubt on the validity of the evidence of support filed with the Board. The Employer argues from Ms. Milo's testimony concerning her experience with a union organizing drive, albeit with another union and in different circumstances, and from her evidence on the issue of supported decision-making, that an inference can be drawn, in the absence of other evidence, that the Union used a "peer" recruiting method to organize this workplace, and not the supported decision-making model. This method of recruiting union supporters is of suspect validity, according to the Employer, because a majority of the employees are persons with mental disabilities and are particularly vulnerable to peer suggestion. According to the Employer, the Board should therefore exercise its discretion under s. 6 of *The Trade Union Act* to order a vote of the employees in the bargaining unit with special instructions to permit supported decision-making. This argument assumes that the Board is not required to order a vote because a majority of the employees have expressed their support for the Union through the filing of support cards with the application for certification, which indeed is the case.

The Employer's argument is novel. The Board has been unable to locate any decisions supporting this approach to the organization of persons with mental disabilities. We note the sorry history of this Board and no doubt other labour relations boards in denying access to collective bargaining to persons with physical or mental disabilities: see *Saskatchewan Insurance, Office and Professional Employees' Union, Local 397 v. Canadian National Institute for the Blind* (1968), 3 Sask. L.R.B. Decisions 116, where Members Thain and Ingram stated in dissent at 117:

> *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."*

The decision to exclude persons with disabilities from collective bargaining was no doubt premised on the view that persons with disabilities were not entitled to paid employment. Their participation in the workplace was not accepted as a right but rather was permitted as an act of charity. Through the efforts of persons with disabilities and their support networks, including agencies similar to the present

Employer, considerable progress has been made to include and accommodate persons with physical or mental disabilities in the workplace. The legal changes that accompanied these efforts included the listing of "physical disability" as a prohibited ground of employment discrimination in *The Saskatchewan Human Rights Code*, S.S. 1979, c.S-24.1; the subsequent amendment of the Code to expand the definition of "disability" to include mental disability: *An Act to amend The Saskatchewan Human Rights Code*, S.S. 1989-1990, c. 23, ss. 3(1) and (3); and the listing of mental and physical disability as prohibited grounds of discrimination in s. 15 - Equality Rights of *The Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11 which states:

> *15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

Many collective agreements incorporate similar "no discrimination" clauses which ban discrimination in the workplace based on the grounds listed in provincial human rights statutes and the *Charter*.

The human rights provisions have been interpreted by the Supreme Court of Canada to support the values of inclusiveness and accommodation. In particular, the Supreme Court has imposed a positive obligation on employers to accommodate, to the point of undue hardship, the needs of workers otherwise disadvantaged by one or more of the prohibited grounds cited in the appropriate statute: see *Re Ontario Human Rights Commission and Simpson-Sears Ltd.* (O'Malley Case), [1985] 2 S.C.R. 536 and *Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970. In a similar vein, the Supreme Court has sanctioned differential treatment on otherwise prohibited grounds under the Equality Rights provisions contained in s. 15 of the *Charter* where such treatment enhances equality rights for a disadvantaged group. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, Mr. Justice McIntyre articulated this approach to equality rights on 164-165 as follows:

> *It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality. This proposition has found frequent expression in the literature on the subject but, as I have noted on a previous occasion, no where more aptly than in the well-known words of Frankfurter J. in Dennis v. United States, 339 U.S. 162, at p. 184:*
>
> > *It was a wise man who said that there is no greater inequality than the equal treatment of unequals.*
>
> *The same thought has been expressed in this Court in the context of s. 2(b) of the Charter in R. v. Big M. Drug Mart Ltd., [1985] 1 S.C.R. 295, where Dickson C.J. said at p. 347:*

> *The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.*
>
> *In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law - and in human affairs an approach is all that can be expected - the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.*

While there is no doubt that the Employer is motivated by concern for its employees, the Board does not share its view that the Board's discretion to order a vote can or should be based on the fact of mental disability, which is otherwise a prohibited ground of discrimination, without evidence that the Union engaged in fraudulent or oppressive conduct of the nature prohibited by ss. 11(2)(a) and 16 of the *Act* with respect to the employees in question.

The Board concludes that imposition of a special voting procedure which differentiates between persons based on their intellectual abilities does not meet the test described by Mr. Justice McIntyre in the *Andrews* case, *supra*. The special procedure does not constitute an application of the law that accords "an equality of benefit and protection and no more of the restrictions, penalties or burdens" for persons with mental disabilities than is accorded to persons without such disabilities. Instead, it would appear to the Board that the imposition of a special voting procedure would place burdens on persons with mental disabilities when they attempt to exercise their rights to join a trade union, which burdens do not exist for other employees. The Board therefore refuses to exercise its discretion to order a vote of the employees in the appropriate unit.

Having come to this conclusion, however, the Board must state clearly that it expects trade unions to take reasonable steps to ensure that all employees, regardless of their intellectual or language abilities, comprehend the significance of signing cards in support of a union. The degree of care expected may vary depending on the particular circumstances of the employees whom the union seeks to represent. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Western Automotive*

Rebuilders Ltd; Dudra et al. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, [1993] 1st Quarter Sask. Labour Rep. 156; LRB File Nos. 239-92 & 263-92, the Board dealt with complaints brought pursuant to s. 11(2)(a) of the *Act* by employees who were not totally fluent in English and who alleged that the Union acted improperly in the manner in which it obtained their support. The Board summarized the evidence and concluded as follows on 164:

> *As with the application of Mr. Dudra, the allegations made by these two employees raise the question of what must be shown to establish that an unfair labour practice has been committed under Section 11(2)(a) of the Act. We have indicated earlier that, although we accept that the notion of "interference" may encompass situations in which no union representative has been guilty of coercion or intimidation, there must be some culpable conduct to constitute a violation of this Section.*
>
> *It is our conclusion that nothing about the contact between Mr. Kildaw and Mr. Frederick and these two employees is suggestive of such impropriety. It was agreed that Mr. Kildaw, who had worked with the two employees, would be the one to explain the matter to them. Mr. Kildaw, in our view, took reasonable steps to compensate for the language difficulties which he knew the employees to have. He attempted to devise examples which they would find it possible to comprehend, he went over the membership card with each of them, and he encouraged them to phone him if they had any questions. We are persuaded that he was satisfied that the two employees understood what he was asking them to do. Though he was prepared to acknowledge that he might have done even more, in our opinion he did what could reasonably be expected in this respect.*

As we have indicated above, there is no evidence in the present case that the Union engaged in any conduct that may have constituted interference of the sort that is prohibited by s. 11(2)(a) of the *Act* or that may constitute fraud within the meaning of s. 16 of the *Act*. In the absence of such evidence, the Board is not called upon to judge the reasonableness of the steps taken by the Union to ensure that the employees in question comprehended the significance of signing a card in support of the Union.

As a majority of the employees in the bargaining unit expressed their support for the trade union, a certification Order will be issued. The Order will exclude the assistant manager from the appropriate bargaining unit, along with the manager and accountant. The depot supervisors shall be included in the appropriate bargaining unit.

Mr. Davies, Board Member, does not agree with the majority of the Board on the issue of the inclusion of the depot supervisors and would hold that they are excluded from the bargaining unit as persons exercising managerial authority. He dissents from the Board's Decision on this issue.

DONNA WELLS, EMPLOYEE, Applicant and REMAI INVESTMENT CORPORATION, OPERATING AS THE IMPERIAL 400 MOTEL, PRINCE ALBERT, SASKATCHEWAN, Employer and UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Certified Union

LRB File No. 305-95; March 15, 1996
Chairperson: Beth Bilson; Members: Don Bell and Bruce McDonald

For the Applicant: Kevin Wilson
For the Employer: Jay Seibel
For the Certified Union: Drew Plaxton

Rescission - Whether rescission application should be dismissed on ground of employer interference - Board deciding employer control of fund used to pay lawyer for applicant constituted interference sufficient to dismiss application.

***The Trade Union Act*, s. 9.**

REASONS FOR DECISION

Beth Bilson, Chairperson: The applicant, Ms. Donna Wells, has asked this Board to rescind the certification Order in which the United Food and Commercial Workers, Local 1400, were certified to bargain collectively on behalf of employees of the Remai Investment Corporation at the Imperial 400 Motel in Prince Albert. In the application, Ms. Wells claims that the majority of employees in the bargaining unit no longer wish to be represented by the Union.

Counsel for the Union argued that the Board should dismiss the application on the grounds that there had been employer interference within the meaning of s. 9 of *The Trade Union Act*, R.S.S. 1978, c.T-17, which reads as follows:

> *9 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.*

Ms. Wells is employed as a front desk clerk at the motel operated by the Employer. She is classified as a full-time employee, although, during the last 18 months, she has been permitted by the Employer to work for several hours each day as a dietary aide at Holy Family Hospital. In her evidence, Ms. Wells said that she does this in order to earn extra money, and that the Employer has no objection to her regular absence so long as she arranges for coverage of the front desk responsibilities by other

employees.

Ms. Wells testified that she and other employees had been doubtful of the benefits of trade union representation at the motel from the time of the original organizing drive. She stated that the employees had a good relationship with the management of the motel, and that she and others were concerned that this would be disrupted by the advent of the Union. Though she and others were concerned, she said they were informed that they would have to wait for some months until the open period before they could make an attempt to have the certification Order rescinded. She said that she thought this information might have come from Ms. Laura Olson, another employee whose activities were the subject of comment by this Board in *United Food and Commercial Workers, Local 1400 v. Remai Investment Corporation and Laura Olson*, [1995] 1st Quarter Sask. Labour Rep. 289; LRB File Nos. 171-94 & 177-94.

Two other employees, Mr. Milan Kolosa and Mr. Larry Belzevick, were active along with Ms. Wells in soliciting support for the rescission application. Ms. Wells testified that Mr. Kolosa really initiated the application, and obtained forms to be signed by employees to indicate their support. Ms. Wells said that the three employees shared the task of speaking to employees about the application more or less equally, though she said that Mr. Kolosa and Mr. Belzevick took perhaps a more active role than she did.

She said that a significant proportion of the forms indicating employee support were provided to employees at the front desk, where she works. She said that it is convenient to contact employees there, because many of them go to the front desk to obtain chits for meals. Ms. Wells said that Mr. Belzevick was often working around the front desk at the same time she was, and that he would provide employees with a form, which they could complete at their leisure.

Ms. Candace Hofferd, an employee who was summoned to testify by the Union, said that she had been beckoned by Mr. Belzevick, who was at the front desk when she was leaving the hotel after work. Ms. Wells talked to her about the decertification application. Ms. Hofferd recalled that Ms. Wells had told her that if the Union were ever successful in getting a raise of fifteen cents per hour, it would be eaten up by the union dues employees would have to pay.

Ms. Wells cited a variety of reasons which she thought were the basis of employee support for the

application. She referred to concern about the union dues which would be deducted once the Union had reached a first contract with the Employer, difficulties in contacting representatives of the Union and reports to employees that this Union was not a "good union." She also said that many of the original supporters of the Union had been temporary employees who had now moved on.

Though she described Mr. Kolosa and Mr. Belzevick as the major proponents of the application for rescission, she said that Mr. Kolosa had asked her to sign the application because she was an employee of longer standing than he was. She agreed to do this, and the application was submitted in her name.

Ms. Wells denied that the general manager, Mr. Rene Raque, or the assistant manager, Ms. Rebecca Ford, had initiated or encouraged the application. She said that, as far as she knew, they had not been aware of the organizing activity going on among employees. She described the physical layout of the front desk area of the motel, where at least some of this organizing activity had occurred, and said that the front desk itself would not be visible from the administrative offices.

When Mr. Kolosa asked Ms. Wells to sign the rescission application, he told her that he had arranged for her to talk to a solicitor. She asked who would be responsible for the cost associated with legal representation. At that time, Mr. Kolosa told her that he had asked the manager, Mr. Raque, whether it would be possible to use the "staff fund" for this purpose.

According to the evidence of Ms. Wells, the staff fund is used to support staff activities, such as parties and other social events. The money in the fund comes largely from two sources, the deposits from beverage bottles and cans which are left behind by motel guests, and the overages which occur in the various motel departments. Ms. Wells said that the fund itself is under the control of management. The employees make suggestions for the use of the fund, and management considers and approves these suggestions. Ms. Wells said that she approached Mr. Raque to confirm that it would be possible to use the money in the staff fund in connection with the legal costs associated with the rescission application.

Ms. Hofferd testified that, some time after she had been contacted by Mr. Belzevick and Ms. Wells about the rescission application, she had been instructed by Mr. Raque to complete a union membership card and return it to his office. When she and another employee went to the office to return the cards, Ms. Hofferd said that she told Mr. Raque that she thought "we waivered the Union;" she explained that by this she meant that she thought the Union was gone. She said that Mr. Raque

said to her, "We're working on it," and not, as counsel for the Applicant suggested to her, "It's in the works."

Section 3 of *The Trade Union Act* reads as follows:

> *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.*

The Board has often commented on the significance of the power which is accorded to employees under this provision to make their own choices concerning representation by a trade union. We have also stated that the rights granted under s. 3 include the right to decide against trade union representation as well as the right to undertake activities in support of a trade union. In the decision in *Remai Investment Corporation, supra*, the Board made the following observation on 298:

> *Counsel for the Employer urged the Board to take the same view of Ms. Olson's conduct as we took in Brandt Industries Ltd., LRB File No. 095-91. In Brandt Industries Ltd. the Board recognized the right of employees to debate the representation question vigorously and to campaign against the Union. We still regard this as an important right. In F. W. Woolworth Co. Limited, LRB File No. 158-92, the Board returned to this theme and stated that charges against individual employees of interfering in an organizing drive are particularly serious because of the chilling effect that they can have upon the democratic process which is at the heart of The Trade Union Act.*

Earlier decisions have made it clear, however, that the Board is alert to any sign that an application for certification has been initiated, encouraged, assisted or influenced by the actions of the employer, as the employer has no legitimate role to play in determining the outcome of the representation question. In the *Remai Investment Corporation* decision, *supra*, from which the above quotation was taken, the Board went on to say on 298:

> *However, there is a distinction between two employees debating the representation question as they work side by side or while they ride to work and what Ms. Olson did. Brandt Industries Ltd. does not stand for the proposition that one of those employees can enlist the coercive power of management in order to gain the support of other employees for his or her position.*

In the case of *Kim Leavitt v. Confederation Flag Inn (1989) Limited and United Food and Commercial Workers, Local No. 1400*, [1990] Winter Sask. Labour Rep. 64; LRB File No. 225-89 at 66, the Board made the following comment:

> *The Board has frequently commented upon the relationship between Section 3, which enshrines the employees' right to determine whether or not they wish to be represented by a union, and Section 9 of the Act. These sections are not inconsistent but complimentary. Section 3 declares the employees' right and Section 9 attempts to guard that right against applications that in reality reflect the will of the employer instead of the employees.*

The Board proceeded to make the following statement on 66-67:

> *Generally, where the employer's conduct leads to a decertification application being made or, although not responsible for the filing of the application, compromises the ability of the employees to decide whether or not they wish to be represented by a union to the extent that the Board is of the opinion that the employees' wishes can no longer be determined, the Board will temporarily remove the employees' right to determine the representation question by dismissing the application.*

In *Susie Mandziak v. Remai Investment Co. Ltd. (Imperial 400 Motel)*, [1987] Dec. Sask. Labour Rep. 35; LRB File No. 162-87, the Board made a similar point on 36:

> *While the Board generally assumes that all employees are of sufficient intelligence and fortitude to know what is best for them and is reluctant to deprive them of an opportunity to express their views by way of a secret ballot vote, it will not ignore the legislative purpose and intent of Section 9 of The Trade Union Act. Section 9 is clearly meant to be applied when an employer's departure from reasonable neutrality in the representation question leads to or results in an application for decertification being made to the Board. In the Board's view, this application resulted directly from the employer's influence and indirect participation in the gathering of necessary evidence of employee support.*

This statement makes clear that s. 9 is directed at a circumstance in which an employer departs from a posture of detachment and neutrality in connection with the issue of trade union representation. There have been cases where an employer has taken a direct role in initiating or assisting an application for rescission of a certification Order, and in these cases, it is fairly easy for the Board to identify the conduct on the part of the employer which constitutes improper interference. On the other hand, as the Board pointed out in *Rick Poberznek v. United Masonry Construction Ltd. and International Union of Bricklayers and Allied Craftsmen, Local No. 3*, [1984] Oct. Sask. Labour Rep. 35; LRB File No. 245-84, employer interference is rarely of an overt nature, and the Board must be prepared to consider the possibility that subtle or indirect forms of influence may improperly inject the interests or views of the employer into the decision concerning trade union representation.

In this connection, the Board intimated in *Robert Pfefferle v. Ace Masonry Contractors Ltd. and Bricklayers and Masons International Union of America, Union No. 3*, [1984] Aug. Sask. Labour

Rep. 45; LRB File No. 225-84, that the absence of a "credible rationale" for rescission offered by the application may be an indication of improper influence on the part of the employer. We think that the Board in that case was reasonable in concluding that if an employee cannot put forward any reason at all for deciding to file an application for rescission, it is a sign that the application has not sprung spontaneously from the employees themselves.

In this case, Ms. Wells herself put forward a variety of reasons why she and other employees wished to disengage themselves from a collective bargaining relationship. It is not necessary, in our view, that an applicant demonstrate that their views of the Union were completely accurate or fair, but that they had given the matter sufficient thought that we could be confident that they came up with the idea themselves. Though it was not possible to form a view concerning the motives of the two other employees who, along with Ms. Wells, spearheaded the campaign to gather support for the application, we are prepared to accept that the applicants advanced a "credible rationale" for the application.

Another issue which has been of some significance in the decisions of the Board in which s. 9 has been considered is that of the use of equipment or facilities either provided by the employer, or used with the tacit permission of the employer. In this case, we have some doubt that it would be possible for an organizing campaign to proceed at the front desk of the motel, in such close proximity to the administrative offices, without members of management being aware that such a campaign was going on. Given the conclusions we have reached on other issues, however, we do not think it necessary to decide whether or not this would be a sufficient basis for the dismissal of the application.

Part of the evidence of Ms. Hofferd concerned a statement which she alleged was made to her by Mr. Raque, to the effect that "we're working" on the decertification of the Union. If Ms. Hofferd heard and understood this remark correctly, it would certainly be the basis for some concern about the neutrality of the Employer on the representation question.

The basis for our conclusion that there was improper interference by the Employer in this case, however, is a different matter. The provision of financial assistance for the employees who are supporting a rescission application is, of course, one of the most powerful instruments an employer may use to influence the course of the campaign. One reason for this is that it may actually make it possible in a practical sense for the employees to undertake such an application. It also provides an indication of the view an employer takes on the representation question, and a subtle suggestion that there are benefits to be gained from making a choice which is consistent with the good opinion of the

employer.

Counsel for the Applicant argued that the Employer did not provide financial assistance in this case, but simply facilitated the access of these employees to funds which essentially belonged to them in any case.

We do not think this is an accurate description of the status of the employee fund. Though the returns from abandoned bottles and cans, and the money from overages created by employee miscalculations, might be regarded as a windfall to the Employer rather than an ordinary financial benefit, there is little doubt that the Employer controls the direction and use of these funds. It cannot be imagined that the Employer would regard the funds resulting from overages as money which should accrue to the employees themselves. The decision that money from these sources should be put into a separate fund which would be used to support employee group activities was evidently a decision made at the discretion of the Employer. Though the employees could suggest uses for the money, members of management had to approve particular projects and disburse the funds for them.

In this regard, there is clearly a distinction between using the money for employee social activities, and using the money to finance an effort to unseat the Union. From the point of view of Ms. Wells, it was legitimate to use the funds to support a cause which she saw to be in the general interest, and it is possible, although no evidence was put forward on this point by the Employer, that members of management also saw the question in this light. In our view, however, the use of the staff fund to underwrite the legal representation of those bringing the application must be seen as a financial contribution made by the Employer to the campaign in favour of the application.

Our view on this is not affected by the fact that Ms. Wells did not talk to Mr. Raque about this matter until she had agreed that the application should be filed in her name. It was clear that Mr. Kolosa had cleared this arrangement with Mr. Raque at an earlier time, and that Ms. Wells was aware of it at the time she agreed to sign the application.

For the reasons we have given, we have decided that there was employer interference in the application within the meaning of s. 9 of *The Trade Union Act*, and the application must be dismissed on these grounds.

LORRAINE GOBEIL, EMPLOYEE, Applicant and REMAI INVESTMENT CORPORATION, OPERATING AS THE CORONET MOTOR INN, PRINCE ALBERT, SASKATCHEWAN, Employer and UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Certified Union

LRB File No. 314-95; March 15, 1996
Chairperson: Beth Bilson; Members: Brenda Cuthbert and Bob Todd

For the Applicant: Kevin Wilson
For the Employer: Larry Seiferling, Q.C.
For the Certified Union: Drew Plaxton

Rescission - Whether rescission application should be dismissed on ground of employer interference - Board deciding fund used to pay lawyer for applicant is not under control of employer - No other indication of employer interference.

***The Trade Union Act*, s. 9.**

REASONS FOR DECISION

Beth Bilson, Chairperson: The United Food and Commercial Workers, Local 1400, was certified in an Order of this Board dated December 22, 1994, as the bargaining agent for a unit of employees of Remai Investment Corporation at the Coronet Motor Inn in Prince Albert. The Applicant, Ms. Lorraine Gobeil, has filed this application on behalf of herself and other employees seeking rescission of the certification Order.

The Union has asked the Board to dismiss the application on the grounds that the Employer interfered with or influenced the application within the meaning of s. 9 of *The Trade Union Act*, R.S.S. 1978, c.T-17, which reads as follows:

> *9 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.*

In her evidence, Ms. Gobeil stated that she had not supported the Union from the time of certification, and she believed that other employees felt the same way. She said that she felt the Union had not managed to accomplish anything on behalf of the employees, and that all of the proposals which were being discussed at the bargaining table simply represented the *status quo*. She said that employees were reluctant to contemplate paying union dues, which would be deducted as soon as an agreement

was concluded with the Employer.

Ms. Gobeil also said that she was concerned that the advent of the Union had disrupted the harmonious relations among employees, and between employees and management. She said that she feared that the establishment of a seniority system would encourage junior employees to undermine the job security of more senior employees, thought she could not explain why she thought this was a possibility.

She said that the Union had not established a presence among the employees, that the staff representatives of the Union were not accessible and that it was unclear whether there were any Union officers among the staff at the hotel. Ms. Gobeil was able to identify four employees who were members of the Union bargaining team, but said that they themselves seemed to be uncertain about their role.

Ms. Gobeil said that two of the employees who were members of the Union bargaining team, Ms. Sherry Chatlain and Ms. Lori Jacobson, approached her sometime in November of 1994. They said that they had been in conversation with Mr. Milan Kolosa, an employee at the Imperial 400 Motor Hotel. That hotel, which is also owned by the Employer, is across the street from the Coronet Motor Inn, and there has generally been considerable contact between the employees at the two establishments; indeed, many employees have worked in both places on either a regular or a casual basis. Mr. Kolosa had suggested to Ms. Chatlain and Ms. Jacobson that a rescission application might be an option if the employees at the Coronet Motor Inn were dissatisfied with representation by the Union.

Ms. Gobeil said that Ms. Chatlain and Ms. Jacobson asked her if she would be willing to undertake the task of gathering support for a rescission application. They said they did not wish to do this themselves, as they felt it might compromise their position as members of the Union bargaining committee. They told her the name of a solicitor, Mr. Kevin Wilson, who had been suggested by Mr. Kolosa.

Ms. Gobeil did get some information from Mr. Wilson about how to proceed with a rescission application, and also an estimate of his fees. She spoke to Ms. Chatlain and Ms. Jacobson again about how the application would be financed, and asked them if she could use money from the "staff fund." Ms. Gobeil said that the staff fund, which had been in existence for some years, draws its basic revenue

from the returns of beer bottles which are abandoned by guests in the hotel. It has typically been used to support staff social activities, as well as for gifts when employees depart, have new babies or suffer an illness. The proceeds of the sale of liquor and raffle tickets at the annual Christmas party are also contributed to the fund.

The evidence of Ms. Gobeil was that Ms. Chatlain and Ms. Jacobson are in charge of the fund, and make all of the disbursements from it. She said that a bank account is maintained for the fund, with the bank book being kept in the safe in the cash office of the hotel. Ms. Chatlain and Ms. Jacobson assured her that there was sufficient money in the fund to pay the account of the solicitor, and she agreed to proceed with gathering support and filing the application on the strength of this assurance.

Ms. Gobeil said that she spent approximately two days contacting employees and soliciting their signatures on forms which indicated their support for this application. She said that she made initial contact with one or two people in the workplace. Otherwise, she contacted them one by one at times when neither she nor the other employee were at work.

Ms. Gobeil denied that she ever spoke to Mr. Lorne Sproale, the manager, or Mr. Tracey Neudorf, the assistant manager, about the decertification effort, or received any encouragement or assistance from them. She said that they would have no reason to be aware that an organizing campaign was in progress. She acknowledged that she had a friendly relationship with both of the managers, particularly Mr. Sproale, and spoke to both of them regularly in the course of her employment; she said that the same things could be said about any of the employees in the hotel.

She said that the only time she had contact with Mr. Sproale concerning the issue was after the application was filed, when they circulated among the employees to obtain their signatures on the Statement of Employment; no representative of the Union accompanied them when they did this.

Ms. Betty Porter, a housekeeping employee in the hotel, testified that she had been contacted by Ms. Gobeil at her home and asked to sign a form in support of the application. She could not remember exactly what Ms. Gobeil said to her, but said she had "left the impression" that the rest of the housekeeping employees had already signed the forms.

Ms. Porter was also permitted to testify with respect to several events which had occurred since the

filing of the application. Counsel for the Applicant objected to the admission of this evidence. The Board accepted it on the basis that it could conceivably have some bearing on the question of whether the reliability of a vote conducted among employees could potentially have been undermined by conduct on the part of representatives of the Employer in the period between the filing of the application and the holding of such a vote.

Ms. Porter said that she had been present at a conversation between the manager, Mr. Sproale, and several housekeeping employees. She said that one of the employees had asked if it would be possible to get a raise because of her financial difficulties. Mr. Sproale had said that this request could not be considered until "all of this union stuff settles down," or words to that effect. When pressed, he said that he could not discuss it further with them. In cross-examination, Ms. Porter said that, after the Union was certified, Mr. Sproale had expressed reluctance to discuss wages with the employees on several occasions.

Ms. Porter said that she could not specifically recollect signing the Statement of Employment, although her signature does appear on that document. She speculated that her signature might have been obtained when Mr. Sproale and Ms. Gobeil went to the coffee room used by the housekeeping staff. She thought there was another occasion on which she encountered Mr. Sproale in the company of Ms. Gobeil; though she was uncertain of the details, she thought Mr. Sproale had asked her if she had "signed the paper to get rid of the Union."

In another recent decision, in *Donna Wells v. Remai Investment Corporation (Imperial 400) and United Food and Commercial Workers, Local 1400*, [1996] Sask. L.R.B.R. 194 , we had occasion to review the principles enunciated by this Board in interpreting s. 9, in the context of a situation which has a number of features in common with the circumstances in which this application has arisen. Indeed, counsel for the Union urged the Board to draw the conclusion that it is more than a coincidence that the two applications have come before us so close together.

In the recent *Imperial 400* decision, and in other decisions, the Board commented on the character of the rights which are conferred by s. 3 of *The Trade Union Act*. The choice of whether or not employees should be represented by a trade union for the purpose of determining their terms and conditions of employment is a choice which the employees themselves are entitled to make, and an employer has no legitimate role in determining or even influencing the outcome of the representational

issue.

In the case of *Susie Mandziak v. Remai Investment Corporation (Imperial 400 Motel)*, [1987] Dec. Sask. Labour Rep. 35; LRB File No. 162-87 at 36, the Board made this comment:

> *While the Board generally assumes that all employees are of sufficient intelligence and fortitude to know what is best for them and is reluctant to deprive them of an opportunity to express their views by way of a secret ballot vote, it will not ignore the legislative purpose and intent of Section 9 of The Trade Union Act. Section 9 is clearly meant to be applied when an employer's departure from reasonable neutrality in the representation question leads to or results in an application for decertification being made to the Board. In the Board's view, this application resulted directly from the employer's influence and indirect participation in the gathering of necessary evidence of employee support.*

The Board has acknowledged that attempts by an employer to influence or subvert employee choice with respect to trade union representation may take subtle and indirect forms. A sophisticated employer, who may appreciate the dangers of engaging in flagrant and open attempts to bring down the union, may not be able to resist the temptation to bring more subtle forms of pressure to bear. In these circumstances, it may be appropriate for the Board to find employer influence in statements or conduct which are only inferentially related to the fate of a decertification application.

Counsel for the Union urged the Board to draw such inferences here. He pointed to several pieces of evidence as the basis for a finding of employer interference sufficient to justify the dismissal of the application. He argued that it was highly unlikely to be a coincidence that there would be two rescission applications emanating from neighbouring hotels under common ownership unless the Employer had a hand in them, and intimated that the chain of employer influence led from Mr. Kolosa at the Imperial 400 Motor Hotel, through Ms. Jacobson and Ms. Chatlain, to the Applicant.

He further argued that the staff fund which was used to finance the application must be regarded as being under the control of the Employer, despite the facade of employee input. He did not allege that Ms. Jacobson and Ms. Chatlain were somehow acting as agents of the Employer in this regard, rather that they were not the ones who actually controlled the funds.

The Board must always be open to the possibility that an employer is exercising some subtle influence on the initiation or the pursuit of an application for rescission. As we have pointed out before, the purpose of permitting the Board to dismiss an application on the basis of a finding of employer

interference is to ensure that evidence of employee wishes may be relied upon as an accurate indication of the autonomous choice to which employees are entitled under s. 3 of the *Act*.

On the other hand, the Board must have some solid grounds for supposing that there has been influence of an improper kind before denying employees an opportunity to make that choice. We have concluded that the Union was unsuccessful in demonstrating any convincing reason for denying the employees the opportunity to express their wishes in this case.

In her evidence at the hearing, Ms. Gobeil described a campaign to gather support for the application which was carefully conducted to avoid contact with employees on the premises of the Employer or at times when the employees were at work.

Though counsel for the Union argued that we should find that the Employer must have known about this campaign, and intimated that there were signs the Employer may have planted the suggestion, we are not persuaded that the evidence shows this to be the case. There was no evidence which contradicted the assertion of the Applicant that she had obtained the information she needed from other employees, either in the same bargaining unit or the bargaining unit at the Imperial 400 Motor Hotel, and from Mr. Wilson. She conducted her campaign circumspectly, and over a short period of time. She filed the application promptly following this campaign.

Though the vehicle - the staff fund - used for financing the applications in both this case and the case of the Imperial 400 was similar, we think the cases can be clearly distinguished. In this case, the decision had been made some years ago to set aside the funds from abandoned beer bottles, which are essentially a windfall from the point of view of all parties, for the use of employees. The evidence indicated that the only other source of money for the fund was the profits from liquor and raffle ticket sales at staff Christmas parties.

The management and control of the fund is in the hands of two bargaining unit employees who were described as trusted workplace leaders by both of the witnesses who testified. Though the bank book for the fund is kept in a safe in the administrative offices of the Employer, there was no evidence at all to suggest any known instance in which management monitored the fund or attempted to control its use.

It is true that there was no canvass of the wishes of the other employees before Ms. Jacobson and Ms.

Chatlain assured the Applicant the money would be available to underwrite the costs of pursuing this application. According to Ms. Gobeil, all three of them assumed it would be appropriate to use the money for an application which had the support of most of the other employees. Whether or not there was some irregularity in assuming that other employees would accept the view that the rescission application should be on the same footing as a Christmas party or baby gift, these facts do not show that there was any influence exercised by the Employer on the fund or on the decision to use it to finance the application.

For the reasons we have given here, we have concluded that there was not sufficient evidence of employer influence to justify the dismissal of the application on that ground.

Counsel for the Applicant argued that, in these circumstances, the Board should issue an Order for rescission, without a vote.

The discretion which the Board has to reject an application, under the terms of s. 9, which we find to be tainted by employer influence, must be distinguished from the discretion which we enjoy, in all circumstances, to decide whether the expression of employee wishes should be put to a vote. Even without a finding that there has been employer interference, it is open to us to decide that a vote would be the most appropriate way of determining the wishes of the employees. By that means, both those who support the application and those who oppose it may have an additional opportunity to attempt to persuade other employees to their view.

In this instance, we find that a vote among bargaining unit employees would be appropriate, and we will issue an Order directing that such a vote be conducted.

In this respect, we should comment briefly on the evidence advanced by the Union concerning statements allegedly made by Mr. Sproale in the period after the application had been filed. According to one of these allegations, Mr. Sproale told the housekeeping employees he would not be able to comment on wage increases until "all this union stuff has settled down." This does not, in our view, establish that Mr. Sproale was exercising any improper influence on the course of the decertification application. It is possible he was referring to the application when he talked about "union stuff." Both the Union and the Employer conceded, however, that the negotiation of the collective agreement had more or less come to a standstill pending the outcome of this application, and the statement attributed

to Mr. Sproale, if correctly reproduced in the evidence of Ms. Porter, may reasonably be interpreted in this light rather than as an attempt to influence the views of the employees.

The other allegation made on the basis of the evidence of Ms. Porter was that Mr. Sproale, accompanied by Ms. Gobeil, made inquiries as to which employees had signed the "paper to get rid of the Union," on a separate occasion from that on which they obtained signatures on the Statement of Employment. Ms. Porter conceded that her memory of these events was not very clear, and that she could not recollect exactly what was said. We find that this evidence was not sufficiently clear to demonstrate improper participation by Mr. Sproale in the events surrounding the application for rescission.

PROFESSIONAL ASSOCIATION OF INTERNES AND RESIDENTS OF SASKATCHEWAN, Applicant and UNIVERSITY OF SASKATCHEWAN, Respondent

LRB File No. 278-95; March 19, 1996
Chairperson: Beth Bilson; Members: Bob Cunningham and Bruce McDonald

For the Applicant: Jay D. Watson and Neil R. McLeod
For the Respondent: John R. Beckman, Q.C.

Employee - Students - Whether medical residents can be considered employees because of student status - Board deciding residents are employees under *The Trade Union Act* despite student status.

Employer - Whether employer of residents is University of Saskatchewan or committee which entered into agreement - Board deciding university is actual employer.

Labour organization - Whether applicant organization is "labour organization" within meaning of *The Trade Union Act* - Board deciding applicant is labour organization.

Trade union - Whether applicant organization is eligible to apply for certification under *The Trade Union Act* - Board deciding applicant is trade union.

***The Trade Union Act*, s. 2(f), (g), (j) and (l).**

REASONS FOR DECISION

Beth Bilson, Chairperson: The Professional Association of Internes and Residents of Saskatchewan has applied to be certified to represent a bargaining unit composed of medical residents who are enrolled in training programs under the auspices of the College of Medicine at the University of Saskatchewan.

The Applicant organization was formed in 1974 with the objective of representing medical residents and internes with respect to certain issues which had arisen between them and the College of Medicine and the medical facilities in which they were carrying out their training programs. These issues included the hours which internes and residents were required to devote to their training, and the amount of remuneration which should be paid to them.

From 1975, the organization entered into a series of agreements with entities, variously named, which

represented the interests of the College of Medicine and the health care facilities. These agreements were in form similar to collective agreements concluded between the parties to collective bargaining relationships, and set out terms and conditions relating to such issues as remuneration, educational and other leave, insurance and other benefits and the process for resolving disputes and grievances.

In 1994, the College of Medicine proposed to levy a tuition fee of approximately $2200.00 per year for the residents. The Applicant organization filed a grievance under their agreement, alleging that the signatory to their agreement, at that time described as the Saskatchewan Medical Postgraduate Committee, was required to pay these fees. The grievance proceeded through the grievance and arbitration procedure set out in the agreement. The arbitration award, which upheld the position taken by the Saskatchewan Medical Postgraduate Committee, was the subject of judicial review proceedings. At the time of the hearing of this application, the parties were awaiting a decision of the Saskatchewan Court of Appeal.

Because of the failure to resolve this issue, as well as difficulties in negotiating revisions to the agreement, the members of the Applicant organization undertook strike action in the summer of 1995.

Following the end of the strike, the Applicant organization decided to file this application seeking to be certified as the trade union representing a bargaining unit composed of medical residents. In the application, they identified the University of Saskatchewan as their employer.

The University of Saskatchewan has opposed the application on two grounds. The first is that the members of the Applicant organization are not employees within the meaning of *The Trade Union Act*, R.S.S. 1978, c.T-17, but postgraduate students enrolled in an educational program offered by the University.

In the alternative, the University argues that if the residents are employees, their employer is not the University of Saskatchewan. Counsel for the University argued that if there is an employment relationship, that relationship is with the Saskatchewan Medical Postgraduate Committee, the signatory to the most recent agreement, not with the University.

The Applicant organization raised a third issue for determination in connection with the application, namely whether the Professional Association of Internes and Residents of Saskatchewan is a labour

organization which is qualified to be the subject of a certification Order under *The Trade Union Act*.

The bargaining unit which has been proposed by the Applicant organization would be composed of residents who are enrolled in medical residency programs offered by the College of Medicine at the University of Saskatchewan. Residents are persons who have obtained an undergraduate degree in medicine, and are pursuing postgraduate clinical training in order to meet the standards for certification in a particular area of medical specialization.

There are two major national bodies which oversee the maintenance of standards and the examination of candidates for certification as medical specialists in various fields. One of these, the College of Family Physicians of Canada, sets and maintains standards for certification in the area of family practice. Physicians who wish to qualify to enter the field of family practice must ordinarily undertake a residency program which is two years in length. A number of the residents on whose behalf the Applicant organization seeks bargaining rights are enrolled in such a residency program at the College of Medicine at the University of Saskatchewan.

The other national accrediting body is the Royal College of Physicians and Surgeons of Canada, which oversees residency programs in a wide range of areas of medical specialization. There are currently nineteen programs at the College of Medicine which operate within the parameters set out by the Royal College of Physicians and Surgeons of Canada.

The two accrediting bodies set out the standards which must be met by residency programs in order that the residents enrolled in them can become qualified to enter the medical profession as certified practitioners in the specialist areas they have chosen; they also examine the residents at the conclusion of their residency programs. The certification of a physician by one of the accrediting bodies is the most usual basis for the granting of a license to practice medicine by the provincial licensing body - in Saskatchewan, the Saskatchewan College of Physicians and Surgeons.

At one time, residents obtained the requisite certification by a process of clinical training overseen by a particular health care facility or physician. In the late 1970s, however, the Royal College of Physicians and Surgeons of Canada, then the primary accrediting body, decided that it would be desirable if residency programs were centred on university medical colleges. The rationale for this change was described by the Royal College in the following terms:

> *The primary purpose of university sponsorship of specialty training is to make available to each trainee all the resources of the university and its participating hospitals that can be mobilized to his or her advantage. The academic and research resources of all faculties and the clinical and other facilities offered by general hospitals and special institutions are needed to provide variety and depth in educational and clinical experience. Central control is necessary to some degree to ensure optimal use of such diverse facilities. Therefore, the development of programs and their continual upgrading cannot be assigned, as in the past, to the sole jurisdiction of the hospital departments. It must be emphasized that administrative arrangements must continue to ensure the strength of all departments, divisions and services engaged in training. It was no accident that specialty training originated in hospital departments, for it is only at this level that the expertise peculiar to the specialty is found. However, the university by adding new dimensions greatly enhances the traditional department-based apprenticeship.*

The residency programs which are offered by the College of Medicine at the University of Saskatchewan are, according to the witnesses who gave evidence at the hearing, typical of the programs which are in place in jurisdictions across Canada. Residents are chosen through a national matching scheme, the Canadian Resident Matching Service ("CaRMS"). Most candidates go through the matching process in their final undergraduate year in medical school. They select the residency programs they are interested in, and register with the CaRMS scheme. The medical colleges which offer the residency programs select a certain number of candidates for interview. On the basis of these interviews, both the candidates and the institutions rank their choices. The candidates and institutions are then matched by computer. One of the features of the scheme is that both parties enter into an agreement to accept the results of the matching process as binding. If there are candidates who are not placed by this process, they can re-enter the matching process and try to identify a placement by that means.

Each of the residency programs offered through the College of Medicine is overseen by a Training Committee, which consists of members of the academic department of the College which corresponds to the area of specialization of the residency program. The actual administration of the residency program is done by a Program Director, also a faculty member of the academic department, who is appointed by the College of Medicine.

Both Dr. Don Duncan, the President of the Applicant organization, and Dr. Bill Bingham, the Associate Dean (Postgraduate Medical Education) of the College of Medicine, took care to distinguish residents from two other categories of clinical students. Internes were medical postgraduates who

undertook a year of clinical training, usually in a hospital setting, in order to become qualified to practice medicine as general practitioners. The interneships were offered and supervised by specific hospitals or other health care facilities.

At the time the Applicant organization was formed in 1974, a number of the persons involved fell into this category. The Saskatchewan College of Physicians and Surgeons, like most other provincial licensing bodies, ultimately ceased to license physicians as general practitioners, because of the increasingly specialized nature of medical practice. The interneship option was phased out. This development occurred as the oversight of residency programs in family practice was undertaken by the College of Family Physicians of Canada.

Though the option of an interneship for the purpose of general licensure was eliminated, a period of clinical training was introduced into the final undergraduate year of the program in the College of Medicine. The students engaged in this program are called Junior Undergraduate Rotating Student Internes ("JURSIs"). These students have never been represented by the Applicant organization. Because their program covers a twelve-month period, which makes it impossible for them to obtain employment to support their training, the JURSIs were for some time paid a stipend of approximately $500.00 per month. This was recently phased out, which resulted in protests from the JURSIs; the JURSI stipend, however, has never been the subject of any formal agreement between the College of Medicine and those students.

The programs in which the residents are enrolled are concentrated on the development of diagnostic and therapeutic clinical skills, as these are the focus of the examinations by the accrediting bodies which will determine whether residents will be licensed to practice medicine in the specialized areas they have chosen. The programs have a formal educational component, consisting of didactic lectures or academic seminars. There is also a research component, as well as an expectation that residents will cultivate their teaching skills through the instruction of more junior residents or undergraduate students.

The overall aim of the process, however, is to assist residents in developing the clinical skills which will enable them to practice as qualified medical specialists. To this end, residents spend much of their time engaged in actual clinical practice. This most commonly occurs in the large urban hospitals, three in Saskatoon and three in Regina, although all or part of a residency program may be served in other

settings, such as a smaller hospital, a clinic or the office of a physician. Residents are supervised in their clinical activities by members of the faculty of the College of Medicine. Though there was some disagreement between Dr. Duncan and Dr. Bingham about the degree of supervision each resident receives, and the degree of responsibility which they are expected to undertake, it is clear that residents take on an increasing degree of independent responsibility as they proceed through the years of the residency program. This expectation is described as follows in a document issued by the Royal College of Physicians and Surgeons of Canada outlining the general requirements for residency programs:

> *Residency is characterized by increasing levels of independent decision making on the part of the resident within the context of the supervision and counsel of the teaching staff who maintain ultimate responsibility for the professional services provided. In the latter portion of the residency the senior resident should be given the opportunity to demonstrate a level of knowledge, clinical skills, technical skills, and attitudes consistent with independent consultant practice.*

Dr. Duncan gave evidence that residents are expected to complete forms which describe in detail the clinical procedures which they undertake, and to submit these forms to the faculty members who supervise those activities. The faculty members who supervise the clinical activities of particular residents may decide to bill the Medical Care Insurance Branch for any of the activities which they identify as being billable medical services provided by the residents.

The supervising physicians also decide which of their own activities constitute billable medical services. The fees which are charged by members of the faculty of the College of Medicine for their clinical services are not remitted to them as individuals. Instead, a billing formula is used to determine the amount which should be sent to each of the clinical academic departments as a global sum, which is referred to as the "Clinical Practice Plan." The fund in each of the Clinical Practice Plans is allocated among the members of the relevant department, and a portion of it is also allocated to the College of Medicine, to be used for various academic purposes, such as the hiring of postdoctoral research fellows or the provisions of travel grants.

There was some disagreement about the amount of money billed to the Medical Care Insurance Branch as a result of the provision of clinical services by the residents. Dr. Duncan said that figures provided by surveying the residents themselves suggested that each resident provides billable services which are worth an average of $60,000 to $70,000 per year. Dr. Bingham was asked about a statement reported in the media and attributed to the Dean of Medicine, Dr. David Popkin, that the billable services provided by residents amounted in value to about twice their annual salary. Dr. Bingham was unable

to confirm this statement; his own impression was that the billable services provided by residents were much less valuable.

Whether or not the residents themselves or the Dean of Medicine may have overestimated the amount of money which is billed in respect of the clinical services provided by residents, it is clear that some portion of the money which comes back to the College of Medicine in the form of the Clinical Practice Plans is attributable to those services.

Under the provisions of the previous agreement, residents are paid a salary which ranges from $31,735 to $46,007, depending on the stage a resident has reached in the residency program. Article 6.4 of the agreement reads as follows:

> *6.4 Residents may not be reclassified to a lower pay level during an appointment without just cause.*

The funding for these salaries comes from a grant called the Clinical Services Fund, which is paid to the College of Medicine from the provincial Department of Health largely for this purpose, although the grant also covers other expenditures. The Clinical Services Fund has no direct connection with the Clinical Practice Plans.

The hours which residents are required to spend in their clinical activities has been the subject of continuing discussion between the Applicant organization and the administrators of the residency program. This issue has also surfaced when the national accrediting bodies have considered the content, objectives and format which are appropriate for residency programs. One of the justifications for the decision to place control of residency programs with the medical colleges rather than health care facilities was that it would ensure that proper emphasis would be given to the academic aspects of the program, and that it would prevent the exploitation of residents as a source of inexpensive medical services. In an outline of residency programs, the College of Family Physicians of Canada made this point:

> *The demands of clinical services **must not** interfere significantly with the residents' ability of the residents [sic] to participate in the academic program. Attendance at key academic activities **must** be assured by freeing residents from other duties.*

That this is still a matter of some concern is clear from the recent report of a task force which reported to the Royal College of Physicians and Surgeons of Canada on fundamental issues in specialty education. In this report, the task force made the following comment:

> *The resident is not an apprentice but a graduate student. Currently in many settings, the resident, as a hospital employee, is seen primarily as a provider of medical services who learns by doing and also by participating in an educational program. With the rapidly changing circumstances of medical- and health-care delivery and the role that hospital experiences play in the education of residents, there is a need to consider realigning the financing of postgraduate education from a hospital to a university base in order to significantly broaden the learning environment for the individual resident and the residency program. There must be an emphasis on scholarship and critical enquiry along with sufficient flexibility to permit residents to select experiences that will serve their career goals. This is not to say that hospitals will not necessarily be the main site for residency education, but clearly they will not be the only site and other environments will assume increasing importance. Also, residents must participate in the direct care of patients because it is only in this way that clinical education can be conducted. However, there is a need to balance service and education by providing opportunities to learn, to reflect, and to consolidate these varied experiences. Clearly, there is also a need to look to alternative methods for the provision of medical care within hospitals.*

This passage suggests that the difficulty with respect to maintaining a sufficiently academic focus may be especially acute in situations where hospitals or other health care facilities have the primary responsibility for assigning and overseeing the tasks undertaken by residents. In this respect, the administrative structure of the residency programs in the case of Saskatchewan may go some way to meeting the concern expressed by the task force. The need to monitor the allocation of responsibilities has not been ignored in Saskatchewan, however.

The agreement covering the terms and conditions of residents reflects this concern in Article 8.1, which reads in part as follows:

> *8.1 Both parties hereto accept that, in order to provide adequate service and care to patients and to enhance the medical education of Residents and so facilitate the realization of their educational objectives, that duty hours be limited to provide a balance of patient service, clinical experience, and academics. Maximum scheduled on-call duty shall be ten (10) duty periods over and above the regular schedule in each thirty (30) days. The ten (10) duty periods referred to are from 1700 - 0800 hours Monday through Friday and 0800 - 0800 hours Saturday, Sunday or statutory holidays. These duty periods shall be referred to as "in-house-on-call" duty.*

In the course of his evidence, Dr. Duncan referred the Board to a table prepared on the basis of information provided by the residents to the Applicant organization, which showed the balance of "educational" activities in which residents are engaged. These include formal instruction, bedside interaction with supervising members of faculty, and instruction which residents provide to junior

residents or undergraduates. There is considerable variation among the residency programs, according to this table, though if the programs in obstetrics and surgery are discounted, there is a more uniform pattern, showing a total of ten to twenty hours per week spent in the listed activities.

According to Dr. Duncan, residents typically spend between 70 and 80 hours per week engaged in all of the activities related to the residency programs. In saying this, he relied in part on a study commissioned by the Applicant organization in 1988. This study, undertaken by Dr. R. Marchant, was directed at the issue of whether cutbacks in the numbers of internes and residents employed in Saskatchewan would be cost-effective to the health care system. The Marchant report stated that residents were involved an average of 73.5 hours per week in the activities related to their programs.

Dr. Duncan suggested that the difference between the total number of hours and the hours spent in activities which the residents describe as "educational" could be regarded as an indication of the degree to which residents provide clinical services which are separate from the academic aspects of their programs. By this, we do not understand Dr. Duncan to have been denying that there is a training or educational aspect to the performance of clinical services by the residents. He was trying to demonstrate that there is a component of their activities which has more to do with the direct provision of patient care than with the academic program.

In his evidence, Dr. Bingham disagreed that a clear line could be drawn between the academic aspect of the residency programs and the provision of clinical services. He emphasized that the overall responsibility for patient care rests with the attending physician, and not with the residents. He said that everything which residents do is done under the supervision of qualified physicians and faculty members, and that it is all part of the academic programs in which the residents are enrolled.

In this connection, Dr. Bingham described his own experience as a faculty member responsible for the supervision of residents. He conceded that residents are expected to act with an increasing degree of independence as they proceed through their programs, but he said that the faculty supervisors and Program Directors bear the responsibility for deciding what degree of autonomy a resident can be afforded at any given point.

Dr. Bingham agreed that his own area of specialization, neonatal care and pediatrics, may be characterized by an unusual degree of direct supervision of residents. He said, however, that this did

not weaken his general view that all of the activities undertaken by residents are primarily educational in nature, and that the focus of all of these activities, and the supervision of them, is on preparing residents to meet the standards which are required by the accrediting bodies.

There can be no doubt that residents are expected to undertake clinical tasks on an increasingly independent basis as they proceed through their program. This notion of "graded responsibility," as Dr. Bingham termed it, is consistent with the expectation that, at the conclusion of a residency program, the resident will be able to function as a fully-fledged medical specialist. The outline of residency programs issued by the College of Family Physicians of Canada, for example, contains the following statement:

> *Residents must learn and experience the role of the family physician in settings other than the office. For hospital care this can be best achieved through the ability to admit the residents' own patients from their family practice setting and to follow them, when appropriate, in hospital. In this context they must learn the skills of referral and consultation. Such skills can also be enriched through the use of in-hospital family medicine rotations, and through resident interaction with specialty trainees in the hospital. Residents should also learn about the cost effective use of resources and the physician's role in hospital committees through participation and formal teaching.*

In materials provided by the College of Medicine to candidates for residency programs, there are also indications of an expectation that residents will undertake independent action. In the outline of the program in anaesthesia, for example, there is a list of the number of various procedures which will be "handled" by fifth year residents. The description of the program in internal medicine contains the following allusions:

> *... These more senior residents supervise inpatient services, see inpatient and outpatient consultations and have a teaching role in the undergraduate programs.*
>
> *PGY 4: Senior residents have a major responsibility in the intensive care unit and carry out inpatient consultations on other services....*

In describing the activities of fifth year residents in the rheumatology program, the materials state:

> *PGY 5: Residents will consolidate their learning in rheumatology and be offered increasing clinical responsibilities aimed at acquiring the skills of an independent consultant. The residents will assume primary responsibility for the inpatient rheumatology service and develop a personal clinic for the initial assessment and ongoing followup of outpatients referred to his/her care. Faculty supervision will be provided tailored to the self-confidence, experience and ability of the trainee.*

Counsel for the University of Saskatchewan argued that all of the activities of the residents, including

their clinical practice, must be seen as part of an academic program in which they are enrolled as students of the University of Saskatchewan. In this connection, he pointed to evidence concerning the tax status of residents.

In 1992, Dr. Popkin, then the Associate Dean of Medicine, raised with Dr. Ken Smith, the Registrar of the University, the question of whether residents could be classified as students for purposes related to the repayment of student loans and the claiming of the educational tax credit. Dr. Smith responded as follows:

> *Following numerous discussions with the Student Loan officials in Regina and representations from Dr. Don Duncan on behalf of PAIRS, I have referred the issue of student status of interns and residents to Vice-President Patrick Browne for resolution. I do not believe that I am in a position to determine if the registrants are students of the university or, if they are, if they are full or part-time. At this time, I am only able to confirm that yours is not among the authorized signatures of the University of Saskatchewan for confirming full-time attendance.*
>
> *The debate on this issue is certainly an interesting one. I can only assume that Dr. Browne will be contacting either Dean McDonald or you for further clarifications.*

The issue as it related to the educational tax credit was referred to Revenue Canada for comment. In June of 1992, Revenue Canada forwarded a letter to Dr. Smith outlining the requirements for student status. The letter said, in part:

> *In order for a student to be eligible to claim the educational tax credit, he or she must have been enrolled in a qualifying educational program. The Income Tax Act provides that a qualifying educational program does not include an educational program taken by a student in connection with or as part of the duties of an office or employment. From our review of the information provided to us, it is our opinion that the educational programs in question are taken by students in connection with or as part of the duties of their offices or employment as a consequence of 7 above. Accordingly, they would not be entitled to claim the education tax credit....*

More recently, the question has been raised by the residents again in connection with the repayment of student loans obtained under the auspices of the Government of Saskatchewan.

Counsel for the Applicant organization said that his client does not deny that the residents are students, and that it is appropriate to regard them as such for a variety of purposes. He argued, however, that this does not preclude considering them to be employees for other purposes. He pointed to a number of indications that they have been treated as employees since the formation of the Applicant organization in 1974.

He argued that the agreement which was reached between the Applicant organization and the Saskatchewan Medical Postgraduate Committee or its predecessors addresses the terms and conditions of the residents in a manner comparable to the agreements reached between trade unions representing groups of employees and their employers.

Under the terms of this agreement, each resident is required to sign a letter of appointment or reappointment, headed "Form A," in the following terms:

> *Pursuant to your appointment to postgraduate training in [e.g. **Psychiatry**] for the period from the **1st** day of **July**, 1994 to the **30th** day of **June**, 1995 as a [**Resident IV**, pay level E], we wish to advise you that the standard terms and conditions of your employment are contained in a Collective Agreement between P.A.I.R.S. and the Saskatchewan Medical Postgraduate Committee dated the 31st day of March, 1994 (copy enclosed). FORM A and the Collective Agreement constitute the contractual agreement between you and the College of Medicine.*

On entering into a residency program, each resident is also required to sign another document, "Form B," which reads as follows:

> *The annual membership fee to the Professional Association of Interns and Residents of Saskatchewan (P.A.I.R.S.) is mandatory as a condition of employment. Dues will be collected by payroll deduction, or, must be directly remitted to P.A.I.R.S. if your salary is paid by a source other than the University of Saskatchewan or the training hospitals.*
>
> *Check one:*
>
> *{ } I wish to belong to P.A.I.R.S. and I authorize this payroll deduction to be made on my behalf by the College of Medicine.*
>
> *{ } I do not wish to belong to P.A.I.R.S. I agree to contact the President of P.A.I.R.S. within thirty days of the date of my appointment to give my reasons for not joining P.A.I.R.S. I agree that membership dues will be deducted from my pay and remitted to P.A.I.R.S.*

The significance of these documents, according to counsel for the Applicant, is that they clearly contemplate a set of contractual obligations which are more characteristic of an employment relationship than of the relationship between a student and an academic institution.

Counsel for the Applicant organization pointed out that, at a number of points in the agreement, the term "employment" is used, as well as the word "training," to describe the situation of the residents. He also alluded to a document in which Dr. Bingham outlined the requirements for the obtaining and reporting of various types of leave. In that document, Dr. Bingham made the following statement,

"...The report form (copy attached) has been revised to include all areas that the College of Medicine, as the employer, is responsible for. Once approved, a copy of the request will be sent to the department."

The arguments made by counsel for the parties to this application embody two clearly different characterizations of the status of medical residents. Counsel for the University of Saskatchewan argued that the residents are students, enrolled in an educational program offered by the College of Medicine, and that all of their activities must be seen in this light. Counsel for the Applicant, on the other hand, argued that the residents have dual status; without denying that they are students for many purposes, he argued that they are also employees performing services which can be seen in some respects as distinct from the educational components of their programs.

Counsel referred members of the Board to two decisions from other jurisdictions in which the status of medical residents was considered. In the first of these, *St. Paul's Hospital v. Professional Association of Residents and Interns*, [1976] 2 C.L.R.B.R. 161, the British Columbia Labour Relations Board considered an application from an organization comparable to the Applicant here to represent residents and interns at a particular hospital.

The British Columbia Board referred on 173 to a decision of the National Labour Relations Board in *Cedars-Sinai Medical Centre v. Cedars-Sinai House Staff Association*, 223 N.L.R.B. 251, in which the following comment was made about the status of medical residents:

> *They [the house staff] participate in these programs not for the purpose of earning a living; instead they are there to pursue the graduate medical education that is a requirement for the practice of medicine. ... While the housestaff spend a great percentage of their time in direct patient care, this is simply the means by which the learning process is carried out. It is only through this direct involvement with patients that the graduate medical student is able to acquire the necessary diagnostic skills and experience to practice his profession. The number of hours worked or the quality of the care rendered to the patients does not result in any change in monetary compensation paid to the housestaff members. The stipend remains fixed and it seems clear that the payments are more in the nature of a living allowance than compensation for services rendered. Nor does it appear that those applying for such programs attached any great significance to the amount of the stipend. Rather their choice was based on the quality of the educational program and the opportunity for an extensive training experience. The programs themselves were designed not for the purpose of meeting the hospital's staffing requirements, but rather to allow the student to develop, in a hospital setting, the clinical judgment and the proficiency in clinical skills necessary to the practice of medicine in the area of his choice.*

The British Columbia Board went on to make this comment at 173:

> *The general thrust of the Cedars-Sinai residency programs appears to be largely the same as that depicted in the evidence about St. Paul's Hospital. While the decisions of the NLRB are clearly not binding on this Board, its judgments of labour law and industrial relations policy are worthy of serious consideration. But to the extent that the Cedars-Sinai decision rested on the premise that the status of employee and of student are mutually exclusive, then we agree with the spirited NLRB dissent that the premise is clearly wrong in law. There is no exclusion from the Labour Code on the ground that someone is a "student". The only relevant question is whether an individual is an "employee" within the meaning of the Code, notwithstanding any other description which may fit his situation as well.*

The British Columbia Board then went on to consider a variety of examples of situations with features of both education and employment. They reached the following conclusion at 175:

> *However, it is also true that each of these "employee" features is subtly changed by the underlying educational theme in the residency programs. The initial selection of house staff by the Hospital is mediated by either the Canadian Matching Service or the University Medical Faculty; termination of the appointment ordinarily occurs when the prescribed program is completed, rather than because of any specific decision to dismiss a resident; scheduling of house staff work is shaped by the standards set by the Medical Colleges about the educational experiences which must be obtained; a high proportion of the medical care performed by the house staff on "teaching patients" is instructional in character; house staff are paid a yearly stipend, which increases each year they are in the program, but is not dependent on the varying number of hours of work which different specialties require; the funds for paying these stipends and benefits come from the Provincial Government as part of the "educational account" in the Hospital budget.*
>
> *But notwithstanding these variations from the norm, I am persuaded that the status of house staff at the Hospital fits comfortably within the legal scope permitted to the concept of "employee". The agreement between PAIR and the Hospital explicitly recognizes that "residents and interns are in fiscal and administrative affairs subject to control and direction of the Hospital". In practice, this means that the Hospital exercises the type of authority over its house staff which establishes a truly employment relationship, although the flavour of that relationship is also significantly influenced by the fact that residents and interns have come to the Hospital to pursue their clinical education.*

When faced with a similar question in *The University Hospital Board et al. v. Professional Association of Interns and Residents of Alberta*, [1981] 3 C.L.R.B.R. 477, the Alberta Labour Relations Board came to a different conclusion. There are a number of features which distinguish the Alberta decision from the decision of the British Columbia Board. The employer was identified in this application as the University of Alberta and the University Hospital, rather than an individual health care facility; it will be recalled that by the time of the Alberta case, the administration of residency

programs had become centred in university medical colleges.

It should also be noted that the decision of the Alberta Board depended in part on a particular aspect of the definition of "employee" in *The Public Service Employee Relations Act*, R.S.A. 1980, c. P-33. In that statute, the definition included members of various professions, including the medical profession, who "practise their profession as a condition of employment." The Board found that this proviso did not apply to the residents.

It must be said that, even when these distinguishing features are taken into account, it is clear that the Alberta Board came to a different conclusion on the essential question of whether medical residents should be regarded exclusively as students, or whether they could also be viewed as employees. The Board summarized the activities of residents in this way on 490:

> *Yet the evidence before this Board as in the St. Paul's case supports the proposition that interns and residents are employed in administering almost a total range of medical services to the patients in the hospital. All parties agree this is the only effective way of instructing physicians in postgraduate medical skills leading to licensure in the case of interns and certification in medical specialties and sub-specialties for residents. The organization of a teaching hospital in affiliation with a recognized medical faculty within a university setting is so designed to accommodate this training programme as the most effective and efficient method of providing the required training.*

The Board ultimately reached the following conclusion on 492:

> *The teaching staff is ultimately responsible for the quality of the medical services provided by the hospital but this is achieved through the control supervision, evaluation and provision of those medical services by the graduate students. The teaching hospital is organized to allow the delivery of those services by the students but insofar as the teaching staff is concerned, the prime objective of providing the services in that manner is to achieve the objective of educating doctors to practise medicine either in the field of general medicine or a specialty discipline. The principal factors of superintendence and control are reposed in the teaching staff to achieve the education goals for which the programme is designed. The remuneration paid is unrelated to the medical services provided, the hours required in patient care, the medical disicipline (sic) involved, or whether medical services are even provided or not as is the case in research work.*

The jurisprudence of our own Board is of relatively little assistance in determining this issue. In a decision in *Canadian Union of Public Employees v. University of Regina* (18 April 1978), LRB File No. 030-78 [unreported]; aff'd [1979] 5 W.W.R. 744 (Sask. C.A.), the Board addressed an application in which the trade union sought to represent a bargaining unit composed of student teaching

assistants and research assistants at the University of Regina. In that decision, the Board commented on two issues: whether the proposed bargaining unit was an appropriate one, and whether certain categories of research assistants could be regarded as employees of the University of Regina. The question of whether the student status of many of the individuals who were the subject of the application precluded considering them as employees was apparently not considered worthy of any comment. All that can be said about it is that it does not seem to have troubled the Board to issue a certification Order covering a group of persons who, for some purposes at least, were students registered in educational programs offered by the University.

In the *St. Paul's Hospital* decision, *supra*, the British Columbia Labour Relations Board suggested that there is a spectrum or continuum of status. At one end of this spectrum are persons who may be defined exclusively as students, although they may be involved in some practical or clinical activities as part of their educational program. As the Board described this position, "...in certain cases the educational features of a clinical program may so predominate in an individual's situation in an institution that the supposed employee status is almost completely obliterated."

At the other end of the spectrum lie fully qualified medical or other practitioners, who have satisfied all of the requirements which entitle them to engage in the practice of their profession independent of supervision or instruction. They arrive at this point on the spectrum by a process of clinical practice in which they take on gradually increasing degrees of autonomy and responsibility.

In a sense, for persons qualified in many specialized areas, the absolute end of this continuum is never achieved, as there is an expectation that the process of study and education will never come to an end. In the report of the task force to the Royal College of Physicians and Surgeons of Canada which was mentioned earlier, for example, the task force made the following statement:

> ***The Task Force recommends that all residents engage in the College's Maintenance of Competence Program (MOCOMP),*** *beginning in the first year of the residency program. MOCOMP's primary aim is to enhance the quality of the self-directed learning activities of specialists and thereby enhance the quality of their patient-care activities. The principles upon which MOCOMP has been developed include: continuing professional development as an essential component of the role and responsibility of a professional (continuing professional development being defined by a set of competencies which includes knowledge, skills, and attitudes) and continuing medical education as a professional behaviour that must be personally planned and relevant (the relative outcomes of continuing medical education being focused on how learning has influenced a specialist's practice, not simply on participation in continuing education).*

The approaches taken in the *The University Hospital Board* and *St. Paul's Hospital* decisions represent a difference over the point on the spectrum at which a medical resident may be regarded as taking on a second role in addition to being a student. From the point of view of the Alberta Board, this could not occur until the resident has completed the residency program, and passed out of the regime of supervision and evaluation which that program represents.

For the British Columbia Board, on the other hand, the fact that residents are pursuing an academic or educational program does not preclude considering them as employees on the basis of the services they provide.

It must, of course, be remembered that the British Columbia Board was considering an application in which a hospital was identified as the employer by the sister organization to the Applicant. In some respects, this separation between the academic institution responsible for the instruction and evaluation of the residents as students, and the health care institution responsible for directing their clinical activities, must be seen as putting the situation on a different footing than that on which the application here is based.

Despite this difference in the particulars of the applications, the essential point made by the British Columbia Board is that it is possible to see the status of medical residents as having a dual character, and we do not see the applicability of this idea as nullified by the fact that the Applicant organization has identified the academic institution in which the residents are enrolled as the employer for the purposes of collective bargaining.

In the *St. Paul's Hospital* decision, the British Columbia Board characterized the process of development in the direction of specialized medical competency as a continuum, on which those enrolled in residency programs may be described as having a dualistic character, as students and as evolving medical practitioners. In our view, this is a more accurate description of the circumstances than the picture created by the Alberta Board in the *The University Hospital Board* case, in which it was suggested that there is a discontinuity in this development, with the residents falling on the "student" side of a clear boundary.

Where students are at a certain stage in their academic career, there are undoubtedly characteristics of their status in relation to the academic institution which would be inconsistent with the development of

a collective bargaining relationship. Students as such are, as counsel for the University put it, recipients of the services of academic institutions, and do not provide services to them.

Residents are undoubtedly students in many respects. Their major objective in applying for acceptance into a residency program is to pursue an educational program which will result in their certification as a medical specialist. In this connection, they are selected according to academic criteria, academic expectations are outlined for them, and they are evaluated by faculty members acting in an academic capacity.

In addition, however, they provide medical services which result in the generation of some revenue for the academic institution in which they are enrolled, and which are acknowledged, at least in part, as clinical services which may be billed to the provincial medical care insurance system.

There are, no doubt, certain complications for the relationship between the parties which arise from having to distinguish between issues which are academic in nature and must be dealt with through the academic structure of the College of Medicine, and issues which are non-academic and fail to be addressed in the context of negotiations of the kind which have resulted in a succession of agreements.

It cannot, however, be argued that there is some reason to suppose that the parties will be unsuccessful in drawing these distinctions, and deciding what issues are appropriately addressed in the context of bargaining. They have been engaged in a form of collective bargaining for 20 years, in which the only thing which appears to have been lacking is the formal imprimatur of this Board in the form of a certification Order.

The evidence provided a number of illustrations of the nature of the relationship which the parties have worked out over time. We earlier alluded to the pursuit by the Applicant organization of a grievance concerning the levying of tuition fees by the University in 1994. In his arbitration award, Mr. Les Prosser, Q.C., commented on this issue in these terms:

> *The Collective Agreement as a whole illustrates that the majority of the matters within its scope relate to the terms and conditions of the residents' employment and training and is specific that such matters are restricted to non-academic terms and conditions.*

Mr. Prosser went on to reach the following conclusion:

> *In my view, the term registration fee does not encompass the term tuition fees. There is no ambiguity in the foregoing provision to justify consideration of any extrinsic evidence which may or may not suggest otherwise.*

It is clear that, whatever position the parties may have taken as this grievance has followed its course, Mr. Prosser felt that the relationship between them as embodied in their agreement formed a basis for distinguishing between the academic aspect of their activities, and the terms and conditions addressed in the agreement.

We would like to comment briefly on a further argument made by counsel for the University. When the residents took industrial action in the summer of 1995, the restrictions placed by the accrediting bodies on the length of absence from the program which would be accepted without penalty was arguably a determining factor in the decision of the residents to return to work. Counsel argued that the fact that the standards of the academic program were so influential demonstrated that the residents should be viewed as students rather than employees.

There are many factors which may be relevant to any group of employees in deciding whether to undertake or continue strike action. For any one of a number of reasons - timing, a sense of professional obligation, public obloquy - a group of employees may decide that strike action, while theoretically an option, is not a feasible choice for pursuing their bargaining objectives. This does not make them any the less employees, in our view; it simply means that their power to avail themselves of the strike weapon may be limited.

We have concluded that the residents who are represented by the Applicant organization are, for some purposes at least, employees within the meaning of *The Trade Union Act*.

The second issue which the Board has been asked to determine is whether the University of Saskatchewan has been correctly identified in the application as the employer of the residents. Counsel for the University argued that his client has never functioned as the employer. He pointed to the succession of entities which have been signatory to the agreements with the Applicant organization. In the most recent of these agreements, the signatory was identified as the Saskatchewan Medical Postgraduate Committee. Prior to that, in addition to this committee or its predecessors, representatives of a number of hospitals also signed the agreements.

Dr. Duncan suggested that the reason for the inclusion of the hospitals as signatories in the earlier agreements was that they were directly responsible for the recruiting, supervision and remuneration of internes who were then members of the Applicant organization.

Counsel for the University did not suggest that the hospital boards or their successors, the district health boards, are the employers of the residents. Rather, he put forward the Saskatchewan Medical Postgraduate Committee as the proper candidate as their employer.

The Saskatchewan Medical Postgraduate Committee is, according to the evidence given by Dr. Bingham and Dr. Duncan, a subcommittee of a standing committee of the Faculty Council of the College of Medicine which is referred to either as the Postgraduate Medical Education Committee or the Postgraduate Clinical Education Committee. Dr. Bingham chairs this committee in his capacity as the Associate Dean (Postgraduate Medical Education). According to its terms of reference, the Postgraduate Medical Education Committee oversees

> *All Postgraduate Clinical Medical training in the Province where recognition by the Royal College of Physicians and Surgeons of Canada is desired by the program or the resident. This will also include the two-year training program in Family Medicine where recognition by the College of Family Physicians of Canada is desired. It would also include jurisdiction over those one-year pre-registration programs in any Saskatchewan hospitals that have been consolidated under the College of Medicine.*
>
> *All Postgraduate Clinical Training requested by a Provincial Licensing Authority or by a trainee where recognition of the program is desired.*

The tasks undertaken by the Postgraduate Medical Education Committee in this respect include the formulation of affiliation agreements with the hospitals in which residents pursue their clinical activities, the monitoring of residency programs in light of the standards set by the accrediting bodies, and the approval of admissions to residency programs. The faculty members who are Program Directors for the residency programs are members of the committee, as are representatives of undergraduate students and residents.

The College of Medicine, the medical profession and those responsible for providing health care in the province have a significant degree of mutual interest in the residency programs which are offered under the auspices of the College of Medicine. This reciprocal interest is reflected in the presence on the Postgraduate Medical Education Committee of representatives of the provincial Department of Health, the Saskatchewan College of Physicians and Surgeons and the Saskatchewan Medical Association.

In his evidence, Dr. Bingham stated that this committee meets quarterly. An executive subcommittee oversees the issues under its jurisdiction between these meetings.

The Saskatchewan Postgraduate Medical Committee is a subcommittee of the Postgraduate Medical Education Committee whose primary, and perhaps exclusive, task has been to negotiate the successive agreements which have been reached with the Applicant organization. The membership of the subcommittee has varied from time to time; when the agreement was negotiated in 1992, there were two members from the office of the Dean of Medicine, a faculty member and administrators from the Royal University Hospital and the Regina General Hospital.

The University is a large and complex institution, and it is not always possible to rely on the indicia to which the Board often has reference in identifying an employer for the purpose of granting a certification Order pursuant to *The Trade Union Act*. The instructional and research activities which are carried on by members of the academic community are funded through a variety of arrangements, not all of which are under the direct control of the University administrative officers. For reasons of administrative efficiency, and in order to encourage a range of scholarly activities, the University has made available the facilities of the University personnel and payroll systems for purposes which may have a fairly loose connection to the core of the institution.

Counsel for the Applicant organization drew the attention of the Board to the fact that Revenue Canada had recently ruled that the University of Saskatchewan is the entity responsible for the withholding of tax and the deducting of unemployment insurance and other contributions. In the context of the University, however, these requirements, which are typically associated with the obligations of employers, cannot be treated as conclusive.

In the *University of Regina* decision at 1-2, *supra*, the Board made the following comment:

> *With respect to research assistants, although the funds from which they are paid are not university funds, the funds are in fact administered by the University. In the case of grants from the National Research Council, under Article 34 of the publication "Awards to University Staff 1978" provides: "the employment of assistants must be in accordance with policies acceptable to the grantee's University." The Council obviously intends the University to set the terms and conditions of employment of assistants and hence it is appropriate that such assistants be bound by the same collective agreement as all other research assistants at the University. The Board therefore finds that research assistants are included in the appropriate unit.*

This implies a readiness on the part of this Board to regard the University of Regina as the employer, for collective bargaining purposes, of student research assistants whose wages were not paid out of University funds, a finding which was held to be within the jurisdiction of the Board by the majority of the Saskatchewan Court of Appeal. It must be acknowledged, however, that the Board did not deal with this matter at length, and it is not entirely clear from the Reasons how the Board arrived at this conclusion.

Counsel for the University of Saskatchewan argued that the question of whether the University is the employer of the medical residents must be assessed in the context of the mandate which is laid out for the institution in *The University of Saskatchewan Act, 1995*, S.S. 1995, c. U-6.1. The central objective of the University - the "business" of the University, as counsel referred to it - is described as follows:

> *4(1) The primary role of the university is to provide post-secondary instruction and research in the humanities, sciences, social sciences and other areas of human intellectual, cultural, social and physical development.*

Counsel argued that the central activities of the University are instruction and research, and that the institution is not in the "business" of providing patient care. The implication of this, he suggested is that, if residents are employees, they should not be regarded as employees of the University because they do not provide services which are connected with the core mandate of the University.

It is our view that the "business" of the University cannot be so narrowly defined as to require that anyone employed there be involved in tasks directly related to teaching or research. The University is not in the restaurant "business," the landscaping "business," or the cleaning "business," yet the University has employees who prepare food, tend the grounds and maintain the buildings. These activities are not directly of an instructional or scholarly nature, but they serve to support the teaching and research efforts which take place in the University community.

Certainly medical education forms a legitimate part of the mandate of the University, however narrowly that mission is defined. The cultivation of residency programs, which provide an option to students to continue their medical training, an attraction to specialists interested in involvement in passing on and refining their own skills through interchange with residents, and a resource which is of value to the medical profession and the health care system in the province, is an integral part of the profile of a well-rounded medical college.

It is the College of Medicine, and therefore the University of Saskatchewan, which, in our view, plays the substantive role in the direction of the clinical activities of the residents. The Saskatchewan Postgraduate Medical Committee cannot be said to have any independent status. It exists only as an emanation of the College of Medicine, called into being only for the purpose of discussing with the Applicant organization the terms and conditions under which they will provide their clinical services. It has no funds of its own or access to funds, and no administrative structure aside from that created by the Faculty Council of the College of Medicine through the standing Postgraduate Medical Education Committee.

In this connection, we do not think that too much significance can be attached to the fact that the Saskatchewan Postgraduate Medical Committee has been named as a party in successive agreements, as well as in grievances and legal proceedings, or to the listing of a number of possible employers, including the Saskatoon District Health Board and various hospitals, in inquiries which were sent to Revenue Canada by counsel for the Applicant. Our purpose here is to decide who is the employer of the medical residents for the purpose of collective bargaining, in the context of the statutory objectives set out in *The Trade Union Act*.

Revenue Canada indeed expressed the view that the University of Saskatchewan is, according to their rules, the employer responsible for making deductions from the salary of the residents. Such a ruling may be a helpful indication of the nature of the relationship which is being examined. Even if they had not reached this conclusion, it is, we think, open to this Board to identify the employer in the light of criteria related to collective bargaining rather than other matters.

Counsel for the University of Saskatchewan sought to underline his argument that the University should not be designated as the employer of the residents by reference to the evidence of Dr. Patrick Browne, the Vice-President (Academic) of the University. Dr. Browne stated that the withdrawal of services by the residents in the summer of 1995 had no noticeable effect on the ability of the University to carry out its work of academic instruction and scholarly work.

It is difficult to know what to make of this evidence. We can certainly accept that the strike by the residents may have had no perceptible effect on the activities of the vast majority of students and faculty members at the University. The fact that a group of employees can carry on industrial action with little effect on the overall operations of an institution does not seem to us necessarily to be

indicative that that entity is not the employer.

In any case, it cannot be said that the industrial action had no effect on the University. Dr. Bingham conceded that members of the faculty of the College of Medicine were called upon to put in extra hours of clinical service during the industrial action. In addition, the Saskatoon District Health Board had to provide replacement services for those of the residents to some extent, and it is significant in this regard that the College of Medicine agreed to reimburse the health board for some proportion of the extra costs incurred by them.

Counsel referred the Board to the following comment, per Barclay J., contained in the judgment of the Saskatchewan Court of Queen's Bench upholding the arbitration award of Mr. Prosser, to which we alluded earlier, "The University of Saskatchewan and the [Saskatchewan Postgraduate Medical] Committee are two different entities and their interests are not necessarily co-extensive."

In this judgment, Barclay J. did not elaborate on this point. The article of the agreement between the Applicant and the Saskatchewan Postgraduate Medical Committee which had been presented for interpretation to Mr. Prosser reads as follows:

> *20.2* ***University of Saskatchewan***
>
> *The College of Medicine will pay the registration fee to the University of Saskatchewan on behalf of all Residents in Royal College and Family Medicine Programs. Residents are required to complete registration documentation in accordance with University and College policy and procedures.*

It must be remembered that Barclay J. was considering whether this article could reasonably be interpreted as excluding the payment of the tuition fees which had been set for the residents. We interpret the comment we quoted earlier as suggesting that the setting of tuition fees by the University in relation to academic programs might be seen as distinct from the obligations undertaken by the Saskatchewan Postgraduate Medical Committee in relation to payment of registration fees.

This may be taken as confirmation of the possibility which we raised above that the academic and clinical service aspects of the activities of residents may be distinct. It does not seem to us, however, to be conclusive that the Saskatchewan Postgraduate Medical Committee has an independent existence, for the purposes we are considering here, from the University of Saskatchewan.

Indeed, it is significant, from this point of view that Article 20.2 of the agreement explicitly places this obligation on the College of Medicine, not on the Saskatchewan Postgraduate Medical Committee.

It should also be noted that the executive committee of the faculty of the College of Medicine were sufficiently cognizant of an interest in this issue as to pass a resolution stating that they would not oppose the effort of the Applicant to become certified.

We have concluded that the University of Saskatchewan is the employer of the residents on whose behalf this application has been made. All of the clinical activities of the residents are supervised by faculty members from the College of Medicine. The Saskatchewan Postgraduate Medical Committee is merely a vehicle for conducting a certain aspect of the relationship between the residents and the College of Medicine. It is the College of Medicine, and thus the University, which substantively directs and controls the activities which have been the subject of collective bargaining between the parties.

Finally, we should comment on the standing of the Applicant as a labour organization. Dr. Duncan was unable to produce the minutes of the founding meeting of the organization, or a copy of a constitution. He did, however, produce copies of bylaws, including those currently in force.

These bylaws make it clear that one of the purposes of the organization is "to negotiate the scale of remuneration and working conditions with the appropriate authorities."

The bylaws also provide for admission to membership, the election of officers, the selection of bargaining representatives and the ratification of collective agreements.

In our view, there is no question that the Professional Association of Internes and Residents of Saskatchewan is a "labour organization" within the meaning of *The Trade Union Act*, and that the organization is eligible to bring an application of this kind.

Given our conclusions concerning the arguments advanced on behalf of the University of Saskatchewan, we are in a position to order that the University provide the Board with a Statement of Employment within 10 days, so that the level of support for the certification application can be assessed.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant and PEAK MANUFACTURING INC., Respondent

LRB File No. 011-96; March 22, 1996
Chairperson: Beth Bilson; Members: Gloria Cymbalisty and Tom Davies

For the Applicant: Drew S. Plaxton
For the Respondent: William G. Turnbull

Bargaining unit - Appropriateness - Whether bargaining unit is appropriate which does not include lead hands on production teams - Board deciding unit not appropriate.

Bargaining unit - Exclusions - Managerial exclusion - Whether lead hands are employees within meaning of *The Trade Union Act* - Board deciding lead hands in this case are employees.

***The Trade Union Act*, s. 2(f)(i) and 5(a).**

REASONS FOR DECISION

Beth Bilson, Chairperson: The United Food and Commercial Workers, Local 1400, have filed an application in which they seek to be granted bargaining rights for a unit of employees of Peak Manufacturing, Inc.

The Employer raised two objections to the description of the bargaining unit which was proposed by the Union. The first objection was that the geographic aspect of the description included not only the current location of the operations of the company, North Battleford, but "any replacement in the Province of Saskatchewan." In light of the evidence which was advanced at the hearing, and of previous statements of the Board on this issue, the Union asked to have the proposed description amended to delete this phrase.

The other objection related to the Union proposal to exclude lead hands from the bargaining unit.

The Employer operates a manufacturing plant in North Battleford, at which they produce recreational vehicles. The Union has proposed to represent the production employees at this location. The bargaining unit which they seek to represent would not include the office staff, the lead hands and a

number of management personnel.

The Employer argued that the lead hands should be included in the bargaining unit, and that the unit as described by the Union is inappropriate because of their exclusion. The Employer proposed to put forward evidence that the lead hands are employees within the meaning of s. 2(f)(i) of *The Trade Union Act*, which reads as follows:

> *2 In this Act:*
>
> *(f) "employee" means:*
>
> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or*
>
> *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer.*
>
> *(i.1) a 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.*

Counsel for the Employer argued that, if the lead hands are employees, they should be included in the bargaining unit.

Counsel for the Union argued that, whether or not the lead hands are employees, the Union is entitled to represent an appropriate bargaining unit, even if it is not the most appropriate unit, and that there is nothing about the exclusion of the lead hands which would make the unit as proposed an inappropriate one.

Mr. Des Power, the President and Chief Executive Officer of the Employer, and Mr. Gordon Bothner, the Personnel Director, testified that the Employer has been making an effort to organize the work done by employees through work teams, and that the lead hands are regarded as leaders of these teams. Mr. Power said that, when his company took over the plant in January of 1994, he identified quality control as a high priority, and decided that the work team format would assist in achieving management objectives in this respect. Mr. Bothner said that the lead hands are chosen for their leadership qualities, and because of the degree of respect they apparently enjoy among their fellow workers.

Mr. Power and Mr. Bothner, as well as several of the lead hands themselves, gave evidence about the duties and responsibilities which are performed by the lead hands. Their functions include acquainting themselves with the work assignments for the team, ensuring that materials and equipment are available to carry out these assignments, and co-ordinating the work which is done by the members of the team. They are expected to interact with other lead hands, and with the supervisors or foremen who oversee the production work, with respect to the place of the work of their teams in the overall production objectives of the company.

The lead hands have no authority to hire employees, although they may be asked to express an opinion concerning particular candidates. Mr. Bothner testified that the lead hands are regarded as possible future candidates for management positions, and for this reason they may occasionally be asked to sit in on selection interviews. He said, however, that this is for their information only, and that they do not play any determining role in the outcome of the selection process.

There is no question that lead hands play a "supervisory" role in the sense that they have a responsibility to instruct and admonish employees on a team if they feel that they are not performing adequately. The lead hands who gave evidence testified, however, that where formal discipline, such as a written reprimand or suspension, is required, they would have to report the matter to the supervisor in their area. The lead hand might make a recommendation that disciplinary action be taken, and might sign any documentation, but the actual decision to discipline would be taken by the supervisor or by Mr. Bothner.

In this connection, Mr. Brad Marchycha gave evidence concerning an occasion on which he said he was verbally reprimanded by a lead hand. Mr. Marchycha had turned on an electrical switch which led a section of one of the vehicles on the assembly line to begin to expand. Mr. Marchycha said that this was an accident on his part.

It would appear that the lead hand in question, Mr. Dave Karpluk, reacted fairly forcefully to this incident, and did berate Mr. Marchycha for creating a hazard to other employees. Mr. Marchycha said that he reported this incident to his own lead hand, Mr. Brian Query, who said that he would take care of it. Mr. Query himself testified that he did discuss the matter with the supervisor, and was surprised to find that a written reprimand was issued to Mr. Marchycha, apparently on the recommendation of Mr. Karpluk. Though there was no evidence to show exactly how the decision was reached to issue the

written reprimand, there was equally no evidence to show that the decision lay with Mr. Karpluk or with Mr. Query. On balance, since Mr. Query was the lead hand directly responsible for the work of Mr. Marchycha, the fact that he was not aware the written reprimand was to be issued suggests that the decision did not lie within his control.

If an employee is considered to be working at an unsatisfactory level, a lead hand can bring this to the attention of the supervisor. Mr. Bothner said that, in these circumstances, every effort is made to place the employee in another position for which they may be more suited. The evidence of the lead hands appears to confirm his statement that the lead hands themselves cannot decide that an employee should be moved or dismissed.

Lead hands retain the time cards completed by employees, and submit them to their supervisors once a week. They also keep forms which can be used to apply for temporary leaves. The evidence suggested that, though the lead hands are required to sign these forms in order to signify that granting leave to an employee will not cause production problems, it is the supervisors who actually approve the leaves.

Lead hands do not have any input into the budgeting process of the Employer, or any authority to expend money on equipment or materials. They do not attend the meetings of senior management at which general matters of company policy are discussed. The lead hands do have weekly meetings with the supervisors, which are devoted to discussion of production issues.

On many previous occasions, this Board has commented on the criteria for drawing a line between those who are employees within the meaning of *The Trade Union Act*, and those whose managerial functions disqualify them from inclusion in a bargaining unit represented by a trade union. In *City of Regina v. Regina Professional Fire Fighters Association, Local No. 181*, [1994] 2nd Quarter Sask. Labour Rep. 73; LRB File Nos. 255-93 & 268-93, the Board summarized on 76 the issue at stake as follows:

> *This Board has on many occasions acknowledged that the decision whether someone should be excluded from a bargaining unit of employees is an important one, both from the point of view of the integrity of the bargaining relationship and from the point of view of the rights of individuals to engage in collective bargaining. On the one hand, both parties through collective bargaining need to be confident that the pursuit of their legitimate objectives will not be frustrated by divisive conflicts of interest or confusion over the nature of those interests. On the other hand, this Board has been alert to the possibility that exclusion from the bargaining unit of*

> *persons who do not genuinely meet the criteria set out in Section 2(f) of The Trade Union Act may unfairly deny them access to union representation and weaken the strength of the bargaining agent.*

The Board has drawn attention in several decisions to the following comment made by the Canada Labour Relations Board in *I.L.W.U., Local 514 v. Vancouver Wharves Ltd.* (1974), 74 C.L.L.C. ¶16,118 at 966:

> *The current structures of industrial or commercial enterprises are such that what used to be easy has become very difficult when attempting to distinguish who has authority, who is employer and who is employee. The authority or managerial functions are spread over an ever increasing band of persons and further it varies in degree according to each enterprise's policy and also it varies regarding the individuals. When one looks at some of the most characteristic and true attributes of management, such as hiring and firing, promoting and demoting, planning the work and appointing people to do it, personally bargaining collectively, executing the provisions of a collective agreement or setting down independently or as a team the general policies of an enterprise, it becomes evident that all of these or any of them may be possessed by some in total, by others only partly and still by others, none at all and in all cases in varying degrees.*

In *Canadian Union of Public Employees, Local 21 v. City of Regina and Regina Civic Middle Management Association*, [1995] 3rd Quarter Sask. Labour Rep. 153; LRB File No. 268-94 at 160-161, the Board described the status of certain supervisory employees in the following way:

> *The picture created by the evidence, however, is that of employees who are important sources of information and whose expertise and knowledge is a valued commodity, rather than as persons whose positions are the site of truly independent decision-making authority in relation to matters which would have a direct and significant impact on the terms and conditions of employment of employees in the bargaining unit.*
>
> *Like many persons in supervisory positions the four incumbents play an important part in the daily direction of their staff, the planning and assignment of duties, routine disciplinary matters, and the selection of employees to fill vacancies. It is clear, however, that they play this role constrained by criteria and policies set elsewhere. Though their input is important because of their close familiarity with the needs and objectives of the units for which they have responsibility, the incumbents cannot be said to exercise actual decision-making authority when it comes to making decisions about hiring or significant disciplinary action; those decisions are made by senior managers and within the boundaries set by a standardized set of criteria developed and closely monitored by the Human Resources Office.*

These observations seem to us to capture many aspects of the position of the lead hands in this case, with the qualification that the lead hands exercise an even lower degree of independent decision-making

authority than the employees considered in the *Regina Civic Middle Management Association* case. We have no hesitation in saying that the lead hands in this case are employees within the meaning of *The Trade Union Act*.

The question remains whether a bargaining unit described in a manner so as to exclude the lead hands is an appropriate bargaining unit in the view of this Board. The Board has routinely said that, while our preference is for bargaining units which are as comprehensive as possible, and which would ideally include all of the employees of an employer, we are prepared to contemplate the creation of bargaining units which are not as inclusive provided that we are satisfied that they represent a coherent and viable basis for sound collective bargaining. In *Canadian Union of Public Employees v. The Board of Education of Northern Lakes School Division, No. 64*, [1996] Sask. L.R.B.R. 115 at 117; LRB File No. 322-95, the Board made the following remark:

> *The Board has always been reluctant to deny groups of employees access to collective bargaining on the grounds that there are bargaining units which might be created, other than the one which is proposed, which would be more ideal from the point of view of collective bargaining policy. The Board has generally been more interested in assessing whether the bargaining unit which is proposed stands a good chance of forming a sound basis for a collective bargaining relationship than in speculating about what might be an ideal configuration.*

Several of the employees who gave evidence on behalf of the Union said that they would be reluctant to contemplate having the lead hands included in the bargaining unit because they view them as representatives of management on many issues. They said they felt they might be uncomfortable discussing bargaining issues in the presence of the lead hands. Mr. Glenn Stewart, the staff representative of the Union who was responsible for the organizing campaign, said that he felt it would be a "disaster" from the point of view of collective bargaining if the lead hands were included in the bargaining unit.

Mr. Power said that, from the point of view of the Employer, the exclusion of the lead hands would create the possibility of a rift between employees in the work teams which might have a negative impact on the co-operative relationships the Employer wishes to foster. He conceded that he could not foresee how this might affect collective bargaining in a concrete sense.

Insofar as their duties include responsibility for directing and instructing other employees, it is not surprising that there is ambivalence on the part of employees and on the part of the lead hands

themselves about their position. Though, as we have said, their actual managerial authority is negligible, the responsibilities of the lead hands include the transmission of instructions and information from management, and the admonition of employees who, because of inexperience or otherwise, are not performing at a level which might be considered acceptable. In the course of carrying out these responsibilities, there are no doubt occasions when the instructions which are transmitted are unwelcome and the criticisms resented. The evidence made it clear that there are also instances of personal antipathy between certain lead hands and certain employees.

In the *Regina Civic Middle Management Association* case, *supra*, the Board commented on 161 on this feature of supervisory positions:

> *It is our view that there is nothing about the functions carried out by the persons in these positions which creates a conflict between the interest of their employer and the interest of their bargaining unit colleagues of a kind which would justify removing the positions from the bargaining unit. Two of them said that they felt their status as members of the bargaining unit had created "problems" with the performance of their duties. Our assessment of this evidence is that such problems did not go beyond the awkwardness and discomfort which is experienced by many employees who must direct of admonish fellow employees. Such tension is not sufficient to qualify as a conflict of interest of the sort which would justify the exclusion of a position on managerial grounds. In order to justify the exclusion, the position must be subject to competing loyalties which render it impossible for an incumbent to bring them into balance.*

Those comments were made in the context of the issue of whether or not those supervisors were employees within the meaning of s. 2(f)(i) of *The Trade Union Act*, but they seem to us to have some relevance as well to the question of whether a bargaining unit which would exclude these employees is appropriate.

In determining whether a bargaining unit from which certain groups are excluded is appropriate, the Board must balance a number of considerations. As we commented in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Centre of the Arts*, [1995] 4th Quarter Sask. Labour Rep. 52; LRB File No. 175-95, the Board does not recognize less inclusive bargaining units simply because a trade union would prefer that unit or because the unit matches the organizing efforts they have undertaken.

Among other factors, the Board considers whether the proposed bargaining unit has boundaries which create a definable and rational entity for the purpose of collective bargaining, and whether the

acceptance or rejection of a bargaining unit will unnecessarily deny access to collective bargaining to some group of employees.

We have concluded that the proposed bargaining unit would not be an appropriate one. It is clear that the duties of the lead hands are entangled with those of the other employees on their respective teams in a way which makes it impossible to separate them. The lead hands spend a significant part of their time working on the tools as other employees do, and the responsibilities which distinguish them still involve working closely with those other employees. There seems to us no rational way to sever the determination of their terms and conditions of employment from those of the other members of their teams, and any attempt to draw a line between the two groups would be artificial.

Whatever awkwardness or personal friction may exist between ordinary employees and the lead hands, it does not seem to us significant enough to destroy the possibility of sound collective bargaining on the basis of the more inclusive unit.

In the application, the Union requested that the Board order a vote in the event that there was not sufficient evidence of support to form the basis of a certification Order. This request was made, of course, in the context of a proposal for a unit which would not include the lead hands. We are prepared to direct a vote among employees in a bargaining unit which would include the lead hands, but we will grant the Union an opportunity to consider whether they wish this to be done. We will grant the Union a period of ten days from the date of this Order in which to indicate to the Board whether they still wish a vote to be conducted. In the event that the Union does not within that period withdraw their request for a vote, we will order that a vote be conducted.

The final issue which the parties raised with the Board concerned the status of an employee whose name was not included on the Statement of Employment. This employee, Mr. Norm Derosier, was given a notice that his employment was being terminated for cause on the morning of the day the application was filed.

Mr. Bothner gave evidence that the Employer had become concerned about instances of unexplained absence on the part of Mr. Derosier. Mr. Bothner said that he had prepared a letter of termination to send to Mr. Derosier, but that he had given the letter to Mr. Derosier personally when he appeared on the morning of January 18, 1996.

We have concluded that the name of Mr. Derosier should be included on the Statement of Employment for the purpose of determining support for the application. Whether or not Mr. Derosier had any ongoing stake in the outcome of the representation question after January 18, he was still employed for some part at least of the date on which the application was filed. It was somewhat fortuitous that Mr. Derosier was terminated in person rather than by mail. Furthermore, we are reluctant to interpret the concept of "employment" in such a technical fashion as to give any incentive to a less scrupulous employer to try to manipulate support for certification by issuing termination notices timed to coincide with the filing of an application.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2067, Applicant and SASKATCHEWAN POWER CORPORATION, Respondent

LRB File No. 069-96; April 2, 1996
Chairperson: Beth Bilson; Members: Carolyn Jones and Don Bell

For the Applicant: Rick Engel
For the Respondent: Brian J. Kenny

Remedies - Interim orders - Whether Board has jurisdiction to make interim order where final order would be made by arbitrator - Board deciding interim order is within jurisdiction.

Remedies - Interim orders - Whether applicant demonstrated irreparable harm justifying interim order - Board deciding applicant is entitled to order.

***The Trade Union Act*, s. 5.3 and s.25.**

REASONS FOR DECISION
APPLICATION FOR INTERIM ORDER

Beth Bilson, Chairperson: The International Brotherhood of Electrical Workers, Local 2067, has been certified by this Board as the bargaining representative for a unit of employees of the Saskatchewan Power Corporation, also known as SaskPower.

During the most recent round of negotiations between the parties, they separated discussion of the ordinary collective bargaining issues from bargaining with respect to a "Restructuring Package." The Restructuring Package addressed a number of matters related to reduction in the workforce through elimination of vacancies, layoff, retirements and early retirements, and to the reassignment of responsibilities which would result from the change in the complement of employees.

On January 21, 1996, the parties signed a Letter of Agreement which outlined the features of a "separation package" which provided for an enhanced retirement benefit for employees eligible for early retirement in 1996. A supplementary Letter of Agreement was signed on January 25, 1996, which dealt with certain implications of the earlier letter.

The Restructuring Package was submitted to the membership of the Union and ratified. Negotiations resumed with respect to other collective bargaining issues, and a complete agreement was ratified by the members of the Union on February 29, 1996.

On January 23, 1996, a letter was sent to members of the bargaining unit outlining the features of the enhanced early retirement benefit which was the subject of the January 21 Letter of Agreement. This letter was sent over the signatures of Mr. Brian Abbott, the acting manager of Human Resources for the Employer, and Mr. Garth Ormiston, the business manager of the Union. The letter invited employees to indicate their interest in the early retirement plan by February 15, 1996.

On March 13, 1996, further letters were sent to members of the bargaining unit. One version of these letters was addressed to employees who had indicated an interest in taking up the early retirement offer. The other was sent to eligible employees who had not replied by the February 15 deadline, inviting them to reconsider. In both cases, employees were asked to notify the Employer by March 22, 1996, what course of action they wished to take. These letters were sent out over the signature of Mr. Abbott alone.

In the case of some of the employees, March 31, 1996, was identified as the date their retirements would take effect.

On March 21, 1996, Mr. Dale Tilling, the Supervisor of Labour Relations for the Employer, indicated that the deadline for employees to contact the Employer was being extended to April 4, 1996. In an e-mail message to employees, the Employer expressed this as follows:

> *IBEW employees offered an early retirement package now have until April 4 to get their documentation into HR Services.*
>
> *Due to an overwhelming response to the offer from the corporation, HR Services is currently dealing with a backlog of requests. Response to those requests will be handled as soon as possible.*

On March 28, 1996, the day before the hearing of this application, Mr. Tilling wrote to Mr. Ormiston. His letter contained the following paragraph:

> *Employees who were originally advised that their retirement date would be March 31, 1996 will be allowed to defer their retirement until April 30, 1996. In addition, these employees may further extend their effective retirement date by a time equivalent to any vacation credits they may have accrued if they wish to take paid vacation time instead of the cash payout.*

The Union filed a grievance on March 20, 1996, alleging that the Employer had violated the Letter of Agreement of January 21, 1996, in the following ways:

> *#1 SaskPower has not given reasonable advance notice to affected employees and the Union to exercise their rights offered in the retirement package.*
>
> *#2 SaskPower has and is creating an unfair disadvantage for certain employees by not allowing them to retire until the end of 1996.*
>
> *1. Employees are not being treated equally.*
> *2. The Union was informed during negotiations that retirements could occur at any time in 1996 as mutually agreed. The Union has never agreed to forced retirement as of March 1, 1996 (or any other date).*

The Union subsequently filed this application asking for the following interim Orders:

> *1. An Interim Order directing the Employer to immediately extend the deadline by 90 days or until dealt with by an arbitrator for employees to accept or reject the early retirement package.*
>
> *2. An Interim Order directing the Employer to reopen the notice period by another 90 days or until dealt with by an arbitrator for those employees who have already elected to accept or reject the early retirement package.*
>
> *3. An Interim Order directing the Employer to refrain from terminating the employment of those employees who have elected early retirement until mutually agreed to, or December 31, 1996, or on a date ordered by the arbitrator, whichever occurs first.*

Counsel for the Employer argued that the Board does not have jurisdiction to make interim Orders in circumstances where the Board is not being asked to make a final or substantive Order related to the issues raised by the Union in the grievance. He alluded to s. 5.3 of *The Trade Union Act*, which reads as follows:

> *5.3 With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.*

He argued that this provision, which was added to the *Act* in 1994, should be interpreted in the light of the jurisprudence concerning the capacity of the Board to order injunctive relief, both prior to the amendment and more recently. He pointed to a number of examples from the decisions of the Board, of which the following, taken from our decision in *Canadian Union of Public Employees, Local 176 v. Regina Health Board*, [1994] 4th Quarter Sask. Labour Rep. 156; LRB File No. 236-94 at 158, will suffice to convey the point he was making:

> *In our discussion of the first criterion, we have established a threshold which it is not difficult for an applicant to meet. Absent some serious consideration such as a question of the jurisdiction of the Board to hear the main application, it is perhaps difficult to imagine circumstances in which this Board, according to the approach we have taken to this question, would find the main application so defective that we would issue an order which would have the effect of denying the applicant the right to have it heard and determined.*
>
> *In this connection, we do not take the term "serious" which has been used at this stage of assessing an application for interlocutory relief as signifying that an applicant must show that there are any issues of broad principle or general public policy at stake. What we take it to mean is that the applicant has made allegations or raised an issue which falls within the jurisdiction of the Board to decide, and which cannot be shown to be "frivolous or vexatious."*

Counsel for the Union argued that the terms of s. 5.3 can be interpreted broadly enough to permit the Board to issue an interim Order in the present circumstances. He pointed to another amendment which was made to the *Act* in 1994, which is the current s. 25(1):

> *25(1) All differences between the parties to a collective bargaining agreement or persons bound by the collective bargaining agreement or on whose behalf the collective bargaining agreement was entered into respecting its meaning, application or alleged violation, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective bargaining agreement.*
>
> *(1.1) Subsections (1.2) to (4) apply to all arbitrations pursuant to this Act or any collective bargaining agreement.*
>
> *(1.2) The finding of an arbitrator or an arbitration board is:*
>
> *(a) final and conclusive;*
>
> *(b) binding on the parties with respect to all matters within the legislative jurisdiction of the Government of Saskatchewan; and*
>
> *(c) enforceable in the same manner as an order of the board made pursuant to this Act.*

He argued that the effect of this amendment is to make it clear that the resolution by arbitration of disputes arising out of the "meaning, application or alleged violation" of a collective agreement is now mandatory. Prior to the amendment, arbitration had a somewhat uncertain role under *The Trade Union Act*, notwithstanding its acknowledged importance in most collective bargaining relationships. Arbitration has now been accorded a clear preference by the legislature as the means of resolving disputes between the parties to a collective agreement, and this places it squarely within the sphere of

the interest of this Board in supervising the collective bargaining process.

This is certainly a case of some novelty. Counsel were not able to refer the Board to any cases where a labour relations board has issued an interim Order under the circumstances which face us here.

Any discussion of the interlocutory powers of the Board must begin with the decision of the Saskatchewan Court of Appeal in *Burkart et al. v. Dairy Producers' Co-operative Ltd.* (1990), 74 D.L.R. (4th) 694. The Court considered the traditional position taken by this Board eschewing the granting of injunctive relief, and determined that the remedial powers available to the Board included the power to grant interlocutory injunctions.

In his judgment, Cameron J.A. took as his starting point the ongoing judicial discussion of the extent to which the courts should defer to labour relations tribunals on questions related to collective bargaining. In *St. Anne Nackawic Pulp & Paper Co. v. C.P.U., Local 219*, [1986] 1 S.C.R. 704, the Supreme Court of Canada considered whether an employer could bring a civil action on the basis of alleged violations of a collective agreement and of collective bargaining legislation. The Court summarized previous judicial comments on the appropriate level of deference which the courts should accord to labour relations tribunals, and made the following comment at 717-718:

> *The legislature created the status of the parties in a process founded upon a solution to labour relations in a wholly new and statutory framework at the centre of which stands a new forum, the contract arbitration tribunal. Further more, the structure embodies a new form of triangular contract with but two signatories, a statutory solution to the disability of the common law in the field of third party rights. These are but some of the components in the all-embracing legislative program for the establishment and furtherance of labour relations in the interest of the community at large as well as in the interests of the parties to those labour relations.*

The Supreme Court went on to say at 718-719:

> *The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts at common law. These considerations necessarily lead one to wonder whether the Miramichi case, supra, and cases like it, would survive an objection to the court's jurisdiction if decided today. The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective*

> *agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.*

We might pause at this point to note that the position of deference outlined in the *St. Anne Nackawic* decision has been reiterated by the Supreme Court of Canada and other courts on many occasions since that case was decided.

In the recent case of *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, the Supreme Court of Canada again considered the question of whether courts retain jurisdiction to entertain issues which are raised on the basis of provisions in a collective agreement. In her judgment, McLachlin J. described on 954 the problems attendant if the courts are held out as an alternative forum for dealing with disputes arising out of a collective bargaining relationship:

> *The final difficulty with the concurrent actions model is that it undercuts the purpose of the regime of exclusive arbitration which lies at the heart of all Canadian labour statutes. It is important that disputes be resolved quickly and economically, with a minimum of disruption to the parties and the economy. To permit concurrent court actions whenever it can be said that the cause of action stands independent of the collective agreement undermines this goal, as this court noted in St.Anne Nackawic.*

McLachlin J. went on to suggest on 959 that arbitrators have exclusive jurisdiction in matters arising under a collective agreement:

> *It satisfies the concern that the dispute resolution process which the various labour statutes of this country have established should not be duplicated and undermined by concurrent actions. It conforms to a pattern of growing judicial deference for the arbitration and grievance process and correlative restrictions on the rights of parties to proceed with parallel or overlapping litigation in the courts.*

Both the *St. Anne Nackawic* and the *Weber* decisions dealt with the question of the degree of judicial deference which should be accorded to arbitrators. In other cases, the courts have expressed their views, in similar terms, concerning the deference which should be shown to labour relations boards administering collective bargaining legislation. In *Moldowan v. S.G.E.U.* (1995), 126 D.L.R. (4th) 289, the Saskatchewan Court of Appeal considered whether the courts should entertain an action based on the alleged breach by a trade union of the duty of fair representation. The duty of fair representation was originally formulated by the courts as a common law concomitant of the exclusive representational rights conferred on trade unions by collective bargaining legislation in North America. In the *Moldowan* decision, the Court of Appeal concluded that the acknowledgement of this duty in

statutory form in *The Trade Union Act* had the effect of conferring on this Board exclusive jurisdiction to deal with the duty of fair representation.

In the course of her judgment in the *Moldowan* case, Jackson, J.A. discussed the question of whether the observations made by the Supreme Court of Canada in the *St. Anne Nackawic* case concerning arbitration were applicable to labour relations boards. She put her conclusion in these terms on 298:

> *The problem before Estey, J. required him to consider the sanctity of the arbitration process and not that of the Labour Relations Board, but it is impossible to read his words without coming to the conclusion that what he said holds true for the Labour Relations Board as well.*

She went on to say at 299-300:

> *In my opinion, in the circumstances where the Trade Union Act applies, having regard for St. Anne, the nature of the regime established to deal with complaints of this nature, the remedies provided, the ability of the board to enforce its orders and the privative clause, the legislature intended the board to have exclusive jurisdiction to hear and determine claims based on breaches of the statutory duty.*

In the very recent decision of the Supreme Court of Canada in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] C.L.L.C. ¶210-011 (*sub nom. C.A.S.A.W., Local 4 v. Royal Oak Mines Inc.*), the Court returned to the theme of the scope of jurisdiction of labour relations boards. Cory J. alluded, among other things, to a comment of Iacobucci J. in *Canadian Broadcasting Corporation v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157 at 181 (or, [1996] C.L.L.C. ¶210-011 at 141,093):

> *... when dealing with a tribunal as specialized as the Canada Labour Relations Board, inherent in whose functioning is the need to resolve disputes quickly and with finality, courts should be reluctant to characterize a provision as jurisdictional unless it is clear that it should be so labelled.*

Cory J. went on to observe on at 141,093:

> *The basis for this approach is the concept that administrative tribunals are set up to replace courts in areas where specific expertise and experience are required. It has been recognized that a labour board is a specialized tribunal which administers a comprehensive statute regulating the complex field of labour relations. The courts are expected to show deference to the expert knowledge and experience acquired by the board through its involvement and participation in developing the collective bargaining regime established by labour codes. If courts too easily characterize powers accorded to the board as provisions which limit jurisdiction then courts effectively usurp the role which Parliament, after careful consideration, accorded to the labour tribunal.*

It goes without saying that the Saskatchewan Court of Appeal did not have the benefit of much of this judicial commentary when the decision in the *Burkart* case, *supra*, was made, but it is clear from the remark of Cameron J. quoted earlier that the Court was in sympathy with the principle underlying the cases we have quoted here, which are illustrations of the general approach the courts have taken in many cases. This is confirmed by another statement made by Cameron J. in his judgment at 707 in the *Burkart* case:

> *...we can see nothing in the powers of the board, when compared to those of the court to suggest the legislature intended the court to have concurrent jurisdiction in relation to disputes of this kind. In this context, the board's adjudicative and remedial powers are in virtually every respect equal to, and in some instances greater than, those of the court. The board is a specialized tribunal, is empowered to hear and determine disputes on a less formal basis and more quickly than the courts, and is equipped with the power to declare, to restrain, to reinstate, to compensate and even to expose to prosecution.*

In *Burkart*, the Saskatchewan Court of Appeal proceeded to consider the specific instance of the jurisdiction of the Board to order injunctive relief. Cameron J. addressed the argument that the issue of interlocutory injunctive relief was the one area in which the remedial power of the Board should be regarded as inferior to that of the courts.

One of the reasons that injunctive remedies were singled out for specific comment stemmed from the comments of Estey J. in *St. Anne Nackawic* which suggested that the power to award injunctions was excepted from the general deference to the jurisdiction of labour relations tribunals in labour relations matters. The basis of this exception was a concern that in the circumstances of an illegal strike, where the collective bargaining system might be said to have become dysfunctional, and incapable of resolving the issues raised by the dispute, the courts should retain the power to intervene. Estey J. adopted the following comment of LaForest J.A. in the court below considering *St. Anne Nackawic*, appearing on 726-727:

> *...this power has been used with the intention of supporting the legislation, not to supplant it. As Cartwright, C.J.C. stated in [Winnipeg Builders' Exchange],..."the purposes of the... Act would be in large measure defeated if the Court were to say that it is powerless to restrain the continuation of a strike engaged in direct violation of the terms of a collective agreement binding on the striking employees and in breach of the express provisions of the Act."*

In *Burkart*, the Saskatchewan Court of Appeal seems to have accepted that, if it is appropriate that the courts continue to exercise the power to order injunctions in cases involving labour relations, it should

be in very limited circumstances. Wakeling J.A. described such circumstances as defined by an "overriding public interest" such as that at stake when an illegal strike occurs.

The British Columbia Court of Appeal appears to have disagreed with placing such strict limitations on the powers of the courts to issue injunctions. In *B.M.W.E. v. Canadian Pacific Ltd.* (1994), 93 B.C.L.R. (2d) 176, that Court explicitly stated a view contrary to that expressed by Wakeling J.A. in *Burkart*, and decided to issue an injunction to restrain an employer from proceeding with certain changes pending the submission of the issue to arbitration.

In *Burkart*, the Saskatchewan Court of Appeal found that this Board enjoys remedial jurisdiction beyond the specific orders contemplated in the various subsections of s. 5, by virtue of s. 42 of *The Trade Union Act*, which reads as follows:

> *42 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.*

Referring to certain comments of Beetz J. in the Supreme Court of Canada decision in *Re Syndicat des employés de production du Québec et de L'Acadie v. Canada (Labour Relations Board)*, [1984] 2 S.C.R. 412, Cameron J.A. stated at 712-713:

> *Taking the scope of Section 42 to be thus limited, it will be seen that even then - in the context and to the extent we are here concerned with it - the provision could be taken as conferring the power at issue without exceeding the scope of the section. It is not as though the section, should one construe it to endow the board with such power, would render any of the board's s. 5 powers unnecessary; or would confer "practically unlimited" power on the board to do anything consistent with the objects of the Act however general; or would bestow upon the board an autonomous or principal power as distinct from a merely incidental or collateral power. That is clear without elaboration. Instead, the section so construed would merely supplement the board's section 5(e) remedial power enabling it to more effectively perform its duties and attain the specific objects of s. 11(1)(m) and (j)...*
>
> *Nor can we think of any good reason to suppose s. 5 is exhaustive to the point of excluding a draw upon s. 42 for such supplementary power.*

In one respect, the effect of the decision in *Burkart* was to assure the Board that we enjoy the authority to award injunctive relief in connection with proceedings before us. Our reading of *Burkart*, however,

is that its significance went beyond what might be called the transfer of jurisdiction over a single remedial option to this Board.

In our view, the approach taken by the Saskatchewan Court of Appeal in the *Burkart* case was to invite this Board to consider our remedial jurisdiction in a more holistic and less limited way, and not to assume that our remedial jurisdiction was restricted to the specific Orders listed in s. 5.

This aspect of the *Burkart* decision has important implications for our interpretation of s. 5.3. In our view, Section 5.3 was not simply intended to give statutory form to the handing over of power to issue injunctions by the courts, but to encourage a more expansive and flexible use of remedial possibilities by the Board, in keeping with the approach which was outlined by Cameron J.A.

Section 5.3 confirms that the Board has the power to make "interim orders." Such orders would include, but not be limited to, interlocutory and injunctive relief of the kind discussed in the *Burkart* decision. For example, in a recent decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Marwest Ltd.*, LRB File No. 038-96, the Board relied on this provision to order the interim reinstatement of an employee.

This does not mean that there is no merit in asking the question whether the Board has jurisdiction, according to the powers contained in s. 5 and s. 42, to make an Order of the kind we are being asked to make here. We agree with counsel for the Employer that arguments about the policy objectives which would be served do not in themselves answer this question. Any huffing and puffing about policy cannot serve to confer upon this Board jurisdiction which it does not have according to provisions of *The Trade Union Act*.

On the other hand, the Court of Appeal displayed an awareness in the *Burkart* decision that an understanding of the public policy goals which underlie *The Trade Union Act* assists in arriving at a reasonable and effectual interpretation of the provisions of that statute. The way the Board chooses to act within the scope of the jurisdiction conferred upon us in the *Act* is informed by our notion of the aims and objectives which the statute as a whole has been conceived to support.

On matters which concern the interpretation of the provisions of collective agreements, this Board has adopted a policy of deference to the outcome of the grievance and arbitration procedure which is

contained in most of those agreements. The Board has acknowledged that many of the claims which are made under collective agreements may also invoke some of the protections which are provided in *The Trade Union Act*. We have, nonetheless, said on a number of occasions that, where the claim involves a dispute which can be submitted to arbitration and for which the arbitral process can provide an adequate remedy, this Board should stand down in favour of the process to which the parties have agreed as the vehicle for resolving the disputes which arise between them.

In the view of the Board, this is consistent with the overriding purpose which *The Trade Union Act* is designed to support, which is to foster sound and vigorous collective bargaining relationships where a group of employees have elected to be represented by a trade union. We have said many times that we do not view the grievance and arbitration process under a collective agreement as an inferior mode of resolving disputes between the parties. It is rather a sign that the collective bargaining process which is our *raison d'être* has borne fruit in the form of a process for dispute resolution which meets the needs of the parties. It should be noted, as well, that the Board has routinely made it clear to the parties that, in the event the dispute cannot be resolved by the grievance and arbitration procedure - if, for example, an arbitrator finds that the dispute is inarbitrable under the collective agreement - the parties may return to the Board to seek determination of any issue properly put before us under the *Act*.

It is not necessary for our purposes here to decide whether the amendment of s. 25(1) of the *Act* renders our deferential posture more or less voluntary on our part. What is of more relevance is the question of whether the Board can exercise its authority to order injunctive relief in aid of a grievance which has been submitted to the grievance and arbitration process between these parties, rather than as a phase of proceeding which will ultimately require a final decision from this Board.

Though we have stated our position as one of deference to arbitrators on matters of interpretation or application of the provisions of collective agreements, it is clear that this Board maintains an interest in the arbitration process overall as a component of collective bargaining. The Board has, for example, found that conduct which thwarts or undermines the grievance procedure constitutes an unfair labour practice: see *University of Saskatchewan v. University of Saskatchewan Faculty Association*, [1989] Fall Sask. Labour Rep. 52; LRB File No. 254-88.

Though the issue does not seem to have been put to the test in this province, it seems fairly clear that, in the absence of an explicit enactment conferring such jurisdiction, an arbitrator or board of

arbitration lacks the power to grant interim or interlocutory orders. This is perhaps the reason for judicial intervention to this end in the *Canadian Pacific* case, *supra*.

In both British Columbia and Ontario, the legislatures appear to have decided to fill this gap by conferring upon arbitration bodies themselves the power to make interim Orders.

There is nothing comparable to these provisions in our own *Trade Union Act*. The question is, therefore, whether the jurisdiction of this Board extends to granting interim Orders which are sought in relation to an issue which an arbitrator or arbitration board will ultimately be asked to decide.

We have concluded that the granting of an interim Order of the kind we are being asked to consider here is both within the jurisdiction of the Board, and consistent with the policy goals which our deliberations serve. The Union has not made this application, it is true, on the basis of any allegation or complaint which they wish to have finally determined by the Board, though it is conceivable that they might have formulated such a claim on the basis of a breach of the duty to bargain collectively, or on the basis of some other provision of the *Act*. What they are asking is to have the assistance of the Board in ensuring that the grievance and arbitration procedure is given sufficient time to resolve the dispute which has arisen between the parties, so that the outcome will not be pre-empted by the unilateral action of the Employer.

In our view, the terms of s. 5.3, combined with s. 42, confer upon this Board adequate remedial jurisdiction to permit us to make an interim Order which would support the effectiveness of the grievance and arbitration process as an element of the collective bargaining relationship between the parties. As we commented earlier, we do not see s. 5.3 as simply recording the conveyance from the courts to the Board of remedial jurisdiction to order injunctive relief, but as a component of a broad ameliorative capacity in the hands of the Board, which can, as Cameron J. suggested, be used to create flexible and imaginative remedial tools in support of the objects of the *Act*, so long as the Board does not stray outside the jurisdictional perimeters set out in the statute.

We can find nothing in s. 5.3, seen in this light, to suggest that our power to grant interim Orders is limited to the situation where the Board will be making the final decision. That is, of course, by far the most common circumstance in which the Board will be asked to consider interim relief, but this does not mean that we cannot act to support the effectual operation of a process which is a vital part of the

collective bargaining regime we have been created to supervise.

Section 5.3 refers to "an application or complaint made pursuant to any provision of this Act," and suggests that the Board may make an interim order "pending the making of a final order or decision." Though the Union has not filed an application alleging an unfair labour practice, their application to the Board in this instance can, in our opinion, be characterized as being "pursuant to any provision of this Act." As counsel for the Union pointed out, s. 25(1) now makes the submission of issues to arbitration a direct requirement. In any case, as the Board has said in the past, the resolution of disputes, by arbitration or otherwise, is a significant aspect of the collective bargaining obligation which underlies and pervades many of the provisions of the *Act*.

We would further note that the term "final order or decision" in s. 5.3 is not tied explicitly to proceedings before the Board itself, and we do not think it is stretching the meaning of s. 5.3 beyond its rational compass to interpret it in the way we have.

Counsel for the Employer pointed out that the Board does not undertake to monitor the conduct of the Minister of Labour, and other third parties who have roles which are mentioned in the *Act*. Though it is hard to say what comment the Board might make in the event the conduct of such third parties intruded into the sphere in which we operate, we agree that their affairs do not as a rule lie under our supervision. The arbitration process, however, can be distinguished from these other references on the basis we have suggested - that it is an integral part of the collective bargaining regime which the Board monitors and protects.

Since the decision in *Burkart*, this Board has had a number of occasions to comment on the principles which should be used in assessing an application for interlocutory relief which is sought before there is an opportunity to hear the entire substantive case on its merits. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Companies Inc.*, [1992] 1st Quarter Sask. Labour Rep. 68; LRB File No. 011-92, the Board stated on 77-78 the general framework of principles which would guide determinations of this kind:

> *1. An interlocutory injunction will only be granted where the right to final relief is clear.*
>
> *2. The applicant, in asserting its rights, must show as a threshold test, either:*

> *a) a strong prima facie case in support of the right which he asserts and a strong possibility that he will succeed at trial in disputes where the success or failure to obtain the injunction will virtually decide the application; or*
>
> *b) that there is a serious issue to be tried in circumstances where the success or failure to obtain the injunction will not decide the application.*
>
> *3. After the appropriate threshold test has been met, the applicant must be able to show that an injunction until the hearing is necessary to protect it against irreparable damage and loss. If the applicant can be adequately compensated through the Board's remedial powers at the final hearing, no injunction will normally be granted.*
>
> *4. Where any doubt exists as to the available remedy, the violation of the applicant's right, the irreparable nature of the loss, or the effectiveness of an expedited hearing, the Board will determine the application on the balance of convenience to the parties. In ascertaining the balance of convenience, the Board will address the considerations referred to by the Court in P.C.S. v. Todd.*

It will be noted that the principles formulated in the *WaterGroup* decision were drawn from the principles applied by the courts in assessing applications for injunctive relief. These principles have continued to evolve, and the Board has commented on the effect of these changes in the decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, [1994] 4th Quarter Sask. Labour Rep. 147; LRB File No. 238-94, observing that the major effect of these changes in the way the criteria are formulated has been to bring together what were listed as a first and second principle in the *WaterGroup* case as a composite criterion. In the decision of the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311 at 314, the Court summarized their approach this way:

> *At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on its merits... A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare.*

In the *Prairie Micro-Tech* decision on 150, the Board summarized the result of the evolution exemplified by the *RJR-MacDonald* case as follows:

> *Formulated in this way, the standard does not put the applicant to the test of showing that there is a probability of success in the final result, and it shifts the*

> *emphasis to the other two elements of the principles outlined by the Board in WaterGroup - the requirement of irreparable harm, and a consideration of the balance of convenience.*

As it happens, the refinement of these aspects of the criteria for assessing an application for interlocutory relief is of limited relevance to the application before us. It was conceded on behalf of the Employer that the issue raised by the Union is amenable to arbitration, and, in any event, the granting of the Order sought by the Union would not have been the equivalent of a final decision on the merits.

Counsel for the Employer did make an argument that the steps taken by the Employer in implementing the early retirement program lay within the sphere of unilateral action protected by the management rights clause, though it is not clear that he made this argument in order to suggest that there was no serious issue capable of being raised by the Union before an arbitrator.

If counsel did mean to suggest by this argument that the management rights clause would foreclose the presentation to an arbitrator of the issues the Union wishes to have determined, we should perhaps comment on it. In *Saskatoon City Police Association v. Saskatoon Board of Police Commissioners*, [1993] 4th Quarter Sask. Labour Rep. 158; LRB File No. 240-93, the Board found that the offer of an enhanced early retirement benefit directly to employees constituted a failure to bargain collectively, because the early retirement program was a term or condition of employment which must be discussed with the Union.

The circumstances in this case are somewhat different, in that the Union was involved in discussions of the program which would be offered. The material placed before us indicates that the form of the early retirement program which was the subject of the Letter of Agreement between the parties on January 21, 1996 was recommended by a joint committee composed of representatives of the Union and the Employer.

Counsel for the Employer argued that a distinction could be drawn between the plan itself, which had been the subject of bargaining which had culminated in the Letter of Agreement, and the implementation of that plan, which he suggested lay within the scope of the management rights reserved to the Employer.

In the grievance, the Union argued that what was contemplated at the time of the Letter of Agreement

was that the Union would continue to be involved in the steps taken to implement the program, and in the arrangements which would govern the situation of individual employees.

On the basis of the material before us, we have to say that the claim outlined in the grievance meets the test of "a serious issue to be tried."

The Union argued that irreparable harm would be done to employees and to the Union if the Employer were permitted to proceed with the implementation of the early retirement program without the issues raised by the Union first being dealt with.

Counsel for the Employer referred us to the decision of the Board in *Canadian Union of Public Employees v. Regina Health District*, [1994] 4th Quarter Sask. Labour Rep. 156; LRB File No. 236-94, in which the Board addressed a claim that the trade union concerned would suffer serious damage to its reputation as a bargaining agent. The Board commented on 159:

> *It is partly because of the pervasiveness of these factors in the health care field that we have come to the conclusion that the Union has failed, on the basis of the material before us at this stage, to draw a connection between the conduct of the Employer which is impugned in this application and the prospect of widespread disaffection with this Union as a bargaining agent which is sufficiently strong that it would justify the granting of an interlocutory order. The Union has had a relationship with this Employer, and the predecessors of this Employer, over a long period of time. Though the Union is facing a period of change, this does not distinguish them from other trade unions in this sector, and, in our view, the material filed before us fails to establish that the interest of this Union is in peril to a degree which cannot be addressed when remedies are considered following a hearing of the application on the merits.*

We are of the view that this situation can be distinguished from the circumstances addressed in the *Regina Health District* case. In this case, the Union is not describing the harm it fears in terms of a nebulous loss of reputation as a bargaining agent. In recent times, representatives of the Union have made great efforts to arrive at a resolution of a difficult issue which will protect their members as much as possible. Whether or not they received assurances that they could continue to address these difficult matters at the implementation stage, the claim of the Union in this respect is an understandable one; if they are right, their role in this respect cannot be restored to them once all of the eligible employees have been dealt with under terms unilaterally set by the Employer. The Union has also claimed that employees are not being dealt with fairly in the implementation stage, and that this violates agreements concluded with the Employer. Again, it is difficult to see how the inequity which is the subject of the

grievance could be corrected if the arbitration process is not permitted some reasonable time to address the complaint of the Union.

We are persuaded that the Union has made out a case that there would be irreparable harm if their application is not granted. What the Union is requesting does not seem unreasonable or disproportionate. The Union has acknowledged the budgetary considerations which led the Employer to propose restructuring, and they have participated in the formulation of a plan which would allow budgetary savings to be realized through an early retirement scheme.

The Union has asked for Orders which would extend the deadline for employees to make decisions with respect to the early retirement program, and the effective date of any early retirements, in order to give an opportunity for the claim of the Union with respect to their role in the plan to be determined through the grievance and arbitration process. We understand that the Union does not propose to prevent the retirement of any employees who have elected to take advantage of the plan, if the Union is satisfied that they have made this election in an informed and voluntary manner.

We will issue Orders to the following effect:

- That the Employer extend the period in which all employees, including any employees who have already signified their decision to accept or reject the early retirement package, may make the decision whether to accept or reject the early retirement package until June 15, 1996, or until the grievance of the Union has been determined by an arbitrator, whichever date occurs sooner.

- That the Employer not require that the effective retirement date of any employee occur prior to December 31, 1996, or the date set by an arbitrator in a decision on the grievance of the Union, or a date mutually agreed between the parties, whichever date occurs first.

- That the Employer, with the approval of the Union, permit any employee to retire on a date prior to June 15, 1996.

- That, in the event an arbitrator dismisses the grievance filed by the Union in

its entirety, these interim orders will cease to have any effect from the date of the decision of the arbitrator.

One cannot rule out the possibility that something unforeseen will occur during the period these interim Orders are in effect. The Board will remain seized in the event that the parties require further assistance.

ELAINE WARNE, ERWIN SCHMIDT, JOHN DUNITZ, JOANNE WALKER, JOAN WELLWOOD, MATT SCHABEL, GEORGE TOTTEN, Applicants and REGINA EXHIBITION ASSOCIATION LTD., Respondent

LRB File Nos. 146-95 to 166-95; April 3, 1996
Chairperson: Beth Bilson; Members: Don Bell and Carolyn Jones

For the Applicants: Mervin C. Phillips
For the Respondent: J. Paul Malone

Natural justice - Bias - Whether is reasonable apprehension of bias where some of witnesses are heard by member of panel in different proceedings - Board deciding is no reasonable apprehension of bias.

Natural justice - Fair hearing - Whether Board had denied fair hearing by failing to take evidence into account or misunderstanding evidence - Board deciding was no denial of fair hearing.

Reconsideration - Natural justice - Apprehension of bias - Whether is reasonable apprehension of bias where some of witnesses are heard by member of panel in different proceeding - Board deciding is no reasonable apprehension of bias.

Reconsideration - Evidence - Whether Board in breach of stated policy concerning application of evidence from earlier proceeding - Board deciding no breach of policy had occurred.

Reconsideration - Evidence - Whether Board had misrepresented evidence at proceeding - Board deciding was no misrepresentation of evidence which would justify reconsideration.

Reconsideration - Evidence - Whether Board had failed to consider evidence differentiating situations of applications - Board deciding this evidence had been considered.

Reconsideration - Discrimination - Anti-union animus - Whether Board had failed to take into account possibility of anti-union animus - Board deciding this issue had been considered in reaching original decision.

***The Trade Union Act*, ss. 5(j), 13 and 42.**

REASONS FOR DECISION

REQUEST FOR RECONSIDERATION

Beth Bilson, Chairperson: In applications designated as LRB File Nos. 146-95 to 166-95, and

appearing in [1996] Sask. L.R.B.R. 5, the seven Applicants made allegations that their employment had been terminated by the Regina Exhibition Association Limited for reasons which were, in part, in contravention of *The Trade Union Act*, R.S.S. 1978, c.T-17, because they were inspired by anti-union animus. The Applicants also sought certain remedies from the Board.

In Reasons for Decision dated January 10, 1996, the Board dismissed the applications. The Applicants have now made a request that the Board reconsider that decision.

The experience of the Board with the reconsideration of decisions has not, to date, been terribly extensive. In a decision in *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Sharon Ruff*, [1993] 3rd Quarter Sask. Labour Rep. 103; LRB File No. 132-93, the Board considered the basis on which we might exercise a jurisdiction to reconsider earlier decisions. We reviewed statutory provisions from other jurisdictions which explicitly outline a procedure for reconsideration, and compared those provisions with certain provisions of *The Trade Union Act*.

In the *Sharon Ruff* decision at 106, the Board concluded that there are good reasons why we should reconsider decisions in the appropriate circumstances:

> *In spite of the differences in wording, we are of the opinion that the Board possesses extensive power to review, and if necessary to rescind or amend, decisions it has already reached. In light of the intended finality of the decisions made by the Board underlined by the privative clause in Section 21 of the Act, it is important that the Board be able to address allegations that there has been some error or injustice in a decision which it has made, and to make amends if such error or injustice can be established.*

The Board went on to sound a note of caution, however, on 107:

> *Though the Board has the power under Section 5(i) to reopen decisions it has arrived at, this power must be exercised sparingly, in our view, and in a way which will not undermine the coherence and stability of the relationships which the Board seeks to foster. In a comment on an application for reconsideration of a decision of the British Columbia Labour Relations Board in Corporation of the District of Burnaby v. Canadian Union of Public Employees, [1974] 1 Can. L.R.B. 128, at 130, the Board asserted that "speed and finality of decisions are especially imperative in labour relations. Of no area of law is it truer to say that justice delayed is justice denied."*

The Board also suggested on 107 that a general approach to applications for reconsideration would

involve a two-stage process, which would require a party seeking reconsideration to persuade the Board that there is a basis for reconsideration:

> *We have concluded that such a two-step approach is appropriate in cases of this kind. We do not agree with counsel for the Employer that we were mistaken in requiring that an applicant who seeks reconsideration of a decision of the Board must persuade us that there are solid grounds for embarking upon that course.*

The criteria which the Board suggested as a basis for deciding whether a request for reconsideration should be granted were borrowed from a decision of the British Columbia Industrial Relations Council in *Overwaitea Foods v. United Food and Commercial Workers, Local 2000* (1990), 90 C.L.L.C. ¶16,049 at 14,417:

> *In [Western Cash Register v. International Brotherhood of Electrical Workers, [1978] 2 CLRBR 532], the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRB No. 61/79, [1979] 3 Can LRBR 153), added a fifth and sixth ground:*
>
> 1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
> 2. *if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
> 3. *if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
> 4. *if the original decision turned on a conclusion of law of[sic] general policy under the Code which law or policy was not properly interpreted by the original panel; or,*
> 5. *if the original decision is tainted by a breach of natural justice; or,*
> 6. *if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

In subsequent cases, it has become clear that not all cases fit neatly into the pattern which was envisioned in the circumstances of the *Sharon Ruff* decision. In *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada v. Refrigeration Installations, a Group of Honey Limited-Honeywell Limitee et al.*, [1995] 3rd Quarter

Sask. Labour Rep. 69; LRB File No. 057-94, for example, the request for reconsideration was based in part on an argument concerning the interpretation of a particular statutory provision. The Board entertained the full argument presented by both parties on this issue, rather than trying to separate the arguments for the purpose of the "two-step" process suggested as the norm in the *Sharon Ruff* case.

That decision, and the criteria outlined in it, have nonetheless provided a useful set of guidelines to the Board when considering requests for reconsideration.

In this case, the parties had agreed to present argument on the grounds put forward by counsel for the Applicants as a basis for reconsideration. Counsel for the Applicants submitted that, in the event the Board accepted that any of these arguments constituted grounds for reconsideration, it would be appropriate for the Board to rehear the entire case, or at least to permit the presentation of further evidence.

Counsel for the Applicants characterized the first three parts of his argument as raising questions of fairness or natural justice, while the fourth point he wished to raise concerned an allegation that the Board had not properly applied one of our own tests for determining whether a dismissal has been discriminatory.

The first point raised on behalf of the Applicants was described as follows in an affidavit filed in support of the request for reconsideration:

> *I am informed by my counsel that in Robert Monahan, Employee, Regina, Saskatchewan and Capital Pontiac Buick Cadillac GMC Ltd. and United Steelworkers of America, LRB File No. 169-93, the Labour Relations Board set out the policy of that Board with respect to the use of evidence from a prior hearing. I have read this decision and am advised by my counsel that the Board failed to follow its own rules in this respect. Attached hereto and marked as Exhibit "D" is a true copy of the said decision. During the hearing of this matter, no evidence was presented with respect to a previous unfair labour practice hearing that involved me, Matt Schabel and George Totten. I note that the other applicants, Joan Wellwood, John Dunitz, Joanne Walker and Erwin Schmidt were not involved in that prior matter. I did not have the opportunity to be heard with respect to the previous allegations against me or the conclusions drawn about my relationship to management and/or other employees. I believe the Board breached its own rules by use of this previous evidence which is detailed by the Board in the highlighted portions of pages 5 and 18 of Exhibit "A".*

In the course of the exchanges between counsel, and between counsel and the Board, it became clear

that counsel for the Applicants was in fact raising two separate arguments in this connection, both of them concerning an earlier decision of the Board, *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd.*, [1993] 1st Quarter Sask. Labour Rep. 121; LRB File Nos. 196-92 & 214-92, which was made in the context of an application by a trade union to represent certain employees in the Casino operated by this Employer.

The first of these arguments was based on an allegation that the Board actually applied evidence from the hearing which was held in relation to *Regina Exhibition Association Ltd.*, in violation of the guidelines stated in the *Capital Pontiac* case for the use of evidence in connection with a proceeding other than the one at which the evidence was adduced.

The source of the concern was that, with the exception of the Chairperson, the members of the panels involved in hearing the two cases were different. No reference was made at the hearing to the evidence presented in the earlier case, and counsel argued that, if the evidence was used, the failure to allow his clients an opportunity to respond to this evidence constituted a denial of natural justice.

Counsel pointed to statements contained in our decision appearing in [1996] Sask. L.R.B.R. 5 at 8, 9, 21-22 and 23, as the basis for this allegation. In that decision, we made the following comments:

> *The first of these units was composed of the wheelers and dealers in the Casino. At the time that the organizing campaign was going on, a certain amount of ill feeling developed between that trade union and the supervisors, who were characterized by the union as part of management. During the certification hearing between the RWDSU and the Employer on that occasion, that union attempted to establish that the supervisors had been guilty of a number of instances of interference in the organizing campaign on behalf of management.*
>
> *Some of the witnesses at the hearing of this application expressed remnants of this tension. Indeed, the argument of counsel for the Applicants was based in part on an allegation that the Employer was colluding with the RWDSU to the detriment of the Applicants.*
>
> ...
>
> *Some of the comments which were attributed to Mr. Butler could, in a different context, be regarded as a misuse of management authority and a contravention of The Trade Union Act. The comments must be seen, however, in the context of the relationship which existed between him and the supervisors. It was not a relationship without its tensions, to be sure. It is clear, however, that the supervisors were viewed, both by the Employer and the RWDSU, as being closely connected with management; and it is understandable that Mr. Butler was in the habit of conducting more candid exchanges with them than he might with in-scope employees.*

...

> *Both Mr. Hollyoak and Ms. Sil said that there was some discussion between the negotiating committee and Mr. Banting in December of 1994, in the face of the organizing initiative taken by the USWA, of the possibility of the inclusion of the supervisors in the unit. According to Ms. Sil, this suggestion had caused some consternation among the Casino employees, in light of the previous tension in their relationship with the supervisors. They ultimately agreed that it would be acceptable as long as they were dealt with as a separate group within the bargaining unit.*

In arriving at our decision concerning the termination of employment of these Applicants, the Board did not consider any of the evidence adduced at the earlier hearing. Our observations concerning the position of the supervisors at the time of the earlier organizing campaign conducted by the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union ("S.J.B.R.W.D.S.U.") were drawn in part from findings of fact which were contained in the Reasons for Decision relating to *Regina Exhibition Association Ltd.*, which are a matter of public record. The following paragraph on 122 summarizes those findings:

> *Around the time of the summer fair week in 1992, the Union commenced an organizing drive among the employees in the Casino. The organizing drive was clearly the topic of much conversation, and it is evident that a certain amount of tension ensued which was attributable to the organizing campaign. The Union alleges that representatives of the Employer, notably the supervisors of the employees in the Casino, made efforts to discourage the employees from supporting the Union, and that these efforts were unlawful under The Trade Union Act. The Union alleges that the conduct of management representatives in this regard had the effect of inducing such fear and tension among the employees that the Union was forced to cut short its organizing campaign, and to file an application to represent a smaller unit of employees than it had originally intended.*

The Board also made the following finding on 124:

> *There was little evidence that the supervisors in this case set out in any calculated way to undermine the Union organizing campaign. They continued, as they had in the past, to engage in informal conversation with their fellow employees, and they perhaps thought it natural that discussion of the efforts of the Union to organize would become a part of such conversations. At some point, however, they should have been instructed, if they could not understand it themselves, that communications which might under ordinary circumstances be a normal part of social conversation have a different impact when one of the parties to the conversation is a representative of management, and the other party is considering whether to exercise rights under The Trade Union Act. Though there may not have been any conscious attempt to coerce employees or to persuade them that negative consequences would result from supporting the Union, the indiscreet and unguarded statements which were clearly made on a number of occasions by supervisors were open to the interpretation that they were made to intimidate and unfairly influence employees.*

With respect to our observation that there were "remnants of this tension" remaining at the time of the hearing of the application of these Applicants, we have reviewed portions of the evidence given at the hearing, and we are persuaded that this comment rests on a sound evidentiary footing.

Counsel for the Applicants argued that this conclusion could not be drawn on the basis of the evidence given by Mr. Mark Hollyoak, a staff representative for the S.J.B.R.W.D.S.U., because any evidence given by him which might be related to this point concerned what the group of supervisors thought about him, and did not indicate how other employees might feel about the supervisors. We agree that the evidence of Mr. Hollyoak might not in itself support such a conclusion, but we think the evidence given by Ms. Leslie Sil, one of the employees from the bargaining unit represented by that trade union, who was on the bargaining team, does support this comment. Ms. Sil spoke of a conversation she had with other employees who were on the bargaining team, who expressed consternation at the suggestion that the supervisors should become part of the bargaining unit, in part, we concluded, because of the tension arising out of the earlier organizing campaign.

The other distinct argument made by counsel for the Applicants in this connection arose out of the fact that a number of witnesses who gave evidence at the hearing of the applications designated as LRB File Nos. 146-95 to 166-95, and appearing in [1996] Sask. L.R.B.R. 5, had also given evidence at the hearing of the application designated as LRB File Nos. 196-92 & 214-92 and appearing in [1995] 1st Quarter Sask. Labour Rep. 121. He referred in particular to three of the Applicants and to Mr. Hollyoak. None of these persons was mentioned by name in the Reasons for Decision of the Board in that case. Ms. Kelly Miner, another staff representative from the S.J.B.R.W.D.S.U., was mentioned by name, and she also gave evidence at this hearing. As the Board did not review the evidence or the Board file from the earlier hearing, we cannot confirm specifically that all of the witnesses identified by counsel in fact testified at that time. We are, however, prepared to accept, for the sake of argument, that all of them did testify at the earlier hearing, as we think it does not affect the argument which was made by counsel for the Applicants.

That argument was that, because these witnesses had testified at the earlier proceedings, and because the Board Chairperson, alone of the present panel, had had that previous opportunity, to assess the credibility of that evidence, there is a reasonable apprehension on the part of his clients that the Board was biased in deciding these applications.

The allegation that there is a reasonable apprehension of bias does not depend, of course, on any actual bias being shown. As we understand the argument, the basis of the allegation is that a member of the Board may have had an opportunity to observe some of the same witnesses in another proceeding, and that a reasonable person could think that this might create a predisposition on the part of that member of the Board to view subsequent evidence given by those witnesses in a particular way.

This must, of course, be distinguished from another basis for a reasonable apprehension of bias which is sometimes raised in connection with tripartite tribunals such as this one, which is rooted in the fact that the side members of these tribunals have gained their experience on one side or the other of a collective bargaining system which is adversarial in structure.

In *Ringrose v. College of Physicians and Surgeons (Alberta)*, [1977] 1 S.C.R. 814, the Supreme Court of Canada considered a claim of apprehended bias in the case of a physician who attempted to have the decision of a disciplinary committee quashed on the grounds that one of the members had also been a member of an executive committee which had decided to suspend his medical privileges pending the outcome of the disciplinary proceedings. The majority of the Court reviewed earlier decisions, and adopted a technical approach to the bias question; that is, they considered such questions as whether the decision of the disciplinary committee constituted an appeal. Dickson J., who concurred in the result, but dissented on how the question of bias should be approached, suggested on 817 that the determination of whether a reasonable apprehension of bias exists should be put on a broader footing:

> *All of the surrounding circumstances must be investigated. What is the function of each of the committees? Does the first body merely find facts, or does it make a preliminary adjudication? What is the effect of one body's decision on the second's decision-making? Is one of the committees sitting in appeal, expressly or in effect, from the decision of the other committee? Is the member in the second committee defending, perhaps unconsciously, a decision of the first committee which he helped to make? Did the first committee initiate the proceedings or lay charges with the result that a member of that committee, who later sits on the other committee to hear evidence, is both accuser and judge? What is the size of the respective committees? What was the degree of participation in each committee by the member whose presence on both committees is impugned?*

Even if one adopts this contextual approach where an allegation is made that there are grounds for a reasonable apprehension of bias, we could find no example to suggest that the concept has ever been applied in circumstances which do not involve stages of the same proceedings, or at least proceedings which affect the rights of the same parties.

In the context of the proceedings of this Board, which involve the ongoing collective bargaining relationships of the players on the fairly restricted stage of Saskatchewan labour relations, it is inevitable that some witnesses will appear on a number of occasions in proceedings before the Board. It can be admitted, for example, that every member of this panel has been present on some occasion when Mr. Hollyoak has given evidence. It would, in our opinion, be impossible for the Board to function if there were a suggestion that every time a witness gives evidence more than once, it is necessary to structure the panel of the Board so that no member has had a previous opportunity to observe that witness.

We are prepared to accept the assertion of counsel for the Applicant that some of the Applicants, though not all, gave evidence at the earlier proceeding involving the allegations of unfair labour practices on the part of the Employer during the organizing campaign conducted by the S.J.B.R.W.D.S.U. The Board did make findings which suggested that some of the supervisors had made statements, perhaps unwittingly, which the Employer should have taken steps to prevent. Whether these findings were based on the evidence of any of the Applicants it is impossible to tell from the Reasons for Decision. The Applicants were not, however, parties to that proceeding, and their interests were not affected by its outcome. We do not think that there is any basis on which the decision in [1993] 1st Quarter Sask. Labour Rep. 121; LRB File Nos. 196-92 & 214-92 can be characterized as part of the same proceeding which we are considering here.

For these reasons, we have concluded that the fact that certain witnesses gave testimony on an earlier occasion does not give rise to a reasonable apprehension of bias on the part of the Applicants.

A further argument made by counsel on behalf of the Applicants was that certain findings of the Board were not supported by the evidence which was cited in the Reasons for Decision. He referred in particular to two findings purportedly founded on the evidence of Ms. Joan Wellwood.

The first concerned Mr. George Young, one of the supervisors in the Casino who had been successful in obtaining a position as Floor Manager, unlike the Applicants. Mr. Young had initiated the efforts to obtain trade union representation for the group of supervisors prior to the abolition of that position. In the Reasons for Decision on 25, the Board made the following statement, "It was suggested by Ms. Joan Wellwood, one of the supervisors who gave evidence, that the success of Mr. Young may have been attributable to his role as an informant to management about union activities. Nothing in other

evidence presented would support this allegation."

We are in the somewhat unusual position in this case of having access to a transcript of the evidence which was ordered by counsel for the Applicants. On reviewing that transcript, we find that we were indeed in error in attributing any such comment to Ms. Wellwood, and we apologize for any confusion or embarrassment which this may have occasioned.

The comments in relation to Mr. Young were in fact made by Ms. Joanne Walker, another Applicant. In her evidence-in-chief Ms. Walker made the following statement:

> *A* *Well, he was quite an instigator in the organizing of the union's activity.*
>
> *Q* *Why do you think he was?*
>
> *A* *I think possibly that he was -- kind of a snich (sic) or an inside person, maybe an informer was a set-up.*

Under cross-examination, Ms. Walker returned to the same theme:

> *Q* *When it came to firing some of the supervisors, in your mind is there any logical reason why the group of you were discharged, and George, Dennis and Dave were kept on?*
>
> *A* *I believe we were let go because of our activities in organizing a union, and George was a front or a snich (phonetic).*

We are therefore satisfied that, although we made an error in attributing these remarks, the evidence did support the comment which was made in the Reasons for Decision.

Counsel also referred to a second comment of the Board on 9:

> *One of the issues which was discussed during the course of that round of bargaining was the number of supervisors, and the use which could be made of them to relieve pit bosses. Joan Wellwood, a supervisor who was a member of the negotiating committee of the Employer at that time, recalled that there had been discussion at that time of the elimination of the position of supervisor. Instead, a Letter of Understanding was appended to the collective agreement which restricted the use of supervisors and contemplated a gradual decline in their numbers.*

We reviewed the portion of the transcript of the evidence of Ms. Wellwood. We acknowledge that the reference to this evidence could have been stated more clearly, and we would take this opportunity to clarify those statements from our Reasons which concern this issue. In this passage of her evidence, dealing with her involvement as a member of the bargaining team representing the Employer in the

1993 negotiations with the S.J.B.R.W.D.S.U., Ms. Wellwood was asked to comment on statements attributed to Mr. Les Butler to the effect that the issue of eliminating "one of those [supervisor] positions" had come up at that time. In her direct response to that part of the testimony of Mr. Butler, Ms. Wellwood said that she did not recall this particular statement. Later in her testimony in chief, however, Ms. Wellwood responded to the following question:

> *Q* *As part of that collective agreement there were certain rules set out about casino supervisors, and the right of management to use casino supervisors instead of union persons, is that right?*
>
> *A* *Yes*

Under cross-examination, Ms. Wellwood had the following exchange with counsel for the Employer:

> *Q.* *Is it fair to say that during 1993 negotiations, or certainly by the end of those negotiations, the issue of the number of supervisors was an issue between the union and the employer?*
>
> *A* *Yes.*
>
> *Q* *That's why they signed the letter of understanding?*
>
> *A* *Yes.*
>
> *Q* *That's why they were saying there are too many supervisors?*
>
> *A* *Yes.*
>
> *Q* *So you knew the number of supervisors was an issue in 1993?*
>
> *A* *Before our full-time hours, yes.*

It would perhaps have been fairer to say on the basis of this evidence, as well as that of Mr. Butler, that there had been discussion in 1993 of the numbers of supervisors, and that the Union had been critical of the number of supervisors employed. The Letter of Understanding which was eventually concluded as a result of these discussions arrived at a resolution based on attrition and a gradual dilution of the proportion of supervisors, rather than on eliminating the position or even terminating the employment of any of the existing supervisors. It was not intended, in this context, to convey the impression that the elimination of the job classification of the supervisors as such was under discussion in 1993.

We do not think this clarification affects the essential point we were trying to make in this passage. We were not suggesting, by using the term "elimination," that the supervisors had been given some kind of notice of their eventual termination in the 1993 negotiations, or that they should have been aware,

from that time, that their future employment was at risk. The significance of these discussions had to do with the nature of the Letter of Understanding which was concluded between the parties to the collective agreement. This Letter of Understanding constituted an agreement between the Employer and the S.J.B.R.W.D.S.U. that restrictions would be placed on the use of supervisors for work which the Union regarded as work which should be allocated to pit bosses, who were within the bargaining unit.

Counsel for the Applicants at the original hearing suggested that the Letter of Understanding should be viewed as providing some kind of guarantee that the supervisor positions would continue to exist, at least as long as the provisions of the collective agreement were in force. We did not then, and do not now, regard this as a reasonable interpretation of an agreement which was clearly aimed at limiting the numbers and future use of supervisors, as compared to in-scope employees. The document began with an acknowledgment on the part of both parties that there were "too many" supervisors.

The evidence of Mr. Hollyoak was that the concern about the ratio of supervisors to in-scope employees ceased to be significant once the Casino began operating over extended hours, since the same number of supervisors were working over longer periods. He said that by the time of the negotiations which began in 1994, the Letter of Understanding was regarded as a dead letter, and its inclusion in the package of bargaining proposals from the Union was a mistake.

We think our characterization of the Letter of Understanding as a compromise which was the culmination of discussions which began with a Union position that the number of supervisors should be reduced is well-founded in the evidence, and that the lack of clarity in the statement we made in the Reasons alluding to Ms. Wellwood was not based on a misunderstanding or misrepresentation of her evidence.

In the affidavit which was filed on behalf of the Applicants, one of the Applicants, Ms. Elaine Warne, made the following statement:

> *At the Hearing, I testified about the special relationship and discussions between me and Les Butler which resulted in my termination. My evidence was not considered individually or in the judgment and I believe that this is a breach of my right to be heard.*

Counsel for the Applicants elaborated on the significance of this statement. He conceded that there

were many common features of the situation of the Applicants, but he argued that they had given evidence which revealed differences in their experience, and in their interactions with the Employer. He alluded to the example of Ms. Warne, who had given evidence concerning her special relationship with Mr. Butler, and her discussions with him about a number of issues, including the organizing campaign among the supervisors.

In our Reasons for Decision on 17, we made the following comment:

> *A further question which counsel for the parties raised in their arguments was that of whether the application should be viewed as resting on the allegations of the Applicants as a group, or whether it is more accurately described as seven individual applications jointly presented. The possibility that individual circumstances may be reflected in an application of this kind cannot be ruled out, nor can the possibility that relief might be appropriate for one applicant but not another. In this case we do not see any basis on the evidence for differentiating between the terminations of the seven Applicants. There is no question that there were some distinctions in the nature of their relationships with Mr. Butler and other members of management. The process which was followed which resulted in the termination of employment of the Applicants was, however, an institutional one, which affected all of the Applicants in the same fashion. We do not think that the evidence supports the theory - vigorously argued by counsel for the Applicants - that the process was manipulated by Mr. Butler in a way which produced such differential results.*

In that passage, and at other points in the Reasons, we alluded to the specific experiences which the supervisors had described in their evidence. We do not think we failed to take into account those individual experiences. Our finding, as indicated in the above paragraph, however, was that the actual termination of their employment came about as part of an institutional process which had a uniform effect, and which did not differentiate between them in the ways which counsel urged us to accept.

At another point in the Reasons on 25, we made the following comment:

> *Part of the argument made by counsel for the Applicants was that the course of objectionable conduct by Mr. Butler, examples of which have been outlined above, culminated in the selection process which resulted in the expulsion of the Applicants from their employment. The plausibility of this scenario depends on the assumption that Mr. Butler had control over the selection process, a premise which is not in our view justified. Mr. Butler did have his opinions about the likely success or failure of some of the candidates, but this does not mean that he was able to determine the outcome. Indeed, we accept that if he had, at least one of the Applicants, Ms. Elaine Warne, might have been hired to a position as Floor Manager.*

This and other examples illustrate the nature of our conclusions on this point. While we acknowledged

that individual supervisors provided evidence of experiences which varied, we proceeded to make a finding that none of the individual incidents or conversations affected the uniform and undifferentiated process which resulted in the termination of the eight employees. We concluded that that process, whatever its other flaws may have been, was not tainted by anti-union sentiment, and was not subject to any manipulation in this respect by Mr. Butler. It should further be noted that, with regard to Ms. Warne herself, we accepted the evidence of Mr. Butler that, had the process been susceptible to his influence, he would have chosen Ms. Warne to fill one of the Floor Manager positions.

The final argument made by counsel for the Applicants in support of his request for reconsideration of the decision was based on an allegation that the Board had failed to apply our own criteria for determining whether a dismissal constitutes a violation of *The Trade Union Act*. He argued that the Board decision focused on the legitimacy of the reasons advanced by the Employer for reorganizing the work in the Casino, and on the relationship between the Employer and the S.J.B.R.W.D.S.U.; he said that the Board did not then proceed as we should have to consider whether there was anti-union animus on the part of the Employer. He argued that this defect was manifested by a failure on the part of the Board to consider a number of issues on which evidence was presented, namely the level of severance payments which were offered to the terminated employees, the related issue of the payments which were made to the Employer as a result of discussions with the provincial government, and the Letter of Understanding, to which we have alluded earlier.

In our Reasons for Decision, the Board outlined, we think correctly, the approach which the Board has generally used in assessing whether a decision to terminate employment is tainted by anti-union sentiment on the part of an employer. We quoted, for example, the following passage from our decision in *United Steelworkers of America v. Eisbrenner Pontiac Asuna Buick Cadillac GMC Ltd.*, [1992] 3rd Quarter Sask. Labour Rep. 135; LRB File Nos. 161-92, 162-92 & 163-92, at 139-140:

> *When it is alleged that what purports to be a lay-off or dismissal of an employee is tainted by anti-union sentiment on the part of an employer, this Board has consistently held, as have tribunals in other jurisdictions, that it is not sufficient for that employer to show that there is a plausible reason for the decision. Even if the employer is able to establish a coherent and credible reason for dismissing or laying off the employee - and we are not persuaded that the reasons put forward by Eisbrenner are entirely convincing - those reasons will only be acceptable as a defence to an unfair labour practice charge under Section 11(1)(e) if it can be shown that they are not accompanied by anything which indicates that anti-union feeling was a factor in the decision.*

A review of the jurisprudence of the Board in relation to this issue would reveal that the Board has

been alert to any sign that the question of trade union representation has played a part in a decision to terminate the employment of an employee or group of employees. As the quotation above suggests, it is not enough that an employer can demonstrate that there was a legitimate or plausible reason underlying the dismissal.

Counsel for the Applicants argued that the Board should have addressed explicitly the issues he listed, which he regarded as important ones. In *International Union of Elevator Constructors v. Weinstein*, [1989] B.C.I.R.C. 244-03, the British Columbia Industrial Relations Council made the following observation:

> *It is trite to say that a panel is under no obligation to refer and address each and every argument made by parties appearing before it, and mere failure to mention an argument made or issue raised by the parties is not enough, per se, to justify re-opening a case. But to disregard an important issue that might prove to be determinative of the dispute is to raise the spectre of procedural unfairness and a denial of natural justice (see, for instance, Bruce Nobbs, IRC No. C33/88, reconsidered at C244/88). Where the failure to deal with an issue or an argument effectively robs the parties of a fair hearing (and this will be determined by the facts of each case) the reconsideration panel may decide the issue itself, but will ordinarily refer it back to the original panel for determination.*

Having further considered the issues mentioned by counsel for the Applicants, we are not of the view that they were improperly ignored in our decision. With respect to the Letter of Understanding, we have already stated that the reference to the supervisors contained in that document had a different character than that put forward by counsel for the Applicants. The terms and conditions of the supervisors themselves were not covered in the collective agreement which was being negotiated in 1993, as they were out of scope of the bargaining unit represented by the S.J.B.R.W.D.S.U.. The Letter of Understanding had its origins in a position taken by the Union, and ultimately accepted by the Employer, which must be seen as adverse to the interest of the supervisor group. We do not think the Letter of Understanding does anything to support the position of the supervisors in this context.

Counsel argued that there was evidence at the hearing of discussions between the Employer and the Government of Saskatchewan which resulted in payments being made to the Employer to cover the transition costs they would incur in making modification to the Casino operation so that it would be able to compete with the new Casino Regina operated by the Saskatchewan Liquor and Gaming Commission. He argued that the payment of this money provided a powerful incentive to the Employer to harbour an anti-union sentiment in relation to the supervisors, because if they were represented by a trade union, they would be able to achieve severance payments which were more advantageous than the

ones which they were ultimately offered, which were based on the requirements of *The Labour Standards Act*, R.S.S. 1978, c. L-1.

There was evidence given at the hearing that the discussions between the Government of Saskatchewan and the Employer did result in payments to the Employer of something like 2.5 million dollars. There was, however, nothing in this evidence which could possibly support the kind of speculation which counsel has invited us to participate in. There was nothing to show any particular relationship between the level of this fund and the severance payments which were ultimately offered to the terminated employees, and nothing to suggest that representation by a trade union would have made any significant difference. We cannot accept that the existence of this fund provided a "powerful incentive" to anti-union activity. We are not confident that this argument was made in these terms at the original hearing. In any case, we do not think the omission of this issue from our Reasons constitutes an indication that we failed to consider an issue so crucial that it would have altered our overall conclusions.

It is true that there was considerable discussion in our Reasons for Decision of the relationship between the Employer and the S.J.B.R.W.D.S.U., and between that Union and the Applicants. We do not view this discussion as irrelevant. Some aspects of these relationships provided an explanation for actions on the part of representatives of the Employer which might otherwise be suspect. In other respects, it is necessary to consider the role of that Union in these events to assess arguments which were made on behalf of the Applicants.

It is true that we did not accept the argument that the decision made by the Employer that the position of supervisor should be terminated, and that eight of the relevant supervisors would not be hired to take Floor Manager positions, was tainted by anti-union sentiment on the part of the Employer. This does not signify that we did not consider these arguments, or that we did not seriously consider the possibility that anti-union animus might have been a factor in these decisions.

We have concluded that our decision represents a fair and thorough assessment of the evidence and argument presented in relation to these applications, and that there are no grounds on which to undertake a rehearing or further hearing of evidence.

SASKATCHEWAN CONSTRUCTION LABOUR RELATIONS COUNCIL INC., Applicant and CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF SASKATCHEWAN INC., Respondent and SASKATCHEWAN PROVINCIAL BUILDING AND CONSTRUCTION TRADES COUNCIL, Interested Party

And

CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF SASKATCHEWAN, Applicant and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, Respondent and SASKATCHEWAN CONSTRUCTION LABOUR RELATIONS COUNCIL INC., Interested Party

LRB File Nos. 023-94 & 039-95; April 4, 1996
Chairperson: Beth Bilson; Members: Brenda Cuthbert and Gloria Cymbalisty

For S.C.L.R.C.: Larry S. Seiferling, Q.C.
For C.L.R.A.: Alan G. McIntyre
For Building Trades Council & Carpenters: Neil R. McLeod

Construction industry - Meaning of "unionized" for purposes of ratification vote and vote under s. 11 of *The Construction Industry Labour Relations Act, 1992* - Board outlining criteria for determining whether employers are entitled to vote.

Employee - Unionized employee - Board reviewing meaning of terms "unionized" under *The Construction Industry Labour Relations Act, 1992.*

Employer - Unionized employer - Board outlining criteria for determining whether employers are "unionized" within meaning of *The Construction Industry Labour Relations Act, 1992.*

***The Construction Industry Labour Relations Act, 1992*, ss. 2(r), 2(s), 11 and 30.**

REASONS FOR DECISION

Beth Bilson, Chairperson: Since the proclamation of *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. 29.11, this Board has been asked to consider a number of questions related to the establishment of the scheme of collective bargaining which is contemplated in that statute. The central feature of this statutory scheme is that unionized employers in the construction industry are to be represented for the purpose of bargaining collectively by a representative employers' organization chosen for each trade division.

In the first instance, pursuant to s. 10 of *The Construction Industry Labour Relations Act, 1992*, the

representative employers' organization in each trade division is designated by the Minister of Labour. In February of 1993, the Minister of Labour named the Construction Labour Relations Association of Saskatchewan Inc. ("C.L.R.A.") as the representative employers' organization in the vast majority of the trade divisions identified under the *Act*.

Section 11 of *The Construction Industry Labour Relations Act, 1992* provides that any replacement of the representative employers' organization or organizations designated by the Minister must be made through an application to this Board by an organization claiming to represent the majority of unionized contractors in a trade division. On January 28, 1994, the Saskatchewan Construction Labour Relations Council Inc. ("S.C.L.R.C.") filed an application, designated as LRB File No. 023-94, seeking to replace the C.L.R.A. as the representative employers' organization in fourteen trade divisions.

At that time, the S.C.L.R.C. applied to this Board for an Order which would enjoin the C.L.R.A. from conducting further collective bargaining pending the determination of the application. In Reasons for Decision dated February 4, 1994, the Board refused to grant such relief.

At a subsequent hearing relating to the same application, the parties asked the Board to consider whether certain employers could be considered to fall within the definition of "unionized employer" set out in *The Construction Industry Labour Relations Act, 1992* for the purposes of the application. In Reasons for Decision dated June 7, 1994, we stated a number of criteria for identifying "unionized employers" within the meaning of the *Act*. Further reference will be made to these criteria later in these Reasons.

At the time of the hearing we have just described, the parties intimated that there might be further issues which the Board would be required to consider prior to determining the application designated as LRB File No. 023-94, though they seemed to be in agreement that the Board should ultimately direct that a vote be conducted to determine whether the S.C.L.R.C. enjoys the support of the majority of unionized employers in the trade divisions listed in the application.

In the application designated as LRB File No. 039-95, the C.L.R.A. and the U.B.C.J.A. have jointly submitted to the Board several questions related to the process for ratification of a collective agreement which these parties concluded in June of 1994. The parties to this application asked the Board to

determine the meaning of the terms "unionized employer" and "unionized employee" for the purpose of deciding which employers should have the franchise in the ratification vote.

These questions were also identified by the parties as requiring determination by the Board in order to allow the application designated as LRB File No. 023-94 to proceed. For this reason, the parties agreed that these issues should be presented to the Board in relation to both applications at the same time.

Counsel for the S.C.L.R.C. advanced a preliminary argument concerning the status of the Saskatchewan Provincial Building and Construction Trades Council in relation to the applications. He argued that the questions arising on both applications properly concern only the unionized employers covered by the provisions of *The Construction Industry Labour Relations Act, 1992*, and that the building trades unions should have no standing to participate in the proceedings before the Board. He said that the issue in LRB File No. 023-94 was the choice of a bargaining agent by the unionized Employers, and that the Unions should not be allowed to intervene in this choice any more than an employer ought to be allowed to intervene in the choice of a bargaining agent by employees. In the case of LRB File No. 039-95, he argued that the question of who should be allowed to cast a vote for or against the ratification of a collective agreement is a matter which should be regarded as an internal matter for the organizations of unionized employers created by the *Act*.

A similar objection was raised to the participation of the building trades unions at an earlier stage in the progress of LRB File No. 023-94. In response, the Board made the following comment at [1994] 2nd Quarter Sask. Labour Rep. 190 at 194:

> *The Board accepts as a general proposition that it would be inappropriate to permit trade unions representing employees in the construction industry to participate as full parties in the determination of which organization is to represent employers at the bargaining table. Though the building trades unions may feel that their interest supports a preference for one organization over another, we agree with counsel for the SCLRC that Section 5 of The Construction Industry Labour Relations Act, 1992 indicates that the choice of bargaining agent is to be made by unionized employers.*
>
> *In this case, however, we were persuaded that the building trades do have an interest in how this Board describes the basic scheme laid out in the statute. Since the Board has not had a previous opportunity to consider the question of who should be considered to fall within the definition of "unionized employer" under the Act, the interpretation of the provisions of the statute in this respect may have a general impact on the evolution of the collective bargaining structure under the legislation. Furthermore, counsel for the SCLRC overstates the case when he says there are no*

> *circumstances under which the Board would allow an employer to make representations on aspects of the selection of a bargaining agent by employees. On a certification application, an employer would certainly have the right to make submissions and present evidence concerning the issue of whether an applicant is a "trade union" as defined in Section 2(l) of The Trade Union Act. And employers can - and frequently do - make representations about whether particular persons fall within the definition of "employee" in Section 2(f) of the Act, an issue which has, on occasion, a significant impact on the extent of the franchise within a proposed bargaining unit.*

We are still of the view that the building trades unions have an interest in the overall direction of the statutory scheme embodied in *The Construction Industry Labour Relations Act, 1992* which justifies permitting them to make representations concerning the general interpretation of the statute. As we stated in the passage quoted above, we accept that the building trades unions are not entitled to exercise an influence over the actual selection of a bargaining agent by the unionized employers. They do have an interest, however, in the conclusions the Board may reach about what constitutes a "unionized employer" or a "unionized employee," and for this reason we are not prepared to deny them standing to make representations on the questions before us here.

In this connection, it is perhaps somewhat unusual to permit the participation of the U.B.C.J.A. as a co-applicant in LRB File No. 039-95. We are not persuaded, however, that in these circumstances, this confers on them any inappropriate status. The submission of a joint reference of dispute in this situation may be seen as a useful way of putting before the Board an issue of interpretation of provisions of the statute which are of general significance to all of the parties who have appeared before us. We do not think the participation of the U.B.C.J.A. by this means puts the S.C.L.R.C. at a disadvantage in this respect.

A brief summary of the events which led to the filing of the application designated as LRB File No. 039-95 may be in order at this point. Once the collective agreement had been concluded between the C.L.R.A. and the U.B.C.J.A., the representative employers' organization proceeded to conduct a ratification ballot among the unionized employers in the Carpenter Trade Division.

A notice was circulated to employers identified by the C.L.R.A. as unionized employers in the trade division, which was to the following effect:

Notice of Meeting - Carpenter

A meeting of the Unionized Employers in the Carpenter Trade Division respecting ratification of a Collective Bargaining Agreement, "Saskatchewan Provincial Carpenters' Agreement" will be held as follows:

Date:	*June 13, 1994*
Time:	*10:00 a.m.*
Place:	*Fieldhouse (Davidson Esso)*
	Davidson, Saskatchewan

Agenda

To review and if considered appropriate, to ratify the proposed Collective Bargaining Agreement between CLR and the Carpenters' Union.

A copy of the proposed Collective Bargaining Agreement is available for viewing by Unionized Employers in the Carpenters' Trade Division at the office of CLR during normal business hours or may be purchased at the price of $10.70 (including $0.70 GST). As the Agreements are not for public use, you will be required to sign a Confidentiality Statement prior to viewing or purchasing copies.

You are eligible to vote provided your Firm:

(i) has been certified through an Order of the Labour Relations Board or has recognized a Trade Union as the Agent to bargain collectively on behalf of your Unionized Employees; and

(ii) employs one or more Unionized Employees on the date the ratification vote is taken.

Please take note as follows:

1. *A Member of the Unionized Employer must attend in person for the Unionized Employer to be eligible to vote on the ratification of the Collective Bargaining Agreement.*
2. *Proxies will not be permitted.*
3. *A Statutory Declaration will have to be sworn respecting eligibility to ratify as a Unionized Employer which includes, for those Unionized Employers which have voluntarily recognized a Trade Union, identification of supporting evidence of voluntary recognition.*
4. *The eligibility to vote will be verified.*
5. *After the vote has been counted, the results will be made public.*
6. *The meeting will be a closed meeting and only Members of Unionized Employers will be permitted to attend.*

DATED at Regina, Saskatchewan, this 6th day of June, 1994.

CLR Construction Labour Relations
Association of Saskatchewan Inc.
Per: _____

Mr. Sid Matthews, the President of the C.L.R.A., said that prior to the meeting of which the contractors had been notified, he was contacted by Mr. Fraser Sutherland, who was making

representations on behalf of contractors in the drywall business. Mr. Sutherland argued that the interests of the drywall contractors had not been taken into account sufficiently in the collective agreement which had been reached. Mr. Matthews agreed to delay the ratification meeting for a week or so. He discussed the issue with members of the bargaining committee of the C.L.R.A., and with the U.B.C.J.A.. It was agreed that an appendix would be added to the agreement which would deal with the specific interests of the drywall contractors.

According to Mr. Matthews, Mr. Sutherland undertook to recommend to the drywall contractors that they ratify the collective agreement with the appendix. He did not in the end make such a recommendation and told Mr. Matthews that he had reservations about the ratification process as a whole.

Mr. Matthews said that this series of exchanges with Mr. Sutherland had led him to have some anxiety about determining the eligibility of employers to vote on the ratification ballot.

The employers who were present at the ratification meeting, which took place on June 22, were asked to submit with each ballot a statutory declaration to the effect that they were covered by a certification Order issued by this Board, and that they employed a unionized employee on the date of the ratification vote.

At the meeting, according to the evidence of Mr. Darrell Kincaid, the President of Kincaid Interiors Ltd., there was some discussion of the meaning of these criteria. Mr. Kincaid said that he had received legal advice saying that his firm would be eligible to cast a ballot if they were covered by a certification Order, and if they had employed a unionized employee within the year preceding the date of the vote. This latter criterion was consistent with the findings of the Board in our earlier decision concerning LRB File No. 023-94.

Mr. Kincaid said that there continued to be some doubt about the interpretation of these criteria. After the ratification meeting, Mr. Kincaid had a further conversation on the subject with Mr. Matthews. Mr. Matthews decided to ask each contractor to forward the names of any unionized employees they had employed as of the date of the ratification meeting.

Mr. Kincaid subsequently sent Mr. Matthews the following letter dated July 13, 1994:

Mr. Sid Matthews

CLR Construction Labour Relations
Association of Saskatchewan Inc.
P.O. Box 3205
Regina, SK S4P 3H1

Dear Sir:

Re: CLR Construction Labour Relations
Association of Saskatchewan Inc.

We have your request for the name of an employee working for our unionized business in the last year.

As requested, we provide you with the name of Conrad Smythe, 3614 Hill Avenue, Regina, Sask.

This information is provided to you solely to answer your inquiry. We presume the information will not be passed to anyone else.

In providing the information to you, we are not acknowledging that CLR is an appropriate organization to represent us, nor that CLR is an employer's organization, nor are we acknowledging any requirement to pay monies to CLR at this time.

Yours very truly,

Darrell Kincaid
President

As a result of the discussion which had taken place at the meeting, and of his conversation with Mr. Kincaid, Mr. Matthews said that he realized there might still be some confusion about what might constitute a "unionized employee" for the purpose of the statutory declaration which Mr. Matthews had asked the contractors to sign. He decided to obtain a further perspective on this question by consulting Mr. Bob Todd, the business agent of the U.B.C.J.A.. Mr. Todd provided Mr. Matthews with a list showing what status each contractor had as far as the Union was concerned. It is not necessary to reproduce all of the information which was provided by Mr. Todd; the entry concerning Kincaid Interiors Ltd. provides an example of the format and nature of this information:

KINCAID INTERIORS LTD.

CERTIFIED.

They have not remitted any dues or benefits to the Union for years. Submit "nil" reports. The Union has not dispatched any Union member to them for years.

They have not signed a new Collective Agreement since 1984. They do not recognize the 1982-84 Agreement.

We should perhaps comment at this point on one of the issues raised by counsel for the S.C.L.R.C.. He suggested that it was improper for Mr. Matthews to consult Mr. Todd concerning these issues, and that this decision on the part of Mr. Matthews demonstrates that his organization cannot effectively represent the interests of the unionized contractors. He pointed specifically to a request in the letter from Mr. Kincaid, which was quoted above, that the information concerning the identity of the unionized employee named in the letter should not be shared with anyone else.

Mr. Matthews said that he did not really note this request, and it would perhaps have been more courteous of him to have told Mr. Kincaid that he proposed to talk to Mr. Todd. In general, however, we can see nothing improper about the consultation Mr. Matthews had with Mr. Todd. For reasons we will come to shortly, the confusion which arose over the scope of the term "unionized employee" was perfectly understandable under the circumstances. It was reasonable for Mr. Matthews to think that one of the things this term might conceivably refer to was a connection between the employee and a trade union, and that the Union might be in possession of information worthy of consideration in this respect.

One of the unique features of the construction industry is the control which the building trades unions maintain over the supply of employees. In an industry where most relationships between employees and employers are of a transient nature, the unions have found that participation in this aspect of the relationship is an important means of protecting union bargaining rights.

We do not interpret the actions of Mr. Matthews as abdicating to the Union any responsibility which was properly that of his organization. Rather, we accept that he sought the advice of Mr. Todd as a source of information which might assist the C.L.R.A. in determining who ought to be permitted to vote on the ratification question.

In spite of the information provided by Mr. Todd, and by the contractors themselves, Mr. Matthews felt unable to come to any firm conclusion about the meaning of the terms "unionized employer" and "unionized employee," either in the context of the ratification of the collective agreement with the U.B.C.J.A., or in the context of the application by the S.C.L.R.C.. Indeed, in his evidence he indicated that the information merely served to suggest that there might be a variety of criteria relevant to the resolution of this issue.

The general definitions for the terms "unionized employee" and "unionized employer" are set out in ss. 2(r) and 2(s) of the *Act* as follows:

> *2(r) "unionized employee" means an employee who is employed by a unionized employer and with respect to whom a trade union has established the right to bargain collectively with the unionized employer;*
>
> *(s) "unionized employer" means an employer in a trade division with respect to whom a trade union has established the right to bargain collectively on behalf of the unionized employees in that trade division:*
>
> > *(i) pursuant to an order of the board made pursuant to clause 5(a), (b) or (c) of The Trade Union Act; or*
> >
> > *(ii) as a result of the employer's having recognized the trade union as the agent to bargain collectively on behalf of those unionized employees.*

Additional definitions which are relevant to the two situations which gave rise to these applications are provided in ss. 11(1) and 30:

> *11(1) In this section, "unionized employer" means a unionized employer who employs one or more unionized employees on the day on which an application pursuant to this section is made.*
>
> ...
>
> *30 Every vote taken among unionized employers in a trade division concerning the ratification of a collective bargaining agreement is restricted to unionized employers in that trade division who employ one or more unionized employees on the day the vote is taken.*

In our earlier Reasons for Decision related to LRB File No. 023-94, we summarized as follows our understanding of the combined effect of the definitions of "unionized employer" in ss. 2(s) and 11(1), at [1994] 2nd Quarter Sask. Labour Rep. 190 at 195:

> *It seems clear to us, when the two provisions are examined together, that the definition in Section 11 is intended to restrict the use of the term "unionized employer" in that section to those unionized employers who, in addition to the criteria set out in Section 2(s), meet the additional requirement that they employ at least one unionized employee "on the day on which an application pursuant to this section is made."*

In that decision, we addressed the significance of the word "employs" in the definition in s. 11(1) at 197:

> *It is important that the Board support legislative goals which are clearly articulated in a statutory provision. At the same time, we agree that the Board should make an*

> *attempt to arrive at a rational interpretation of this provision which does not have absurd results, and we are of the view that the consequences of a restrictive interpretation which were pointed out by counsel for the SCLRC in his argument fall into this category. It is difficult to imagine that the legislature intended to have the important entitlement to participate in the choice of a representative employers' organization determined by so fortuitous a consideration as whether an employer had someone actually working in construction on the single day when an application is filed under Section 11, or by the seasonal nature of certain types of construction activity.*
>
> *In considering which employees will be allowed to participate in certain decisions under The Trade Union Act, in connection, for example, with votes on applications for rescission, or on application to raid by a trade union, the Board has considered an employment relationship to be characterized by signs which go beyond the issue of whether an employee was actually at work when an application was filed. The Board has, for example, included among the employees who should be allowed to take part in a vote those who still enjoy recall rights, even if they have been laid off and therefore not working for a considerable period; see, for example, Calvin Ennis and Con-Force Structures Ltd., LRB File No. 185-92; International Brotherhood of Carpenters and Joiners v. Con-Force Structures Ltd., LRB File No. 188-92; and Robert Schan v. Little Borland Ltd., LRB File Nos. 221-85 and 275-85.*

The Board went on to say at 198:

> *In keeping with the historic origins, and what we understand to be the goals of the statute, we would therefore favour an interpretation of the definition of "unionized employer" in Section 11(1) which does not restrict the enumeration of the employers to be considered to a snapshot taken on a single day, which may not be typical of the year as a whole, and which would certainly routinely exclude whole groups of employers from participation.*

On the other hand, the Board rejected at 199 an interpretation of the concept of "unionized employer" which would include all employers who had ever been the subject of a certification Order issued by this Board:

> *We have concluded that the goals of the Act would not be well-served overall by an interpretation of the term "unionized employer" which would serve to confer the franchise on employers whose involvement with the Saskatchewan construction industry is tangential, purely formal or of ancient date. We agree that the concept of employment in Section 11(1) should be given a broad enough meaning to prevent absurdity, and that it should comprehend employment relationships which may still have some notional existence even though there are no employees actually at work on the particular day in January on which an application is filed. We think, however, that some boundary has to be drawn around such relationships in order to exclude relationships which are too tenuous to have any practical meaning. We therefore propose to recognize as satisfying the criterion set out in Section 11(1) unionized employers who have actually employed one or more unionized employees within the period of one year prior to January 28, 1994, the date on which this application was filed.*

The Board ultimately summarized as follows, at 207-208, the identifying characteristics of a "unionized employer" for the purpose of participating in an application under s. 11 of *The Construction Industry Labour Relations Act, 1992*:

- *The definition includes unionized employers who have actually employed one or more unionized employees within the period of one year prior to January 28, 1994.*
- *The definition does not include employers who may hold Saskatchewan certification orders or have accorded voluntary recognition to a trade union within Saskatchewan in the past, but who have not employed unionized employees within Saskatchewan within the year prior to January 28, 1994.*
- *The definition includes those unionized employers described in Section 2(s)(i) who meet the above criteria, as well as those described in Section 2(s)(ii) who meet those requirements; in the case of the latter, this is subject to any requirement for further determination of the existence of any particular relationship which is alleged to be based on voluntary recognition.*
- *In order to participate in the selection of the representative employers' organization for a trade division, an employer must fall within the definition of the term "unionized employer" in that trade division.*
- *The definition of the term "unionized employer" includes unionized employers who, at the time the Act was passed, had an association with a spin-off entity, though it does not include the spin-off entitles themselves.*

As Mr. Matthews discovered when he attempted to apply these criteria to the process of holding a ratification vote, this list of criteria does not answer all of the questions which might be asked about who should be considered a "unionized employer" or a "unionized employee." The additional questions which arose in the course of that process have led the parties to seek the assistance of the Board in proceeding to the next steps of both the ratification of the agreement with the U.B.C.J.A. and the application under s. 11.

It will be noted that to some extent the combined effect of the definitions in s. 2(r) and s. 2(s) is a circular one. A "unionized employee" and a "unionized employer" are defined in terms of each other. It is clear that one of the requisites in both definitions is that a "trade union has established the right to bargain collectively" on behalf of employees. The definition of a "unionized employer" in s. 2(s) recognizes that this may occur pursuant either to a certification Order issued by this Board or through the process of voluntary recognition.

With respect to the latter qualification, we made the following comment in our earlier Reasons for Decision related to LRB File No. 023-94, at [1994] 2nd Quarter Sask. Labour Rep. 190 at 200:

> *Under The Trade Union Act, the status of voluntary recognition has been shrouded in uncertainty and remains one of the few significant issues on which there has been no extensive comment by the Board. The Board has provided no exact definition of what constitutes voluntary recognition. Though there have been some cases in which voluntary recognition has been viewed as conferring very limited status under the Act, it is clear from the decision in United Food and Commercial Workers v. Canada Messenger Transportation Systems Ltd., LRB File No. 091-90, that neither a voluntary recognition, nor a collective agreement concluded as a result, can withstand a challenge from a duly certified trade union. The inclusion of relationships based on voluntary recognition among those which have formal implications under The Construction Industry Labour Relations Act, 1992 thus presents the Board with a question of some novelty, that of what is necessary to establish that a voluntary recognition actually exists.*
>
> *We are unable at this point to offer a comprehensive catalogue of the clues which might serve to identify a voluntary recognition which falls within the scheme of the Act. There may be many cases in which the parties are able to agree that a relationship based on voluntary recognition has been established, and may be able to point to clear indicia of such a relationship, such as signed collective agreements. In other cases, it may be necessary to have the question put before the Board for a determination whether a particular employer has voluntarily recognized a trade union.*

Counsel for the S.C.L.R.C. argued that the meaning of these definitions is clear: once a trade union has acquired the right to bargain collectively on behalf of employees, either by voluntary recognition, or under a certification Order, the employer falls within the scope of the term "unionized employer." The implication of this would be that, subject to the criteria set out earlier, which are relevant to s. 11(1) and s. 30, and any possible uncertainties related to the concept of voluntary recognition, the presence of a certification Order would conclusively entitle an employer to be included within the scope of the term "unionized employer."

Mr. Todd gave considerable evidence concerning the difficulties which the building trades unions had experienced during the period after the repeal of the previous *Construction Industry Labour Relations Act*. Counsel for the S.C.L.R.C. argued that these difficulties should not affect the inclusion of these employers within the scope of the definition of "unionized employer." Whatever problems the unions had encountered in asserting their rights, he argued that these did not mean that the bargaining rights under the certification Orders did not exist. He said that the onus lay on the building trades unions to ensure that their rights were respected; the fact that there were barriers in their way did not mean that they had not "established the right to bargain collectively."

Counsel for the building trades unions and for the C.L.R.A. argued that the word "unionized" must mean more than the existence of a certification Order which had long since ceased to have any practical effect.

In a decision in *International Union of Operating Engineers, Local 870 v. Dominion Company Inc.; United Brotherhood of Carpenters and Joiners, Local 1985 v. PCL Industrial Constructors Ltd.*, [1994] 1st Quarter Sask. Labour Rep. 146; LRB File Nos. 158-93 & 176-93, we reviewed the events which led to the passage of *The Construction industry Labour Relations Act, 1992*. The Board made the following comment on 149 concerning the period between the repeal of the previous statute and the passage of the new one:

> *For a variety of reasons, the legislation was repealed in 1983, before the end of the stated term of the second set of collective agreements. The death of the statute plunged collective bargaining in the construction industry into chaos from which it does not yet seem to have recovered. One of the factors which contributed to this confusion was a fundamental difference of opinion between trade unions and unionized employers over the fate of the agreements which had been reached during the period when The Construction Industry Labour Relations Act was in effect.*

The issue which preoccupied the Board in that decision was the significance of the transition provision, s. 37 of *The Construction Industry Labour Relations Act, 1992*, in relation to the effect of the collective agreements which had been concluded under the auspices of the previous statute prior to 1984. These agreements had been the subject of ongoing controversy after 1984, and it was not until 1990 that the Saskatchewan Court of Appeal upheld a decision of this Board that the terms and conditions set out in those agreements continued in effect after the repeal of the statute.

In the *Dominion Company Inc.; PCL Industrial Constructors Ltd.* decision, *supra*, the Board commented on the status of the agreements in the light of s. 37. The Board concluded that the word "termination" as used in *The Construction Industry Labour Relations Act, 1992* has the same meaning as that term as used in *The Trade Union Act*, and made the following observation at 166:

> *This does not mean that it is without further significance, however. Though the agreement as such does not continue in force, the terms and conditions embodied in it provide the basis for the dealings between the parties until collective bargaining has reached some kind of conclusion. The obligations of an employer expressed in Sections 11(1)(m) and 11(1)(c) of The Trade Union Act continue. According to the jurisprudence of this Board, the only added right which an employer acquires by giving a notice to terminate a collective agreement rather than a notice to revise it is that of eventually making unilateral changes in the terms and conditions of employment when a reasonable course of good faith bargaining has failed to bear*

any fruit and the parties are at an impasse.

Mr. Todd described many of the problems which had been encountered by the building trades unions after the repeal of the original *Construction Industry Labour Relations Act*. He said that many contractors covered by certification Orders refused to abide by the provisions of collective agreements which had been concluded earlier, and often refused to negotiate new agreements. The system which had been in place for the recruitment of employees through the union hiring halls was often ignored, and it was difficult for the unions to discover who was being employed and to ensure that they paid union dues or got a dispensation from the union to work outside the terms of a collective agreement.

The evidence given by Mr. Todd was in some respects confirmed by that of Mr. Kincaid. Mr. Kincaid said that one of his reasons for raising with Mr. Matthews the question of what might identify a "unionized employee" for the purpose of s. 30 was that he himself was uncertain about the status of the employee he identified in his letter of July 13, 1994. He said that he had not hired the employee through a union hiring hall, but he understood the employee to have been at one time a union member. The employee had worked for him fairly steadily, though not continuously, from 1980 on. Mr. Kincaid said that he assumed the employee had paid union dues at one time, although he did not remember any investigation of that point on his part. He said that the other employees of his firm, who might number between one and ten at any time, had been hired directly, and not dispatched by the Union; he did not think there were any others who were members of the Union. Mr. Kincaid said that he sets wage rates by discussing the matter directly with the employees.

One of the distinctive features of the construction industry is the method which has evolved of providing pension, disability and health benefits for employees. Because of the transience of the relationship between employees in this sector and any one employer, employers make contributions to a general fund which is supervised jointly by representatives of the unions and employers. Mr. Kincaid has himself been on the Board of Trustees for the Insurance Benefit trust Fund for Alberta and Saskatchewan which was established to support insurance benefits for carpenters in the two provinces.

After the repeal of the previous *Construction Industry Labour Relations Act*, the U.B.C.J.A. reached a tentative agreement with the drywall contractors in 1985. An agreement, dated December 5, 1986, was made by the Board of Trustees in the following terms:

NOW THEREFORE BE IT RESOLVED that the Trustees do hereby waive such right

> *as they may have had to contributions for work done by members of the Union between May 1, 1984 and the effective date of any new Collective Agreement entered into between the Carpenters' Union and the Drywall Contractors, except for such contributions as have been voluntarily made by certain employers.*

As it turned out, the collective agreement was never ratified by the members of the Union. Mr. Kincaid said that the waiver agreement which was arrived at by the Board of Trustees was interpreted as exempting the drywall contractors from further contributions indefinitely, since the agreement had never been executed.

Counsel for the S.C.L.R.C. argued that the criterion which distinguishes employers who fall within the definition of "unionized employer" is a simple one - that the employer either recognize a trade union as enjoying bargaining rights on behalf of employees or that a trade union have obtained a certification Order from this Board. A "unionized employee," according to this argument, is an employee on whose behalf a trade union has established bargaining rights, either under a certification Order or by voluntary recognition.

We have to say there is considerable force in this argument in some respects. It would establish a clear means of determining who constitutes a "unionized employer," subject to the methods we suggested in our earlier decision for deciding whether an employment relationship is in existence on the relevant date.

Indeed, a certification Order is nearly always a useful proxy for the bargaining rights which a trade union may be said to have established, and in most circumstances, we would have little hesitation in saying that the certification Order provides a sufficient indication that an employer is "unionized."

We say this because a certification Order generally confers upon a trade union rights which may be said to have some substance. It creates a relationship with an employer in which that employer is obliged to deal with the union exclusively concerning the terms and conditions of employment for employees, and in which the trade union is entitled to expect that the employer will refer to the union concerning all matters which might have implications for those terms and conditions of employment. This relationship is typically characterized by the negotiation of issues leading to the conclusion of a collective agreement, the observance of any terms and conditions already agreed upon, the enforcement of union security provisions, and the resolution of grievances and disputes, among other things.

It is not necessary to reiterate at length what the Board has said on previous occasions about the unique features of the construction industry. It is sufficient to remark that, because of these unique characteristics, trade unions in the construction industry play a somewhat different role than in ordinary industrial settings. The concept of union security in the construction industry, for example, can only be meaningful if the union is looked to as the source of employees; the usual union security provision under which employees are required to join the trade union within a particular period after entering into their employment would be no protection for unions in the construction sector, as working relationships often last a very short time. The union hiring hall has been the primary mechanism for ensuring that union security obligations are met.

The union also plays a different role in relation to the administration of pension and insurance benefits. A typical structure for the funding and allocation of these benefits was described in the evidence of Mr. Kincaid.

The granting of a certification Order does not ensure that there will never be a dispute between the parties to the collective bargaining relationship, or that it will not be necessary for one party, usually the trade union, to assert the rights established by the certification Order through the grievance procedure, by an application to this Board or in some other way. On a number of occasions, we have upheld the principle that a trade union must stake some timely claim in order to protect or assert these rights.

In the circumstances which have obtained in the construction industry since 1984, it is clear that the existence of a certification Order is not in itself any indication that the collective bargaining relationship created by the Order displays the concomitant characteristics one might ordinarily expect. In at least some cases, even though a certification Order was obtained at some time in the past, nothing which could be said to constitute a collective bargaining relationship now exists. Mr. Kincaid was admirably candid in his evidence that he does not resort to discussions with the Union to establish the terms and conditions of employment for his employees, that he has not within the time covered by his memory of events hired employees through the Union hiring hall, that he regards his firm and others to be exempted from contribution to the insurance benefit fund, and that he does not know whether the only employee he has identified as a candidate for inclusion within the definition of "unionized employee" still has a union membership or pays dues to the Union. It is possible to conclude from the document prepared by Mr. Todd, and from the evidence of Mr. Matthews, that there are other

employers who have had a similar pattern of dealings with the certified trade unions in the years since 1984.

In this environment, we have concluded that it is not possible to assume, as we might ordinarily, that the certification Order is a sign that a trade union has actually "established the right to bargain collectively." The "right to bargain collectively" is, in our opinion, a term which describes the existence of a relationship which includes two parties. If the trade union has in a general sense a responsibility to assert the rights which come into being by virtue of the certification Order, an employer has a similar obligation to observe the requirements of the relationship, notably to bargain with the trade union in good faith, and to recognize the trade union as the exclusive voice of the employees in relation to terms and conditions of employment. Where the certification Order has been allowed to become empty of any substantive consequences, it is, in our view, necessary to look to alternative or additional criteria for deciding whether an employee or employer should be regarded as "unionized."

There are a number of features which are common to what might be described as "living" collective bargaining relationships in the construction industry. Relating them to the relevant provisions of *The Construction Industry Labour Relations Act, 1992*, they may be summarized as follows:

- That this Board has at any time granted a certification Order covering the employer and the trade union;
- That, in the terms of s. 11(1) or s. 30, the employer has, within the year preceding the date of the application in question, employed at least one employee who is a member of the trade union or pays dues to the trade union;
- That, within the year preceding the filing of the application in question, the employer has employed an employee whose most recent hiring was done through being dispatched by the trade union;
- That the employer has contributed within the year preceding the filing of the application to a pension fund or insurance benefit fund in whose administration the trade union is involved;
- That the employer has contributed within the year preceding the filing of the application to a training or apprenticeship fund in whose administration the trade union is involved;
- That the employer is a signatory to a collective agreement which they currently

recognize as binding upon them;

- That the employer has, within the year preceding the filing of the application, voluntarily agreed to abide by the terms of a collective agreement to which the trade union is a signatory; and
- That the employer has, within the previous year, engaged in negotiations with the trade union concerning the terms and conditions of employment of any employee, or concerning a dispute or grievance related to the terms and conditions of employment of any employee.

In our view, the existence of any three of these features would provide sufficient indicia that a genuine bargaining relationship exists, and that the term "unionized" may be regarded as being of some significance.

Counsel for the S.C.L.R.C. argued that to deprive any of the employers who are named in a certification Order of the opportunity to participate in either the ratification of the collective agreements or the choice of bargaining agent would be to disenfranchise them in connection with decisions by which they will clearly be affected. In our previous Reasons for Decision relating to LRB File No. 023-94, the Board commented on a similar argument which was raised concerning the standing to vote of certified employers who are not currently active in the province of Saskatchewan, at [1994] 2nd Quarter Sask. Labour Rep. 190 at 198-199:

> *It is certainly probable that some employer who has not been involved in construction in Saskatchewan for some time will at some time in the future be subject to obligations under collective agreements negotiated under the Act, and that their exclusion from the group of unionized employers at this point will deny them any input into the choice of bargaining representative. The Board must frequently, however, strike a balance between the democratic rights of employees under Section 3 of The Trade Union Act and considerations of stability or practicality in collective bargaining, and it is, in our view, equally necessary to strike such a balance under this statute. While Section 5 of The Construction Industry Labour Relations Act, 1992 is suggestive of a legislative intention to accord democratic participation in employers' organizations to unionized contractors, this goal must be seen in the context of other important objectives, including that of providing a structure for collective bargaining in the construction industry which is conducive to stability and which accurately reflects the features of the industry in Saskatchewan.*
>
> *Though efforts must be made to secure to unionized employers the participation in the democratic process to which they are entitled under Section 5, the voters' list which is formulated must also meet the practical test that those on it should have a substantive and current stake in the construction industry as it presently operates in this province.*

Though the issue with which we are concerned here is not precisely the same as the matter addressed in this passage, we think the general principle stated there has relevance to these circumstances. In creating any list of those entitled to vote on a particular question, a balance must be drawn between extending the franchise to the broadest range of persons whose interests will be affected by the outcome, and devising ways of defining the entitlement to a franchise in practical terms. In this case, we acknowledge that the outcome of both of the votes which are in the offing will have some impact on all employers whose employment relationships are governed by the provisions of *The Trade Union Act* or *The Construction Industry Labour Relations Act, 1992*. This includes the contractors on whose behalf counsel for the S.C.L.R.C. made his arguments, as well as those who may revive a dormant certification Order tomorrow, or who may become the subject of certification proceedings within the next week. Any such list is compiled according to criteria which must draw the lines of inclusion and exclusion somewhere, and which will always exclude someone whose interests will be affected.

In drawing these lines, it is our view that it is reasonable to require that there be some characteristics present which make the term "unionized" more than a hollow shell, and that the criteria we have suggested are not excessively demanding in this respect. This approach is also, we think, more consistent with the objectives of *The Construction Industry Labour Relations Act, 1992*, which we understand to include the establishment of a sound framework for stable collective bargaining in the construction industry. It seems unlikely that this objective would be advanced by failing to distinguish between those employers who have been active participants in collective bargaining, and those who have played a role in permitting or encouraging the atrophy of the bargaining relationships to which they are notionally a party.

One can certainly hope that the circumstances in the construction industry, which are based on the cloudy and confusing events which have occurred since 1984, constitute a unique situation, and that there will come a time when the existence of a certification Order may again be relied upon as a sign that a collective bargaining relationship is in being, however stormy that relationship may be.

Counsel for the S.C.L.R.C. suggested that, in respect of LRB File No. 023-94, the Board should now direct a vote among the unionized contractors who meet the criteria set out by the Board in our two decisions. This issue was not addressed by the C.L.R.A., and it is not clear to us whether they are in agreement that the application should now proceed to a vote. We will therefore allow a period of two weeks from the date of the Order which accompanies these Reasons, in which the parties may indicate

whether they think there are any other outstanding issues which must be dealt with before a vote occurs. If the parties have not indicated that they wish to make any further representations to the Board, we will proceed to direct that a vote be conducted.

The Board will remain seized in the event any further clarification or comment on the issues raised in the two applications is required.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and RAIDER INDUSTRIES INC. AND MARTIN BROWN, RICK MCDONALD, AND MEL STEPHANSON, Respondents

LRB File No. 005-96; April 30, 1996
Chairperson: Beth Bilson; Members: Bob Todd and Brenda Cuthbert

For the Applicant: Larry Kowalchuk
For the Respondents: Pat McDonald

Bargaining unit - Exclusions - Managerial exclusions - Whether team leaders should be excluded from bargaining unit - Board deciding team leaders should not be excluded.

Bargaining unit - Exclusions - New positions - Review of principles and practice - Board reaffirming inclusion of new positions in bargaining unit until scope is changed by agreement or by amendment of certification order.

Employee - Whether team leaders are employees within meaning of *The Trade Union Act* - Board deciding team leaders are employees.

Unfair labour practice - Duty to bargain - Whether employer is in violation of duty to bargain by failing to bargain with union with respect to creation of new positions - Board deciding employer had committed unfair labour practice.

Unfair labour practice - Unilateral change - Whether employer committed unfair labour practice by altering terms and conditions of team leaders before agreement was reached with trade union - Board deciding employer had committed unfair labour practice.

Unfair labour practice - Union security - Whether employer committed unfair labour practice by not applying union security provision to team leaders - Board deciding employer had committed unfair labour practice.

***The Trade Union Act*, ss. 11(1)(c), 11(1)(m) and 36.**

REASONS FOR DECISION

Beth Bilson, Chairperson: The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union represents a unit of employees for Raider Industries Inc. for the purpose of bargaining collectively.

In the original certification Order, which was dated May 4, 1995, the bargaining unit represented by

the Union was described as follows:

> *all employees of Brown Industries (1976) Ltd., Pro-More Industries Ltd. and Lo Rider Industries Inc., and any corporate entity manufacturing products under the name of Raider, in or in connection with its places of business in Drinkwater, Saskatchewan, except the Owner, Plant Manager, Fabrication Manager, Human Resources Officer, Warehouse Manager, Paint Manager, Transportation Manager, Office Manager, truck drivers and office staff...*

As a result of a corporate reorganizing which took place in January of 1996, an amended certification Order was issued, which identified the Employer under the present name, Raider Industries Inc., and expanded the geographic scope of the bargaining unit to include a plant at Moose Jaw.

In June of 1995, or thereabouts, the Employer invited applications from existing employees for a new position designated as team leader. No formal job description was attached to the position at that time. Mr. Darrell Young, who was one of the successful applicants, testified that he was told it was a supervisory position; he understood that initially team leaders would be expected to have most of their decisions approved by higher management, but that eventually they would be involved in personnel decisions concerning employees who were on their work teams.

Mr. Brian Haughey, a staff representative of the Union, wrote to Mr. Martin Brown on September 27, 1995, asking the Employer to begin deducting dues from all bargaining unit employees. In a letter dated November 7, 1995, Mr. Haughey noted that no dues had been deducted from the wages of the team leaders.

Negotiations directed towards the conclusion of a collective agreement between the parties commenced in June of 1995. The representatives of the Employer proposed that the team leader position should be excluded from the bargaining unit. The Union rejected this proposal, and has continued to argue that the position should be in-scope. It is clear that the Employer has continued to treat the team leader position as one which is out-of-scope of the bargaining unit, and has maintained that stand at the bargaining table to date.

On January 8, 1996, the Union filed this application alleging that the Employer has committed unfair labour practices and violations of ss. 11(1)(a), (c), (f) and (m) and s. 36(2) of *The Trade Union Act*, R.S.S. 1978, c.T-17, which read 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:

> *(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;*
>
> ...
>
> *(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;*
>
> ...
>
> *(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;*
>
> ...
>
> *(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;*

...

36(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 30 days after the commencement in 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.

> *36(2) Failure on the part of any employer to carry out the provisions of subsection (1) shall be an unfair labour practice.*

Though the Employer had filed no application to amend the certification Order, the parties agreed that the Board should determine the question of whether the incumbents in the position of team leader are "employees" within the meaning of s. 2(f)(i) of the *Act*, which reads as follows:

> *2 In this Act:*
>
> *(f) "employee" means:*
>
> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or*
>
> *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer.*
>
> *(i.1) a 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.*

Each of the five persons who occupy the position of team leader is associated with one of the five work teams in the paint, rail, assembly and lid, fabrication (setup) and fabrication (production) areas. Mr. Rick McDonald, the Human Resources manager, testified that there are no formal job descriptions for positions in the company, but he provided a list of the duties which the team leaders are expected to perform. The list is as follows:

Team Leader Responsibilities

- *Daily opening and closing of departments;*
- *Daily scheduling of production;*
- *Meeting weekly production targets;*
- *Equipment repairs and trouble shooting;*
- *Statistical process control;*
- *Involved in hiring;*
- *Daily supervision of department personnel;*
- *Involved in disciplinary action/firing;*
- *Attendance records;*

- *Ordering of weekly supplies;*
- *Monthly inventory;*
- *Health and Safety;*
- *Housekeeping;*
- *Distribution of pay cheques*

Mr. Young testified that the team leaders are not directly involved in production work, though they may lend a hand if an emergency arises. They are responsible for ensuring that materials and equipment are available, for coordinating the tasks performed by members of the team to make sure that work flows smoothly, for monitoring the work of employees, for jointly planning with other team leaders how the work of their teams should be coordinated, for maintaining records and for promoting safe work practices among the team members.

Mr. Young and Mr. McDonald both described the role which is played by the team leaders in hiring new employees. A team leader would initiate a request for additional employees. The pool of applications is maintained by Mr. McDonald, who reviews them, interviews candidates and compiles a roster of suitable candidates. The team leader would review the applications on file for production positions, and select a likely candidate. That person would then be contacted by Mr. McDonald and offered a job.

The team leaders instruct and admonish employees in the course of their daily work, and deliver informal verbal reprimands and warnings for inadequate performance or unacceptable behaviour. If something more serious is required, such as a written reprimand or short suspension, the team leader would consult Mr. McDonald. Mr. McDonald testified that he fills out a discipline form and allows the team leader to review it to ensure its accuracy.

An interview is then held, at which the employee and the team leader are present, as well as Mr. McDonald or another representative of senior management. The sample forms which were produced by Mr. McDonald indicated that when he did not attend interviews, it was sometimes the department manager directly responsible for the team who was present, and on one occasion the plant manager. At the end of the interview, the employee and the team leader sign the form.

Mr. McDonald testified that no one, not even a senior manager, could make a unilateral decision to fire an employee, but that it would be a matter for consultation. Mr. Young gave evidence concerning the

termination of the employment of a probationary employee.

The team leaders are authorized to approve short leaves of absence based on their ability to accommodate the requests of employees, but they do not schedule vacations or more prolonged periods of leave.

Mr. Bothner testified that a short course had been arranged for the team leaders to prepare them for their responsibilities. As he described it, the subject matter of the course was largely related to personal interactions and conflict management techniques.

In his evidence, Mr. Darrell Young said that there had been a change in the degree of responsibility as a team leader dating from the decision of the Employer to transfer some production activities from the original Drinkwater location to a new plant in Moose Jaw. One aspect of this transfer was the relocation of a large number of employees and all of the senior management of the Employer to Moose Jaw. Two of the team leaders were moved to Moose Jaw, with three remaining at Drinkwater. Something approximating one third of the workforce continued to work in Drinkwater, along with the office staff.

After this transfer, which occurred early in January of 1996, the three team leaders at Drinkwater assumed a greater degree of independence and responsibility, because of their physical separation from the department managers and other senior management. Mr. Young also testified that a new plant manager had been appointed to oversee the expanding production at the Drinkwater location, a matter of days prior to the hearing.

There are many cases in the annals of the Board which have required the consideration of the purpose and extent of that part of s. 2(f)(i) which excludes from the definition of "employee" those persons whose primary function is to carry out managerial tasks. In the jurisdiction served by this Board, and in other jurisdictions, labour relations boards have looked to a list of criteria, always increasing in length, which may assist in a determination as to whether the incumbent in any particular position should be considered an employee or a member of management for the purpose of their role in collective bargaining.

In a decision in *City of Regina v. Canadian Union of Public Employees, Local 21 and Regina Civic*

Middle Management Association, [1995] 3rd Quarter Sask. Labour Rep. 153; LRB File No. 268-94, the Board summarized the general character of these factors as follows, on 160:

> *As other decisions cited here have pointed out, numerous factors drawn from a lengthy menu may be relevant to the question of whether a particular position should be designated as sufficiently managerial in nature to justify its exclusion from the bargaining unit. These factors may include the part played by the incumbent in personnel or disciplinary matters, the role played in major planning decisions or the formulation of budgets, the extent to which the incumbent acts independent of supervision or advice, the specific language in which duties attached to the position are described, the degree to which other employees look to the incumbent for direction or decisions, and the impact decisions taken by the incumbent have on the terms and conditions of employment of others in a bargaining unit.*

Counsel for the Union suggested that certain firm conclusions could be drawn from the jurisprudence of this Board concerning which of these factors should be regarded as the *sine qua non* for the exclusion of a position from the bargaining unit represented by a trade union. In this connection, he argued that the Board has always required that a person be responsible for "hiring, firing, and something more" in order to justify their exclusion from the bargaining unit.

We do not think this somewhat technical and categorical approach is sustained by a careful reading of the past decisions of the Board. Though some of the factors which the Board has looked to - and they would certainly include the ability to hire or fire employees - are more telling in the assessment than others, we think the general approach we have taken is not aimed at devising a formula based on the weight of each of a list of considerations.

Though the Board has found it necessary to grapple with the factual details surrounding the positions which are put forward as candidates for exclusion, we have always tried to ensure that the major focus of our inquiry is on the overall rationale for the exclusion of managerial positions, and that our assessment of each position is made in the light of this rationale.

We have often alluded to the statement of this rationale provided by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby v. Canadian Union of Public Employees* (1974), 1 C.L.L.C. 1 at 3:

> *The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more*

> *efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand yielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, had decided that in the tug of these two competing forces, management must be assigned to the side of the employer.*
>
> *The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decision can have important effects on the economic lives of employees, eg., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their ability. The employer does not want management's identification with its interest diluted by participation in the activities of the employees' union.*
>
> *More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organization as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in seniority for that promotion and are the very people who will likely rise in the union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of the employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.*

In *University Hospital v. Saskatchewan Union of Nurses*, [1984] Nov. Sask. Labour Rep. 31; LRB File No. 089-84, this Board described the rationale in the following comment on 36:

> *In the final analysis, then, this Board must continue to balance the need for managerial exclusions with the recognition that all employees have a fundamental right to form, join or assist trade unions and to bargain collectively through them. The Board recognizes that there must be good and compelling reason to find that anyone is not entitled to exercise the basic rights declared and protected by Section 3 of The Trade Union Act. It will do so when a person has such a tangible and significant role to play in managing the employer's work or workforce that to include*

> *him in the bargaining unit would produce an alien influence and be incompatible with the effective performance of his duties and responsibilities.*

In these passages, labour relations tribunals have tried to capture the essential point of distinguishing employees from management in a collective bargaining context. They have concluded that it is necessary for every person in an enterprise or organization to be clearly allocated either to the group of employees who are represented by a trade union or to the system of managers whose decisions and policies are subject to challenge by the trade union.

As the Board has often commented, the nature of modern organizations has made the task of drawing the line between employees and management increasingly difficult. This is especially true in the case of positions in the widening band which lies between that part of the organization where all activity may be unequivocally described as managerial, and that part where persons clearly possess no managerial authority.

In *International Longshoremen's and Warehousemen's Union, Local 514 v. Vancouver Wharves Limited* (1974), 74 C.L.L.C. ¶16,118 at 966, the Canada Labour Relations Board made the point in these terms:

> *... The current structures of industrial or commercial enterprises are such that what used to be easy has become very difficult when attempting to distinguish who has authority, who is employer and who is employee. The authority or managerial functions are spread over an ever increasing band of persons and further it varies in degree according to each enterprise's policy and also it varies regarding the individuals. When one looks at some of the most characteristic and true attributes of management, such as hiring and firing, promoting and demoting, planning the work and appointing people to do it, personally bargaining collectively, executing the provisions of a collective agreement or setting down independently or as a team the general policies of an enterprise, it becomes evident that all of these or any of them may be possessed by some in total, by others only partly and still by others, none at all and in all cases in varying degrees.*

This Board made a similar point in *Grain Services Union (ILWU Canadian Area) v. AgPro Grain Inc.*, [1995] 1st Quarter Sask. Labour Rep. 243; LRB File No. 257-94, at 246:

> *In modern organizations, particularly larger ones, there are many signals and descriptions which are used to refer to duties relating to the supervision of other employees, the gathering of information, the making of professional or technical judgments, or the assessment of the performance of employees or the business as a whole. It is often difficult to distinguish those configurations of these clues which indicate that a person has true managerial authority from those in which such*

> *authority is so attenuated or insignificant as not to justify exclusion from the bargaining unit. The Board must be cautious about accepting titles or vague attributions of managerial authority as a basis for depriving employees of the opportunity to have their interests represented by a trade union.*

We made a further comment to this effect in *City of Regina v. Regina Professional Fire Fighters Association, Local 181*, [1994] 2nd Quarter Sask. Labour Rep. 73; LRB File Nos. 255-93 & 268-93, at 82:

> *Modern enterprises often employ persons who are charged with the responsibility of handling sophisticated or sensitive information, or of applying skilled professional judgement to inquiries initiated by an employer, or of formulating policy options which may be considered by management. To exclude all such persons from the definition of "employee" in The Trade Union Act would be to deny the benefits of collective bargaining to a wide range of persons who, while highly skilled and educated, have no direct control or influence on the terms and conditions under which their colleagues work of a kind which would either create a conflict of interest inimical to healthy collective bargaining, or render them less vulnerable to unilateral employer determination of their own terms and conditions of employment.*

In *Service Employees' International Union v. Metis Addictions Council of Saskatchewan Inc.*, [1993] 3rd Quarter Sask. Labour Rep. 49; LRB File No. 002-93, the Board attempted to describe on 59 the essential quality which characterizes those who are properly excluded from representation by a trade union on the grounds of their managerial functions:

> *It is our view that in order to be excluded from the group defined as employees by Section 2(f)(i), a person must have a significant degree of decision-making authority in relation to matters which affect the terms, conditions or tenure of employment of other employees. A high degree of independence to make decisions of a purely professional nature is not sufficient, in our opinion, to meet the requirements for exclusion under this section.*

In the *University Hospital* decision, *supra* at 35, the Board commented on the position of persons who perform supervisory duties in relation to bargaining unit employees:

> *Viewed in the context of these authorities, the Board has concluded that the words "any person who is an integral part of his employer's management" refers to individuals whose functions and responsibilities clearly and demonstrably cause them to become a necessary component of management. Those functions and responsibilities may include the exercise of "first line" authority over fellow employees (i.e. hire, fire, promote, demote, discipline, evaluate, etc.) significant participation in the planning and formulation of employer policy affecting the running of the organization or the direction of its workforce, independent decision making authority in matters affecting the economic lives of employees, and responsibilities of an administrative nature which are central to policy and planning.*

> *Those general guidelines can be refined by the continuing recognition that in any setting (and particularly in the field of nursing) it is normal for the most highly trained and skilled individuals to teach and supervise those with less skill and experience, to allocate and co-ordinate work, and to ensure it is being done properly, efficiently and safely. As a general rule the Board will not find that those who only co-ordinate, direct and supervise the work of individuals with lesser skill or education are performing functions of a managerial character or that they are an essential component of their employer's management. Similarly, the duty to carry out minor admonitory functions need not create the kind of conflict requiring exclusion from the bargaining unit. From a practical standpoint, to hold otherwise would deny the benefits of collective bargaining to much of the highly trained, educated and skilled workforce that is characteristic of modern public and private sector enterprise. In the Board's opinion, the legislature did not intend to do that when it amended the definition of "employee" in Section 2(f)(i) of The Trade Union Act.*

It will be noted that these comments were made in the context of a phrase which no longer forms part of the definition of "employee" in s. 2(f). At the time the *University Hospital* decision was written, s. 2(f)(i) provided for the exclusion not only of persons acting in a managerial or confidential capacity, but of any person who was considered "an integral part of his employer's management." This part of s. 2(f)(i) was subsequently repealed.

Without entering into an extensive review of the somewhat inconclusive jurisprudence of the Board on the scope of this ground for exclusion, it may be said that the Board interpreted this phrase as contemplating the exclusion of positions on a somewhat broader basis than that provided by the exclusion based on the performance of managerial functions. When one considers the comments quoted above in the context of the current provision, which focuses on exclusion based on managerial or confidential functions, the implication is that the Board should be even more careful about exaggerating the degree of managerial authority which is attached to responsibilities which are supervisory in nature.

By suggesting that persons whose tasks are of a supervisory, technical or instructional character may not fall into the category of persons who are excluded by s. 2(f)(i), the Board does not mean to denigrate the importance of the functions performed by the incumbents in positions of this kind. The competence of these persons and their effectiveness in directing and coordinating the activity of the workforce is often essential to the success of the organization which employs them. This may be particularly true in the case of organizations which have moved to a "flatter," more decentralized and

consensual sort of management structure. In the *Regina Professional Fire Fighters Association* decision, *supra* at 160, the Board alluded to this:

> *The City of Regina is a complex bureaucratic structure in which people at many levels have a role in influencing any decisions which are made. The current management approach favoured by the Employer places an emphasis on broad consultation and consensus and on fostering a sense of "ownership" among all administrators and staff. The relationship between the role any person may play in the decision-making of the organization and the appropriate placing of that person in connection with any of the collective bargaining relationships to which the Employer is a party is not easy to identify in this context.*

The significance of their role, however, should not distract us from the original focus of our inquiry, which must be on the question of whether the aspects of their work which might be described as managerial functions create a conflict of interest of such significance that it justifies their removal from access to collective bargaining. In the *Regina Professional Fire Fighters Association* decision, *supra* at 160-161, the Board commented on the distinction which must be drawn between the importance of the work of these employees and true managerial authority:

> *The picture created by the evidence, however, is of employees who are important sources of information and whose expertise and knowledge is a valued commodity, rather than of persons whose positions are the site of truly independent decision-making authority in relation to matters which would have a direct and significant impact on the terms and conditions of employment of employees in the bargaining unit.*
>
> *Like many persons in supervisory positions, the four incumbents play an important part in the daily direction of their staff, the planning and assignment of duties, routine disciplinary matters, and the selection of employees to fill vacancies. It is clear, however, that they play this role constrained by criteria and policies set elsewhere. Though their input is important because of their close familiarity with the needs and objectives of the units for which they have responsibility, the incumbents cannot be said to exercise actual decision-making authority when it comes to making decisions about hiring or significant disciplinary action; those decisions are made by senior managers and within the boundaries set by a standardized set of criteria developed and closely monitored by the Human Resources office.*

We have concluded that the position of team leader does not meet the criteria for exclusion from the bargaining unit. Though the team leaders do perform some functions which are of a managerial nature, it cannot be said that their "primary responsibility" is to "actually exercise authority and actually perform functions of a managerial character." Though they have some input into personnel decisions, some ability to direct and admonish the workforce on a day-to-day basis and some capacity to influence the effectiveness of the enterprise, they do not have a role in the decision-making of the Employer of

sufficient independence or authority to justify excluding them from the bargaining unit. We would therefore reject the application of the Employer to amend the certification Order to exclude the position of team leader.

In the application, the Union alleged that the decision of the Employer to designate the team leader position as being out of scope of the bargaining unit entailed the commission of unfair labour practices within the meaning of ss. 11(1)(a), (c), (f), and (m) and s. 36(2) of *The Trade Union Act*.

On a number of occasions, the Board has addressed the issue of the status of newly-created positions and the persons who occupy them, and we think the Board has stated clearly the proper approach which should be adopted by an employer under these circumstances.

Though the Board has given qualified support to the proposition that it is open to the parties to modify the scope of the bargaining unit through collective bargaining, we have also imposed certain limits on the capacity of the parties to alter the effect of the certification Order in this way. In *Beverage Dispensers and Culinary Workers v. Terra Nova Motor Inn*, [1975] 2 S.C.R. 749, the Supreme Court of Canada commented at 752-753 on the significance of a certification Order:

> *Certification of a trade union as bargaining agent qualifies it to compel an employer to bargain collectively with it on behalf of employees for whom the union has been so certified. Those employees collectively form the "unit" in respect of which collective bargaining is compelled. In The Labour Relations Act, R.S.B.C. 1960, c. 205, "unit" is defined simply as meaning a "group of employees", sensibly so because what is central to the certification process is to ensure (as s. 10(1) of the Act specifies) that the "unit" is appropriate for collective bargaining. If a collective agreement results from the bargaining, it may cover additional or fewer classes of employees, as the parties may mutually decide; but, of course, each may insist that the bargaining be confined on behalf of, or be in relation to only that unit for which certification was obtained. Certainly, once a collective agreement has been negotiated, with its specification of employees covered thereby, they become the work force, whether in the same or larger numbers (according to business exigencies) around which the administration of the collective agreement proceeds; and subsequent renewal collective agreements may, as a result of employer business developments or union importunities, or both, vary the job categories which those agreements cover.*

In a decision in *Saskatchewan Government Employees' Association v. Saskatchewan Liquor Board*, [1981] May Sask. Labour Rep. 37; LRB File No. 256-80, this Board alluded to that passage, and made the following comment at 40:

> *There are two possible circumstances where the Board might refuse to recognize the*

> *definition of a bargaining unit reached by the parties in a collective bargaining agreement which differs from the bargaining unit defined in a Board order. The first is where the Board finds that the unit agreed to by the parties is not an appropriate unit. While, in the opinion of the Board, the unit agreed to in the collective bargaining agreement in this case may not be the most appropriate unit, the Board cannot say that it is not an appropriate unit. The second area where the Board might not recognize a unit voluntarily agreed to by the parties and differing from the unit defined by a Board order is where the agreed unit violates the right of employees to be represented by a union within the unit defined by the Board. This objection would have to be raised by employees who felt their right to have representation by the union was violated. There is no suggestion that such circumstances prevail.*

In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 496 v. Beeland Co-operative Association Limited*, [1982] Nov. Sask. Labour Rep. 38; LRB File No. 259-82, the Board confirmed the importance of the certification Order at 40:

> *In summary, parties to a certification order are bound by it. If the parties, by agreement, wish to change the scope of the order they may do so. However, if one party chooses to rely upon the terms of the certification order as to scope, the other may not insist upon negotiation of scope to the extent that negotiations are brought to a halt. They are bound by the terms of the order, and if the other party insists upon negotiations on the basis of the terms of the order, they are obliged to negotiate on that basis.*

The Board made a further comment to this effect in *Service Employees' International Union, Local 336 v. Town of Shaunavon and William Humeny*, [1987] Dec. Sask. Labour Rep. 37; LRB File No. 151-87, at 39:

> *The Board will not permit the policy set forth in the Liquor Board case to interfere with the obligation on the part of a party to a certification order to bargain collectively with respect to the terms and conditions of employment of employees included in the bargaining unit. A decision to the contrary would permit a party, acting under the guise of negotiating a different scope clause, to simply refuse to recognize a Board decision with respect to the appropriateness of a bargaining unit, and the order would be rendered meaningless.*

Based on this view of the significance of the certification Order in determining scope, the Board has been exceedingly clear about the process which must be followed if an employer wishes to create a position out of the scope of the bargaining unit. In *Canadian Labour Congress, Local 481 v. Saskatchewan Government Employees' Association* (13 December 1978), LRB File No. 192-78 (Unreported), the Board outlined the alternatives on 2:

> *It has been the policy of the Board, in cases of all employee units, where a new classification is created, to put the onus upon the employer to satisfy the Board that*

> *the occupant of the new classification is not an employee within the meaning of Section 2(f)(i) of The Trade Union Act and therefore should be excluded from the unit. The proper procedure for an employer in such circumstances is, if it cannot obtain Union agreement, to apply to the Board for an Order amending the Certification Order to exclude the new classification. The employer did not do so during the open period. Therefore its obligation to bargain with the Union with respect to whether or not the position should be in scope remains and the refusal of the employer to continue such negotiations constitutes an unfair labour practice. The Board makes no finding as to whether or not the new classification should be in scope or out of scope. Unfair labour practice proceedings before the Board are not a proper framework for determining such questions. There will be an Order finding the employer guilty of an unfair labour practice accordingly.*

In *City Fire Fighters' Union v. City of Regina*, [1984] Jan. Sask. Labour Rep. 37; LRB File No. 017-83, the Board commented further on this approach at 39:

> *In this case the employer did negotiate with the Applicant with respect to which unit the Research Technician would fall into. However, having failed to reach agreement it did not then apply to the Board for an amendment to the Applicant's certification Order, either during the open period permitted by Section 5(k) of the Trade Union Act or under Section 5(j) which permits the Board to amend a certification Order where the amendment is considered by the Board to be necessary for the purpose of clarifying or correcting an Order. This is not a case in which it can be said that the parties have changed the scope of the certification Order through the collective bargaining process. The scope of the certification Order is incorporated into the collective bargaining agreement by reference, and for all practical purposes they are one and the same. Unless the certification Order is amended, the parties to the Order are bound by its terms. (See Retail, Wholesale and Department Store Union, Local 496 v. Beeland Co-operative Association Limited, LRB File 259-82, Reasons for Decision dated August 13, 1982).*

The Board considered this issue as well in a decision in *Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre*, [1991] 3rd Quarter Sask. Labour Rep. 56; LRB File Nos. 199-90 & 234-90, in the context of a slightly different issue, that of the status of incumbents in a newly created out-of-scope position in the period while a determination by this Board is pending. The Board outlined on 58 the three possible options for characterizing the positions during this period:

> *There are only three alternatives available:*
>
> > *1. First, the position is out-of-scope of the bargaining unit until the Board orders that it is in. In such case, the Employer will only be guilty of an unfair labour practice if it is subsequently ruled that the position is in-scope. This is the Empire Oil option which was followed by the Board without comment in Pioneer Village and Regina General Hospital. In practical terms, this alternative permits the Employer to exclude a position and refuse to recognize the Union while its application is before the Board. This procedure encourages unilateral action and exposes the Employer to an*

> *unfair labour practice; it also creates the risk of conflict between the Board's ultimate ruling and the basis upon which the employee was hired.*
>
> *2. The second possibility is that the position is out-of-scope, while the application is pending, regardless of how the Board ultimately rules. This option creates the same problem as the first, except that it removes the risk of an unfair labour practice from the Employer's shoulders.*
>
> *3. The final option is that the position is in-scope while the application is pending, regardless of how the Board ultimately rules. Admittedly, there is still a risk of conflict between the Board's eventual order and the basis upon which the employee was hired, however, this option has several advantages and all the unpalatable features of unilateral action and the consequent risk of unfair labour practices are removed.*

In determining that the third option should be selected, the Board commented as follows at 58-59 on the reason for choosing this way of looking at the question:

> *When arriving at a certification order the Board considers, inter alia, the need for managerial exclusions (see: Westfair Foods Ltd. v. UFCW SLRB 085-80; Corporation District of Burnaby v. Canadian Union of Public Employees, Local 23 (1974) 1 CLLC p. 1). Unless changed, the certification order so described applies to the parties for the balance of their bargaining relationship and is of fundamental importance in the conduct of their subsequent affairs. The Empire Oil argument neglects to consider that in order for a position to be excluded from an existing all-employee unit, the Board must first find that the person filling that position is not an "employee" within the meaning of Section 2(f) of the Act. The status of "employee" or "non-employee" is a judgment for the Board to make on an appropriate application where the parties cannot agree. Essentially therefore, the Board's "saying so makes it so". From a procedural point of view, until the Board makes that decision, the position must remain in the all-employee unit in compliance with, and in deference to, the Board's existing certification order. The substantive determination, at some subsequent date, that a person filling the position is not an "employee", cannot retroactively alter the integrity of an existing Board certification order directing all employees to be part of the unit.*
>
> *Assigning new positions into the bargaining unit until the Board orders otherwise is consistent with the Board's practice of placing the onus, in exclusion applications, on the employer. In addition, it coincides with the reasoning which prompted all boards to adopt the "all-employee" description of the bargaining unit over the enumerative or classification list method. One of the critical considerations why the "all-employee" method of unit description replaced the enumerative or classification list method was to avoid the endless applications which arose every time the employer reorganized, changed position titles or created new positions. "All-employee" units accommodate these changes without the necessity of an application to the Board. The only time an application to the Board is required is when the employer wishes to have a new position excluded.*
>
> *Finally, assigning new positions into the unit, pending the Board's order, is also consistent with both orderly collective bargaining and the objects and philosophy of*

> *The Trade Union Act. It serves the interests of all the parties in that it avoids the necessity of an employer having to risk an unfair labour practice in order to have the exclusion issue of a position determined. To countenance an approach that would allow unilateral exclusions from an existing certification order would inevitably lead to industrial instability because it effectively encourages parties to ignore their contractual, as well as their statutory rights and obligations. Where the Board has a choice between two practices: one based upon unilateral action and one based upon respect for the Board's order, until changed in accordance with the provisions of The Trade Union Act, the Board will obviously prefer the latter.*

The Board reiterated at 59 the procedure which should be followed by an employer:

> *Accordingly, where a new position is created in an "all-employee" unit, it remains in the bargaining unit unless excluded by order of the Board or agreement of the parties. Filing an amendment application pursuant to Section 5(k) of the Act does not have the same effect as an order. Therefore, if the Employer wishes to exclude a new position from the scope of the bargaining unit, it must be done in one of the following ways:*
>
> 1. *it may be excluded through the process of collective bargaining;*
> 2. *if attempts at bargaining have failed, it can apply for an amendment to the certification order pursuant to Section 5(j), (k) or (m) of The Trade Union Act.*

In this case, the Employer has taken the position at the bargaining table that the team leader position should be out of scope. Mr. Haughey testified that he was informed of the intention to create these positions as out-of-scope positions shortly after the certification Order was granted. There was, however, nothing which could be called negotiation concerning the creation of the positions, and the Employer treated them as positions which were out-of-scope from the outset. There was no agreement between the parties to exclude the position from the scope of the unit, and there was no timely application from the Employer to request this Board to amend the certification Order.

In the light of the clear directions given by the Board in the past concerning the appropriate procedure which should be followed, it is difficult to understand why the Employer would institute the positions in the way they did, and they did not put forward a defence at the hearing. There was no suggestion advanced on behalf of the Employer that the certification Order granted to the Union was not essentially an "all-employee" Order of the kind to which the procedure outlined by the Board clearly applies.

We have concluded that the Employer did commit unfair labour practices within the meaning of s.

11(1)(c), in that they failed to bargain collectively with the Union concerning the creation of these positions; within the meaning of s. 11(1)(m), in that they unilaterally changed the terms and conditions of employment of the team leaders, as well as the scope of the certification Order, without bargaining collectively with the Union; and within the meaning of s. 36(2) in that they failed to recognize the union security provision as applying to the team leaders, although they were at the time within the scope of the bargaining unit. It was not clear how the Union saw ss. 11(1)(a) and (f) as applying to the evidence, so we have made no findings concerning the allegations made in connection with these provisions.

There was no argument made by the parties concerning the remedies which should be implemented as a result of these findings. The Board will remain seized of the remedial issues, in the event the parties are unable to agree on the full remedial implications of this decision. We will, however, issue a cease and desist Order as a result of our findings that unfair labour practices have been committed.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3730, Applicant and ST. PAUL'S ROMAN CATHOLIC SEPARATE SCHOOL DIVISION #20, Respondent

LRB File No. 033-96; April 30, 1996
Chairperson: Beth Bilson; Members: Ken Hutchinson and Bruce McDonald

For the Applicant: Kevin C. Wilson
For the Respondent: Richard W. Elson

Unfair labour practice - Coercion and intimidation - Communication - Whether communications by representative of employer had coercive effect - Board deciding some of communications constituted unfair labour practice.

Unfair labour practice - Coercion and intimidation - Communication - Whether holding of union office is "right conferred by this Act" - Board deciding holding of union office component of rights is protected under *The Trade Union Act*.

Unfair labour practice - Interference - Whether representatives of employer had interfered with administration of labour organization - Board deciding reluctance to deal with representative of union and advice to withdraw from union executive constituted unfair labour practice.

***The Trade Union Act*, ss. 11(1)(a) and (b).**

REASONS FOR DECISION

Beth Bilson, Chairperson: In an Order dated December 1, 1994, the Canadian Union of Public Employees, Local 3730, was certified by this Board as the bargaining agent for a unit of employees of St. Paul's Roman Catholic School Division #20.

The events which led up to the granting of that certification Order are not at issue in this application. They do, nonetheless, form part of the context in which this application arose.

The employees who are represented by Local 3730 of the Union are generally referred to as "service workers." They are employed by the Employer as caretakers, tradespersons and maintenance workers, and are responsible for the maintenance and repair of property belonging to the Employer. In the period prior to the certification Order of December, 1994, these employees were part of Local 2268, which included clerical and administrative employees of the Employer as well.

In proceedings before this Board in LRB File No. 017-94, *Canadian Union of Public Employees, Local 3730 v. Saskaton Separate School Board of the St. Paul's Roman Catholic Separate School District No. 20*, [1994] 2nd Quarter Sask. Labour Rep. 96, the employees who now form Local 3730 sought to become separate from Local 2268. At that time, the means they wished to use to achieve this end was an amendment, pursuant to s. 5(j) of *The Trade Union Act*, R.S.S. 1978, c.T-17, to a certification Order of 1958.

The Employer opposed the application of the Union at that time. In evidence before the Board at these proceedings, the Employer explained that their opposition to the application for amendment was based on concerns posed by the timing of the application. The Employer had been engaged, jointly with representatives of Local 2268, in a complex pay equity project, which was nearing completion at that time. In any event, the Board concluded that amendment of the 1958 certification Order was not appropriate, given the changes which had occurred since that time, and dismissed the application.

Local 2268 subsequently withdrew from participation in the pay equity project. Local 3730 filed a new application for certification as a bargaining representative of the service employees; the Employer consented to that application, and the Board granted the Order in December of 1994.

In this application, the Union has alleged that representatives of the Employer committed a number of unfair labour practices and violations of ss. 11(1)(a), (b), (c), (d) and (e) of *The Trade Union Act*, which read 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:*
>
> > *(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten 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 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 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.*

These allegations are founded on the conduct of representatives of the Employer in relation to Mr. Brian Neveu, who is employed as service manager. Mr. Neveu was active in the formation of Local 3730, and has been a member of the executive of the Union since it was certified.

In February of 1994, three employees were designated as service managers, working out of the Service Centre operated by the Employer in the north end of Saskatoon. These employees were responsible for responding to requests for mechanical repairs and emergency intervention at a number of schools; the occasions on which the service managers were called were typically those which the caretakers or

building managers at the schools could not handle themselves. Their area of responsibility included heating, plumbing and air conditioning systems. In addition, they were expected to obtain electrical services as required. The service managers were capable of a wide range of monitoring and repairs themselves; where the repairs required went beyond their resources, they could retain the services of contractors to undertake repairs or replacements.

In due course, one of the three service managers retired, leaving Mr. Neveu and Mr. Garry Anderson. Mr. Neveu had responsibility for schools on the west side of the city, and Mr. Anderson oversaw schools on the east side.

At the time when the service manager position was created, the senior administrator in this area of the operations of the Employer was Mr. Bill Coumont, who was superintendent of Facility Services. Mr. Duane Panko, who reported to Mr. Coumont, was one of two supervisors of Facility Services. Mr. Coumont was described by witnesses at the hearing as a "hands-on" administrator, who took direct control of the activities of the service managers. Mr. Panko had less to do with their day-to-day activity, and was more involved in the coordination and planning of facility construction, renovation and repair. This was particularly true in the period starting towards the end of 1994, when Mr. Panko devoted most of his time to planning connected with the construction of a new high school. Mr. Coumont was expected to retire in October of 1995, and for the last several months of his employment, he worked out of the Service Centre; in these circumstances, he had an even closer relationship with the service workers.

When Mr. Coumont retired, there was some reorganization of the administrative structure related to facilities. The former Facility Services area was combined with Financial Services under the direction of one superintendent, Mr. Don Lloyd, who had previously been in charge of the Financial Services area.

One of the results of the reorganization is that the functions performed by Mr. Lloyd have been of a more exclusively administrative nature. Mr. Panko, in turn, has taken direct responsibility for the activities of the service workers, including the service managers.

Both Mr. Anderson and Mr. Neveu indicated that they had a fairly friendly relationship with Mr. Coumont. According to their description, he fostered a spirit of rivalry between them in order to

get them to perform more effectively, and there was considerable good-natured teasing about a variety of topics, including their capabilities. Mr. Neveu said that he thought Mr. Coumont stayed neutral about the formation of Local 3730. Mr. Panko said that he and Mr. Coumont differed from other colleagues in the administration because they were never opposed to the idea of Local 3730 being formed as a separate body.

Mr. Lloyd was described as operating "by the book" and bringing a more formal atmosphere to the administration of this area.

Mr. Anderson, Mr. Neveu and Mr. Panko all testified that there had been discussion at various times of the question of whether the service manager position should be out of scope. According to Mr. Anderson, there had been some discussion of this sort when Mr. Coumont was still there. He recalled having several discussions of this issue with Mr. Neveu, and he said that they had both changed their opinion a number of times.

Mr. Neveu said that his recollection was that he had always stated his preference to stay in the bargaining unit. Mr. Panko, on the other hand, recalled that at one point Mr. Neveu had expressed the opinion that if the position were out-of-scope, the service managers might have more influence over the caretakers. Mr. Panko said that, as he recalled it, the last conversation he had had with Mr. Neveu and Mr. Anderson on the subject had ended with a consensus that the position should remain in scope.

Mr. Neveu said that at some point in these conversations Mr. Panko suggested that Mr. Neveu should consider withdrawing from his executive role in the affairs of the Union.

Mr. Panko did not deny that he might have made comments which would suggest approval of the idea that Mr. Neveu should play a less active role. As he recalled it, these comments were made in connection with the discussion of whether it would be desirable for the service manager position should be out-of-scope; Mr. Panko said that at one time it had been his view that there was something of a conflict of interest between the duties of the service manager and a prominent role in the Union. In addition, Mr. Panko said that he did have some concern that Mr. Neveu and others active in the Union might be spending an excessive amount of work time on Union business. Mr. Panko said that Mr. Neveu himself had expressed anxiety about his exposure as a member of the Union executive; though he did not recall any specific conversation, he said that he could have agreed with Mr. Neveu that a less

prominent role would be preferable.

Mr. Panko and Mr. Neveu agreed that they had a good working relationship prior to the reorganization of the administration of the Administrative Services area. They both testified that their relations took a turn for the worse in November of 1995, when a disagreement arose concerning the organization of events marking the retirement of Mr. Coumont. Mr. Panko said that a number of events had been organized by the School Board and the administration, and that Mr. Merkowsky, another Supervisor in the Facilities Services area, had suggested that a further dinner be planned jointly by administrators and representatives of the Union.

When this suggestion was put to the members of Local 3730, they decided that they would prefer to salute Mr. Coumont at the Christmas party which was being planned for Union members. Mr. Panko stated that he did not think this was appropriate, and he raised this with Mr. Neveu and Mr. Richard Germs, another member of the Union executive, when he encountered them at the Service Centre.

According to Mr. Neveu, Mr. Panko said to him and to Mr. Germs that he thought they were withdrawing from the Union executive. Mr. Panko said that he had understood that both Mr. Neveu and Mr. Germs had planned to leave the executive, and this was the reason for his comment. Mr. Panko said that he did tell them that he thought the idea of honouring Mr. Coumont at the Union Christmas party was inappropriate, because he thought it would be difficult to focus on the celebration for Mr. Coumont. Mr. Neveu said that he made it clear to Mr. Panko that the officers of the Union were carrying out the wishes which the majority of members had expressed. Mr. Panko continued to protest, and said that he thought the vote at the Union meeting did not reflect the true wishes of many Union members.

In his evidence, Mr. Panko expressed his opinion that his opinion was confirmed by the Christmas party itself. He said that a number of administrators had been offended by the speech given on that occasion by Mr. Greg Lynchuk, the President of Local 3730, which they interpreted as denigrating the value of education. Mr. Neveu, on the other hand, said that the members of the Union thought the evening had gone well, and he thought that Mr. Coumont was pleased with the retirement tribute organized by the Union.

Mr. Coumont actually retired at the end of October, 1995. In reviewing the operations of the Service

Centre, Mr. Panko came to the conclusion that a change should be made in the work assigned to Mr. Anderson and Mr. Neveu. He determined that the geographical areas assigned to them should be switched, so that Mr. Neveu would henceforth work at schools on the east side, and Mr. Anderson would be responsible for schools on the west side. Mr. Panko said that one of the major reasons for this was that this assignment would place the two service managers on the respective sides of the city where they lived, which would lead to a saving on travel costs. The other major reason he cited was that it would be beneficial for both of the service managers to be familiar with all schools in the city.

Mr. Panko said that, in addition to these reasons, there had been some complaints concerning the work of Mr. Neveu from caretakers and principals of the elementary schools. He said the basis of their complaints was an allegation that Mr. Neveu spent a disproportionate amount of time at E.D. Feehan High School and Bishop James Mahoney High School. Mr. Panko said that he suspected that one of the explanations for the amount of time Mr. Neveu was spending at Bishop Mahoney High School was that Mr. Lynchuk was the Building Manager there; he said that he thought Mr. Neveu and Mr. Lynchuk were spending time on personal or Union business. He acknowledged that these considerations did play some role in the decision to switch the assignments of the two service managers.

He sent a memorandum to Mr. Neveu and Mr. Anderson, dated November 9, 1995, informing them that their new assignments would take effect as of November 15. Mr. Anderson accepted the new assignment without complaint, but Mr. Neveu objected that he was in the middle of one or two significant projects. In light of this, he was allowed a further week to complete the work he was doing on these.

In December, 1995, Mr. Panko summoned the employees at the Service Centre to a meeting. He announced his intention to create three additional service manager positions. Unlike the positions occupied by Mr. Anderson and Mr. Neveu, the duties associated with these positions would not be related to the mechanical aspects of the school facilities, but would be connected with carpentry and similar matters.

The employees at the Service Centre asked a number of questions about these new positions, and they were particularly concerned about how the positions would be filled. Mr. Panko said that he had three persons in mind to fill these positions, and that he thought employees in other positions would be used

to their best advantage if they stayed where they were. One of the persons Mr. Panko had in mind to fill one of the new positions was Mr. Darryl Therres, a relatively new employee. In response to questions about this, Mr. Panko said that if he could not fill the positions with those he thought the best candidates, he might as well give up; he said he would give Mr. Therres his own job. Mr. Panko said that he made this remark in jest, although it was later quoted at a Union meeting as a serious statement.

At the meeting, the question was raised of whether the Employer was required to fill the positions through the posting process laid out in the collective agreement with the Union. Mr. Panko acknowledged that he might have said something to the effect that he would prefer not to have the collective agreement quoted to him, as his ignorance of it would allow him to fill the positions as he thought best.

Two of the three new service manager positions were ultimately filled, one of them by Mr. Therres. The Union subsequently filed a grievance concerning the method adopted by the Employer for creating and filling the positions.

One of the factors which led to a deterioration in the relationship between Mr. Neveu and Mr. Panko was the continuing friction between Mr. Neveu and Mr. Anderson. Mr. Neveu suggested that it was only after the switch in work assignments that this became a serious matter. Mr. Panko, however, dated his own knowledge of the conflict between the two service managers back to a time in 1994 before the retirement of Mr. Bilodeau, the third service manager; he said that Mr. Bilodeau had reported that if something were not done about the conflict between Mr. Anderson and Mr. Neveu, they would "kill each other."

Both Mr. Neveu and Mr. Anderson said that each of them had heard from third parties that the other had made remarks critical of their work.

In January of 1996, Mr. Lloyd, who said that he regarded the reported conduct of Mr. Neveu and Mr. Anderson as "childish," decided to meet with them. Mr. Lloyd said that when he and Mr. Panko met with Mr. Neveu, his objective was to make it clear that Mr. Neveu would have to sort out his differences with Mr. Anderson so that they could work together in a professional setting. He said that the meeting was confidential, and that he did not intend any disciplinary action to follow. He said that he did say to Mr. Neveu that if they could not work together, one of them would have to go. He said

that he was not meaning to suggest that one of them would be fired, simply that unless they resolved their conflict, it might be necessary to move one of them to a different job.

Following the meeting with Mr. Neveu, Mr. Lloyd telephoned Mr. Lynchuk to inform him of the nature of the meeting, and to assure him that the meeting was not disciplinary in nature. He said that he did this because he knew that Mr. Neveu and Mr. Lynchuk were friends, and because Mr. Lynchuk had a somewhat aggressive approach to questions involving the interests of the Union.

Mr. Lloyd said that a similar meeting was held with Mr. Anderson, though it was somewhat shorter and more informal than the meeting with Mr. Neveu. He was not sure that he told Mr. Anderson that the meeting should be kept confidential. He did not inform Mr. Lynchuk - or Mr. Neveu - of this conversation.

Mr. Neveu said that he heard a report from Mr. Germs the day following his meeting with Mr. Panko and Mr. Anderson. Mr. Germs said that Mr. Anderson had been saying it would not be necessary for him to "get" Mr. Neveu, as Mr. Lloyd would "get" him instead. Mr. Neveu said he put this down to a breach of the supposed confidentiality of the meeting by Mr. Lloyd or Mr. Panko. Mr. Lloyd said that he had talked about the meeting to no one but Mr. Lynchuk, although he assumed that both Mr. Neveu and Mr. Anderson would draw the conclusion that he had talked to both of them. Mr. Neveu said that the report he heard from Mr. Germs convinced him there was no point taking any steps to try to improve the situation between him and Mr. Anderson.

Mr. Neveu gave examples of several instances in which he said he thought he was being "set up" or isolated from meetings connected with his work. One of these was a meeting which occurred concerning a retrofit of the heating system at E.D. Feehan High School. According to Mr. Panko, this was a seminar which was presented by the contractor responsible for new heating controls. He said that he had told Mr. Anderson to let Mr. Neveu know of the seminar. Mr. Anderson testified that he did tell Mr. Neveu about the seminar. Mr. Neveu said that he heard about it from an employee of the contractor, who said that he should be there. Mr. Neveu said that when he arrived at the meeting, it had already begun, and he had the impression that Mr. Panko and Mr. Anderson were trying to demonstrate that there was some defect in the system which was attributable to the work of Mr. Neveu. Mr. Panko said that he was not familiar with the technical aspects of heating controls, and he was simply asking for an explanation of certain statements by the contractor.

On another occasion, a meeting was held to discuss the inventory of tools which caretakers and building managers should have available to them. According to Mr. Panko, the objective of this meeting was to make these employees less dependent on the service managers. He said that he did not think it necessary for Mr. Neveu to be there. He said he could not remember Mr. Lynchuk asking why Mr. Neveu was not there and insisting that he be paged, though he said that this might have occurred.

Mr. Neveu also gave evidence about an occasion on which he was summoned to St. Anne School when the principal became concerned about the presence of a rag in one of the air conditioning units on the roof of the school. Mr. Neveu said that there had been complaints about the air quality at the school; in particular, the secretary was complaining about the air quality in her area. Mr. Neveu said that he had installed a device to test for carbon dioxide, and that these tests had not indicated anything wrong with the air in that respect. He said that there had not been tests for carbon monoxide at that time. Mr. Neveu thought the last time he would have been on the roof of the school was about September of 1994.

Mr. Anderson said that in the first week of February, 1996, he was called to St. Anne School because of the difficulties with the adjustment of the heat in one classroom. He went up to check the units on the roof, and discovered that a rag had been inserted under the hood of the exhaust vent. He had a subsequent conversation with the principal and the caretaker of the school, and with a contractor, who inspected the unit. Mr. Anderson felt obliged to report it to Mr. Panko because it posed a safety hazard. Mr. Anderson testified that the caretaker at the school had suggested it might be blamed on Mr. Neveu. Mr. Anderson said that he could not imagine that Mr. Neveu would have done anything of the kind.

Mr. Neveu was alerted by the contractor to the problem which had been discovered, and went to the school the day after the contractor had been there. He and Mr. Anderson met with the principal. Mr. Neveu again said that he felt that Mr. Anderson was trying to demonstrate that Mr. Neveu was responsible for the insertion of the rag in the exhaust vent.

In the first week of February, as well, Mr. Lloyd met with Mr. Therres, who was upset about an incident which had occurred at the Service Centre. According to Mr. Lloyd, he had assumed that pay stubs for employees were distributed by the foreman at the Service Centre, Mr. Wes Ostrachuk; when delivered to the Service Centre, the pay stubs were not in separate envelopes. In fact, it ultimately

became apparent that there had been considerable deviation from the practice of having the foreman responsible for the pay stubs. On this occasion, the pay stub for Mr. Therres had fallen into the hands of a number of employees, and had become the subject of general discussion about his wage level.

Mr. Lloyd testified that he decided to interview a number of the employees at the Service Centre, including Mr. Neveu, about this incident. Since he wished to obtain information from Mr. Neveu about a number of other matters, he arranged to meet with Mr. Neveu first.

Mr. Neveu was informed of the meeting, which occurred on February 9, 1996, by Mr. Panko. Mr. Neveu said that, in their first conversation, Mr. Panko did not tell him what the subject of the meeting would be, but said, "Just be there." Mr. Panko said he thought he had told Mr. Neveu it was a "continuation" of the meeting in January at which his relationship with Mr. Anderson had been discussed.

Mr. Neveu later called Mr. Panko again, to ask if he could bring a Union representative with him. According to Mr. Neveu, Mr. Panko said, "You may have buried yourself this time," or words to that effect. Mr. Panko did not remember saying anything of the kind. Mr. Panko did acknowledge that he told Mr. Neveu to think carefully about who he brought with him, and that he did intend to discourage Mr. Neveu from having Mr. Lynchuk accompany him. The reason Mr. Panko gave for this was that he thought the presence of Mr. Lynchuk would not create an atmosphere favourable to resolving the issues which came up in the best interest of Mr. Neveu.

Mr. Neveu did elect to take Mr. Lynchuk to the meeting of February 9. Prior to the meeting, Mr. Panko asked if he could have a word with Mr. Neveu. Mr. Lynchuk advised Mr. Neveu not to talk to Mr. Panko alone, and Mr. Lynchuk went into the office of Mr. Panko with Mr. Neveu. Mr. Panko said that his purpose in asking to speak to Mr. Neveu was to give him some friendly advice about how to approach the meeting with Mr. Lloyd. He told Mr. Neveu that he should take "the high road." Mr. Panko testified that by this he meant that Mr. Neveu should be candid and forthcoming in answering the questions put to him by Mr. Lloyd, and that if he did this there would be nothing to worry about. He acknowledged that he may have said something to Mr. Neveu to the effect that "you must think you're guilty" because he had chosen to bring Mr. Lynchuk with him.

During the brief conversation, there was an increasingly heated discussion between Mr. Lynchuk and

Mr. Panko. Indeed, Mr. Neveu said that he felt uncomfortable because their exchange had nothing to do with the issues concerning him. Mr. Merkowsky entered the office, and suggested that Mr. Panko should calm down. Mr. Panko admitted that he had lost his temper, and told Mr. Merkowsky to "get these guys out of here," although Mr. Neveu suggested that he used a more vulgar term.

Some fifteen minutes later, the meeting commenced. In addition to Mr. Lynchuk, Mr. Neveu, Mr. Panko and Mr. Lloyd, Ms. Linda Braun, from Personnel Services, attended the meeting in order to take notes. Mr. Lloyd made it clear at the beginning of the meeting that only he and Mr. Neveu would be allowed to speak. Mr. Lloyd said that this was because the meeting was of a fact-finding nature, and he only wished to obtain information from Mr. Neveu in response to specific questions. He said that there was no reason to allow Mr. Lynchuk to speak, and that, in any case, he had heard of the heated exchange between Mr. Lynchuk and Mr. Panko and did not want such an event repeated.

Mr. Neveu was asked about his role in the incident involving the circulation of the pay stub relating to Mr. Therres. Mr. Neveu said that he had not been in the Service Centre when the incident began, although he had passed through when the employees were still discussing whether it was appropriate that Mr. Therres be paid at the fourth step of the pay scale.

Mr. Lloyd also asked Mr. Neveu for his version of the events involving the heat exchange unit at St. Anne School.

A further item to which Mr. Neveu was asked to respond was an allegation that he had asked contractors to alter invoices so that the services described in them would not include any which Mr. Neveu might have been expected to perform himself. He was also asked about an allegation concerning his joint ownership of a computer with an employee of a contractor whose services had been used.

Finally, Mr. Neveu was asked whether he had ever done any work for schools for which he had been paid in cash. Mr. Neveu responded by asking whether what Mr. Lloyd had in mind was a number of crosses which Mr. Neveu had constructed with an industrial arts teacher. In some cases, he said, he had been paid in cash, and on another occasion, they had donated a cross for the lobby of the administrative offices of the Employer.

Mr. Lloyd said that these questions arose because he had rejected a petty cash claim made by a principal for work done by Mr. Neveu. He said that this request was not consistent with school board policy, which required prior approval for any payments to employees. Mr. Lloyd testified that he later decided this was not an infraction, because the policy had not been adhered to regularly, though he gave instructions that it was to be followed in future.

There was some further discussion at the meeting of the relationship between Mr. Neveu and Mr. Anderson. It is also clear that there was some discussion of the possibility of Mr. Neveu returning to a job as a building manager. Mr. Lloyd and Mr. Panko both testified that this was not suggested by them as a "demotion" for Mr. Neveu, but that he raised the notion himself as he expressed concern about retaining his employment with the Employer. Mr. Lloyd said he tried to make it clear to Mr. Neveu that there was no need to consider any action of this kind at that point.

At the end of the meeting, Mr. Panko apologized for losing his temper during his conversation with Mr. Neveu and Mr. Lynchuk prior to the meeting. Both Mr. Panko and Mr. Lloyd said that this was a spontaneous gesture on the part of Mr. Panko. Mr. Neveu, on the other hand, said that he did not think it was a sincere apology.

In his evidence, Mr. Neveu said that he was devastated by the way things had gone at the meeting, and assumed that the Employer was compiling a list of reasons for ending his employment. He said that he was under such stress following the meeting that he consulted a physician within the next several days. As a result, he went on medical leave, and had not returned to work at the time of the hearing.

Counsel for the Union argued that these events constitute a campaign of harassment against Mr. Neveu which is based on his activity in and on behalf of the Union.

Counsel for the Employer, on the other hand, argued that the Union has failed to show that any of the conduct of the Employer was motivated by anti-union sentiment, or that the Employer intended to coerce or intimidate Mr. Neveu or anyone else.

Though we are of the view that the evidence falls short of showing any consciously-orchestrated campaign of harassment against Mr. Neveu, we have concluded that certain aspects of the conduct of representatives of the Employer do constitute unfair labour practices.

In relation to the allegation that the Employer had violated s. 11(1)(a) of *The Trade Union Act*, counsel for the Employer argued that the term "any right conferred by this Act" must be construed in a fairly narrow way. So, for example, he argued that the conversations in which Mr. Panko questioned the wisdom of Mr. Neveu or Mr. Germs remaining in their positions on the executive of the Union were concerned merely with the holding of union office, which is not a "right conferred by this Act." He argued that the two fundamental rights conferred by the *Act* are those of bargaining collectively and choosing a bargaining agent, and that the holding of union office does not fall into either of these categories.

It is our opinion that this argument betrays a misunderstanding of the nature and scope of the rights conferred on employees by *The Trade Union Act*, and of the protection intended by s. 11(1)(a). The general right conferred on employees by *The Trade Union Act* is the right described in s. 3 to "organize in and to form, join or assist trade unions."

It is true enough that no individual has any entitlement to union office as such, but this Board has traditionally interpreted s. 11(1)(a) as creating a broad protection for employees who are participating in trade union activity or making decisions concerning trade union representation. This participation may take any of a variety of forms. The point of s. 11(1)(a) is that the high degree of influence which an employer enjoys in relation to employees should not be deployed to affect the relationship between employees and trade unions.

The Board has said that the version of s. 11(1)(a) which came into effect in October of 1994 does not have the effect of preventing all communication between employers and employees which may relate to trade unions or collective bargaining. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Limited and United Food and Commercial Workers Union, Local 1400*, [1995] 2nd Quarter Sask. Labour Rep. 234; LRB File Nos. 246-94 & 291-94, the Board made the following comment on 259:

> *It is our view that the amendment has not materially altered the import of Section 11(1)(a), but has provided a useful clarification of its essential orientation. It makes it clear that it is not part of the purpose of the section to elevate the status of communication from an employer to employees; the provision emphasizes that coercive conduct on the part of an employer, of which communication may be the means, is unlawful.*
>
> *The jurisprudence of the Board indicates that we have always interpreted this as the focus of the section; the amended language provides additional support for this view.*

> *It does not, however, render improper all communication by an employer on matters which may be the subject of bargaining.*

In arriving at this interpretation, however, the Board emphasized that there are severe restrictions on the extent to which an employer is free to make statements or take steps which may intrude into the decisions or activities of employees who are considering whether to seek trade union representation or who are participating in the affairs of a trade union. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Brown Industries (1976) Ltd.*, [1994] 2nd Quarter Sask. Labour Rep. 71; LRB File Nos. 010-95 & 012-95, the Board made this statement on 85:

> *The proviso which was included in the previous version of Section 11(1)(a) has sometimes been referred to as an "employer free speech" provision. It should be clear from the jurisprudence of this Board that we have never interpreted the issue as one which revolves around a public interest in protecting the right of an employer as a citizen to speak freely. We have taken the position that any communication from an employer to employees must be seen as coloured by the coercive potential present in a relationship where the employer has disproportionate power derived from control over employment, and the terms and conditions of that employment. In this context, we have stressed that an employer is not entitled to influence the decision employees make about trade union representation, and that an employer makes comments on the representation question at their peril.*

In the *Westfair Foods* case, *supra* at 259-260, the Board went on to make this comment:

> *We have often stressed, however, that for an employer to decide to communicate with employees concerning matters which are the subject of bargaining with the trade union representing those employees is to enter on a course which entails significant risks. As we have indicated, the Board has not prohibited employers from presenting accurate information to their employees, stating their position on bargaining issues, or describing the status of collective bargaining. On the other hand, the Board has made it clear that communications from an employer cannot be regarded in the same benign and uncoloured light as ordinary exchanges. An assessment of whether there is something objectionable about a communication from an employer must take into account the vulnerability of employees to the incalculable and often unacknowledged influence which such an utterance may have upon persons whose working conditions or employment may depend on the character of their relationship with the employer. In some situations, as the Board suggested in the F.W. Woolworth decision, supra, there may be no room for any communication from the employer which does not have a coercive implication.*

We have concluded that some of the communications which took place between representatives of the Employer and employees did constitute unfair labour practices. Most of these occurred in conversations between Mr. Panko and Mr. Neveu. Mr. Neveu described these conversations in somewhat more colourful terms than was supported by the recollections of Mr. Panko. From our

observation of Mr. Panko as a witness, it seems unlikely that he gave vent to some of the more lurid expressions suggested by Mr. Neveu. Mr. Panko did not strike us as someone who set out to undermine and weaken the influence of the trade union among the employees. He was, however, inexperienced in a workplace where employees are represented by a trade union, and many of the mistakes he made may be attributable to this inexperience.

It is clear, even by the account of Mr. Panko himself, that he was responsible for communications which went beyond the boundaries of neutral and appropriate employer comment on questions of trade union representation and trade union activity.

Though he may not have regularly described the Union in such derogatory terms as suggested by Mr. Neveu, he did say on a number of occasions that he thought it would be in the interest of Mr. Neveu and Mr. Germs to withdraw from involvement on the Union executive. He said that this was, in part, because of his concern that they were spending too much time on Union business during work time, and because he thought there was a potential conflict of interest for Mr. Neveu as a member of the executive and a supervisor. He further said that he was reacting the concerns expressed by Mr. Neveu himself about the tensions which arose from his prominence in the Union.

To some extent, these are legitimate concerns. It is clear, however, that Mr. Panko thought the activity of the Union executive was not constructive or productive in a more general sense, and that in his conversations with Mr. Neveu and Mr. Germs he suggested this to them.

Mr. Panko said in his testimony that he thought trade unions might serve a useful purpose, but that, in his opinion, the leadership of this Union had ceased to be guided by the wishes of the membership. He made a specific comment to this effect when he discussed with Mr. Neveu the plans for honouring Mr. Coumont.

One of the factors which contributed to the views held by Mr. Panko about the Union was the presence of Mr. Lynchuk as the President of the Union. Mr. Panko said that he did not respect Mr. Lynchuk, and thought that his participation in representation of employee interests was not helpful. He stated to Mr. Neveu a number of times that he did not think it was prudent to seek representation or assistance from Mr. Lynchuk in his dealings with the Employer. When Mr. Neveu appeared in the company of Mr. Lynchuk prior to the meeting with Mr. Lloyd on February 9, 1996, Mr. Panko concedes that he

may have said that Mr. Neveu must "think he was guilty" because he had brought Mr. Lynchuk. He proceeded to lose his temper, a development he immediately regretted, because of the presence of Mr. Lynchuk.

On another occasion, when he met with employees in the Service Centre to discuss the creation of the new service manager positions, Mr. Panko thought it was possible that he had indicated he did not want to be told how the collective agreement addressed the creation of new positions.

Mr. Panko may not think of himself as an influential or powerful person. It is incumbent upon him to realize, however, that insofar as he represents the Employer in dealings with the employees, he is in a position to exercise a considerable influence over the terms and conditions of their employment, and that, from their point of view, he exercises authority over their situation. The comments we have outlined here, and others he may have made, suggest a degree of disrespect for and impatience with the Union which could have an intimidating effect on employees who actively support the Union, and on those who may be considering whether to support the Union. Comments of this kind, whether or not they were so intended by Mr. Panko, convey the impression to employees that the Employer disapproves of overt support for the Union, and that their interest may best be served by sharing the opinions of the Employer.

In his evidence, Mr. Panko said that some of the comments concerning the Union were made on occasions when Mr. Neveu raised the issue. In circumstances such as those he described, in which he was trying to establish a good working relationship with an employee who exercised a significant degree of responsibility, it is no doubt difficult to maintain a distinction between welcome candour and obtrusive criticism. The representative of an employer must make efforts, nonetheless, to observe the boundary which is created by the description of the bargaining unit in a certification Order. Though there has been some desultory discussion of removing the service manager positions from the bargaining unit, Mr. Neveu is an in-scope employee, and that aspect of his position should always have been kept in mind by Mr. Panko in his discussions with him.

The Union has also made an allegation that the Employer has committed violations of s. 11(1)(b) of *The Trade Union Act*. Though allegations which invoke this provision do not arise often in the experience of the Board, we have commented on its scope in several previous decisions. In *Saskatchewan United Food and Commercial Workers v. Federated Co-operatives Ltd.*, [1985] May

Sask. Labour Rep. 30; LRB File No. 213-83, the Board made this comment on 33:

> *Section 11(1)(b) of The Trade Union Act prohibits an employer from interfering with the formation or administration of any labour organization. The Canada Labour Relations Board considered the phrase "interference with the formation or administration of a trade union" as it appears in Section 184(1)(a) of The Canada Labour Code in National Association of Broadcasting Employees and Technicians v. A.T.V. New Brunswick Limited (C.K.C.W.-T.V.) 1979 3 CLRB 342 and stated at p. 346-7:*
>
> > *The administration of the union. This is directed at the protection of the legal entity, and involves such matters as elections of officers, collecting of money, expenditure of this money, general meetings of the members, etc. In a word all internal matters of a trade union considered as a business. This is to assure that the employer will not control the union with which it will negotiate and thus assure that the negotiations will be conducted at arm's length.*
>
> *A union's right to discipline its own members is as much an administrative function of the union as the election of its officers. Section 11(1)(b) prohibits an employer from interfering with that function. Interference could occur in a number of ways. Some of the most obvious include, for example, attempting to bribe, intimidate or improperly influence witnesses or union officials involved in discipline proceedings.*

Counsel for the Employer argued that s. 11(1)(b) is intended to protect a trade union from actual and overt interference in the internal processes and affairs of the union, and that it does not extend to lend support to allegations concerning attempts by an employer to influence or persuade employees to take a certain position on union issues.

The Board has stated that s. 11(1)(b) cannot be cited to prevent employers from doing all things which are contrary to what a trade union may perceive as its interest. In the *Westfair Foods* case, *supra* at 267, for example, the Board made this statement:

> *In our view, this passage suggests the appropriate focus for this section. We see it as intended to protect the integrity of the trade union as an organization, not to speak to all of the types of conflict which may arise between a trade union and an employer in the course of their dealings. Insofar as meetings between an employer and employees are permissible - and we have outlined the perils which they face on other grounds - it is to be expected that they will be planned by the employer so that the persuasive impact of the information conveyed will be maximized. This in itself, however annoying, does not constitute "interference with the administration" of a trade union within the meaning of Section 11(1)(b).*

In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Canada Safeway Ltd.*, [1995] 3rd Quarter Sask. Labour Rep. 170; LRB File No. 093-95, the Board added this at 183:

> *... In the relationship between a trade union and an employer, there will be many occasions when the strategy pursued by the union does not have the anticipated results, or the union must make concessions in the face of the superior bargaining power of the employer. This is the nature of collective bargaining. It cannot be the case that every action of an employer which does not serve the best interests of the trade union can be viewed as an infraction of Section 11(1)(b). As we indicated in the cases cited above, this provision must, in our view, be taken to govern conduct which threatens the integrity of the trade union as an organization, or creates obstacles which make it difficult or impossible for a trade union to carry on as an organizational entity devoted to representing employees....*

We agree with counsel for the Employer that not every comment which denigrates a trade union amounts to an infraction of s. 11(1)(b). On the other hand, direct attempts to influence the choice of trade union leadership do, in our view, fall into the category of conduct prohibited by s. 11(1)(b). We think there were examples of such prohibited conduct in this case. One of these occurred in the discussions between Mr. Panko and Mr. Neveu, and between Mr. Panko, Mr. Neveu and Mr. Germs.

Mr. Panko suggested to both Mr. Neveu and Mr. Germs that they should withdraw from positions on the Union executive. Mr. Panko said that this was just a friendly suggestion, but we find that he did directly advise the two employees to withdraw, and that this constituted interference of the kind prohibited by s. 11(1)(b). In this connection, we do not accept the argument advanced on behalf of the Employer that it is necessary for the Union to establish that the decisions of Mr. Neveu and Mr. Germs to resign their positions on the Union executive were attributable entirely to the advice of Mr. Panko. We think it is sufficient for the Union to establish that an employer has taken action which constitutes interference, whether or not it has any demonstrable effect.

The other examples which we think constituted a violation of s. 11(1)(b) have to do with the reactions of both Mr. Panko and Mr. Lloyd to Mr. Lynchuk as a representative of the Union. It would be unrealistic to suppose that personal conflicts do not arise on occasion between representatives of employers and trade unions. It is not, however, open to an employer to address such conflict by attempting to ignore or sideline a representative who has been duly chosen by employees to act on their behalf.

Both Mr. Panko and, more subtly, Mr. Lloyd suggested to Mr. Neveu that there was something wrong with getting assistance from Mr. Lynchuk on matters which had clear implications for the terms, conditions and tenure of his employment. Mr. Panko made no secret of his hostility towards Mr.

Lynchuk, and suggested to Mr. Neveu a number of times that it was not appropriate to associate with Mr. Lynchuk too closely. He also became engaged in a confrontation with Mr. Lynchuk prior to the February 9 meeting, in the course of which he made it clear that he did not want to deal with Mr. Lynchuk further.

Mr. Lloyd said that he prevented Mr. Lynchuk from active participation in the meeting with Mr. Neveu because he did not view it as a disciplinary proceeding. In *Bakery, Confectionery and Tobacco Workers International Union, Local 389 v. Weston Bakeries Ltd.*, [1995] 1st Quarter Sask. Labour Rep. 261; LRB File No. 274-94, this Board found that it was not improper for an employer to conduct a preliminary investigation among employees without involving union representatives. The Board drew a distinction in this respect between this kind of preliminary investigation and contact with employees which may have disciplinary connotations, at 268-269:

> *An employer must clearly exercise some caution in approaching employees who may be the subject of discipline because such an approach may interfere with the right of employees to trade union representation in a dispute with their employer. This does not, however, prevent an employer from obtaining information from other employees whose only connection to an actual or potential dispute is the possession of facts which may assist the employer to make a decision whether or not to enter into a formal investigation or undertake disciplinary action. A discussion of this kind does not conflict with the exclusive status of a trade union as the bargaining representative of employees.*

The distinction suggested in this passage is often a difficult one to draw in practice. Mr. Lloyd testified that he was interviewing Mr. Neveu in the context of an inquiry into the pay stub incident in the Service Centre, and that he was merely trying to obtain some information which would allow him to decide how he should proceed.

There is no question, however, that the interview with Mr. Neveu was different from the discussions which took place with other employees concerning this particular issue. Mr. Neveu was questioned about a range of matters. Many of the questions suggested that allegations of a serious nature, some of which called into question his integrity, had been made against Mr. Neveu. Though Mr. Neveu was not aware that many of these issues would be raised at the meeting, it was natural for him to conclude, even on the basis of the limited information available prior to the meeting, that the meeting with Mr. Lloyd might have some disciplinary implications. On the basis of what happened at the meeting, this conclusion seems even more reasonable. Though Mr. Lloyd allowed Mr. Lynchuk to be present at the meeting, he did not permit him to participate in the meeting or to make any representations on behalf of

Mr. Neveu. Though there may have been other reasons for this, the conclusion cannot be avoided that one of the reasons for consigning Mr. Lynchuk to ineffectual silence at the meeting was that Mr. Lloyd did not regard Mr. Lynchuk as an appropriate representative of employee interests.

The allocation of representational roles by the employees is not something in which an employer has a legitimate voice, and, by their comments and actions, Mr. Panko and Mr. Lloyd clearly tried to undercut the effectiveness of Mr. Lynchuk as a leader in the Union. In our view, this went beyond legitimate exchange and became improper interference within the meaning of s. 11(1)(b).

The Union cited s. 11(1)(d) of *The Trade Union Act* in its application. Counsel for the Union did not specifically demonstrate how the evidence put before the Board would support the application of this provision, and we prefer to make no finding concerning this section.

With respect to s. 11(1)(e), as we indicated earlier, we do not think the Union has succeeded in showing that Mr. Neveu was the target of sustained harassment and discrimination. The series of events which led to this application have clearly taken a severe toll on Mr. Neveu. A number of factors have contributed to the situation in which he now finds himself. These include the sustained personal tension between him and Mr. Anderson, the difficulties which attended the formation of the Union, his association with the controversial figure of Mr. Lynchuk, the changes which have taken place in the status and duties of the service managers, and the stresses of arriving at satisfactory working relationships with new administrators.

Among the contributing factors must also be included the meetings which were arranged by Mr. Lloyd. It is not surprising that Mr. Neveu found these highly stressful. The purpose and expected outcome of the meetings were not clearly set out for him. In the case of the meeting on February 9, he was not alerted to the range of allegations which were, at least by implication, being made against him. Though Mr. Lloyd denies that the meeting had any disciplinary purpose, this was not communicated to Mr. Neveu and, indeed, it appears that some of the issues raised at the meeting are the subject of a continuing investigation by the Employer.

It seems reasonable for Mr. Neveu to view some aspects of his treatment by the Employer as unfair and unnecessarily mysterious. We do not think, however, that the evidence is sufficient to establish that Mr. Neveu was singled out for harassment because of his position in the Union. We have found that

some aspects of the interchange between Mr. Neveu and representative of the Employer constituted unfair labour practices; we do not find, however, that a violation of s. 11(1)(e) has been established.

The Union has not asked for any remedial Order aside from an Order that the Employer cease and desist from further conduct in violation of the sections of *The Trade Union Act* which were cited. We will issue an Order in these terms.

RETAIL WHOLESALE CANADA, A DIVISION OF THE UNITED STEELWORKERS OF AMERICA, Applicant and UNITED CABS LTD., Respondent and WILLIAM JOHNSTON AND MICHAEL WINOWICH, Intervenors

LRB File No. 115-95; April 30, 1996
Chairperson: Beth Bilson; Members: Bruce McDonald and Terry Verbeke

For the Applicant: Neil R. McLeod
For the Respondent: Melissa Brunsdon
For the Intervenors: William Johnston

Bargaining unit - Appropriateness - Whether bargaining unit defined in terms of ownership or control of one car is appropriate - Board deciding unit defined in these terms is appropriate.

Employee - Whether drivers who are subject of application are employees within meaning of *The Trade Union Act* - Board deciding drivers are employees.

Employee - "Dependent contractor" - Whether s. 2(f)(i.1) of *The Trade Union Act* is equivalent to dependent contractor provisions in other jurisdictions - Board deciding this is not equivalent of dependent contractor provision.

Employee - Independent contractor - Whether drivers should be considered independent contractors - Board deciding drivers are not independent contractors.

Employer - Whether taxi company is employer of drivers - Board deciding taxi company is employer.

Practice and procedure - Evidence - Evidence of support - Board declining to consider letters concerning withdrawal of support not filed with Board prior to date of application.

Practice and procedure - Statement of employment - Whether union proposal that statement of employment include drivers driving two or more shifts per week is reasonable - Board deciding this is reasonable way to compose statement of employment.

Unfair labour practice - Union unfair labour practice - Coercion and intimidation - Whether support for application was obtained through coercion or misrepresentation - Board deciding evidence did not support allegation that union committed unfair labour practices during organizing campaign.

***The Trade Union Act*, ss. 2(f)(i.1), 2(f)(iii), 2(g), 10 and 11(2)(a).**

REASONS FOR DECISION

Beth Bilson, Chairperson: The Retail Wholesale Canada Division of the United Steelworkers of America has filed an application seeking to be certified to represent a unit of employees of United Cab Ltd. in Saskatoon.

United Cabs Ltd., which also operates under the name Blueline Taxi, carries on a taxi service which is regulated under a bylaw of the City of Saskatoon. Prior to the hearing, the parties had agreed that there were three basic issues outstanding between them.

The first of these is whether any of those identified as employees by the Union are employees within the meaning of s. 2(f) of *The Trade Union Act*, R.S.S. 1978, c.T-17 *vis-à-vis* United Cabs Ltd. The second question relates to what criteria should be used to determine which individuals were employed as of the date of the application, in the event the Board should decide that those described in the application are employees. The parties asked the Board to determine these two issues at this time.

The parties were in agreement that the third issue - the actual identity of those whose names should be included on the Statement of Employment - should be put aside pending the outcome of the other two matters.

The Board permitted Mr. Michael Winowich and Mr. William Johnston to participate in these proceedings. Mr. Johnston wished to intervene on behalf of a number of employees who alleged that the Union had committed certain improprieties in the course of the organizing campaign. Mr. Johnston was permitted to present evidence and make argument with respect to these allegations.

Mr. Winowich originally filed an application which took the form of a request for rescission of a Board Order on the ground of fraud. Since the Board had made no Order in relation to these parties, it was clear that the application could not be considered in this form. When Mr. Winowich outlined his concern to the Board at the hearing, it became evident that he wished to make allegations somewhat similar to the matters raised by Mr. Johnston. Mr. Winowich was not present after the first day or so of the hearing, and did not appear to make argument at the conclusion of the hearing. Mr. Johnston suggested to the Board that Mr. Winowich might have left Saskatoon to take up employment elsewhere. The Board must therefore regard the application of Mr. Winowich as being abandoned,

though we are satisfied that the essence of his complaint has been addressed in our deliberations concerning the allegations made by Mr. Johnston.

The bylaw of the City of Saskatoon designated as Bylaw 6066 regulates a number of aspects of the taxi industry in that municipality. It provides that the City retains control over the issuing of the basic license to operate a taxi. It also, among other things, specifies the rates which may be charged for carriage of passengers, states the requirements for metering and calculating fares, and states the variations in charges for certain kinds of trips. The bylaw also contains certain special provisions for vehicles equipped to carry disabled passengers.

The power of the City of Saskatoon under this bylaw to issue taxi licenses, or "franchises," is used to control the number of taxis which carry on business in the city. At present there are 165 franchises, and no new ones have been issued for some time. One hundred and five of these franchises are connected with taxicabs operating under the banner of United Cab or Blueline Taxi. The remaining franchises carry on business under the banner of Radio Cab. There are no freelance or "gypsy" cabs operating in Saskatoon.

The exploitation of the franchises which are connected with the United Cab and Blueline Taxi names gives rise to a complex network of relationships. These relationships are of considerable significance for the purpose of answering the questions which the parties have put before us here.

The franchise itself may be characterized as a business asset, and its ownership may or may not be connected with actual involvement in the day-to-day business of the taxi industry. Each franchise is connected with an actual taxicab which is used to carry passengers. The owner of a franchise does not necessarily, however, drive the taxicab to which the plate signifying that franchise is attached. According to the evidence presented on behalf of United Cab Ltd. at the hearing, 24 of the franchise owners do drive.

Others treat the ownership of a franchise as an investment. Franchises may be bought and sold, or passed on by inheritance. The current market value of each franchise is approximately $25,000.

According to the evidence, a number of individuals and companies own one, two or three franchises. There is only one example of franchise ownership on a larger scale. One company, J.G. Taxis Limited,

owns 21 franchises.

If the owner of a franchise does not drive the taxicab, the franchise is leased to someone else who drives it or arranges for others to do so. There are currently 51 franchises leased by individual lessees or "lease operators." All of the individual lease operators drive the taxicabs associated with the franchise. In addition, there are three instances where individuals or companies have leased multiple franchises. United Cab Ltd. itself leases thirteen franchises, Geneva Roth Management leases seven, and Mr. Neil Farries leases six.

In order to make the maximum use of any taxicab, a franchise owner or lease operator generally hires additional drivers to ensure that the taxicab is on the road for as many hours as possible. These drivers rent the use of the taxicab; this rental is usually calculated on a per-shift basis. The typical rental in the winter period is currently $45 per shift. The rental may be reduced in the summer, when business is slower.

United Cabs Ltd. stands at the hub of this network in a number of respects. The company provides a dispatch service which is used to allocate passenger requests among the vehicles which are operating at any given time. The distribution of requests is done through a computer system; drivers are notified of available trips by means of terminals which are installed in all vehicles. Evidence was advanced by the Union estimating that 75 per cent of the income of drivers comes from trips brought to their attention through the dispatch system. Drivers may obtain additional trips from taxi stands at the airport and other locations, from responding to passengers who flag them down, and, to a limited extent, from personal arrangements with passengers.

United Cabs Ltd. attempts to maintain a public image which will lead passengers to contact the company if they are in need of taxi services. To this end, they require that taxicabs which operate under one of the corporate banners be painted a uniform colour and display one of the two corporate names.

Four or five years ago, United Cabs Ltd. initiated the Blueline Taxi designation. According to the evidence of Mr. Tony Rosina, the Systems Manager of the company, this was suggested by some of the drivers as a way of expanding business in some sectors of the market. Blueline Taxi was conceived as an upmarket taxi service which would provide customers with a higher level of personal service and

carriage in newer and larger cars. The original idea was that the Blueline service would be restricted to a small proportion of the total taxicab fleet, and that there would be more stringent requirements in terms of the dress of drivers, the expectations for service, and the state of the vehicles used.

Blueline Taxi has a separate telephone number, although taxis are dispatched by the dispatch staff used by United Cab. Though Blueline Taxi maintains some distinctions of driver attire, and make and model of car, Mr. Rosina testified that over the years the original objective of establishing Blueline Taxi as an elite taxi service has become somewhat watered down. He attributed this largely to the decline of the taxi business overall. Of the 105 vehicles in the United Cab Ltd. fleet, over 80 currently carry the Blueline Taxi banner.

United Cabs Ltd. provides some of the equipment used in the taxicabs, including top signs and radio equipment. Because the computerized dispatch system uses computer equipment which is no longer manufactured, United Cabs Ltd. is, in effect, the exclusive supplier of computers for the taxicabs.

The dispatch and administrative office of United Cabs Ltd. is on Avenue C South in Saskatoon. At another location, on Avenue B South, the company operates a gas bar, autobody shop and vehicle sales lot. The autobody shop uses the name Atomic Autobody, which is also the name of the car sales operation. United Cabs Ltd. offers those operating taxicabs favourable pricing on propane, vehicle repairs and body work.

United Cabs Ltd. also arranges for owners and lease operators to have charging privileges at a number of automobile parts and service businesses elsewhere in the city.

With respect to the franchise owners who do not drive, United Cabs Ltd. may function as a broker, bringing together franchise owners and those interested in leasing a franchise, and administering the lease arrangement on behalf of the franchise owner. At the time of the hearing, United Cabs Ltd. was acting as a broker for 77 of the franchises.

Under the city bylaw, owners of taxi franchises are required to supply the police with a list of drivers. According to Mr. Rosina, United Cabs Ltd. has been administering this requirement. The company provides all newly-hired drivers a form which they are asked to complete and present at the police station. United Cabs Ltd. also places periodic advertisements in the local newspaper to recruit new

drivers.

United Cabs Ltd. conducts any negotiations concerning taxi stands. There are taxi stands at the airport, and at such locations as hotels and hospitals. In the case of the airport, United Cab was the signatory to a formal agreement. In other cases, there may be an informal arrangement. With respect to some of the taxi stands, United Cabs Ltd. provides and maintains telephone service to the location.

With respect to some clients, United Cabs Ltd. has agreed to allow the fares incurred to be charged. Drivers can collect the fares charged to these accounts through the company office. In other cases, United Cabs Ltd. agrees to flat fees for certain customers. The trips for which flat fees are charged include those involving employees of Canadian National Railways, employees traveling to the potash mines in the vicinity of Saskatoon, and students going to the Saskatoon public schools. Many of the flat fee trips are distributed on a rotating basis to give all drivers a fair opportunity to do them. In the case of the public school service, United Cabs Ltd. has agreed to provide a consistent rota of drivers, for the reassurance of students and parents.

All drivers are required to accept Visa and American Express cards. They can obtain cash for these charges at the United Cab office, subject to a handling charge.

There are a variety of obligations and financial responsibilities which are assumed by different players in this system. The franchise owners are responsible for equipping the taxicabs with radios, computer equipment, taxi meters and a top sign. They are also responsible for the cost of a business license and a radio license each year. For the purposes of insurance, the franchise owners are registered as the owners of the vehicles, and must pay the cost of vehicle insurance, which is approximately $2,100 annually. In addition, the franchise owner is responsible for maintaining a comprehensive insurance policy costing about $700 per year.

The lease operators pay a rental fee for the franchise. Though there is no formally standardized rate, the rental fees charged are generally set at $520 per month. Lease operators, or franchise owners if they have not leased the franchise, pay administrative charges to United Cabs Ltd. These "office fees" are set at $108 per week for vehicles under the United Cab banner, and $113 per week for Blueline Taxi vehicles. United Cabs Ltd. also charges a monthly fee for radio and computer maintenance, which is paid by the lease operator or franchise owner.

United Cabs Ltd. maintains an insurance fund, referred to in evidence as the "dollar a day insurance," which is designed to lower the deductible in the case of accidents causing damage to vehicles from $600 to $200. The charge of one dollar per day is paid by the franchise owner or lease operator, though it was suggested that drivers are also asked to pay it in some circumstances.

In some cases, United Cabs Ltd. has assisted lease operators with financing for the purchase of vehicles. In these cases, it was indicated that it is compulsory for the lease operator to pay the dollar per day.

As we noted earlier, drivers pay a flat fee per shift to the lease operator or franchise owner who hired them. They are also responsible for fuel costs while they are operating the vehicles.

There is a procedural manual issued to all drivers, which is generally referred to as the "drivers' rules." The exact origins of these rules are lost in the mists of time, according to Mr. Rosina. He said, however, that they represent a body of practices and procedures which were in part borrowed from other taxi services. Other parts have been added or modified as a result of changes proposed by the "Drivers' Committee." The parts of the manual which deal with the use of the computer system were added by United Cabs Ltd.

The Drivers' Committee consisted, until recently, of representatives of franchise owners and lease operators actually involved in driving taxicabs. In early 1995, after the Union had initiated the organizing campaign which led to this application, the Committee was restructured to include representatives of the drivers, the franchise owners who do not drive, and the drivers of the vans for disabled passengers.

The Committee meets from time to time to discuss various concerns, as well as to propose additions or revisions to the rules. Though there was some dispute about the actual role played by the Committee in relation to discipline of drivers, it is clear that it is open to drivers who are dissatisfied with disciplinary measures taken against them to make representations to the Committee. Mr. Rosina described this as an "appeal," and suggested the company would consider themselves bound by any results of the process. Other witnesses did not view the consideration of a case by the Drivers' Committee as a final appeal, though a number of them saw representations to the Committee as a recourse open to them.

The level of taxi fares lies under the control of the City of Saskatoon. From time to time, the two taxi companies in Saskatoon may make a joint request to the City to have the fares raised. Mr. Rosina testified that United Cabs Ltd. would not make such a request alone, but would seek the cooperation of Radio Cab. The suggestion that fares should be raised is often initiated by the Drivers' Committee.

The primary issue raised by the parties for determination by this Board is whether this configuration of facts indicates that there is a relationship between United Cabs Ltd. and the group of drivers which the Union seeks to represent which can be characterized as one between an employer and employees for the purposes of *The Trade Union Act*.

Section 2(f) of *The Trade Union Act* reads as follows:

> *2 In this Act:*
>
> *(f) "employee" means:*
>
> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or*
>
> *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer.*
>
> *(i.1) a 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 labour-management 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;*

Counsel for the Union argued that, though many of the drivers identified in the application may display some of the characteristics of independent contractors, they are in fact dependent upon United Cabs Ltd. and should be regarded as employees within the meaning of s. 2(f)(iii) of *The Trade Union Act*. He referred the Board to statutory provisions in other jurisdictions which allude to "dependent contractors," and suggested that this notion is an appropriate way of looking at the situation of the drivers in this case.

Counsel for United Cabs Ltd., on the other hand, argued that there is the equivalent of a "dependent contractor" provision in s. 2(f)(i.1), and that the drivers do not meet the criteria set out in this section because they do not have a contract with United Cabs Ltd.

In deciding whether a person is an employee for a purpose which relates to the advancement of the policy objectives embodied in *The Trade Union Act*, the Board must attempt to distinguish between persons who are genuinely operating in an entrepreneurial fashion independent of an "employer," and those who, whatever the form their relationship with that putative employer takes, are really employees whose access to the option of bargaining collectively should be protected.

The Board made this point in the following way in a decision in *Retail, Wholesale and Department Store Union, Local 544 v. Dairy Producers' Co-operative Limited*, [1983] Dec. Sask. Labour Rep. 30; LRB File No. 029-83 at 32:

> *The contractual relationship between Messrs. Parr and Isaak and the Respondent must be examined against the purpose of The Trade Union Act. That purpose is to protect the right of employees to organize in and to bargain collectively through a trade union of their own choosing. Once acquired, collective bargaining rights should be protected from erosion by contractual arrangements that differ in form but not in substance from the employment relationship. If the substance of the relationship between an individual and the person to whom he provides work or services is closer to that of an independent contractor than it is to an employer/employee relationship then the individual is not an employee within the meaning of Section 2(f)(i) of the Act and the Board will not designate that person as an employee for the purposes of Section 2(f)(iii).*

In *International Brotherhood of Electrical Workers, Local 2038 v. Tesco Electric Ltd.*, [1990] Summer Sask. Labour Rep. 57; LRB File No. 267-89, the Board made a related comment at 59-60:

> *With respect to the final consideration: ... the statutory purpose of The Trade Union Act is to protect the rights of employees to organize in trade unions of their own choosing for the purpose of bargaining collectively with their employers.*

> *Accordingly, individuals should not be excluded from collective bargaining because the form of their relationship does not coincide with what is generally regarded as "employer-employee", when in substance, they might be just as controlled and dependent on the party using their services as an employee is in relation to his employer. If the substance of the relationship between the individual and company is essentially similar to that occupied by an employee in relation to his employer, then the individual is in fact an "employee" within the meaning of Section 2(f) of the Act and will be so designated by the Board, notwithstanding the form or nomenclature attached to that relationship.*

In another decision, *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Locals 539 and 540 v. Federated Co-operative Limited and Sherwood Co-operative Association Ltd.*, [1990] Fall Sask. Labour Rep. 57; LRB File No. 256-88, the Board attempted at 58 to capture the qualities which identify a genuinely independent contractor:

> *That conclusion was that although it is not the only consideration, entrepreneurial independence or control, in the sense of the latitude to make decisions which determine the financial success or failure of the business, is the most important feature that distinguishes independent contractors from employees.*
>
> *This Board agrees with that analysis. An independent contractor is essentially a business person, an entrepreneur, a risk taker who takes chances in the marketplace with a view to making a profit. Success or failure of his enterprises depends upon how well he utilizes the capital and labour that he controls and how well he assesses the marketplace. Regardless of how inferior a businessman's bargaining power may be or how poor his bargain, he is not an employee within the meaning of the Act.*

The Ontario Labour Relations Board commented on the policy considerations underlying the distinction between independent contractors and employees in *Di Sabatino v. I.B.T., Local 879 et al.* (1977), 77 C.L.L.C. ¶16,092 at 543-544:

> *18. The Labour Relations Act, however, was never intended to insulate entrepreneurs from economic competition by allowing that class of person to act in combination. Such combinations not only fall outside the purview of collective bargaining legislation, but they are also expressly restricted by the federal Combines Investigation Act. Collective bargaining policy, thus, expressly encourages combinations, while competition policy operates in the opposite direction. Given these two quite different policies, it then becomes important to identify the outer limits of our own statute, The Labour Relations Act.*
>
> *19. The task of distinguishing between the individual worker and the true entrepreneur has never been easy. There exists an economic spectrum - coloured at one end by the true entrepreneur and at the other end by the individual worker. These two points of the spectrum can be identified clearly. The businessman who sells goods, and employs others to produce these goods, is clearly not entitled to use The Labour Relations Act for the purpose of forming a combination with other businessmen. On the other hand, it is clear that the worker who supplies only his*

> *own labour to an employer is entitled to organize with other workers under the Act. At the shaded area toward the middle of the economic spectrum, however, it becomes difficult to draw a distinction.*

In determining whether an individual falls closer to the "employee" or the "independent contractor" end of the continuum of relationships, this Board and other labour relations tribunals have resorted to a variety of criteria to assist in the characterization of any given set of circumstances. Some of these are drawn from traditional common law tests used for determining such issues as vicarious liability and liability for taxes. In the *Dairy Producers' Co-operative* decision, *supra* at 32, the Board alluded to one of the most frequently quoted sources:

> *Lord Wright in Montreal v. The Montreal Locomotive Works Ltd. et al (1947) 1 DLR 161, a case concerning liability for municipal taxation, adopted a useful and widely accepted fourfold test at p. 169 wherein the questions to be examined are the (1) degree of control over the method of providing goods and services; (2) ownership of the tools; (3) chance of profit; and (4) risk of loss.*

In many decisions, the concept of "control" drawn from the four-fold test laid out in *Montreal Locomotive* has been the focus of the analysis.

In *International Woodworkers of America v. Livingston Transportation Ltd.*, [1972] O.L.R.B. Rep. May 488, the Ontario Board suggested two additional ways of looking at the question of whether individuals should be treated as independent contractors or employees. An example of comment on the first of these, the "statutory purpose" test, is found in the passage quoted above from the *Tesco Electric* decision of this Board. The second criterion suggested in *Livingston Transportation* was to ask the "crucial question" of whether, overall, a person is carrying on business for himself or on behalf of a superior.

Writing in the 1960s, Professor Harry Arthurs commented on the awkwardness of the process used in determining whether individuals belonged on the "employee" or "independent contractor" side of the line. In an article entitled "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power" (1965) 16 U.T.L.J. 89, Professor Arthurs pointed out that the analysis up to that time had focused on the extent to which the details of individual situations partook of the character of independent contractors. This necessitated describing someone whose situation more closely resembled employment than independent business as "not an independent contractor," or "not really an independent contractor," rather than focusing attention on the characteristics of these individuals themselves.

He suggested that the persons who were "not really independent contractors" should be described as "dependent contractors." This would permit an analysis which concentrated on the economic dependence of such persons as the rationale for including them within the scope of the collective bargaining system as employees. In several jurisdictions, including Ontario, provisions which explicitly enshrined this notion were subsequently adopted. This provision in the Ontario *Labour Relations Act*, R.S.O. 1990, c. L.2 reads as follows:

> *"dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;*
>
> *"employee" includes a dependent contractor*

The effect of the inclusion of this provision was described by the Ontario Labour Relations Board in the *Di Sabatino* decision, *supra*, in the following comment at 545:

> *23. The question that must now be answered by the Board is, not whether a person falling within the shaded area on the economic spectrum is an employee or an independent contractor, but whether that person is a dependent contractor. This new point of departure does not mean that considerations formerly taken into account are now totally irrelevant. The statutory definition of dependent contractor clearly requires some reference to the employee-independent contractor distinction. A shift of emphasis has occurred, however, as this new definition recognizes that persons in an economic position closely analogous to that of the employee should also enjoy the benefits of collective bargaining. The determination of who is a dependent contractor is now a comparative exercise that requires reference to a much broader range of labour relations considerations.*
>
> *24. This redefinition of the limits of the Labour Relations Act serves two purposes. First, it recognizes that, as a matter of fairness, persons in economic positions that are closely analogous should be given the same legislative treatment. A second purpose, and one no less important, is to protect existing collective bargaining rights from being eroded by arrangements that differ only in form, but not in substance, from the employment relationship. These two considerations provide the justification for the shift of emphasis.*
>
> *25. The shift of emphasis is readily apparent from a reading of the definition of dependent contractor. Clearly a person need not be employed under a contract of employment to be considered as a dependent contractor, and provision of tools, vehicles, equipment, machinery is no longer a major consideration. Contractual form and the ownership of tools are no longer essential considerations. The emphasis, instead, is placed upon economic and business factors. Both the type of economic dependence that exists, and the kind of business relationship entered into, determine whether a person more closely resembles an employee than an independent contractor.*

Counsel for United Cabs Ltd. argued that s. 2(f)(i.1) of *The Trade Union Act* is intended to perform the same function as the dependent contractor provisions in other jurisdictions, albeit in a more technical and limited way. She argued that the terms of s. 2(f)(iii) should be applied when the question is whether someone is an independent contractor, but that s. 2(f)(i.1) is the applicable provision when a question of economic dependence arises.

Section 2(f)(i.1) and its predecessors have had an interesting and somewhat mysterious life in the context of the evolution of *The Trade Union Act*. Prior to 1983, this provision was designated as s. 2(f)(ii) of the *Act*. With the amendments to the *Act* at that time, this clause was deleted, only to be put back into the statute in 1994 as s. 2(f)(i.1).

In the few cases prior to 1983 where this section was the subject of comment, there was little discussion of the differentiation between s. 2(f)(ii), as it then was, and s. 2(f)(iii). In *Canadian Union of Public Employees, Local Union No. 832 v. Board of Parkland School Unit, No. 63*, [1978] June Sask. Labour Rep. 56; LRB File No. 564-77, the Board appears to have referred to the two sections without distinguishing between them. In *Canadian Union of Public Employees v. Shamrock School Division No. 38*, [1981] May Sask. Labour Rep. 47; LRB File No. 383-80, the Board referred to both ss. 2(f)(ii) and (iii), but seems to have relied exclusively upon s. 2(f)(ii) to reach a conclusion. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Yorkton Co-operative Association Ltd.*, [1981] Oct. Sask. Labour Rep. 34; LRB File No. 124-80, the Board referred only to s. 2(f)(ii).

It should be noted that all three of these cases dealt with the question of whether persons providing caretaking and cleaning services were independent contractors or employees, and in all three cases there was in fact a contract covering the work which these persons provided.

Given the conclusion we have reached on this point, we do not think it is necessary to enter into an exhaustive interpretation of the meaning of s. 2(f)(i.1). We do not, however, accept the interpretation suggested by counsel for United Cabs Ltd. This interpretation would necessitate distinguishing between ss. 2(f)(i.1) and 2(f)(iii) on the basis that the former deals with persons referred to elsewhere as "dependent contractors," while s. 2(f)(iii) addresses the question of whether persons are "really" or "not really" independent contractors. This argument seems to us to be inherently anomalous, in that it suggests the Board may address the situation of "more independent" contractors on a holistic and

policy-oriented basis, while the fate of "dependent contractors" hangs on the question of whether there is actually a contract in place or not.

We cannot comment on the full range of circumstances to which the current s. 2(f)(i.1) may have application. A clue to its possible significance seems to us to be contained in the decision of the Board in the *Board of Parkland School Unit* case, *supra*. In that decision, the Board alluded to s. 2(g)(iii) of *The Trade Union Act* in connection with ss. 2(f)(ii) and (iii). Section 2(g)(iii) reads as follows:

> *2 In this Act:*
>
> *(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;*

This provision makes it clear that the Board can determine that, in circumstances such as those presented in the decisions in *Board of Parkland School Unit* and *Yorkton Co-operative Association Ltd.*, persons who are apparently employed by an independent contractor can be characterized as employees of the principal with whom a contract for services has been concluded, for purposes related to collective bargaining. It may be that the addition of s. 2(f)(i.1) was necessary to allow the Board to define such persons as employees, as s. 2(g)(iii) deals with the characterization of the employer, not the employees. We make this comment merely to suggest a possible reason for the decision to reintroduce s. 2(f)(i.1) into the *Act*. We do not present this as an authoritative interpretation of the provision.

The Trade Union Act has never contained a provision which addresses specifically the position of "dependent contractors." The Board has interpreted s. 2(f)(iii), however, as providing a basis for consideration of a broad range of factors, and we agree with counsel for the Union that economic dependence must be included among them. This may leave us pondering the question of whether someone is "really" or "not really" an independent contractor, and using the inelegant locutions to which Professor Arthurs took exception. We would not necessarily agree with him, however, that the provision in this form creates a strait-jacket which precludes the Board from coming to grips with the issue of dependence as part of the assessment of whether someone is more appropriately considered an employee or an independent entrepreneur.

The old common law criteria, along with the added standards suggested in cases like *Livingston Transportation*, *supra*, are still helpful in examining the character of different kinds of relationships. The Board has never meant to suggest, however, that any of these criteria in themselves should be regarded as determinative or authoritative. In a decision in *Canadian Union of Public Employees v. City of North Battleford*, [1993] 1st Quarter Sask. Labour Rep. 296; LRB File No. 090-93, the Board commented at 298-299 on our overall approach to this issue:

> *Two principles may be drawn from these cases. One is that the definition in Section 2(f)(iii) frees the Board from the necessity of relying exclusively on tests, such as the "four-fold" test from the Montreal Locomotive Works case, which draw upon - and are more appropriate to -the jurisprudence of contract at common law. The other criteria which have been suggested, such as the statutory purpose test, and the "crucial question" of whether a person is acting for himself or a superior, are intended to underline that the role of a labour relations board in this context is not to determine whether a person can be sued in contract, or whether she is vicariously liable for the negligent conduct of her employees, but is rather to determine whether the true character of a relationship is such that collective bargaining is an appropriate mechanism for the interactions between the parties.*
>
> *The other important principle which is articulated in the cases referred to above, as well as many others, is that the character of any such relationship can only be determined in relation to a wide range of factual elements, which may combine to present a different pattern from one case to another.*

The Board is presented by s. 2(f)(iii) with a choice. On the one hand, the Board can conclude that the persons in question are true independent contractors, whose activities are genuinely entrepreneurial and risk-taking. In this context, an inequality of bargaining power cannot in itself justify the removal of someone from the classification of independent contractor; many business relationships which have none of the features of employment involve parties who do not carry on business on an equal footing.

On the other hand, the Board may conclude that, when the relationship is taken as a whole, there is a degree of dependence by the contractor on the principal which indicates that the relationship is most accurately viewed, not as a relationship between entrepreneurs capable of deciding their economic future, but as a relationship which sufficiently resembles an ordinary employment relationship that the "employees" should be given an opportunity to deal with the "employer" on the basis of collective bargaining.

The evidence concerning the circumstances of the drivers of United Cab and Blueline Taxi taxicabs reveals a complex web of interrelationships and obligations. It seems clear that some of these

relationships display a higher degree of independence, and a different balance of bargaining power, than others. The drivers who rent a taxicab on a per shift basis may see their situation somewhat differently than someone like Mr. Farries, who has control over a number of taxicabs. Indeed, the statements of Mr. Johnston suggest that at least some of those, like him, who drive a taxicab and lease a franchise from someone else, prefer to think of themselves as entrepreneurs rather than employees of United Cabs Ltd.

Our task here is to decide whether the group of persons identified by the Union in the application have, overall, a relationship with United Cabs Ltd. which is enough like employment that they should be given an opportunity to decide whether they wish to be represented by a trade union in their dealings with the taxi company. There are a number of aspects of these relationships which are of significance in this connection.

Counsel for United Cabs Ltd. argued that the company provides dispatch and other administrative and technical services for the convenience of franchise owners, lease operators and drivers, and that the company is not a direct party to any relationship which might be characterized as one of employment. She emphasized that any of the participants in the taxi service are free to engage in dealings with other participants on their own terms, and that they are in fact free to leave the United Cab Ltd. taxi service altogether and seek the same services from Radio Cab or try to make a go of it on their own.

It is our view that this description underestimates the degree of influence and control which is exercised by United Cabs Ltd. over those who participate in the taxi service under the banners of United Cab and Blueline Taxi.

The business objective of United Cabs Ltd. must be seen as the creation of a corporate image for the United Cab and Blueline Taxi fleets which will attract as large a proportion as possible of the taxi business in and around Saskatoon, so that the company can expect a good return from the services which are provided to the participants in the taxi service. To this end, the company engages in promotion of the taxi services, negotiates in an effort to obtain a favourable position for attracting customers in public locations, and provides an equitable and efficient dispatch system for the distribution of taxi trips.

The company also has an interest in ensuring that the public obtains reliable, courteous and efficient

service from taxicabs operating under the banners which are connected with the company. In this connection, the company has a clear interest in ensuring that the rules contained in the procedures manual are observed. As we have seen, there was considerable evidence concerning the origins and rationale of the rules. There was also evidence concerning the process of enforcing the rules, including descriptions of a number of specific incidents.

In some situations, it is clear that infractions of the rules may be dealt with in a fairly summary or informal fashion. In some cases, for example, a lease operator may simply not continue to rent out a vehicle to a particular driver. In cases where a driver owes money to the lease operator or franchise owner, notice is sometimes given to others, and it is considered bad form to hire one of these drivers until the situation is rectified.

In other cases, drivers may be called to account for infractions in a more formal sense. A charge that a driver has committed a violation of the rules may originate in a number of ways. It may arise as a result of a customer complaint, or the complaint of another driver. In some cases, the infraction comes to light as a result of the administrative activities of United Cabs Ltd. For a long period, an infraction would result in a driver being "blacked," which meant that a fine was assessed according to the nature and seriousness of the violation.

More recently, the ordinary penalty imposed for infractions has been a suspension rather than "blacking." These suspensions are effected by "de-authorizing" a vehicle, which means that the vehicle is precluded from being assigned trips through the computer dispatch system for a designated period. Mr. Rosina gave evidence that he has imposed such suspensions in circumstances where a customer has made a complaint. Continuing to drive during a suspension is considered in itself an infraction.

In a newsletter dated November of 1993, which was circulated to drivers, and written by Mr. Rosina, the following statement was made:

> *With the new system of suspensions instead of dollar value fines some drivers have asked that if they are suspended can they still work the stands and the Airport. The answer is no. A suspension is just that, a suspension. It does not mean just suspended from accepting trips through the computer. As a reminder anyone caught working the stands, Airport, etc. while suspended will receive an even longer suspension.*

A later newsletter, dated March, 1994, contained some comments concerning complaints, and ended

with the following statements:

> *Most of us have been around here long enough to know the program - Customer, Staff or Driver complaint regarding any of the above, or any other rule (written or unwritten), will result in a suspension. Driver's (sic) caught working 1-10's or sitting at the Airport or stands will have their suspensions increased by days not hours ... ignorance of the rules is not a valid excuse ... end of argument ...*

In another newsletter dated March of 1993, there is reference to the prospect of suspensions for other infractions:

> *Any person refusing to offer limo service, or complaining to a customer will be suspended. (NO EXCUSES EXCEPTED.)*
>
> *Any person booking time out to miss a short trip will be suspended for the rest of that shift.*

On one occasion, Mr. Rosina suspended a driver because of a report that he had suffered a seizure while driving. Mr. Rosina indicated to this driver both verbally and in writing that his reinstatement to driving was conditional on the receipt of a medical report confirming his fitness to drive.

In a letter dated February 14, 1995, Mr. Rosina sent the following letter to a driver, Mr. Dennis Anderson:

> *TO: DENNIS ANDERSON*
> *CAR #54*
>
> *As you know it has come to our attention that you have been driving since the end of July with no driver's license. Forgetting for a couple of days to renew a license can be considered an oversight but there is absoulety (sic) no excuse for going over six months without a current and valid license. By continuing to drive without a license you put in jeopardy not only the insurance converage (sic) on your owner's car and your passengers but also the liability insurance of each and every car on this fleet.*
>
> *I am sorry to say that because of your actions you have left me no choice but to end your association with this company.*

The failure of Mr. Anderson to renew his license came to the attention of United Cabs Ltd. because he was involved in an accident which was the subject of an insurance claim. Mr. Anderson made representations to the Drivers' Committee concerning his termination. The Committee undertook an investigation of the circumstances under which Mr. Anderson had been dismissed, and ascertained that Saskatchewan Government Insurance did not regard the accident in which Mr. Anderson had been involved as a serious one. The Committee recommended that the dismissal be retracted, and Mr. Rosina acceded to the recommendation.

Committee had effective control over the discipline of drivers, and that this Committee had the last word concerning the decision to terminate Mr. Anderson.

In our view, it is not clear that the Committee did have the "last word" in cases of discipline.

Two franchise owners who were called by United Cabs Ltd. to give evidence, said that in the case of routine or minor infractions of the rules, it is usual for Mr. Rosina, or perhaps the franchise owner himself, to deal with it. As these witnesses described it, it is only the more serious issues which are considered by the Drivers' Committee.

In the cases where drivers were suspended, at least for short periods, it is not clear that the Committee could have offered drivers any redress for the income lost during the period in which they were de-authorized. Thus, it is apparent that for the vast majority of disciplinary cases, leaving aside those where a lease operator or franchise owner administers minor or informal sanctions, United Cabs Ltd. initiates action and imposes penalties.

In the case of the decision to terminate Mr. Anderson, Mr. Rosina stated that he had no choice but to reinstate when the Drivers' Committee made a recommendation to that effect.

This does not seem to us to be a completely accurate statement of the position of this Committee. In the procedural manual, the relationship between the Drivers' Committee and the management of United Cabs Ltd. is described as follows, "The Committee's authority shall be complete and be superseded only by management if they deem the Committee's decision to be detrimental to the business and general well being of United Cabs Limited."

Mr. Cliff Kowbel, who sits on the Drivers' Committee as a franchise owner, and who conducted the inquiry which was the basis of the recommendation for the reinstatement of Mr. Anderson, testified that it was his understanding that United Cabs Ltd. had the option of rejecting the recommendation. Mr. Rosina was reluctant to concede that United Cabs Ltd. might have a veto over the recommendations of the Drivers' Committee. He did describe one situation in which he had convinced the Committee to withdraw a recommendation.

It was clear that, in the opinion of Mr. Rosina, it would be unwise and impolitic for United Cabs Ltd.

to refuse to accept a recommendation arrived at by the Drivers' Committee. He may be right about this, but this does not alter the fact that the company has the power, if they feel strongly enough, to override the decisions of the Drivers' Committee. Under cross-examination, Mr. Rosina conceded that the company might have been able to veto the Committee recommendation to reinstate Mr. Anderson. The process has almost never been pursued to a showdown, but the policy manual makes it clear that United Cabs Ltd. reserves the authority to make a final decision in the best interests of the company.

It should be noted that an application was filed by the Union alleging that the termination of the employment of Mr. Anderson constituted an unfair labour practice. This matter was ultimately settled between the parties, and the Board has never been asked to consider the merits of the allegations. What is worthy of remark here is that representatives of United Cabs Ltd. and the solicitor for the company were involved in all discussions related to the application; these discussions never included the lease operator whose taxicab Mr. Anderson was driving.

Because it is the corporate image of United Cabs Ltd. which is affected by the operations of taxicabs operating under the banners of United Cab and Blueline Taxi, it stands to reason that the company has a strong interest in maintaining standards with respect to such things as customer service, safety, the condition of vehicles and the appearance of drivers. We have concluded from the evidence that United Cabs Ltd. takes the preeminent role in ensuring that drivers adhere to these standards, through exhortations in the company newsletters, and through disciplinary measures such as those we have described.

It is our view, as well, that United Cabs Ltd. has a strong degree of influence on the economic welfare of the drivers. In this respect, we do not think the concept of economic control requires the payment of wages. In *Ontario Taxi Association, Local 1688 v. Blue Line Taxi Co. Ltd.*, [1979] O.L.R.B. Rep. Nov. 1056 at 1065, the Ontario Labour Relations Board commented on this point:

> *8. It is argued that despite the flow of work opportunities being through the respondent that no compensation or reward flows directly from the respondent to the owner-drivers but rather that all revenues flow from third-party passengers and the owner-drivers are totally at risk for the collection of such; and that this factor distinguishes the instant case from previous cases considered by the Board where the responsibility of revenue collection from third parties was assumed by the respondent and payments flowed directly from the respondent to the owner-driver. In our view this single factor cannot be allowed to obscure the fact that the control of work opportunities by the respondent is of, and in itself, the sine qua non of the economic dependence which here exists, and the form of compensating for the*

> *service performed is determined by the type of market being served. This form of compensation, combined with the stand rental flowing back to the respondent, must be viewed in the total context of the taxi industry, and is not sufficient to make the driver more closely resemble an independent contractor than an employee.*

In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Hamilton Yellow Cab Company Limited et al.*, [1987] 17 C.L.R.B.R. (N.S.) 129 at 151, the Ontario Board pursued this point:

> *We are inclined to accept these views. We do not think that in the context of the taxi industry the collection of fares (set by the City) by owner-operators or drivers is a critical element in their relationship with Yellow - particularly since Yellow retains virtually complete and unreviewable control over the flow of work opportunities and the deductions from the drivers' revenue in respect of stand or equipment rental. If Yellow were to increase these fees, as it could do unilaterally, the operators/drivers would have their income reduced proportionally, and, if dissatisfied, would have little option except to go to work for some other broker - a position analogous to that of a disgruntled employee.*

The pattern of relationships between United Cabs Ltd., on the one hand, and the franchise owners, lease operators and drivers identified in the application, on the other, reveals that the putative employer exercises a high level of control over the economic rewards to these drivers. The evidence suggested that perhaps 75 per cent of the income which the drivers receive comes from trips which are allocated through the dispatch system operated by United Cabs Ltd. These trips are attracted by United Cab advertising, and by the public reputation of the taxi service offered by the company. The remainder of the trips from which drivers derive their income are almost all obtained as the result of efforts by United Cabs Ltd. to secure locations for taxi stands, and to negotiate flat rate fees and customer accounts.

The evidence did not establish that there is any overt requirement that operators or drivers obtain fuel, vehicles, repairs or equipment through auxiliary enterprises owned by United Cabs Ltd. or by companies related to United Cabs Ltd., with the exception of the requirement that vehicles which are financed with the assistance of United Cabs Ltd. must be approved by them. The company is certainly able to use its buying power to create financial incentives for such purchases.

In addition, the company offers credit privileges to drivers for goods and services obtained from their own enterprises and certain others. United Cabs Ltd. also handles credit card and charge account charges for the drivers, for an administrative fee. There was evidence that the company may suspend

drivers, or remove their credit privileges, in the event their payments fall into arrears, or if their credit is overextended from the viewpoint of the company.

United Cabs Ltd. leases a number of franchises, and brokers the leasing of a large number of others. By this means, the company maintains active control over a significant majority of the taxi licenses which are connected with taxicabs under the United Cab and Blueline Taxi designations. One of the results of this is a high degree of standardization in the fees which are paid for franchises.

We have commented earlier that there is no explicit reference in our *Trade Union Act* to the concept of a "dependent contractor," in contrast to legislation in other jurisdictions, notably Ontario and British Columbia, where the labour relations boards have determined that drivers of taxicabs are employees in this sense. We have also observed, however, that the idea of economic dependence is a useful criterion in deciding whether a person is truly an independent contractor or an "employee" within the meaning of s. 2(f)(iii) of *The Trade Union Act*.

In our opinion, the drivers are in a position of economic dependence on United Cabs Ltd. which places them at the employee, rather than the independent contractor, end of the continuum. It is true that some of the ordinary indicia of the employment relationship are absent; United Cabs Ltd. does not, for example, make deductions for income tax, unemployment insurance contributions or workers compensation premiums.

It is also evident that the taxi industry has many unique features, and that there are limitations on the capacity of a taxi company to exercise direct control over the drivers which are created by the nature of the work and the characteristics of the people who do it. Nonetheless, we find that the economic dependence of the drivers on the taxi company, and the assertion by the taxi company of authority with respect to the standards of service and performance of the drivers, are basic features of the relationship between the company and the drivers. These features, in our opinion, signify that the relationship is one which can be the basis of collective bargaining.

The other major issue which was presented by the parties for determination at this time was the question of whether the bargaining unit described by the Union in the application is an appropriate one. The Union is proposing to represent all drivers, full-time and part-time, with the exception of franchise owners or lease operators who have control over more than one vehicle. This group would include

lease operators and franchise owners who drive, but have control, through ownership or lease of a license, over only one car, as well as the drivers who lease cars on a per-shift basis.

In this connection, we agree with the underlying premise of this description, which is that both franchise owners and lease operators who drive, and the drivers who enter into leasing arrangements with them, are employees within the meaning of *The Trade Union Act*. In the *Hamilton Yellow Cab* case, *supra* at 152, the Ontario Labour Relations Board addressed this point:

> *In the taxi business, the owner-operator does not engage a replacement driver to "profit from his labour" in any material sense, but rather to fill in for the times when he cannot work for Yellow, so that he can "make ends meet", and to preserve the continuity of his commitment to the Yellow organization. The owner-operator is an "employer" in form only, for the meaningful lines of accountability still run between Yellow and the working driver, who remains, on the job, subject to Yellow's rules direction and control. The economic relationship between the owner-operator and driver is largely confined to agreeing on the split of the revenue derived from serving Yellow's customers and is either a flat fee or some percentage of the total. Like the owner-operator, the driver derives his income from the name, goodwill, and dispatch service of Yellow, and he is subject to the same rules of behaviour and disciplinary regimen. In this regard the terminology of "leasing a shift" is quite accurate. The driver is not so much being "employed" by the owner-operator, as being permitted, for a fee, to work for Yellow. Yellow can tolerate such substitution because anyone working in its system must conform to Yellow's detailed prescriptions about the way things must be done, and Yellow always retains the residual right to discipline or terminate any driver that does not meet those norms. In this regard Yellow is not unlike a construction industry employer who will be content with whomever is referred from the union hiring hall so long as s/he confirms to the prescribed standards of performance.*

Counsel for United Cabs Ltd. argued that, if lease operators and franchise owners who have control over one vehicle can be considered employees for this purpose, then it is impossible to exclude lease operators and franchise owners who have control over more than one car.

We have described the positions of those persons who are clearly employees, without any of the characteristics of an independent contractor, and those persons who are genuinely independent entrepreneurs, as being at opposite ends of a continuum. In between these polar positions, there are persons who may have some of the characteristics of both in varying degrees. As counsel for the Union put it, any line drawn between persons on this continuum is bound to be an arbitrary one in some respects.

This is true of the notional boundary between lease operators and franchise owners who are responsible for one car, and those who control more than one.

There were examples in the evidence given by witnesses at the hearing of situations which are some distance apart on this continuum. Mr. Merv Sawchyn owns a franchise, and drives the taxicab which is connected to that franchise. When he is not driving it, his wife or his stepson drive it. Mr. Sawchyn has made an investment in the taxi business, in the sense that he bought a vehicle and leased a franchise, but his own income is derived largely from driving the taxicab.

The position of Mr. Sawchyn may be contrasted with that of Mr. Neil Farries, who currently leases six franchises. Mr. Farries has at other times owned a number of franchises, and has leased up to ten franchises at a time. At the time of the hearing, he was still driving part-time, and was also engaged in a number of other business activities. At the time the application was filed, Mr. Farries had hired twelve drivers, in addition to himself. It is clear that someone like Mr. Farries displays many more of the risk-taking characteristics of the entrepreneur than Mr. Sawchyn.

In between these two situations, there are various degrees of risk, responsibility, independence and obligation, and it is difficult to state with precision where the line has been crossed which would justify regarding an individual as an employee rather than an independent contractor. In their application, the Union has chosen to draw the line between those who own or control one car, and those who own or control two. It may be that the line would be more realistically drawn between two and three, or three and four. It may be that at some future time, a more appropriate unit would be created by the inclusion of those who own or control two cars or three, should the Board decide that they, too, have more of the characteristics of employees than of independent contractors.

For the purposes of this application, however, we are satisfied that the standard suggested by the Union is as defensible as any. It provides a clear basis for distinguishing persons inside the bargaining unit from those without. Beyond the line they suggest, the franchise owners and lease operators have responsibilities for at least one car which they do not drive, in which they presumably have an interest of a more purely entrepreneurial nature. In our view, the bargaining unit which the Union has proposed is in this respect an appropriate one.

Counsel for United Cabs Ltd. also took exception to the proposal by the Union to exclude from the

Statement of Employment any driver who had driven less than two shifts per week over a period of three months preceding the application. Counsel referred the Board to a number of decisions in which the Board has expressed our reluctance to except casual and part-time employees from a bargaining unit, because of the difficulties created for these employees if they are excluded from a reasonable opportunity for access to collective bargaining.

Counsel for the Union stated that the Union does not propose that these employees should be excluded from the bargaining unit, simply that they should not be included on the Statement of Employment for the purpose of considering whether the Union has filed evidence of support for a majority of employees.

The Board accepts the Union characterization of this issue, that it is not an issue of the composition of the bargaining unit which is to be represented if the Union is successful in demonstrating majority support, but that it is a question of who should be regarded as having a sufficiently tangible employment relationship on the date the application was filed to justify granting them a voice in the representation question.

In *International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 v. Little Rock Construction*, [1995] 4th Quarter Sask. Labour Rep. 102; LRB File No. 190-95, the Board addressed this point on 104-105 in these terms:

> *What is meant by being an employee as of the date the application for certification is filed has in some instances been a matter for debate. In deciding who should be regarded as an employee for the purpose of having a voice in the question of whether a group of employees should be represented by a trade union, the Board must consider the implications of drawing the boundaries of the franchise too narrowly or too broadly.*
>
> *On the one hand, to require that an employee actually be at work on the date the application is filed in order to be included in the Statement of Employment would be clearly unfair to employees who are by any reasonable standard regular employees, and who are for some reason absent on that arbitrarily chosen date. An employee who is away on sick leave or maternity leave has a legitimate and obvious interest in the outcome of the representational question.*
>
> *At the other end of the spectrum, allowing the inclusion of a large number of persons whose current connection with the employer is tenuous may give a disproportionate voice in the representation question to persons whose stake in the terms and conditions of employment in the workplace may be minimal.*

In *Calvin Ennis v. Con-Force Structures Ltd. and United Brotherhood of Carpenters and Joiners*,

[1992] 4th Quarter Sask. Labour Rep. 117; LRB File Nos. 185-92 & 188-92, the Board commented at 121-122 on the rights of workers who had been laid off on the date of an application:

> *It is evident from this passage that the Board accepts that long-term employees build up a tangible and valuable interest in their employment and the question of which union, if any, will represent them, and that this interest does not dissipate just because they happen to be laid off when the application was filed, or when the vote was held, or on both dates. At the same time, the Board recognized that the very interest which it is attempting to protect, could actually be injured if the Board permitted every employee with unexpired recall rights to vote, regardless of any other factors. That is why this Board, like the Ontario, British Columbia and Canada Labour Relations Boards, has indicated that it will take into consideration evidence which establishes that, notwithstanding an employee's contractual recall rights, he has no significant continuing interest in the representation question. In Northern Telecom, the Board applied those considerations and refused eligibility status when it was established that, notwithstanding the employees' contractual right, there was no true prospect of recall.*

Counsel for the Union said that the Union had tried to arrive at a standard for inclusion on the Statement of Employment which would include individuals driving on a casual basis who had a significant degree of connection with the company over the three months prior to the filing of the application. This should also include the majority of seasonal employees, since the three months leading up to the filing of the application fell in the busier winter period. He argued that in the case of persons who had worked less than two shifts per week over that three month period, the connection to the employer was too tenuous to justify their inclusion on the Statement of Employment.

Counsel for United Cabs Ltd. referred the Board to a decision in *Canadian Union of Public Employees v. Lakeland Regional Library Board*, [1987] Apr. Sask. Labour Rep. 59; LRB File No. 116-86. In that decision, the Board determined that employees who had worked 30 hours in the previous year should be included on the Statement of Employment. The Board made this comment:

> *So that there will be no misunderstanding, the Board wishes to make it clear that its admittedly arbitrary criteria are meant to apply only to the particular facts of this case. Certainly, the Board does not in any way intend to alter its past policy concerning the rejection of evidence of matters occurring after the date of the filing of an application, which it is entitled to do under Section 10 of The Trade Union Act.*

The dividing line suggested by the Union is, using the term used by the Board in the *Lakeland Regional Library* case, "admittedly arbitrary." It seems to us a reasonable one, however. Unlike the library setting in that case, where there seems to have been a regular pattern of use of relief librarians on a casual basis, the pattern of employment of all drivers in this case is a fluid and changeable one. It

seems to us reasonable for the Union to suggest that drivers who drove less than two shifts per week in the three months before the application was filed had a tenuous connection with employment at United Cabs Ltd., and do not qualify to be included for the purpose of determining the representational question. Other criteria might also be defensible, but the Union has suggested a defensible way of drawing the line between those who have a tangible employment relationship and those whose connection with United Cabs Ltd. is a tenuous one.

The final question which was raised for determination by the Board concerned the allegations of impropriety in the conduct of the Union during the organizing campaign. Section 11(2)(a) of *The Trade Union Act* reads as follows:

> *11(2) It shall be an unfair labour practice for any employee, trade union or any other person:*
>
> > *(a) to interfere with, restrain, intimidate, threaten or coerce an employee with a view to encouraging or discouraging membership in or activity in or for a labour organization.*

Mr. Bill Johnston, who made representations on behalf of himself and other drivers in connection with these allegations, said that the Union had misled drivers about the implications of signing a union card, and that Union organizers had made misrepresentations about what the Union would be able to accomplish.

Mr. Johnston presented a petition, signed by a number of drivers, asking the Board to direct a vote. He also called evidence from several drivers who said that they had written letters asking for the return of union cards which they had signed during the organizing drive. In the course of the hearing, the originals of several of these letters were produced by Mr. Rosina. He said that drivers had asked him for information about how to get their union cards back, and had left the letters in his office. He said that he understood that evidence of withdrawals of support which originated after the date of filing of the application would not be considered by the Board, and so he did nothing with them but store them in his office.

Mr. Ron St. Pierre, a representative of the Union who had supervised the organizing campaign, testified that the Union had not received any of the letters. He stated that the policy of the Union is not to return Union cards when an employee asks for them, without having an opportunity to talk to the employee and ensure that the employee has made an independent decision. He gave an example of

receiving a request from one driver for the return of a signed card. Mr. St. Pierre said that he eventually talked it over with the driver, who decided to leave the card with the Union. He conceded that the Union would be unlikely to actually return a card; he said that if the matter were not resolved with the individual, the Labour Relations Board would be asked to determine whether the card should be considered or not. He also testified that the office of the Union has received a number of requests for the return of cards over the years, and that the staff are trained to bring such requests to the attention of organizers.

Section 10 of *The Trade Union Act* reads as follows:

> *10 Where an application is made to the board for an order under clause 5(a) or (b), 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 regulations of the board.*

It has been the longstanding practice of the Board to refuse to consider evidence which relates to support or revocation of support for a certification application which is not in the hands of the Board on the date an application is filed. In this case, we are satisfied that the letters from employees which were produced should not be considered.

Mr. Johnston called a number of witnesses to describe the experiences which had led them to make the allegations of impropriety against the Union. The evidence of a number of these witnesses was to the effect that they had signed a union card because they were persuaded by union organizers that it would be in their interest, and later changed their minds about this. One of them said he had changed his mind because he had become a lease operator, and thought trade union representation was more appropriate for people who were only drivers. One of them said he had signed a card because he was in partnership with a driver who supported the Union; when the partnership was dissolved, he decided he wanted to withdraw his support.

These witnesses gave some examples of the kind of representations made by the Union which led them to sign a card. One of them referred to the prospect of disability insurance, and another mentioned the possibility of a pension plan. Mr. Johnston himself said that one of the drivers had been "promised" a lower cost for propane.

Mr. St. Pierre gave evidence concerning the nature of the organizing activities which were undertaken by the Union. Mr. Jim Robinson, a driver who was a member of the organizing committee, also gave evidence on this subject.

Mr. St. Pierre said that several representatives from the national office of the Union had assisted him in putting on a training session for the drivers who were taking part in the organizing campaign. He said that organizers were instructed to provide drivers with information, and to answer their questions. They were advised against putting pressure on their colleagues to sign cards, and to extricate themselves from any confrontational situations.

He said that he and other organizers would contact drivers while they were waiting for trips at stands or on their breaks, and would attempt to tell them something about the Union. Mr. St. Pierre and Mr. Robinson said that they had copies of collective agreements which had been concluded on behalf of drivers in Ontario, and that they would use these to provide examples of provisions which might be attained through collective bargaining. They both said that they did not make any promises to prospective Union members, and tried to present an accurate picture of what collective bargaining could accomplish.

Both of these witnesses also said that they did not press the issue with drivers who were resistant to hearing about the organizing campaign. Under cross-examination by Mr. Johnston, Mr. Robinson conceded that he and Mr. Johnston had had a heated conversation; his recollection, however, was that it was not specifically about the issue of representation by the Union, but arose from what Mr. Robinson perceived as a lack of sympathy on the part of Mr. Johnston in relation to recent injuries Mr. Robinson had suffered at the hands of some passengers. Mr. Johnston suggested to Mr. Robinson that he had insisted the Union would require the installation of expensive safety shields because of his personal experience; Mr. Robinson said that safety was an issue which Union organizers had talked about, but that he had stated no commitment to any particular safety measure.

Mr. St. Pierre said that he had provided his home telephone number so that drivers could call him for information, and that he received many calls. He said that it was not part of the organizing campaign to call drivers at home as far as he knew, and he did not know of anyone who was doing that. He said that he did call one driver at home after that person had left a message asking for his Union card back.

The Union circulated newsletters which contained information and stated the Union point of view on a number of issues. Mr. St. Pierre said that United Cabs Ltd. had complained when members of the organizing committee left copies of one of the newsletters at the airport, and that the copies were withdrawn.

In our view, the picture created by the evidence does not show that the Union committed any improprieties in their organizing campaign. Mr. Johnston intimated that there had been instances of harassment and abuse of drivers in the course of the campaign, but there was no direct evidence of such conduct on the part of Union organizers.

The evidence which was presented was of persons who had signed a Union card and later changed their minds. It is common enough in any democratic system for persons to alter their views about important issues, and they are perfectly entitled to do that. It is also true in any democratic system that there must be some criteria for determining what the majority do support in relation to particular decisions, and establishing fixed points at which opinion will be assessed. Elections are held to elect members to legislatures, for example; though voters may decide the day after an election that they no longer support the candidate they voted for, a parliamentary system could not function if such changes of opinion were allowed to alter the outcome of the election.

In the case of applications filed with this Board related to questions of trade union representation, it is necessary to develop a coherent picture of whether there is majority support for a trade union at a particular time. The time which has been accepted consistently by the Board as critical for this purpose is the date on which an application is filed. The question of majority support will be determined as of that date, whether or not individuals might later wish to withdraw their support for the trade union or add their support.

If the Union has obtained support under conditions which cast serious doubt on whether the indications of support were voluntary, that is a different question, but in this case, we do not think the evidence supports the allegation that this was the case in the context of this organizing campaign.

For the reasons we have given, we have decided to dismiss the application alleging unfair labour practices on the part of the Union.

The Board will remain seized on this application in order to deal with any issues which may remain outstanding after the parties have had an opportunity to give further attention to the composition of the Statement of Employment.

SASKATCHEWAN UNION OF NURSES, Applicant and PRINCE ALBERT DISTRICT HEALTH BOARD, Respondent

LRB File No. 304-95; April 30, 1996
Chairperson: Beth Bilson; Members: Don Bell and Carolyn Jones

For the Applicant: Norma Wallace
For the Respondent: Larry F. Seiferling, Q.C.

Bargaining unit - Appropriateness - Whether bargaining unit comprising two nurses formerly at health centre is appropriate in context of new health facility - Board deciding unit is not appropriate.

Practice and procedure - Intermingling - Board ordering vote to determine whether intermingled employees support continued representation by union.

Reference of dispute - Parties referring question of whether union should be allowed to continue to represent two employees from health centre - Board deciding question on basis of appropriateness of bargaining unit.

***The Trade Union Act*, s. 24.**

REASONS FOR DECISION

Beth Bilson, Chairperson: The Saskatchewan Union of Nurses and the Prince Albert District Health Board jointly filed this application requesting a determination by the Board of a dispute which has arisen between them concerning the status of a group of nurses employed at a facility which is now called the Birch Hills Health Facility.

The dispute has arisen in the context of the changes which have occurred in the administration of health services for the Province of Saskatchewan since the proclamation of *The Health Districts Act*, S.S. 1993, c. H-0.01 in 1993. The reconfiguration of employers in the health care sector, the devolution of responsibility for the delivery of health care to the local level, and changes in the financing of health care delivery have given rise to a multitude of complex problems related to the structure and process of collective bargaining between the newly-structured employers and the trade unions representing employees.

Prior to the changes which were triggered by the creation of the district health boards, there were two

separate health care facilities in the community of Birch Hills. At one of these, the Birch Hills Memorial Hospital, the Union had been granted a certification Order in respect of a bargaining unit of nurses described as follows:

> *determining that all Registered Nurses employed as such by the Birch Hills Memorial Union Hospital Board, operating the Birch Hills Memorial Union Hospital, and the said Birch Hills Memorial Union Hospital, Birch Hills, Saskatchewan, except the director of nursing.*

The other facility was a special care home, which was known for some time as the Birchview Nursing Home. The nurses at this facility were not the subject of a certification Order.

These facilities were physically separated, although they were quite close together. They operated under different statutory regimes and different administrative boards.

On October 1, 1993, the Birch Hills Memorial Hospital ceased operation as an acute care facility. Under the designation Birch Hills Memorial Health Centre, a portion of the old hospital building became a health centre. The Health Centre offered a clinic service, with regular attendance by physicians, some educational programs, and one bed in which patients might stay for observation. The facility was open during regular office hours from Monday to Friday. A standby telephone service was available for emergencies after hours.

In a letter dated June 23, 1993, the Employer had notified the Union that the seven nurses who were employed at the acute care hospital would be laid off when the hospital closed. The letter also indicated that the Health Centre would require the services of four part-time nurses. These positions were filled by four of the nurses who had been laid off. The selection was made on the basis of their seniority in the bargaining unit at the hospital.

In September of 1994, the base of the telephone emergency service was transferred from the Health Centre to the Nursing Home. This resulted in the reduction of the staff at the Health Centre to two nurses, Ms. Debra Danielson and Ms. Mildred Rowluck.

By the summer of 1995, the Employer had begun to construct an extension to the Nursing Home which was intended to house the Health Centre. In a letter dated May 30, 1995, the Employer informed the Union that the existing Health Centre would be closing at the end of September:

> *Re: Closure of Birch Hills Memorial Health Centre*
>
> *This will serve as official notice that effective September 30, 1995, the health centre will be closed. This will directly affect all employees working at the centre. There will no longer be a need for the approximately 1.4 full time equivalent registered nurse positions.*
>
> *Although the Birchwood Home [sic] is non-unionized to SUN, it will have openings for two part-time nursing positions. We are prepared to provide the following options to the nurses at this time:*
>
> *a) laid off nurses could apply for and be given the two part-time positions.*
> *b) they could be placed on the district recall list.*
> *c) any other option you provide us within the guidelines of the Collective Agreement.*
>
> *In conclusion, the effect is that all employees have been issued lay-off notices. Please contact me at your earliest convenience to further discuss this matter in order that we may arrange for an adjustment plan for the employees.*
>
> *Thank you.*

It would appear from the evidence that there has been some confusion about what the new facility would be called. In one of the newsletters issued by the Employer, the extension which was being built was referred to as the "Health Centre." In other communications, the Employer referred to the structure as a whole as the "Birch Hills Health Facility." The latter seems to be the most common designation.

In September of 1995, the two additional positions which were created at the new facility, on this occasion still referred to as "Birchview Nursing Home," were offered to Ms. Danielson and Ms. Rowluck, in the following terms:

> *Re: Permanent Part-time R.N. Position*
>
> *We are pleased to offer you the above position at Birchview Nursing Home to commence on October 1, 1995. This position will consist of 45 X 8 hour shifts and 12 X 11.78 hour shifts in a 24 week rotation. Rotation through both the nursing home and clinic will be expected.*
>
> *The following are the options that are available to you:*
>
> *I accept the position at Birchview Nursing Home at your current rate of pay and be placed on the district recall list with a severance payment option if you terminate from the recall list at a later date.*
>
> *II accept the position at Birchview Nursing Home at your current rate of pay and take the severance package from the Health Centre and relinquish all rights to the district recall list.*

> *III do not accept the position at Birchview Nursing Home and be placed on the District Recall list and have severance as an option.*
>
> *If your choice is to accept the position, acceptance of this offer and conditions of employment must be indicated by signing below and returning to the Human Resources office within seven days.*

It is clear from this letter that the Employer accepted that the two employees had certain entitlements under the collective agreement with the Union, and under Letters of Understanding which had been reached with the Union relating to the merger of health care facilities and the transfer of employees resulting from the reorganization going on in the Prince Albert Health District. It is also clear that the Employer contemplated that the positions being offered to these employees would involve work in both the clinic and the nursing home parts of the combined facility.

The Union made representations to the Employer to the effect that the positions defined for these employees should be related exclusively to the continuing work of the "health centre." The Employer required that the employees accept the positions as they had defined them, although they agreed that the issues raised by the Union should be submitted to this Board for determination.

The two employees accepted the positions. The schedule set by the Employer requires all employees to rotate through both the clinic and the nursing home, in a proportion of six weeks out of 24 in the clinic. Ms. Danielson and Ms. Rowluck were asked to provide orientation for other employees to the work done in the clinic.

The Union has continued to take the position that the part of the now-combined facility which offers the services previously carried out in the Birch Hills Memorial Health Centre should be regarded as a separate entity which is a viable basis for continued collective bargaining on the basis of the certification Order issued to the Union in connection with the former hospital.

The representative of the Union argued that there is nothing anomalous about accepting the two nurses from the former Health Centre as a separate bargaining unit, which is covered by the certification Order and the collective agreement. She argued that the only thing which connects the clinic part of the facility with the rest of it is the schedule imposed by the Employer, which could easily be restructured to schedule work in the two areas separately.

She conceded that there had been no alteration of the certification Order at the time of the closure of the Birch Hills Memorial Hospital, but argued nonetheless that the Employer had clearly assumed a role equivalent to that of a successor to the previous Employer, and had taken on the obligations under the certification Order and the collective agreement. She said that, if the Board considered it necessary, it might be appropriate to record the changes which have taken place in an amendment to the certification Order pursuant to s. 5(j) of *The Trade Union Act*, R.S.S. 1978, c.T-17, but she said that the Union did not regard this as a necessary foundation for the continued obligation of the Employer to recognize and deal with the Union in relation to the two employees.

Counsel for the Employer argued that, if the Union wanted to base a claim on successorship, the appropriate time for that may have been in 1993, when the Birch Hills Memorial Hospital closed, and the Health Centre opened, but not when the employees were offered positions at the combined facility in 1995.

Counsel referred to the decision of the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Ltd. and United Food and Commercial Workers Union, Local 1400*, [1995] 2nd Quarter Sask. Labour Rep. 234; LRB Files Nos. 246-94 & 291-94. In that decision, the Board made the following comment on 273-274:

> *The circumstances in which the question arose in the Western Clay Products case were not parallel to the situation in this case. Nonetheless, the comment made by the Court of Appeal seems to us to point to an essential distinction between the purpose of Section 37 and the purpose of other parts of the Act which may contemplate changes in a bargaining relationship. We have concluded that Section 37 does not apply to a circumstance where the employer named in the certification Order still owns the business following whatever change occurs. Though the Board has been prepared to give a liberal interpretation to the idea of "disposition" under Section 37(1), the term "the person acquiring the business or part thereof" can only, in our view, apply to an employer who has not previously been affected by the certification Order. The effect of a finding that the new employer is a successor is to impose, by law, the collective bargaining obligations to which the former owner was subject upon the person who has acquired the business or part of a business.*
>
> *The effects of a reorganization or realignment within the operations controlled by one employer seem to us to be dealt with under other provisions of the Act. If a reorganization affects a significant number of employees in the bargaining unit, - which was not the case in the specific instance of the Yorkton store, but might be in the case of changes affecting the other stores as a group - it might constitute a technological change, which would be subject to the provisions of Section 43 of The Trade Union Act.*

The Union does not seem to have explicitly taken the position that the change which was implemented by the Employer constituted a technological change within the meaning of s. 43 of *The Trade Union Act*. There was some allusion to the possibility that the change might have this character, perhaps because of the references in correspondence from the Employer to an "adjustment plan" for the employees in the bargaining unit represented by the Union, a term which is used in s. 43. In any event, the Employer seems to have given considerable notice to the Union of the change, which the Union may have determined to preclude an application under s. 43.

Counsel for the Employer argued that, if the situation is not properly characterized as one of successorship, it must be seen as a situation in which two groups of employees are intermingled because of the combination of two facilities. He argued that the nature of the new facility would not be conducive to the recognition of the "Health Centre" as a separate and appropriate bargaining unit.

The changes which have taken place in the organization of health services since 1992 have had a significant impact on the collective bargaining structures, relationships and obligations in that sector. It is not necessary to review here the range of issues which have arisen for determination by this Board, or those which have been dealt with by the parties themselves. The approach which the Board has taken can generally be described as a pragmatic or functional one; we have tried to accommodate the changes by building on the bargaining relationships which existed prior to the reforms, which were largely based on individual facilities or services. In *Health Sciences Association of Saskatchewan v. Saskatoon City Hospital and Service Employees' International Union*, [1993] 4th Quarter Sask. Labour Rep. 56; LRB File No. 266-93, we made this comment on 61, which captures the temper of this approach:

> *It is true that the process of consolidation, merger or transfer of departments or services within the Health District poses a number of complicated and serious questions. Among these issues are the significance of seniority accrued in one bargaining unit when an employee or group of employees are moved to another unit, the access of employees to vacancies or promotion opportunities, bumping rights and appropriate supervisory structures. In our view, however, the key to resolving these questions lies, not in a redefinition of bargaining units - a process which could not provide comprehensive answers to these matters in any case - but in the acknowledgment of existing obligations and the application of the provisions of existing or modified collective agreements. Where individual collective agreements do not provide adequate answers, it is possible that some process of discussion may be necessary to resolve questions which cut across collective agreements or whose solution may affect more than one group of employees. In evidence before the Board, there was reference to such mechanisms as the "merger and transfer*

> *agreements" concluded between the Regina District Health Board and a group of trade unions representing groups of employees in that district. The conclusion of such agreements is consistent, in our view, with the pragmatic approach traditionally followed by the parties to collective bargaining in the health care sector, and is also consistent with the approach taken by this Board to the recognition of bargaining rights in this field.*

In trying to determine how established bargaining relationships may require modification or redefinition to meet the new conditions, we have indicated that the old descriptions of bargaining units or the extent of bargaining rights may have limited meaning in new circumstances. In *Service Employees' International Union, Local 336 v. Southwest District Health Board*, [1994] 4th Quarter Sask. Labour Rep. 191; LRB File No. 158-94, the Board made this point as follows at 195-196:

> *We see this as an issue of that kind. As we have indicated, the predominant basis for the delineation of bargaining units continues to be individual facilities, though it may be anticipated that there will ultimately be applications to consolidate or merge existing bargaining units which may produce a new configuration of bargaining units. While the existing single-facility bargaining units continue to be the basis on which collective bargaining takes place, this does not mean that there has been no shift in the nature of the bargaining relationship which is based on bargaining units so defined, or that there has not been a change in the relationship between existing bargaining units. For example, though the Union described as "all-employee" units the units defined in the certification Orders it has obtained, some going back thirty years, the term "all-employee unit" is of limited use in describing the relationships which must be fostered now that one employer has replaced fifteen separate employers. Though there may be some positions which manifestly belong within a particular bargaining unit, it will be less clear in other cases where a particular position belongs, and how it should be allocated. This may be especially true of positions of the kind we are considering here, where the duties performed by incumbents are not related exclusively to one facility, but cover a number of different facilities. Though there have apparently been isolated cases in the past where employees held more than one position within the district, this is somewhat different from the circumstance where the responsibilities associated with one position relate to more than one facility.*

We do not think it is necessary to make an explicit finding in these circumstances concerning whether the Union would have been foreclosed from making an application based on s. 37, if they wished to pursue the question of whether the Prince Albert District Health Board had incurred certain obligations from the Birch Hills Memorial Hospital Board which survived through the phase of existence of the Birch Hills Memorial Health Centre. We think the Union has raised the question in a way which allows us to confront the essence of the issues which are in dispute between the parties, by asking us to consider the general question of whether the Employer is compelled to recognize the Union as the representative of a bargaining unit of employees which continues to exist as a separate entity.

Answering this question requires us to focus on the appropriateness of the bargaining unit which the Union proposes as the basis for collective bargaining with the Employer. Although this Board has often recognized the continuation of the bargaining rights of groups of employees who have in the past elected to be represented by a trade union, it must be said that these bargaining rights are not of an absolute kind. In order to maintain the right to represent employees, a trade union must continue to represent a majority of employees in a bargaining unit which is appropriate, that is, a bargaining unit which the Board has determined to constitute a viable basis for a collective bargaining relationship.

The representative of the Union referred us to the decision of the Board in *Saskatchewan Government Employees Union v. Headway Ski Corporation*, [1987] Aug. Sask. Labour Rep. 48; LRB File No. 396-86. In that decision, the Board found that a successor Employer was obliged to recognize the bargaining rights of a group of employees previously employed by a government department. The Board made this comment on 57:

> *Applying those principles to the facts of this case, the Board finds no evidence that employees covered by the S.G.E.U. collective agreement were mixed or intermingled with the pre-existing work force of Headway Management Ltd., which for many years operated the ski school and rental shop independently from the ski lift and snow-making and grooming operations performed by S.G.E.U. members. The latter operations have now been transferred in their entirety to Headway Ski Corporation, but they continue to be carried on separately from the Headway Management Ltd. enterprises. There are no employees of Headway Ski Corporation other than those doing work that was previously done by S.G.E.U. members, employed by the Government of Saskatchewan.*

It is clear from this statement that the Board concluded that it was possible to continue to treat the former government employees as a separate group for the purpose of bargaining collectively. In *Saskatchewan Health-Care Association v. Service Employees' International Union, Local 336 and Canadian Union of Public Employees, Local 2297; Service Employees' International Union, Local 336 v. Wolf Willow Lodge and Barry Grant*, [1992] 3rd Quarter Sask. Labour Rep. 93; LRB File Nos. 091-92, 099-92 & 155-92, the Board at 99 acknowledged this as one possibility, and suggested a way of distinguishing this scenario from a situation where employees must be viewed as "intermingled:"

> *Where one institution or enterprise takes over or merges with another, the question of how to deal with the representational interests of employees who have become "intermingled" may arise. There are, of course, cases where putting two sets of employees under one roof does not mean that the two bargaining units cannot be continued independent of one another; there are also cases where a successor acquires a business which remains geographically separate, and may be treated as an independent unit (see, for example, Daynes Health Care Ltd., [1985] OLRB Rep.*

> *March p. 387). The test suggested by the British Columbia Labour Relations Board in The Glenshield House, BCLRB No. 45/84, was "whether the day-to-day operation of the transferor's previous business will be altered to complement the successor's operation in such a way as to necessitate a change in the composition of the bargaining unit." Though this sentence is clearly speaking to a situation which differs slightly from this one, the process of combining the Wolf Willow Lodge with Eastend Union Hospital can, in our view, be said to necessitate a change in the composition of the existing bargaining units.*

In *Saskatchewan Union of Nurses v. Twin Rivers District Health Board*, [1994] 3rd Quarter Sask. Labour Rep. 132; LRB File No. 109-94, the Board commented at 134 on a situation similar in many respects to the one which is before us here:

> *The parties are in agreement that the work of the nurses in the Cut Knife Health Complex can no longer be sensibly divided between a unionized bargaining unit and a non-union group of nurses. There is no longer any basis on which an appropriate bargaining unit less inclusive than the group of nurses as a whole can be defined We are in agreement with this conclusion. Though the Board has on many occasions granted certification for bargaining units which are smaller than the most inclusive units, there must be some comprehensible criteria by which such a unit might be delineated, and such criteria cannot be articulated in this case.*

In *Retail, Wholesale and Department Store Union, Local 454 v. Westfair Foods Ltd. and United Food and Commercial Workers, Local 1400; United Food and Commercial Workers, Local 1400 v. Westfair Foods Ltd. and Retail, Wholesale and Department Store Union, Local 454*, [1993] 1st Quarter Sask. Labour Rep. 102; LRB File Nos. 232-92, 233-92 & 096-92, the Board commented at 107 on the significance of determining whether a bargaining unit is appropriate:

> *The power to decide what constitutes an appropriate bargaining unit is given to this Board under Section 5(a) of The Trade Union Act. It is a decision in which considerations of collective bargaining policy play the major role. Though a number of elements of the factual situation may be relevant, the overwhelming concern of the Board in determining the boundaries of an appropriate bargaining unit is to ensure the health and vitality of collective bargaining. The concern of this Board about the potential difficulties posed by the continued existence of two all-employee bargaining units certified to the same employer in the same location was expressed in decisions in Alberta Food and Commercial Workers v. Shelly Western, LRB File No. 166-80, and United Food and Commercial Workers International Union v. Shelly Western, LRB File No. 195-79, both of which concerned this same warehouse.*

This comment was made in connection with the issue of whether two bargaining units could be accommodated within one facility. It alludes to a point which is of significance in this situation as well, which is that the Board has a general interest in ensuring that bargaining units are delineated in terms

which will form a rational basis for a sound collective bargaining relationship. We must be persuaded that the terms and conditions of employment of the employees in the unit which is proposed are sufficiently distinctive that they can be the basis of negotiation with the employer.

We have concluded that this cannot be said in the circumstances which we have considered here. The evidence does not show that the health centre can any longer be considered a separate facility. Though the fact that the two facilities have been placed under one roof is not determinative, it is one of the signs that what were once two separate entities will in future be operated as a coordinated whole. The rotating schedule is not simply an arbitrary whim of the Employer, but an indication that the functions which are to be performed by the staff within the combined facility, including the nurses, will become less distinct. Though there have been various phases in this evolution, it is clear that ultimately there will be no intelligible way of distinguishing the jobs of the "health centre" nurses from those of the "nursing home" nurses.

Ms. Danielson and Ms. Rowluck, as well as the other nurses laid off from the Birch Hills Memorial Hospital, and then the Birch Hills Memorial Health Centre, continue to have some residual rights under the collective agreement and the district merger and transfer agreements, and for these purposes they continue to be represented by the Union as they were when the hospital was in operation.

From the point of view of the positions in the Birch Hills Health Facility, however, we have determined that an appropriate bargaining unit would be a unit composed of all nurses in that facility. The Union can only retain, or obtain, bargaining rights for that unit if they can establish that they enjoy the support of the majority of employees in the unit. To this end, we will order that a vote be conducted among all of the nurses employed at the Birch Hills Health Facility.

We will remain seized in the event it proves necessary to consider further representations on any issues, including positions to be excluded from the bargaining unit.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Applicant and CAN AM CONSTRUCTION INC., Respondent

LRB File No. 196-95; May 8, 1996
Chairperson: Beth Bilson; Members: Ken Hutchinson and Gloria Cymbalisty

For the Applicant: Bob Todd
For the Respondent: Larry Seiferling, Q.C.

Reconsideration - Criteria - Whether Board should reconsider decision to grant certification order on grounds that union estimate of number of bargaining unit employees is lower than number of support cards apparently filed - Board deciding not to reconsider decision.

Rescission - Fraud - Whether providing estimate of lower number of bargaining unit employees than support cards filed is inherently fraudulent - Board deciding not to rescind order on grounds of fraud.

Certification - Practice and procedure - Application form - Board clarifying nature of requirement that number of employees in proposed bargaining unit be estimated.

Certification - Practice and procedure - Number of employees - Board responsible for identifying anomalies in estimates of number of employees on application form compared to statement of employment.

***The Trade Union Act*, ss. 5 and 16.**

REASONS FOR DECISION

REQUEST FOR RECONSIDERATION / RESCISSION

Beth Bilson, Chairperson: In a certification Order dated November 24, 1995, the United Brotherhood of Carpenters and Joiners of America, Local 1985 ("U.B.C.J.A."), was designated by this Board as the bargaining agent for a unit of employees of Can Am Construction Inc.

The Employer has subsequently requested that the Board rescind that Order, pursuant to s. 16 of *The Trade Union Act*, R.S.S. 1978, c.T-17 on the ground that the Order was obtained by fraud. At the hearing, counsel for the Employer intimated that his client would not aggressively pursue the application for rescission based on fraud, asking in the alternative that the Board reconsider the decision to grant a certification Order. Counsel submitted that the appropriate remedy in this case

would be to conduct a vote among the employees.

In the original application for certification, the Union sought to represent a bargaining unit described as follows, "All Journeymen Carpenters, Carpenters, Carpenter Apprentices and Carpenter Foremen employed by Can Am Construction Inc. within the Province of Saskatchewan."

It will be noted that this represents the standard carpenter bargaining unit which was set out as a result of the decision of this Board in *Construction and General Workers v. International Erectors & Riggers, a Division of Newbery Energy*, [1979] Sept. Sask. Labour Rep. 37; LRB File No. 114-79.

The Union gave the following information as part of paragraph 5 of the application:

> 5 (a) *There are approximately 4 employees in the said unit.*
>
> (b) *Does the applicant trade union claim to represent a majority of these employees? Yes*
>
> (c) *If it should be found that the applicant trade union does not represent a majority, does the said trade union hereby apply for a vote to be conducted among the employees concerned pursuant to the Trade Union Act? Yes*

The Employer submitted a Statement of Employment, which contained 18 names of employees who allegedly fell within the bargaining unit description set out in the application for certification, though the Statement also indicated that two of these persons performed managerial functions. The Employer made no other representations, written or verbal, to the Board. The Union made no objection to the Statement of Employment filed by the Employer.

The Board subsequently examined the evidence of support filed by the Union, compared this evidence with the Statement of Employment, and issued a certification Order on this basis.

The basis of the application now made by the Employer for rescission or, alternatively, reconsideration, is based on the estimate given in the application for certification of the number of employees in the proposed bargaining unit. It is clear from the fact that the Board issued a certification Order in these circumstances that the Union must have filed with the Board a greater number of support cards than the four employees they estimated to be in the bargaining unit, or they would not have established majority support in a unit which the Employer states to include 16 employees. Counsel for the

Employer argued that, where a trade union estimates a smaller number of employees to be in the bargaining unit than the number of support cards filed, the representative who signs and swears the application for certification must knowingly be making false statements to the Board, which are intended to mislead the Board and the employer.

Mr. Bob Todd, the representative of the Union who appeared on both occasions before the Board, offered an explanation for the discrepancy in the numbers. He said that the employees who were the subject of the application for certification were employed at a remote camp in the northern part of Saskatchewan. The initial report he received was that there were approximately four carpenters working on the site, which was the number he entered in paragraph 5(a) of the application. He subsequently received a larger number of support cards, which he filed with the Board.

He pointed out that, with the exception of the "carpenter" designation, which was attached to five employees, the classifications listed on the Statement of Employment are not responsive to the categories mentioned in the standard carpenter bargaining unit. Instead of the classifications of "journeyman carpenter," "carpenter apprentice" and "carpenter foreman," the Statement of Employment refers to "carpenter helpers" and "carpenter leaders." He argued that if a trade union is in possession of evidence of support which goes beyond the numbers which have been proposed for inclusion in the bargaining unit, the trade union should file it when the application is filed; if the employer proposes a different and larger bargaining unit, it would be too late for the trade union to file additional evidence of support, given the rigidity of the Board policy concerning the receipt of evidence after the date on which an application is filed.

In his argument, counsel for the Employer stressed the importance of maintaining the absolute integrity of the procedure conducted by the Board to determine whether a trade union has provided evidence of support from the majority of employees in a bargaining unit. Under this procedure, the evidence of support provided by individual employees is kept confidential to the Board, and is not exposed for scrutiny in the public proceedings of the Board.

The Board has often acknowledged the importance for the credibility of the certification process of establishing a clear procedure and adhering to it. We have set exacting standards which must be met for the receipt of evidence of support or of withdrawal of support. All of this evidence must be filed with the Board in original form by the date on which the application is filed. Evidence of support must

satisfy certain criteria with respect to content, including a clear statement of support for the application, a date of signature which may be assessed in relation to time limits, and a signature which is identical to that provided by the Employer on the Statement of Employment. The Board has never shrunk from rejecting evidence which does not meet the criteria expected, and a fair number of applications have been dismissed because they have not complied with the standards established by the Board.

In this connection, counsel for the Employer referred us to a number of cases in which the Ontario Labour Relations Board decided to reject applications because of a failure on the part of a trade union to comply with the requirements for documents filed in connection with evidence of support. Though all of these cases refer to a procedure which is somewhat more elaborate and which imposes a larger number of formal requirements than our own, we accept the basic point made in them, which is that this Board cannot be too fastidious when it comes to receiving and assessing the evidence of support (or non-support) which is the basis of decisions concerning certification applications.

This brings us to the question of the status and effect of the estimate which a trade union is asked to provide in paragraph 5(a) of the application form. Though the trade union is asked to estimate the number of employees in the bargaining unit which they propose as the basis for certification, an employer is generally in a better position to know the precise numbers of employees who fall within the scope of the bargaining unit which is described in the application. In a practical sense, the most telling factor in the assessment by the Board is the comparison of the evidence of support with the list of the names on the Statement of Employment filed by the employer. Unless the trade union makes some objection to the Statement of Employment, this comparison is generally the basis on which the application is determined.

The estimate made by the trade union of the number of employees has a more marginal role in the assessment under these circumstances. As is often the case, an exception must be made to this proposition in the case of the construction industry. In a large number of cases, employers have chosen not to file a Statement of Employment, not to reply to the application, and not to appear before the Board. In these cases, the Board refers to the estimate made by the trade union as a basis for determining whether the trade union claiming to represent a majority of employees is well-founded.

In *International Union of Operating Engineers v. Ramco Installations Ltd.*, [1996] Sask. L.R.B.R. 1;

LRB File No. 247-95, the Board addressed a related issue in the context of a request for reconsideration of an earlier decision to issue a certification Order. One of the grounds on which reconsideration was sought was the failure of the trade union to make an estimate of the number of employees in the proposed bargaining unit. The Board made the following comment on this point on 4:

> *Technically, this argument has considerable force, and the Board should perhaps have requested that the Union provide an estimate of the size of the bargaining unit. On the other hand, it must be recognized that what is required of the Union in an application for certification is only an estimate; it must be anticipated that an employer is in possession of the information required to establish the number of employees with precision.*
>
> *It should further be noted that the application for certification takes the form of a statutory declaration in which a trade union attests that they claim to represent a majority of employees in the bargaining unit of employees they put forward as a basis for collective bargaining. In the absence of any contrary representations from an employer, it is our view that it is appropriate to accept the claim made by the trade union, and that the absence of an estimate of the number of employees does not in itself constitute a fatal flaw in the application.*

On reviewing this statement, we have come to the conclusion that we may have overstated the point in the *Ramco Installations Ltd.* case, *supra*. In that case, a certification Order had been issued in circumstances where the Employer had not responded at all to the application. Though the Board found that other procedural defects justified a reconsideration, we wished to make the point, in connection with the issue of the absence of an estimate, that one cannot have too much sympathy for an employer who wishes to overturn a certification Order on purely technical grounds when they have not taken earlier opportunities to address before the Board any legitimate concerns they may have.

On the other hand, we are now of the view that another aspect of this comment, which might be taken to suggest that there is no onus on a trade union to supply the Board with the estimate asked for in paragraph 5(a) of the application form, was somewhat misleading. Though we did not, in that case, view the absence of the estimate as a sufficient ground for reconsideration of the decision to issue a certification Order, we should not have left the impression that we do not or should not require trade unions to supply us with the estimate which the application form requests.

In this case, the circumstances are somewhat different than those in the *Ramco Installations Ltd.* case, *supra*. The Employer did supply a Statement of Employment, albeit one which was not responsive to the description of the bargaining unit in the certification application. Rather than contest the Statement of Employment in this form, the Union chose to accept it.

In order to address the multitude of jurisdictional questions which had arisen between the building trade unions, this Board, in the decision in *Newbery Energy*, *supra*, chose to establish a set of standard bargaining unit descriptions which would, it was hoped, ensure that all applications for certification would adhere to clear craft lines. It is clear from what has occurred in this case that there are still some gray areas in the delineation of craft jurisdictions on construction sites.

In this case, Mr. Todd said that he initially thought there were approximately four carpenters on the site, and that the Statement of Employment suggests there may be five persons who meet that description. The Employer filed a Statement of Employment suggesting, however, that there were 16 employees falling within the craft jurisdiction of the Union.

We are reluctant to accept the proposition that the Employer was entitled to rely on defeating the certification application by supplying a Statement of Employment with a considerably larger number of employees on it than the number which the Union estimated to comprise the bargaining unit. If, as one must assume, the Employer was supplying a list of employees which he believed in good faith to fall within the carpenter jurisdiction, then the Statement of Employment can be taken as correcting the estimate supplied by the Union, on the basis of the superior knowledge of the Employer concerning the employees actually employed on the date of the application. If the Union had not filed all of the evidence of support which came into their possession by the date of the application, they would have been out of luck had the Board determined to accept the more generous number advanced by the Employer.

It was, of course, open to the Union to object to the wider bargaining unit implicit in the Statement of Employment, and to insist on adhering to the bargaining unit as they originally proposed it. They chose, instead, to accept a group of employees falling within a wider notion of carpenter jurisdiction.

The Board continues to schedule hearings for all certification applications, partly to ensure that the parties have an opportunity to put before the Board any concerns they have. In this case, all of the information, except the evidence of support, which is currently available to the Board was available to the Employer prior to the original hearing. The Employer chose not to appear, apparently on the grounds that they were confident a certification application would not be issued. They did not choose to appear to address the question of why their list of bargaining unit employees diverged so markedly from the estimate provided by the Union. If the Employer has provided the Statement of Employment

in good faith, the hearing provides an opportunity to defend the bargaining unit defined in those terms, or to raise any questions about the bargaining unit which the trade union put forward in the application.

We have commented earlier that we do not accept the proposition that an employer is entitled to rely on the discrepancy between the estimate provided by the trade union and the numbers included in the Statement of Employment. The Employer put forward a number of names; the Union accepted that all of these employees should be included within the bargaining unit. Assuming the Employer was providing accurate information to the Board, it is difficult to see what difference it would have made to the representations made by the Employer if the Union had estimated the number of employees differently. The only situation in which an employer could claim to "rely" on such an anomaly to defeat the certification application would be where the Statement of Employment was not compiled in good faith, and we do not think it necessary to contemplate that possibility in this case. In our view, there are no grounds for concluding in this case that either party acted fraudulently or in bad faith.

For the reasons we have stated here, we have decided not to grant the request for reconsideration or rescission of the certification Order.

That is not to say that we are satisfied with the course events have taken in this case. We fully accept the comments of counsel for the Employer concerning the importance of maintaining a procedure for the assessment of the evidence presented in connection with certification applications which is as transparent as possible under the circumstances, and which brings to light all issues which it may be necessary to resolve before issuing or refusing a certification Order.

In this case, the difference between the number of bargaining unit employees estimated by the Union and the number of support cards received should have alerted the Board to the fact that there was potentially some confusion or difference of opinion about who would be included in the bargaining unit, notwithstanding that in form the unit was a standard carpenter unit. That there was some possibility for confusion of this kind was confirmed by the Statement of Employment which the Employer submitted to the Board.

Where such a divergence of view appears on the face of the material, the process of the Board should have been, but apparently was not, adequate to identify the source, nature and scope of the difficulty.

Orders we issue in this sector has apparently been quite limited. Several recent situations, including this one and that in the *Ramco Installations Ltd.* decision, *supra*, remind us that the use of standard bargaining unit descriptions does not relieve the Board of the obligation to ensure that both parties to a certification application, as well as any other parties who may have an interest in the outcome, are proceeding on the basis of both a common understanding of the issues and a mutually comprehensible vocabulary.

As we indicated earlier, we have decided not to rescind or reconsider the decision in this case. We will undertake, however, to review the procedures followed by the Board to ensure that such anomalies as that which surfaced in this case are queried at the initiative of the Board, that the parties are advised of apparent discrepancies, and that there is an opportunity to resolve those matters prior to the issuing of a certification Order.

GUY STEWART, Applicant and SASKATCHEWAN BREWERS' BOTTLE & KEG WORKERS, LOCAL UNION NO. 340, Respondent

LRB File No. 029-95; May 21, 1996
Chairperson: Beth Bilson; Members: Ken Hutchinson and Carolyn Jones

For the Applicant: Mary E. Neufeld
For the Respondent: Sandra G. Mitchell

Remedies - Legal expenses - Whether expense of legal representation should be granted in circumstances where applicant is claiming denial of union membership - Board deciding to grant legal expenses in part.

Remedies - Lost income - Whether applicant could claim loss of wages increases which might have been negotiated if he had been given opportunity to attend union meetings - Board deciding such claim is too speculative.

Remedies - Union dues - Whether applicant could claim return of union dues on basis that is not regarded as member of union - Board deciding applicant had some benefit of union representation of bargaining unit, denying claim for union dues.

***The Trade Union Act*, ss. 5(d), 5(e) and 42.**

REASONS FOR DECISION

MONETARY LOSS

Beth Bilson, Chairperson: The Saskatchewan Brewers' Bottle and Keg Workers, Local 340, has been certified by this Board as the bargaining agent for a unit of employees of the Saskatchewan Brewers' Association. Mr. Guy Stewart, who at the time the application was heard was an employee of the Employer at the bottle and keg exchange in Regina, alleged in the application that the Union had committed certain violations of *The Trade Union Act*, R.S.S. 1978, c.T-17 by denying natural justice to him and to several other employees, and by restraining the right of those employees to participate in the affairs of the Union.

It is not necessary to review in detail the findings of the Board following the hearing of the application. It is sufficient to comment that the Board did find that a number of the allegations made in the application were well-founded. The major claim made by Mr. Stewart was that the Union had told him

and his colleagues, all of whom were "temporary" employees, that they were not members of the Union and that they could not take part in the meetings or votes of the membership, although Union dues continued to be deducted from their wages.

Mr. Stewart and the Union failed to reach a settlement concerning the monetary loss claimed by Mr. Stewart in his application, and the Board was asked to reconvene to consider these claims.

The monetary loss claimed by Mr. Stewart related to three items: a notional wage increase which would allegedly have been negotiated if the interests of the temporary employees had been reflected at the bargaining table; the Union dues deducted during the years of his employment; and the expenses incurred by Mr. Stewart in advancing his claim against the Union.

With respect to the first element of this claim, counsel for Mr. Stewart argued that because Mr. Stewart had not been able to attend Union meetings he could not ensure that the position of the temporary employees was considered in preparing proposals for collective bargaining. Mr. Stewart and several other employees were designated as temporary employees because they worked part-time for much of the year, with a larger number of hours in the summer. In spite of this designation, there was little distinction between the duties performed by these employees and the full-time employees, and all of the temporary employees who testified at the hearing had been employees for some years. The wage rate for temporary employees was, at the time of the hearing, less than half the hourly rate for full-time employees, and there had been no increase in this rate in the most recent round of collective bargaining.

Counsel for Mr. Stewart argued that, if the temporary employees had been able to participate in Union meetings, they might have been able to achieve a wage increase which would narrow the gap between their hourly rate and that of the full-time employees; she produced a number of calculations to demonstrate what this might have meant in terms of loss to Mr. Stewart.

In our original decision in this case, we made it clear that the denial of an opportunity to take part in the deliberations of a democratic organization under these circumstances represented a serious incursion into the rights of Mr. Stewart. We also commented, however, on the impossibility of drawing a causal link between participation in a democratic process and any particular outcome of that process

[*Stewart v. Saskatchewan Brewers' Bottle & Keg Workers, Local 340*, [1995] 2nd Quarter Sask. Labour Rep. 204; LRB File No. 029-95, at 216]:

> *The benefits of access to a democratic process are ephemeral ones, for no particular outcome can be guaranteed by giving individuals a right to participate, and no one can ever be sure what effect their personal participation has on the decisions which are arrived at. They are benefits, nonetheless, and the right of trade union members to participate in the decisions which affect the course taken by their union on their behalf is surely an important one. The right of an individual to participate in trade union decision-making, even if that individual never persuades one other person, even if that individual remains the single voice in opposition, is an entitlement deserving of protection.*
>
> *In general, trade unions are acutely aware of this, and tolerate - indeed welcome - a wide spectrum of opinion in their ranks. This general state of affairs does not, however, mean that violations of the canons of fair and democratic practice should not be pointed out when they occur.*

In the process of collective bargaining, the representatives of employees must take into account a variety of interests and objectives. They must also be prepared to deal with the limitations which are placed on their ability to attain their objectives by the ability of the employer to resist their efforts. Whatever discussions may take place prior to the formulation of the initial bargaining package and the commencement of negotiations are only one factor contributing to the outcome of the bargaining process.

It is always possible that the presence of Mr. Stewart at Union meetings might have altered the nature and weight of various bargaining proposals. It is equally possible that any representations made by Mr. Stewart would have fallen on deaf ears. It is also possible, though perhaps unlikely, that Mr. Stewart himself might have been convinced to accept that wage increases for temporary employees should be foregone in favour of pursuing other issues.

There is a noticeable difference between the wage rate paid to the temporary employees and that of the full-time employees. It cannot be said with any certainty, however, that Mr. Stewart could have achieved a narrowing of that gap by his influence at Union meetings, or that this difference in wage rates was the result of anything but a legitimate collective bargaining process.

We have therefore concluded that there is no basis on which the claim advanced on behalf of Mr. Stewart for a speculative wage increase can be granted.

The second item claimed by Mr. Stewart is a return of the Union dues paid by him since he was employed in 1989. Counsel for Mr. Stewart argued that since he was not regarded by the Union as a member, and since he was not allowed to take part in Union activities, he received nothing in return for his Union dues, and he should be reimbursed for them, including the "initiation fee" which he paid after this application was filed.

Counsel for the Union restated the position taken by the Union at the hearing - that it had been open to Mr. Stewart to take part in Union meetings, as he had not been physically prevented from attending them.

We found nothing in the representations made by the parties at the hearing concerning monetary loss to persuade us that we were in error in our original findings that Mr. Stewart had indeed been denied access to participation in the affairs of the Union on the grounds that he was not a member of the Union. As we indicated in our earlier Reasons for Decision, it was not clear how the Union had arrived at the position that temporary employees would not be regarded as members, and the decision may have arisen from benevolent motives; we found, however, that the Union had failed to treat Mr. Stewart and others as members, and that this was improper.

It is open to a trade union to make concessions to certain groups of employees with respect to the level of membership fees, or the collection of membership fees, and that may be what the Union wished to do here. Section 36 of *The Trade Union Act* makes it clear, however, that employees cannot be denied membership in the Union except on the limited grounds that they refuse to pay the charges paid by others. Mr. Semeniuk appears to have appreciated this, and advised the officers of the local Union accordingly.

We can find no previous instance where an employee has asked this Board to order the refund of union dues in circumstances such as these. There are a small number of cases in other jurisdictions where employees have had union dues refunded to them, or where they have been excused from paying arrears. In *Kevin Allison MacLaren v. Labourers Protective Union* (1982), 42 di 79, the Canada Labour Relations Board found that an employee had been improperly suspended from membership in the trade union, and ordered that he be reinstated to membership without being required to pay arrears of union dues. A similar decision was reached by that Board in *Val Udvarhely v. Canadian Airline Flight Attendants' Association*, [1979] 2 C.L.R.B.R. 569.

In that context, an improper suspension from membership in the trade union had the effect of denying the complainant any opportunity for employment with unionized employers. It seems a reasonable conclusion in those circumstances that the suspended employee ceased to receive any benefits at all from representation by the trade union.

The situation which is before us here can, we think, be distinguished from the circumstances described in these cases. In the case of Mr. Stewart, though he was denied access to participation in trade union activities, he did continue to enjoy the benefits of trade union representation in certain respects. He continued to be employed, and to receive a wage rate which the Union had bargained on behalf of employees. He would have had access to the grievance and arbitration procedure, and whatever other benefits were contained in the agreements negotiated by the Union on behalf of employees.

Under these conditions, we have concluded that it cannot be said that Mr. Stewart lost the entire benefit of trade union representation, although his own status within the Union was an equivocal one. For these reasons, we have decided not to order the refund of the Union dues paid by Mr. Stewart.

The final request made by Mr. Stewart is for an Order that the legal expenses attached to the bringing of this application be paid by the Union.

The use of Orders requiring the payment of legal expenses has been a fairly common feature of the remedial arsenal in several jurisdictions, though this remedy has been almost exclusively connected with cases involving breaches of the duty of fair representation. A number of difficult issues have arisen in this connection, and labour relations tribunals have adopted varying approaches to these issues.

Labour relations boards have generally taken a very cautious attitude towards the issue of ordering "costs" - in the sense a court would use that term. The general view expressed by labour relations boards has been that it is not appropriate to order costs, for the reasons suggested by the Ontario Labour Relations Board in *Repac Construction and Materials Limited v. Teamsters*, [1976] O.L.R.B. Rep. Oct. 610 at 612:

> *... The underlying purpose of The Labour Relations Act, as set out in its preamble, is to further harmonious relations between employers and employees through the collective bargaining process. The purpose is not well served by a procedure that usually requires the identification of a winner and a loser. The application of such a*

> *procedure, moreover, would be time-consuming, distracting the Board from its primary task of facilitating collective bargaining.*
>
> *The awarding of costs, therefore, should not be extended beyond the situation where a party is being compensated for the expenses that would result from an adjournment to convenience another party. To extend this procedure any further would introduce an unnecessarily punitive element into the Board's procedures. The request for costs are denied.*

In *Labourers International Union of North America v. Bellai Brothers*, [1994] O.L.R.B. Rep. Jan. 2, the Ontario Board commented at 11:

> *36. The Board has awarded costs in so few cases that the cases in which it has done so are the exception rather than the rule. Even when the Board has awarded costs, the Board has stressed the extraordinary nature of such an award, and has either not commented on its jurisdiction to do so, or has done so only in general terms, or has indicated it was doing so under the Board's remedial authority under what is now section 91(4) of the Act....*

The British Columbia Labour Relations Board also commented on this issue in *Delta Optimist v. Ernest Bexley*, [1980] 2 C.L.R.B.R. 227 at 249-250:

> *There are, as well, other reasons that the Board is reluctant to award costs except in extreme circumstances such as those warranting a make whole remedy. Since the Board has no authority to make an order for compensation in relation to contraventions of Part V of the Code, any policy respecting legal costs could not be consistently and uniformly administered in relation to all complaints and applications under the Code. In addition, we do not take the Union to be arguing that legal costs should be awarded in all matters before the Board and thus any policy with respect to costs would require that distinctions be drawn between those cases where an order for costs would be warranted and those where it would not. It is hard to imagine a judgment less amenable to predictable, objective standards. Furthermore, a policy of granting legal costs would necessitate an administrative procedure or apparatus to review the reasonableness of the legal costs claimed and that exercise is not conveniently achieved by the resources available to the Board; it is undertaken at this time only in those extreme cases where a make whole remedy is appropriate. Finally, while the Union has undeniably been put to considerable cost and expense by reason of the Respondents' strategy in this case, compensation for litigation expenses would not remedy the real harm inflicted by the unfair labour practices committed by the Respondents or the aggravated effect of those unfair labour practices.*

In the *Bellai Brothers* decision, *supra,* the Ontario Labour Relations Board went on to conclude that, in the absence of specific statutory authority to do so, there was a serious question as to whether the Board has jurisdiction, in any event, to order the payment of costs. The Board reviewed in detail specific provisions of a number of Ontario statutes which directly conferred on certain administrative

tribunals the authority to order the payment of certain kinds of expenses. The Board reached the following conclusion at 24:

> *56. Accordingly, we return to the first question, which is not addressed by any of the policy laden reasons for not awarding costs; that is, does the Board have the jurisdiction to award costs? As a creature of statute, an administrative tribunal like this Board has only the powers conferred upon it by legislation. The Board has no inherent jurisdiction to award costs. Further, in the context of the recent comprehensive review of the Labour Relations Act and the express granting to other tribunals of an authority to award costs, in addition to the remedial jurisdiction and the power to control their own practice and procedures which, as does this Board, these tribunals enjoy, there is no legislation which expressly gives the Board an authority to award costs. Finally, no costs jurisdiction can be implied, either from the provisions of any legislation, or from any apparent need for the Board to be able to award costs.*

The position reached by the Ontario Labour Relations Board in the *Bellai Brothers* case, *supra,* represented a change of direction from earlier cases in which the Board had ordered the payment of legal expenses connected with hearings before the Board. An example of the use of such a remedy may be found in *Hébert-Vaillant v. Canadian Union of Public Employees* (1982), 82 C.L.L.C. ¶16,161, which, like many instances of this remedy, involved a breach of the duty of fair representation. It may be noted that the passage quoted above from the *Bellai Brothers* decision draws attention to a series of legislative amendments occurring shortly prior to that decision. The stand adopted in the *Bellai Brothers* case was reiterated by the Board in the very recent case of *William Hill v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, [1995] O.L.R.B. Rep. Oct. 1249.

Both the Canada Labour Relations Board and the British Columbia Labour Relations Board have approached this issue from a different direction than that taken in the recent Ontario cases. Both of these bodies have founded the use of the remedy of ordering the payment of "costs" in their general power to order rectification of violations of the legislation.

In British Columbia, in particular, the award of legal expenses has been made in the context of a "make-whole" remedy, that is, a remedy directed at redressing all aspects of the loss suffered by an applicant. In a decision in *McNamara v. Canadian Paperworkers Union*, [1989] B.C.J. No. 2447 (Q.L.), the British Columbia Supreme Court approved this position in the following terms at 47-49:

> *8. In my opinion, the provision to "rectify a contravention of the Act" in s. 8(4)(b) and 28(1)(b) coupled with an express provision in s. 28(1)(d) to "make an*

> *order determining and fixing the monetary value of an injury or loss suffered by a person as a result of a contravention of the Act" clearly indicates the legislative intent to include within Council's broad remedial jurisdiction a mandate to order costs in appropriate circumstances. The next question I must then consider is whether Council's decision to order that the Union reimburse McNamara and Comeau's reasonable legal and other expenses, including costs was patently unreasonable? I think not.*
>
> *9. I am of the view that Council's order in this case was consistent with its past practice and with the spirit and intent of section 27 of the Act. It is established policy of Council that where other effective remedies exist a make whole remedy will not be ordered. In the case at bar, Council ordered costs because of the dilatory conduct of the Union to restore the membership rights of McNamara and Comeau frustrating the effect of the Original Panel's order. From the outset, Council repeatedly expressed its position that its order be implemented in a timely manner so as to provide an effective remedy to McNamara and Comeau. In Council's opinion there was no other practical way to remedy the wrong and the special expertise of Council put it in the best position to determine the appropriate remedy. It is the very circumstances found in this case that renders an order for costs reasonably within the scope of Council's remedial jurisdiction.*

In *Hotel, Restaurant and Culinary Employees & Bartender Union, Local 40 v. Century Plaza Hotel Ltd.*, [1979] 3 C.L.R.B.R. 49 at 70, the criteria guiding the use of "make-whole" orders were described as follows:

> *First, these orders are of a remedial rather than a penal nature. Second, they are employed in situations where the use of a more traditional remedy, i.e., a cease and desist order, would be inadequate. In these instances, the Employer has often "... already harvested the `fruits of its violations'". Third, these orders are often issued in cases where the Board has withheld a draconian form of relief. Fourth, these orders arise under the Code, from the expansion of the Board's remedial authority. The purpose of the expansion was to remove the "...artificial restrictions on the type of remedy which may be ordered..." in the new situation created by the Code where the Board finds itself "...the chief agency for giving effect to the law...".*

The specific circumstances in which an Order for legal costs would be made were outlined by the British Columbia Industrial Relations Council (as it then was) in *Scott v. B.C. Government Employees' Union* (1992), No. C104/92 [unreported], which Reasons were quoted in *Scott v. B.C. Government Employees' Union*, [1992] 16 C.L.R.B.R. 65 at 67-68:

> *A review of the relevant jurisprudence reveals that, like all remedies the Council may award, legal costs are, first and foremost, discretionary, a function of policy, and only awarded where the Council finds a breach of the Act. Second, this remedy, like all others, must fall within the governing notion of remedies being remedial, not punitive. Third, legal costs may be awarded where traditional remedies have proven ineffective. Fourth, if they are going to be awarded at all, it is normally in cases*

> *where the conduct complained of has been particularly egregious. Fifth, the most usual circumstances in which legal costs are awarded are Section 7 applications where different considerations apply.*
>
> *Where the Council upholds an individual's Section 7 complaint of unfair representation by a trade union, the reasoning is, generally speaking, that the individual union member and the union have divergent and conflicting interests. Independent counsel for the individual is perceived as the best way to protect the individual's interests. The equities of the situation demand that lack of financial resources not prevent the individual from pursuing rights under the Act or be financially penalized for doing so: consequently, a make-whole order is made.*

The *Scott* decision suggests that applications alleging a breach of the duty of fair representation form a particularly appropriate context for the award of legal expenses, for the reasons suggested in the passage quoted above. The rationale given there was elaborated further in another decision of the British Columbia Industrial Relations Council, *Jeff Jensen v. International Woodworkers of America*, No. C99/88 [unreported]:

> *There are two characteristics of a successful Section 7 complaint which support the fashioning of a make whole remedy which includes compensation for legal expenses. The nature of the violation is that the complainant has been in some manner or degree abandoned by his bargaining agent. The proceeding to redress that violation requires that he, as an individual, must mount a legal offensive if he is to regain his rights. The complainant is thus placed in the position of waging a legal campaign against the often formidable resources of his union. His employer, often a beneficiary of the decision of the bargaining agent to decline to represent the complainant in an employment dispute, is usually supportive of the union's position in Section 7 complaints and represents yet another adversary which the complainant might face in the proceedings. In these circumstances it is reasonable, if not prudent, for an individual complainant to retain counsel. Moreover, the complainant will incur that expense as a direct result of and by reason only of the union's failure to adequately represent him. The objective of the remedy as stated in Christine Leach, above, which is to place the complainant in the position which he would have occupied had no violation occurred, would be frustrated if he is faced with the financial burden attendant upon his achieving redress. It is appropriate, therefore, that the policy of the LRB as articulated above which will avoid that result should be applied by the Council in its administration of the remedial provisions of the Act.*

The British Columbia Labour Relations Board has more recently re-examined the propositions which were made in cases like the ones just cited. In *Kelland v. Tunnel and Rock Workers* (1993), 21 C.L.R.B.R. (2d) 254, the Board commented at 268:

> *The rationale articulated in Jensen, supra, and implicitly found in other decisions, is initially attractive. One cannot help but feel sympathetic towards individuals who successfully pursue duty of fair representation complaints against the trade union*

> *which was statutorily required to represent their interests in the first place. This is especially true where the employer aligns itself with the position taken by the trade union in order to avoid the matter proceeding to arbitration. Nonetheless, the difficulty with the "inequality of resources" rationale is that it cannot be logically restricted to the duty of fair representation context: a small and inexperienced employer may well be required to obtain legal counsel at significant expense in order to pursue remedies against a trade union with "formidable resources"; conversely, a trade union with limited resources may well be placed in a position of disadvantage if required to wage "a legal campaign" against a large, corporate employer. Thus, unless one establishes a rather artificial boundary of limiting the Jensen rationale to the duty of fair representation context, it would represent a significant departure from the general policy which has long governed awards of legal costs.*

The British Columbia Board concluded that awards of costs should not be made as a matter of course in duty of fair representation cases; nor should such a remedy be limited to duty of fair representation cases. Rather, they should be considered in circumstances, such as those outlined in the *Kidd Brothers* case, *Kidd Brothers Produce Ltd. v. Miscellaneous Workers Union*, [1976] 2 C.L.R.B.R. 304 where a "make-whole" approach is being taken to the granting of remedies. The Board observed in the *Kelland* case, *supra* at 270:

> *We therefore repeat our view that an award of legal costs to successful duty of fair representation complainants should only be made in a manner consistent with the general principles governing remedies in all applications coming before the Board. They will only be awarded in exceptional circumstances which justify the imposition of a "make-whole" order. For example, legal costs may be granted where traditional remedies would be inadequate and there would otherwise be no practical avenue for providing effective and meaningful relief. There is perhaps no need to emphasize the restriction that an award of legal costs must have a remedial or compensatory purpose, as distinguished from being punitive....*

A parallel comment was made in the decision of the Canada Labour Relations Board in *Darius L'Heureux* (30 November 1993) [unreported]:

> *An employee bringing a duty of fair representation complaint, even successfully, would not receive costs in the normal course. The Board views an award of costs as an extraordinary remedy. Costs can be counter productive to the relationship, reinforcing the labels of winner and loser. Costs awards may discourage parties from settling and do not respond to the real harm done. They are often viewed as punitive which is inconsistent with labour relations remedies. The Board's processes are also unaccustomed to assessing costs, thereby detracting from the Board's primary functions.*

We are of the view that, like the legislation which is the basis of the decisions of the Canada Labour Relations Board and the British Columbia Labour Relations Board, *The Trade Union Act* confers upon

this Board broad power to fashion remedies like the "make-whole" remedies described in those decisions. The powers granted to the Board in ss. 5(e) and (g), along with the general remedial power under s. 42, permit us a wide latitude in devising remedies which will address the losses suffered by applicants in the context of the objectives of *The Trade Union Act*.

In this connection, it is perhaps helpful to think of legal expenses in terms other than the notion of "costs" as it is understood in connection with proceedings in civil courts. For reasons which have been alluded to earlier, this Board has never considered it appropriate to award costs in that sense of the term as part of the determination of applications under *The Trade Union Act*. This does not mean that there are not circumstances in which the expense of obtaining legal advice might not be part of an extraordinary "make-whole" remedy. In some cases, the essence of the infraction which is alleged by an applicant concerns the representation to which an employee is entitled under the *Act*. In this sense, granting some compensation for the use by an applicant of the services of a solicitor is more akin to compensation for a breach of fiduciary duty than to costs in their traditional sense.

As counsel for the Union pointed out, this Board has expressed some reservations about the use of private counsel by employees in their dealings with a trade union. In *Brent Liick v. Canadian Union of Public Employees*, [1995] 3rd Quarter Sask. Labour Rep. 78; LRB File No. 237-93, the Board made the following comment at 102-103:

> *As we indicated in the Berry decision, it is not unusual for an individual employee to seek the advice of private counsel, and it may in some circumstances be appropriate for a trade union to accept assistance from that source. As we have indicated above, however, it is the trade union which enjoys the exclusive right and obligation to represent employees in matters which concern their terms and conditions of employment, including issues related to disciplinary action. This severely restricts the role which may be played by private counsel. It is the trade union which retains control over the decisions concerning whether and how grievances should be pursued, not the individual employee or his counsel. The employee is bound by the decisions reached by the trade union or settlements reached with an employer; neither the employee nor counsel can exercise a veto over such actions or insist that the trade union comply with their demands.*

We would reiterate our view that an employee is not entitled to retain legal counsel to make representations every time the employee has a disagreement or difference of opinion with the trade union, or to present the bill for those legal services to the trade union as a matter of course.

We must also admit to a concern that we not encourage the view that proceedings before this Board can

only be undertaken effectively when an applicant is represented by legal counsel. The Board makes considerable efforts to remain accessible to parties who are not represented by lawyers, and to conduct hearings in which a lay person can participate.

Nonetheless, there are, in our opinion, circumstances in which it is justifiable to consider a remedial Order to assist an applicant with the expenses associated with legal representation. We expressed our view in our earlier Reasons for Decision that the circumstances which gave rise to this application are exceedingly unusual. As the British Columbia Board pointed out in the *Kelland* case, *supra,* not all cases in which a trade union has committed a breach of the duty of fair representation are cases in which that union has completely disqualified itself from further representation of the complainant. Similarly, not all cases in which an applicant wishes to raise complaints about defects in the procedures followed by a trade union are cases in which the applicant should be permitted to make use of legal services at the expense of the trade union.

A further complication for the devising of remedies under *The Trade Union Act* is that these remedies must be formulated in the context of the objectives of the *Act*. Among these objectives are the promotion of sound collective bargaining, and the encouragement of trade unions as vigorous and democratic organizations.

In this case, the Applicant, Mr. Stewart, advanced a claim for redress which falls into the category of a "make-whole" remedy of the kind discussed in the cases we have cited. Earlier in these Reasons, we have declined to grant two elements of this claim. It is our view, however, that the claim for legal expenses is not necessarily contingent on the granting of other forms of relief in circumstances such as these.

In our original decision, the Board found that the Union had been guilty of certain infractions of *The Trade Union Act* in placing restrictions on the ability of Mr. Stewart and others to participate in the affairs of the Union. The loss to Mr. Stewart can be characterized as the loss of an opportunity to take part in the decision-making process of his bargaining agent, and of the rights attached to full membership in a democratic organization.

In this context, the only redress which can be granted to Mr. Stewart is to order that the Union make some amends for the sums invested by Mr. Stewart in identifying the nature and scope of the wrong

done to him by the Union and in making efforts to bring home to the Union the abridgement of the democratic process which they had brought about.

A wide range of factors must be taken into account in deciding whether it is appropriate to grant the request of Mr. Stewart for the payment of his legal expenses by the Union. In this case, it is our view that Mr. Stewart was justified in attempting to bring to light the highly irregular conduct of the Union in preventing him and his colleagues from taking part in the democratic processes of the Union, and in making use of the services of a solicitor to assist him in formulating this unusual application. Since the Union took the view that Mr. Stewart was not a member of the Union prior to the filing of the application, it is difficult to see how it would be reasonable to have expected him to obtain assistance from that source. Indeed, as late as the hearing concerning monetary loss, the position of the Union continued to be essentially that they had been guilty of no conduct which was inappropriate.

On the other hand, it would not serve the objectives of *The Trade Union Act* well if we were to grant a remedy which impaired the ability of the Union to carry out the representational and bargaining functions which were the object of the certification Order. Indeed, the capacity of the Union to make effective use of their representational authority was an element of the application which precipitated these proceedings.

Section 5(g) of *The Trade Union Act*, as we read it, allows this Board to grant a remedy which provides less than complete compensation to an applicant if it is "appropriate." Considerations such as the ability of a trade union to sustain the cost of complete compensation seem to us relevant to the formulation of a remedial Order.

In this case, we propose to order that the Union reimburse Mr. Stewart for legal fees to the extent of $1500.00.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 529, Applicant and BILL'S ELECTRIC CITY LTD., PRINCE ALBERT, SASKATCHEWAN, Respondent

LRB File No. 061-96; May 21, 1996
Chairperson: Beth Bilson; Members: Brenda Cuthbert and George Wall

For the Applicant: Gus Gerecke
For the Respondent: No Appearance

Unfair labour practice - Duty to bargain - Whether employer is required to deal with union concerning terms and conditions of employment and grievances after certification order issued - Board deciding failure to deal with union an unfair labour practice.

***The Trade Union Act*, s. 11(1)(c).**

REASONS FOR DECISION

The International Brotherhood of Electrical Workers, Local 529, was certified by this Board in an Order dated August 18, 1995 for a unit of employees of Bill's Electric City Ltd.. This Unit was described as follows:

> *(a) that all Journeyman Electricians, Electrical Apprentices, Electrical Workers, and Electrical Foremen, employed by Bill's Electric City Ltd., in the Province of Saskatchewan, north of the 51st parallel, are an appropriate unit of employees for the purpose of bargaining collectively*

The Union has brought an application in which it is alleged that the Employer has committed unfair labour practices and violations of s. 11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c.T-17, which reads 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:*
>
> > *(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 Board received a signed registration card indicating that a copy of this application, along with a request for a Reply, had been delivered to the Employer. Normal Board practice would also suggest

that notice of the scheduled hearing of the matter was also sent to the Employer. No representative of the Employer was present at the hearing, however. The decision we have made with respect to this application is based on evidence given before the Board by Mr. Garth Gerecke, the Business Manager of the Union.

Mr. Gerecke testified that the contact between the Union and the Employer began when the Employer requested the dispatch of a number of employees from the Union hiring hall for work on a project in Hudson Bay, Saskatchewan. It was on the basis of this work that the application which resulted in the certification of the Union was made.

Following the granting of the certification Order, Mr. Gerecke said that on August 29, 1995, he sent the Employer copies of forms to be used for the remittance of union dues, as well as contributions to the pension fund, training fund, industry promotion fund and health and welfare fund.

When he received no response from the Employer, Mr. Gerecke sent a letter to the Employer, dated October 25, 1995, which read as follows:

> *Pursuant to the Saskatchewan Trade Union Act and the August 18, 1995 Order of the Labour Relations Board which requires Bill's Electric City Ltd. to bargain collectively with IBEW Local 529 and pursuant to the provisions of Section 15 of the Construction Industry Relations Act 1992, the current Saskatchewan Provincial Electrical Agreement is now in effect between IBEW Local 529 and Bill's Electric City Ltd. Accordingly, we are enclosing two copies of this Agreement for your convenience.*
>
> *We hereby request that you familiarize yourselves with the Agreement and comply with its terms immediately. We also wish to draw particular attention to Article 3:00 of the Agreement which includes the Union Security provision from Section 36(1) of the Saskatchewan Trade Union Act and also our hiring procedures which should be followed in the future.*
>
> *We are also enclosing the necessary remittance forms which you are required to complete on a monthly basis and send in along with your remittance for Union dues, Building Trades Fund, Training Fund, Industry Promotion Fund, and Health & Welfare and Pension. These deductions and contributions are to be remitted by the 15th of the following month to which they apply.*

Mr. Gerecke said that he also made an appointment to talk to Mr. Bill Sokulski, a representative of the Employer, on October 26. He delivered the letter of October 25, along with two copies of the applicable collective agreement.

Mr. Gerecke testified that the Union has often accepted a deviation from the collective agreement in the commercial sector, in recognition of the necessity for unionized employers to compete with non-union contractors. In the course of the discussion with Mr. Sokulski, Mr. Gerecke said that he indicated the Union would be willing to supply an "enabling letter," which would allow alterations in the terms of the agreement. He further testified that he spoke to Mr. Sokulski of the possibility of concluding terms and conditions which would apply to a particular project, if that appeared more desirable to the Employer.

At the conclusion of this meeting, Mr. Gerecke said that he thought he and Mr. Sokulski had established the basis of a co-operative relationship. At a subsequent meeting with Union members, he made a report to this effect.

The administration of the payroll of the Employer was not done by employees of the company, but by an outside agent. On contacting this person in November, Mr. Gerecke ascertained that she had never been given any information concerning the deduction of union dues or payments to the welfare or other funds.

On the basis of this discovery, Mr. Gerecke made an attempt to get the Employer to send a list of employees for payroll purposes. At that time, he indicated that the Union would be willing to have the payments made as of November 1, and would not require retroactive payments.

After numerous efforts to contact the Employer, Mr. Gerecke made contact with Mr. Sokulski on January 9, 1996. At that time, Mr. Sokulski expressed reluctance to co-operate, and said he preferred to "leave it up to the employees." Mr. Gerecke testified that he explained to Mr. Sokulski that the certification Order required the Employer to deal with the Union, and that he had no choice but to do so. At the end of the conversation, Mr. Sokulski did agree to respond to the requests of the Union by January 16.

Though Mr. Gerecke said he did receive a list of employees as of January 11, he received no indication that the Employer intended to pay the remittances or to accept the application of the provisions of the collective agreement. Mr. Gerecke said that he spoke to Mr. Sokulski in late January or early February, and made a further effort to persuade him that the Employer was required to follow the collective agreement.

On February 14, 1996, the Union filed a grievance in the following terms:

> *RE: COMPLIANCE WITH THE SASKATCHEWAN PROVINCIAL ELECTRICAL AGREEMENT*
>
> *This letter will serve as an official grievance against Bill's Electric City Ltd. for refusal and/or failure to comply with the Local 529 Provincial Electrical Agreement in any respect, contrary to the notice dated October 25, 1995 (copy attached) which was hand delivered to you on October 26, 1995.*
>
> *The violations include but are not limited to Bill's Electric City Ltd. failure to:*
>
> - *follow the hiring procedure;*
> - *pay employees the hourly wage rate and benefits as per the Agreement or Enabling Provisions;*
> - *remit Pension contributions as per the Agreement;*
> - *remit Health & Welfare contributions as per the Agreement;*
> - *remit Training Fund contributions as per the Agreement;*
> - *remit Industry Promotion Fund contributions as per the Agreement;*
> - *remit Union Dues as per the Agreement;*
> - *remit Building Trades Fund contributions as per the Agreement*
>
> *I regret that the filing of this grievance has become necessary and would like to re-emphasize the wish that I expressed to you when we met on October 26th '95 that we work together as co-operative partners in the Electrical industry as opposed to an adversary relationship. I do hope that we can get things back on track.*
>
> *We hope that you will give this matter your immediate attention and respond without delay.*

The Employer has never responded to this grievance, or to the earlier requests of the Union. On March 15, 1996, the Union filed this application alleging that the Employer was guilty of contravening s. 11(1)(c) of *The Trade Union Act*.

The basic obligation which is imposed upon an employer as a result of a certification Order is that of recognizing the union as the exclusive representative of employees for the purpose of bargaining collectively about their terms and conditions of employment.

In the construction industry, the results of a certification Order are somewhat different than in other employment settings. It will generally not be a matter of arriving at a new collective agreement with the employer named in the Order, but of applying the provisions of an agreement reached under the auspices of *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. 29.11. These provisions would typically include an obligation to hire members of the trade union, a requirement for

the payment of benefit contributions in addition to the deduction of union dues and the payment of the wages indicated in the relevant construction agreement. There is some capacity for the parties to deviate from the provisions of the agreement, on an "enabling" basis, or on the basis of a project agreement; the evidence of Mr. Gerecke was that the Union indicated a willingness to discuss the modification of the obligations of the Employer in one or other of these ways.

The effect of s. 11(1)(c) has generally been described as the establishment of a "duty to bargain," in other words, to enter into a collective bargaining relationship with the trade union representing the employees. The scope of the concept of "bargaining collectively" is defined in s. 2(b) of the *Act* as follows:

> 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.*

In many decisions over the period of more than half a century, the Board has emphasized that the duty to bargain is one of the central features of *The Trade Union Act*. The objectives of the *Act* cannot be met entirely on the basis of allowing employees to organize, join and assist trade unions. The leverage which employees can exercise by this means depends on the imposition on the employer of a responsibility to deal with the trade union, and only with the trade union, in matters which concern the terms and conditions of employment of employees.

It is evident from the definition in s. 2(b) that the scope of this responsibility goes beyond being present at the bargaining table, though the term "bargaining" is often associated with the negotiation of a collective agreement. An employer is in fact obligated to enter into discussions with the trade union about any matters concerning the terms and conditions of employment of employees. These include questions of how the provisions of the collective agreement are to be applied or interpreted, and the use of the grievance procedure to resolve disputes arising out of these questions.

Mr. Gerecke said that he had not anticipated anything other than a harmonious relationship with this Employer, partly because Mr. Sokulski was at one time a member of the Union, and partly because the application for certification arose out of a voluntary request on the part of the Employer for a supply of Union members for a project. It is possible that the Employer has failed to understand the seriousness of the legal obligation which is imposed by the issuing of a certification Order by this Board. The failure of the Employer to participate in these proceedings is perhaps an indication that the Employer is not fully aware of the seriousness of the allegations which have been made by the Union.

The responsibilities which rest on the Employer now include entering into discussion with representatives of the Union about the terms and conditions which may be applied to employees, acknowledgement of obligations which are imposed by the relevant collective agreement, responding to legitimate requests from the Union for the payment of monies pursuant to the collective agreement or the deduction of dues pursuant to union security provisions, and making an effort to resolve the issues which were raised by the Union in the grievance filed on February 14, 1996.

These obligations have the force of law. They are not matters which an employer has the option to ignore.

We have concluded that, for whatever reason, the Employer has committed violations of s. 11(1)(c) of *The Trade Union Act*, by declining to enter into serious discussion with the Union of the terms and conditions of employment which are to be applied to employees, by failing to respond to Union requests for remittance of funds, and by ignoring the issues raised by the Union in the grievance.

In addition to the usual Order to cease and desist, we will issue Orders to the following effect:

- That, within twenty days from the date of these Orders, a representative or representatives of the Employer meet with a representative or representatives of the Union to discuss the terms and conditions of employment of the employees in the bargaining unit, and to make reasonable efforts to resolve the issues cited by the Union in the grievance dated February 14, 1996.

- That, within twenty days from the date of these Orders, the Employer respond to the requests made by the Union for contributions to pension, health and

welfare, training, industry promotion and building trades funds, as well as all union dues required under the provisions of the Provincial Electrical Agreement.

GRAIN SERVICES UNION (ILWU CANADIAN AREA), Applicant and CSP FOODS (A DIVISION OF SASKATCHEWAN WHEAT POOL), Respondent

LRB File No. 025-96; May 30, 1996
Vice-Chairperson: Gwen Gray; Members: Bruce McDonald and Ken Hutchinson

For the Applicant: Walter Eberle
For the Respondent: Melissa Brunsdon

Bargaining unit - Appropriate bargaining unit - Managerial exclusion - Kettle operator/lead hand - Board deciding to exclude position from bargaining unit as incumbent has effective control over matters affecting terms and conditions of employment of others.

***The Trade Union Act*, s. 2(f)(i).**

REASONS FOR DECISION

Gwen Gray, Vice-Chairperson: The Union brought an application to certify employees who work at the Wet Goods plant of CSP Foods in Saskatoon. The parties agreed to a general description of the argaining unit as follows:

> *"all employees of CSP Foods (A Division of Saskatchewan Wheat Pool) at the Wet Goods Plant operation located at CSP Foods, 75 - 33rd Street East, Saskatoon, Saskatchewan except the positions of Operations Manager [and Kettle Operator/Lead Hand]."*

The parties do not agree on the status of the position of "kettle operator/lead hand." The Employer takes the position that it ought to be excluded under s. 2(f)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17, while the Union argues that the position is non-managerial and should be included in the bargaining unit. Section 2(f)(i) reads as follows:

> *2 In this Act:*
>
> *(f) "employee" means:*
>
> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or*

> *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer.*

Mr. Nelson, the incumbent in the position of kettle operator/lead hand, began working at CSP Foods in 1975 as a bakery mixer in the Bakery Mix department. In 1994, he transferred his employment to the Wet Goods plant then owned by Dawn Foods and managed by Mr. Don Kosack. In addition to Mr. Kosack, there were only two other employees in the plant. When Mr. Kosack transferred to Etobicoke in January 1995, Mr. Nelson took over many of his duties, which included the scheduling of staff, ordering of supplies, and maintaining contacts with suppliers, customers and the Marketing department of CSP Foods.

Subsequently, under the ownership of CSP Foods, Mr. Roy Kulchar was appointed to supervise the operations of the plant. Mr. Kulchar was responsible for the overall management of two other departments of CSP Foods as well as the Wet Goods plant. His office was located in the Flour Mill. Mr. Kulchar left in January, 1996 to take on other responsibilities and he was replaced by Mr. Don Boyenko, Operations Manager.

Mr. Boyenko has overall management responsibility for three other departments in addition to the Wet Goods plant, with each department reporting to him through an out-of-scope manager. Mr. Nelson reports to Mr. Boyenko and meets with him approximately once a week for 15 to 20 minutes. Mr. Boyenko does not supervise the day-to-day work of employees in the Wet Goods plant. Under the management of Mr. Kulchar and Mr. Boyenko, Mr. Nelson continued to perform the functions that previously had been performed by Mr. Kosack.

The permanent workforce in the plant consists of five employees including Mr. Nelson. However, a large contingent of temporary workers is employed from time to time. Mr. Nelson is responsible for securing adequate temporary staff through a labour service called Kelly's Temporary Services. In addition to arranging temporary employees, Mr. Nelson recommended to his superiors that two individuals, Mr. Lorne Roper and Mr. Stuart Beck, be hired on a permanent basis. He also arranged for the transfer of Lyndon Moysuik from the Special Crops area to the Wet Goods plant. Mr. Nelson also implemented a temporary lay-off of regular employees for a period of one week in February, 1996.

In his position as kettle operator/lead hand, Mr. Nelson completes WCB accident forms for employees and arranges light duty work for employees on WCB leave. He is responsible for completing payroll forms, approving vacation leaves, scheduling overtime, docking pay for lateness, and administering verbal warnings on work performance issues. He testified that he has the authority to discipline employees up to and including discharge, although there has been no reason for him to exercise this authority. Similarly, he testified that he will be responsible for conducting annual performance evaluations of employees, although that duty had not yet been performed. Mr. Nelson receives employees' grievances and complaints and relies upon them for advice. Although he is not currently responsible for setting wages of employees, he believed that he would be involved in the negotiations of wages for the employees under a collective bargaining regime.

In relation to the actual production work undertaken in the Wet Goods plant, Mr. Nelson is responsible for the maintenance and repair of the equipment used in the processes and has authority to contract the services of a contractor to undertake the repairs. He is responsible for maintaining industrial secrets used in the plant. He regularly deals with out-of-scope managers in the Warehouse, Marketing and Accounting departments. According to his evidence, he spends approximately six hours out of a ten-hour day performing the three key functions of his position: scheduling production; selecting, scheduling and training staff; and dealing with outside contacts. The remainder of his time is spent performing hands-on production work.

Based on his previous experience as a union member and as an occasional lead hand in the Bakery Mix department, Mr. Nelson is of the view that his current duties would conflict with membership in the bargaining unit. In his opinion, if his position was to be included in the bargaining unit, his co-workers would not respect his authority. In his previous position, the lead hand functions did not include any responsibility for hiring, disciplining or other similar staffing functions, except for scheduling of work.

The job description identified for Mr. Nelson's position was written in November, 1995 and, according to his evidence, does not reflect the expanded duties undertaken by him with the change in the management personnel at the plant. The job description contains functions more in keeping with the functions performed by a traditional lead hand. Mr. Nelson did not think that the job description accurately describes the duties which he now performs.

On cross-examination, Mr. Nelson acknowledged that the restructuring notice which was issued by

CSP Foods on January 15, 1996 stated that effective that date "Don Boyenko will assume responsibility for the Wet Goods Plant Operations." Mr. Nelson admitted that the regular staff employed in the plant requires little supervision. He also confirmed that in the Bakery Mix department lead hands are included in the bargaining unit and are covered by the collective agreement. The lead hand was responsible for training of staff and scheduling of staff. Production scheduling, however, was set by the operations manager.

The rationale for excluding managerial employees from a bargaining unit was summarized by the British Columbia Labour Relations Board in *The Corporation of the District of Burnaby v. Canadian Union of Public Employees, Local 23*, [1974] 1 Can. L.R.B.R. 1 where the Board stated at 3-4:

> *The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.*
>
> *The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability." The employer does not want management's identification with its interests diluted by participation in the activities of the employees' union.*

The Board described one of the tests for determining if a person is performing managerial functions in *Service Employees' International Union, Local 333 v. Metis Addictions Council of Saskatchewan, Inc.*, [1993] 3rd Quarter Sask. Labour Rep. 49, LRB File No. 002-93 at 59:

> *It is our view that in order to be excluded form the group defined as employees by Section 2(f)(i), a person must have a significant degree of decision-making authority in relation to matters which affect the terms, conditions or tenure of employment of other employees. A high degree of independence to make decisions of a purely*

> *professional nature is not sufficient, in our opinion, to meet the requirements for exclusion under this section.*

In *Grain Services Union (I.L.W.U. Canadian Area) v. AgPro Grain Inc.*, [1995] 1st Quarter Sask. Labour Rep. 243, LRB File No. 257-94 the Board also considered whether the employee would experience a conflict in interest should his position be included in the bargaining unit. The Board concluded at 248:

> *On the other hand, it must be remembered that the essential question in considering whether a position ought to be excluded on this ground is whether the incumbent in the position would face a significant conflict of interest as a member of the bargaining unit because of the degree of influence over the terms and conditions of employment of other employees. With respect to the large number of casual employees who are engaged in processing work for a limited but crucial period, we are satisfied that Mr. Kuzminski is responsible for hiring them, and assessing their suitability for continued employment. It is inevitable that the advent of collective bargaining will add to the managerial component of his duties, not detract from it, as the administration of a collective agreement becomes a factor in his relationship with the casual employees for whom he is responsible. We have therefore concluded that this one position of Processing Manager should be excluded from the bargaining unit.*

Mr. Eberle for the Union also referred the Board to its previous decision in *Grain Services Union (I.L.W.U. Canadian Area) v. Hillcrest Farms Ltd.*, [1995] 2nd Quarter Sask. Labour Rep. 109, LRB File No. 014-95 where the Board decided to include the position of hatchery manager within the scope of the bargaining unit. The Board cautioned that experience and skill should not be confused with managerial authority when it concluded at 113 as follows:

> *In assessing the duties associated with a position to determine whether those duties are focused primarily on managerial functions, we must be careful not to confuse the attributes of an experienced and skilled employee, an employee whose views are valued and respected by an employer, an employee who may have an important role in the daily supervision and admonition of other employees, with actual managerial authority. It is not sufficient for exclusion that a person make a wide range of independent decisions, for this is characteristic of many employees whose responsibilities are in professional, technical or administrative areas. The test is whether the incumbent has sufficient autonomy in making decisions which have a direct impact on the terms and conditions of employment of fellow employees.*

In this case, the Board is satisfied that Mr. Nelson does actually perform managerial duties. He has effective authority to hire and discipline, both of which are clear indicia of managerial authority. He also has effective control over other matters that affect the terms and conditions of the employment of the employees in the plant, including the scheduling of their work, layoffs, hiring of temporary staff,

granting of leaves and vacations, evaluating staff performance, and he predicts, negotiating with the Union. The Board finds that the functions Mr. Nelson performs place him in a conflict of interest with the members of the bargaining unit and as such, his position should be excluded from the bargaining unit under s. 2(f)(i).

The difficulty with the exclusion of Mr. Nelson's position is its misleading job title. Generally, the Board would include a lead hand in the bargaining unit as the term "lead hand" usually denotes a position that, although it may contain supervisory functions, it lacks independent decision-making authority regarding the terms and conditions of the employment of others. The exclusion of the "kettle operator/lead hand" position in this instance should not be interpreted as an exclusion of persons who perform duties similar to those listed in the job description filed in this application for the "kettle operator/lead hand." The exclusion is instead intended to reflect the duties performed by Mr. Nelson at the date of this hearing, which the testimony indicated were much broader in their managerial content than is suggested by the job description.

The Union's application for certification, having been filed with majority support, is granted in the terms set out above, including the exclusion of the "kettle operator/lead hand" position.

REGINA POLICE ASSOCIATION INC., Applicant and REGINA BOARD OF POLICE COMMISSIONERS, Respondent

LRB File No. 125-96; June 3, 1996
Chairperson: Beth Bilson; Members: Terry Verbeke and Hugh Wagner

For the Applicant: Garrett Wilson
For the Respondent: Dennis Ball, Q.C.

Remedy - Interim order - Whether Board should reconsider earlier decision granting interim order when arbitration board would be disposing of substantive issues - Board deciding no basis on which to reconsider earlier remedy.

Remedy - Interim order - Irreparable harm - Whether applicant had demonstrated irreparable harm would occur if order not granted - Board deciding applicant had not demonstrated irreparable harm.

***The Trade Union Act*, ss. 5.3 and 42.**

REASONS FOR DECISION
APPLICATION FOR INTERIM ORDER

Beth Bilson, Chairperson: The Regina Police Association represents a unit of sworn officers and civilian employees employed by the Regina Board of Police Commissioners in the Regina Police Service.

The Union has made an application seeking an interim order to enjoin the Employer from proceeding further with changes in the policy regarding the granting of sick leave, pending the disposition of a policy grievance filed by the Union on January 10, 1996.

The material filed by the parties indicates that the dispute has arisen in connection with one aspect of the provision of the collective agreement dealing with sick leave. This clause reads as follows:

> *17(a) All members shall be granted sick leave with full pay on the approval of the Chief of Police. Provided, however, that if justification, in writing, is produced, the Board shall give consideration to, and render a decision with respect to any case where the approval of the Chief is not obtained.*

The Union filed a document outlining the evolution of this provision since the first collective agreement between these parties in 1947. This provision, which the Union characterized as "the unlimited sick

leave provision," was initially contained only in the agreement which covered the terms and conditions of employment for sworn officers. In the agreement which covered civilian employees, the sick leave article provided for the accumulation of sick leave credits at the rate of 1.25 days per month, and for the banking and carry over of credits under certain conditions.

The sworn officers and civilian employees were eventually merged into one group for the purpose of collective bargaining. In 1982, all civilian employees were given an opportunity to elect whether they wished to continue to be covered by the provision allowing for the accumulation of credits, or whether they wished to be covered by the "unlimited sick leave" provision. Most of the employees elected the latter, although some of them have continued to fall under the provision which contemplates the calculation of credits.

According to the material filed by the Union, the provision which was quoted above, and which now covers nearly all of the employees in the bargaining unit, has traditionally been interpreted by the parties as requiring the Chief of Police to permit an employee to take paid sick leave as long as the employee can establish that the absence is caused by illness. The Union alleges that this has established a past practice which cannot be unilaterally altered by the Employer.

The Employer, on the other hand, takes the position that Article 17(a) of the collective agreement endows the Chief of Police with a discretion to grant or withhold approval when any employee requests sick leave, although the illness of the employee is clearly a factor.

The material filed by the Employer in connection with the application contained a segment of a transcript which was taken from tape recordings of meetings held between the bargaining committees of the parties when they were negotiating a revised collective agreement in 1992. There was, apparently, some dispute concerning the circumstances under which these tape recordings were made and the conditions which were established for their use. The Union did not object to the submission of the transcript to the Board, or contest its accuracy as a record of the discussion between the parties on this point.

At the time of the negotiations in 1992, the Employer raised the issue of the interpretation and application of s. 17(a). Mr. Dennis Ball, the chief spokesperson for the Employer in the negotiations, made the following comment, for example, on June 26, 1992:

> *Under the Collective Agreement, unlike I think any other Agreement that I have seen, Article 17 in Schedule "A" provides the Chief of Police with the discretion to grant sick leave, says all members shall be granted sick leave on the approval of the Chief of Police. The Article itself contains no guidance as to when the Chief will and when he won't, when he should, when he shouldn't, grant his approval and over the years, as far as I've been able to determine there hasn't ever been a policy or a concrete policy established in that regard. Theoretically if the Chief doesn't approve then there is no sick leave entitlement - that's what the language seems to indicate. On the other hand in practice, if he doesn't say no, there appears to be a sick leave entitlement. The position we initially took at the table is that we have a proposal on sick leave. We indicated to you that we are prepared to negotiate sick leave with you. We think that it might be in your interests, although you will decide what's in your interests, to entrench into the Collective Agreement, an entitlement to sick leave rather than be subject to the discretion of the Chief. I would have been inclined to use the words "subject to the whim of the Chief" but it's our view that under the existing Agreement, the Chief cannot exercise his discretion on a whim, that his discretion has to be exercised in a manner as indicated to you at our last time, at our last session, that is, fairly applied and uniformly applied without discrimination based on questions of whether employees are sworn members or not or whether they are male or female, those kinds of things. I think that some guidance - we can get some guidance as to the appropriate policy from other Collective Agreements in both the Police Service and elsewhere and we indicated to you that if we are unable to negotiate something by way of sick leave that is acceptable to you and to us, that will be entrenched into the Collective Agreement, then we propose to develop a policy and communicate it to you which would be implemented upon the commencement of a revised Collective Bargaining Agreement. Ultimately this will settle and it will be settled one way or another.*

On or around this date, the representatives of the Employer presented the Union negotiating committee with a copy of the policy which the Employer proposed to implement, absent any modification to the provision in the collective agreement. This proposal, which took the form of a draft memorandum from Chief Ernie Reimer, who was at that time the Chief of Police, read as follows:

> *The Collective Bargaining Agreement between Regina City Policemen's Association and the Board of Police Commissioners of the City of Regina which expired December 31, 1991 contains the following provisions respecting sick leave:*
>
> *Schedule A*
>
> *17. Sick Leave*
>
> *(a) All members shall be granted sick leave on the approval of the Chief of Police. Provided, however, that if justification, in writing, is produced, the Board shall give consideration to, and render a decision with respect to any case where the approval of the Chief is not obtained.*
>
> *Schedule B*
>
> *9. Sick Leave*

> *(a) (i) Effective January 1, 1974, all permanent employees shall accumulate sick credits from the day they last entered the service of the Board. Such credits shall accumulate monthly at the rate of one and one-quarter (1 1/4) days' credit for each completed month of service, and unexpended sick leave credits shall be accumulated up to but not exceeding two hundred (200) working days.*
>
> *(ii) Where an employee has accumulated two hundred (200) working days sick leave credit, he may accumulate additional credits in respect of the current year of service. Upon completion of a current year of service, any unused portion of the accumulated credits in respect of that year shall be forfeited.*

All employees of Regina Police Service receive sick leave benefits pursuant to Schedule A, clause 17(a) except for ten civilian employees who receive sick leave benefits under Schedule B, clause 9(a).

It is the Chief of Police's responsibility to determine whether or not a member shall be granted sick leave pursuant to Article 17, clause (a) of the Collective Agreement. In carrying out that responsibility, it is essential that the Chief exercises his discretion in a manner that is fair, reasonable, and uniformly applied to all members in a non-discriminatory fashion.

Accordingly, I wish to inform the Association and its members that my discretion to approve sick leave pursuant to Article 17, clause (a) of the Collective Agreement will be exercised in accordance with the following policy:

1. *All employees shall accumulate sick credits at the rate of 1 1/4 eight hour days per month (ten hours per month) calculated from the date on which the employee last entered the Regina Police Service. Each employee will be considered to have accumulated present sick leave credits equal to his total months of service multiplied by ten hours and reduced by the amount of sick leave used to date.*

2. *The maximum unexpended sick leave credit will be sixteen hundred (1,600) hours provided, however, that where an employee has accumulated sixteen hundred (1,600) hours, he may accumulate additional sick leave credits in respect of his current year of service. Upon completion of a current year of service, any unused portion of the accumulated credits in respect of that year shall be forfeited.*

3. *When all accumulated sick leave credits have been expended, the employee shall be entitled to apply for disability benefits in accordance with the existing Superannuation and Benefit Plan.*

4. *A record of employees' absence and sick credits shall be retained by payroll and made available to the Association and to each employee upon request.*

This policy shall take effect upon the commencement of a revised Collective Agreement between the Regina City Policemen's Association and Board of Police Commissioners of the City of Regina.

The representatives of the Union continued to take the position that the Chief of Police did not enjoy any discretion with respect to the granting of sick leave under s. 17(a), and that the Employer could not institute a new policy which was inconsistent with the past practice followed by the parties prior to the 1992 round of bargaining. The Union further indicated that they had no interest in negotiating any modifications to the existing article in the agreement.

Following the conclusion of the collective agreement, the new Chief of Police, Chief Murray Langgard, wrote to the Union, in a letter dated December 7, 1994, to advise them that the Employer intended to implement the new policy respecting sick leave in the new year. The letter, to which a copy of the proposed policy was attached, read in part as follows:

> *The Association was advised that the Chief of Police's past practice of approving all requests for sick leave would not apply under a revised collective agreement. Instead, a policy would be introduced for approving requests for sick leave in a non-discriminatory, reasonable and uniform manner. The Association was asked if it wished to negotiate with respect to such a policy but refused to do so.*
>
> *Accordingly, the Association was informed that the attached sick leave policy would be implemented during the term of the existing collective bargaining agreement. The Association was again encouraged to enter into negotiations with respect to the policy, but again it declined.*
>
> *With that background in mind, this letter is to inform you that effective December 30, 1994, I will be approving sick leave pursuant to Schedule A, Article 17, Clause (a), in accordance with the attached sick leave policy. As soon as possible, the Association will be provided with a list of accumulated sick leave available to all members and will be asked to verify the accuracy of that information. (For your information, no member will be placed in a negative position with respect to sick leave regardless of the number of past absences due to sickness.) Subject to the Association's comments with respect to the accuracy of the information, each member will be informed of his or her accumulated sick leave.*
>
> *We recognize that further discussions must be held concerning the inter-relationship between sick leave and other benefits programs, including short term disability. As you know, the existing collective bargaining agreement between the parties expires on December 31, 1994, and both sides have indicated their desire to negotiate revisions to the agreement. The Board of Police Commissioners remains prepared to enter into negotiations concerning the safety net for all members who may experience sickness and/or disability.*

On December 12, 1994, Sergeant Troy Hagen, the President of the Union, replied in the following terms:

> *In reply to your letter dated December 7, 1994 concerning the proposed Sick Leave Policy, we submit the following for your consideration.*

It is the Regina Police Association's position that the proposed policy is premature for presentation at this time. We are currently examining long term disability, and are awaiting a response from the Pension Plan Actuary, Mr. D. Smith, for his opinion and recommendations.

The Regina Police Association recognizes that there is a deficiency in our Long Term Disability, and agreed to go to committee in an effort to resolve this matter.

In the event the Long Term Disability Plan can be resolved in a manner that addresses the deficiencies, then discussions can take place concerning sick leave. Perhaps the perceived problems with the present sick leave has more to do with the lack of a suitable long term disability, than with the Sick Leave Policy.

While it appears important on your part to implement this policy prior to the expiration of the current Agreement, we feel it would be unwise to do so prior to considering the findings of the Long Term Disability Committee. We foresee more problems with implementing this Policy, as opposed to the present Policy. There is no urgency to implement this Policy at this time, as the "Chief's discretion" will be as valid next year as it is this year. We do recognize that there may be negotiations concerning long term disability/sick leave, however, we may be able to resolve this through our Committee.

Further, we take exception to your comment that we refused to negotiate sick leave. While we may not have agreed with your proposed policy, we did hold the view of your right to present this as a proposal. Although we recognize that the letter was written by Mr. Ball for your signature, it serves no purpose to assess blame, or accuse the opposite side for failing to negotiate. You must understand that if there is an accusation in any piece of correspondence addressed to our Association, we must respond so that there is no appearance of agreement viewed by our silence.

In conclusion we would ask that you withhold implementing this Policy until the Long Term Disability Committee submits its findings, and there is further discussions which may resolve this issue to the satisfaction of all parties.

As a result of further discussions between the parties, it was agreed that the Employer would suspend the implementation of the policy appended to the letter from Chief Langgard dated December 7, 1994, while an effort was made to arrive at agreement concerning a satisfactory plan for long term disability. A committee was struck to consider this matter, and a long term disability plan was put into place in the fall of 1995.

The collective agreement which was signed in 1994 expired on December 31, 1994, and new negotiations continued in 1995 towards revisions to the agreement. According to the Union, the sick leave provision was not an issue in this round of negotiations.

The position of the Employer, however, was that the sick leave provision was raised in this round of

negotiations. In the Affidavit of Gordon Wilkie, which was filed in support of the Reply of the Employer to this application, Mr. Wilkie made the following statement:

> *I was a member of the Respondent employer's negotiating committee during collective bargaining of revisions for the term commencing January 1, 1995 and was present at all negotiating sessions, and I say as the fact is that the issue of sick leave was specifically raised by the Respondent as one of the most important issues to be discussed during those negotiations. For example, when the parties exchanged their proposals near the commencement of negotiations on Friday, February 24, 1995 the Respondent referenced sick leave as one of six subjects of significant importance. Moreover, the Respondent's formal proposals presented to the Association contained the Following:*
>
> > *Schedule "A"*
> >
> > *17. SICK LEAVE*
> >
> > *The Board reiterates that effective July 1, 1995 the Chief of Police will be exercising his discretion respecting such leave according to the policy already communicated to the Association. In the interim the Board proposes that a mutually acceptable long term disability program be developed between the parties.*

This affidavit went on to attest that the Union had declined to enter into any discussion of the sick leave issue during that round of negotiations.

In any event, on October 31, 1995, Chief Langgard wrote the following memorandum to all employees concerning the sick leave policy:

> *Re: Sick Leave Policy*
>
> *All employees of the Regina Police Service receive sick leave benefits pursuant to Schedule A, Clause 17(a), except for several civilian employees who receive sick leave benefits under Schedule B, Clause 9(a).*
>
> *It is the Chief of Police's responsibility to determine whether or not a member shall be granted sick leave pursuant to Article 17, Clause (a) of the Collective Agreement. In carrying out that responsibility, it is essential the Chief approve sick leave in a manner which is fair, reasonable and uniformly applied to all members in a non-discriminatory fashion.*
>
> *Accordingly, effective January 1, 1996, sick leave pursuant to Article 17, Clause (a), of the Collective Agreement will be exercised in accordance with the following policy:*
>
> *1. All employees shall accumulate sick leave credits at the rate of one and one-quarter (1 1/4) days per month calculated from the date on which the employee last entered the Regina Police Service (e.g., 8 hour day = 10 hours; 7.5 hour day = 9.38 hours; 7.33 hour day = 9.17 hours).*

Each employee will be considered to have accumulated present sick leave credits equal to his total months of service multiplied by 10 hours, 9.38 hours or 9.17 hours, respectively, and reduced by the amount of sick leave used to date.

2. *Maximum unexpended sick leave credit will be 1600 hours, 1500 hours or 1466 hours, respectively, provided, however, that where an employee has accumulated 1600 hours, 1500 hours or 1466 hours, respectively, he may accumulate additional sick leave credits in respect of his current year of service. Upon completion of a current year of service, any unused portion of the accumulated credits in respect of that year shall be forfeited.*

3. *As at January 1, 1996, all employees with negative sick leave credits will revert to a zero balance and all employees will be credited with eight (8) additional hours to their respective credits as of this date.*

4. *When all accumulated sick leave credits have been expended by an employee, such employee's pay will be reduced accordingly. However, the employee shall be entitled to apply for sick leave benefits from Unemployment Insurance or disability benefits in accordance with the existing Superannuation and Benefit plan or the new Disability Plan.*

5. *A record of employee absence and sick credits shall be retained by Payroll and made available to the Associations and to each employee upon request.*

The policy was implemented as of January 1, 1996. The sick leave credits for each employee were calculated according to the policy. If the example provided as an Exhibit to the Affidavit of Brenda Towne, which was filed in support of the application, is representative, each employee was provided with a computer printout showing the current status of sick leave credit under the policy. In some cases, particular employees were shown to have "overdrawn" their sick leave credits, though, as the memorandum quoted above suggests, they were granted a small credit at the outset of the new policy. It does not seem to be a matter of dispute that employees who may have exceeded their credits were treated, at the next occasion on which they were absent by reason of illness, as though they were on leave without pay rather than on paid sick leave. According to the Affidavit of Heather Gray, which was filed by the Union, Ms. Gray had resorted to the use of other paid leave time which she had accumulated, as an alternative to days of unpaid leave.

On January 10, 1996, the Union filed a policy grievance, alleging that the implementation of the new sick pay policy constituted a violation of the collective agreement. In keeping with the grievance procedure laid out in the collective agreement, the Union requested that the matter be heard by the Board of Police Commissioners. According to counsel for the Union, the Union was taken by surprise when the Board of Police Commissioners fixed a date seven days later, and requested an adjournment.

They later requested a further adjournment.

On February 9, 1996, the Union wrote to the Employer suggesting that, in light of the delays which had occurred in arranging to have the issue heard by the Board of Police Commissioners, the Employer might consider waiving this stage of the grievance procedure and agree to have the matter proceed straight to arbitration.

The Employer declined to waive the stage of the grievance procedure contemplating a hearing by the Board of Police Commissioners, and a hearing was held on April 17, 1996. Following this hearing, and before the Board of Police Commissioners communicated their conclusions, Sergeant Hagen wrote a letter, dated April 30, 1996, to Mayor Doug Archer, the Chair of the Board of Police Commissioners, which read as follows:

Re: Sick Leave Policy

> *We appreciate the opportunity to discuss with you the problems that have arisen as a result of the unilateral change made by the Board of Police Commissioners in the Regina Police Service sick leave policy effective January 1, 1996. We hope that it might be possible that together we can work out an acceptable sick leave program, but the matter is becoming urgent. Severe hardship is now being experienced by a number of our members who have been adversely affected by the policy now being administered in the Department.*
>
> *As you are aware, the grievance filed by the Association, and which brought about our discussion on April 17th, will ultimately be determined by an arbitrator. This process, however, will consume far too much time.*
>
> *The Association proposes that implementation on the changes to the sick leave program be immediately suspended and that all affected employees be reinstated to the benefits of the former program until the issue can be resolved, either by negotiation between us or by the decision of the arbitrator.*
>
> *Because the matter has become of such urgency, we have instructed our solicitors to make application to the Labour Relations Board for an interim order restoring the status quo pending completion of the arbitration process. That application will go forward on May 15, 1996, unless some better resolution can be negotiated before then.*
>
> *We would appreciate hearing from you without delay.*

Mayor Archer responded in a letter dated May 13, 1996:

Re: Regina Police Association - Sick Leave Grievance

> *This letter will acknowledge and respond to your letter dated April 30, 1996 and received on May 6, 1996 concerning the above grievance. The issue of sick leave was first reviewed by the Regina Board of Police Commissioners on March 20, 1996*

> *when Constable Heather Gray applied to the Board for a review of sick leave benefits. A copy of the letter outlining the Board's position is attached for your reference.*
>
> *This matter was further considered by the Board on April 17, 1996 when the Regina Police Association made representation on this issue by way of a grievance. After reviewing the matter with our negotiating team, it seems clear that an offer was made to the Association to participate in revising the application of Article 17(a) on sick leave. This offer was declined.*
>
> *As we have indicated during negotiations on the 1992-94 contract and again in our letter to the solicitor for Constable Heather Gray, the Board is prepared to discuss the application of this Section and in fact believe it is important to do this. We are not however prepared to accept as a precondition to discussion your request to revert to the previous application of this Section. We asked for discussions with the previous application in place but received only a negative response from the Association. It would clearly not be helpful to accept your precondition for discussion at this time.*

According to the Affidavit of Christine Tell which was filed by the Union, the Union received a copy of this letter on May 21, 1996. Counsel said that the Union was not sure whether this letter constituted a denial of the grievance, or a rejection of the position taken by the Union in the letter of Sergeant Hagen dated April 30.

The Union contacted this Board on May 24 with respect to this application, and counsel for the Employer acknowledged that the Employer had received notice of the application on that date. At a pre-hearing held on May 28, two days prior to this hearing, the parties undertook to obtain information about possible dates on which the grievance might proceed to arbitration. The Employer filed a letter with the Board indicating the availability of two of the arbitrators named in the collective agreement. The Union had not given formal notice to proceed to arbitration at the time the application was filed; in a letter dated May 29, the Union gave this notice.

In making this application, the Union relied on the decision of the Board in *International Brotherhood of Electrical Workers v. Saskatchewan Power Corporation*, [1996] Sask. L.R.B.R. 243, LRB File No. 069-96. In that case, the Board had issued an interim order enjoining an employer from proceeding with the implementation of an early retirement program. The novel feature of the *Saskatchewan Power Corporation* decision was that the trade union had not applied to the Board for substantive relief, but had filed a grievance under the collective agreement.

The Board reviewed a range of judicial commentary on the issue of the remedial jurisdiction of labour

relations tribunals, dating from the significant decision of the Saskatchewan Court of Appeal in *Burkart v. Dairy Producers' Co-operative Ltd.* (1990), 74 D.L.R. (4th) 694. The Board made this comment about the effect of this jurisprudence, at 251-252:

> *In one respect, the effect of the decision in Burkart [supra] was to assure the Board that we enjoy the authority to award injunctive relief in connection with proceedings before us. Our reading of Burkart, however, is that its significance went beyond what might be called the transfer of jurisdiction over a single remedial option to this Board.*
>
> *In our view, the approach taken by the Saskatchewan Court of Appeal in the Burkart case was to invite this Board to consider our remedial jurisdiction in a more holistic and less limited way, and not to assume that our remedial jurisdiction was restricted to the specific orders listed in Section 5.*

The Board went on, at 252, to make this observation:

> *This does not mean that there is no merit in asking the question whether the Board has jurisdiction, according to the powers contained in Section 5 and Section 42, to make an order of the kind we are being asked to make here. We agree with counsel for the Employer that arguments about the policy objectives which would be served do not in themselves answer this question. Any huffing and puffing about policy cannot serve to confer upon this Board jurisdiction which it does not have according to provisions of The Trade Union Act.*
>
> *On the other hand, the Court of Appeal displayed an awareness in the Burkart decision that an understanding of the public policy goals which underlie The Trade Union Act assists in arriving at a reasonable and effectual interpretation of the provisions of that statute. The way the Board chooses to act within the scope of the jurisdiction conferred upon us in the Act is informed by our notion of the aims and objectives which the statute as a whole has been conceived to support.*

The Board then considered the relationship between the statutory mandate of this Board under *The Trade Union Act*, R.S.S. 1978, c. T-17, and the grievance and arbitration procedure set out in a collective agreement. The Board reached the following conclusion with respect to our jurisdiction to issue an interim Order in these circumstances, at 254:

> *We have concluded that the granting of an interim order of the kind we are being asked to consider here is both within the jurisdiction of the Board, and consistent with the policy goals which our deliberations serve. The Union has not made this application, it is true, on the basis of any allegation or complaint which they wish to have finally determined by the Board, though it is conceivable that they might have formulated such a claim on the basis of a breach of the duty to bargain collectively, or on the basis of some other provision of the Act. What they are asking is to have the assistance of the Board in ensuring that the grievance and arbitration procedure is given sufficient time to resolve the dispute which has arisen between the parties, so that the outcome will not be preempted by the unilateral action of the Employer.*
>
> *In our view, the terms of s. 5.3, combined with s. 42, confer upon this Board*

> *adequate remedial jurisdiction to permit us to make an interim order which would support the effectiveness of the grievance and arbitration process as an element of the collective bargaining relationship between the parties. As we commented earlier, we do not see s. 5.3 as simply recording the conveyance from the courts to the Board of remedial jurisdiction to order injunctive relief, but as a component of a broad ameliorative capacity in the hands of the Board, which can, as Cameron J. suggested, be used to create flexible and imaginative remedial tools in support of the objects of the Act, so long as the Board does not stray outside the jurisdictional perimeters set out in the statute.*

Counsel for the Employer urged the Board to reconsider the conclusions which the Board had reached in the *Saskatchewan Power Corporation* case respecting our jurisdiction to make an interim order in circumstances where the Board will not be asked to make a final disposition of the issue in dispute. In this connection, he argued that the mere mention of other agencies or tribunals - the courts, the Minister of Labour, the Lieutenant-Governor in Council - cannot serve to confer upon this Board jurisdiction over their proceedings, or to intervene in matters which fall to them to decide. In the *Saskatchewan Power Corporation* decision, the Board responded to a similar argument in the following terms, at 255:

> *Counsel for the Employer pointed out that the Board does not undertake to monitor the conduct of the Minster of Labour, and other third parties who have roles which are mentioned in the Act. Though it is hard to say what comment the Board might make in the event the conduct of such third parties intruded into the sphere in which we operate, we agree that their affairs do not as a rule lie under our supervision. The arbitration process, however, can be distinguished from these other references on the basis we have suggested - that it is an integral part of the collective bargaining regime which the Board monitors and protects.*

We have not been persuaded by the argument of counsel for the Employer in this case that our decision in *Saskatchewan Power Corporation* was made without due regard for the limits of our jurisdiction under *The Trade Union Act* . It remains our view that this Board has a legitimate role in protecting the capacity of the grievance and arbitration procedure to function as an effective means of resolving the disputes which arise between the parties to collective bargaining relationships.

The Board first outlined the criteria which would be applied in considering applications for interlocutory relief in the case of *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Companies Inc.*, [1992] 1st Quarter Sask. Labour Rep. 68, LRB File No. 011-92. The Board summarized these principles as follows, at 77-78:

1. *An interlocutory injunction will only be granted where the right to final relief is clear.*

2. *The applicant, in asserting its rights, must show as a*

threshold test, either:

a) a strong prima facie case in support of the right which he asserts and a strong possibility that he will succeed at trial in disputes where the success or failure to obtain the injunction will virtually decide the application; or

b) that there is a serious issue to be tried in circumstances where the success or failure to obtain the injunction will not decide the application.

3. *After the appropriate threshold test has been met, the applicant must be able to show that an injunction until the hearing is necessary to protect it against irreparable damage and loss. If the applicant can be adequately compensated through the Board's remedial powers at the final hearing, no injunction will normally be granted.*

4. *Where any doubt exists as to the available remedy, the violation of the applicant's right, the irreparable nature of the loss, or the effectiveness of an expedited hearing, the Board will determine the application on the balance of convenience to the parties. In ascertaining the balance of convenience, the Board will address the considerations referred to by the Court in [Potash Corporation v. Todd, [1987] 2 W.W.R. 481].*

In our decision in the *Saskatchewan Power Corporation* case, *supra*, we commented as follows on the subsequent evolution of these principles at 256:

> *It will be noted that the principles formulated in the [WaterGroup Companies Inc. decision, supra] were drawn from the principles applied by the courts in assessing applications for injunctive relief. These principles have continued to evolve, and the Board has commented on the effect of these changes in the decision in Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc., [1994] 4th Quarter, Sask. Labour Report, 147, LRB File No. 238-94,observing that the major effect of these changes in the way the criteria are formulated has been to bring together what were listed as a first and second principle in the [WaterGroup Companies Inc.] case as a composite criterion. In the decision of the Supreme Court of Canada in RJR-MacDonald Inc. v. Canada (Attorney-General), [1994] 1 S.C.R. 311 at 314, the Court summarized their approach this way:*
>
> > *At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on its merits...A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare.*

> *In the Prairie Micro-Teach decision, the Board summarized the result of the evolution exemplified by the RJR-MacDonald case as follows:*
>
> > *Formulated in this way, the standard does not put the applicant to the test of showing that there is a probability of success in the final result, and it shifts the emphasis to the other two elements of the principles outlined by the Board in [WaterGroup Companies Inc.] - the requirement of irreparable harm, and a consideration of the balance of convenience.*

In the *Saskatchewan Power Corporation* decision, *supra*, the Board commented on the relevance of the first two aspects of the tests set out in *WaterGroup Companies*, *supra*, which have subsequently been characterized as being sufficiently closely connected to constitute two aspects of a single criterion. In the *Saskatchewan Power Corporation* case, the Board observed that the parties did not disagree that the matter which was in dispute between them would be amenable to the arbitration process.

In connection with the dispute over sick pay which is the subject of this application, we do not think it can be seriously argued that there is no "serious question" which could be put before an arbitrator acting under the collective agreement. Though the parties are naturally of different minds about the likelihood of success of the grievance at arbitration, it cannot be suggested that the grievance is of a frivolous or illusory nature. As in the *Saskatchewan Power Corporation* case, it is thus not necessary for us to analyze at length the nature of the dispute between the parties with a view to deciding whether there is something of substance which can be submitted to arbitration.

It is the degree and nature of the harm which will be suffered by the Union and by employees if an interim order is not granted which must determine the issue here, in our view.

Counsel for the Union argued that the Union and individual employees will suffer serious and extensive harm unless an interim order is granted, and that this harm will not be amenable to rectification by the outcome of the arbitration proceedings. The harm cited by the Union is of several different kinds. As one example, the Union submitted that the effectiveness and reputation of the Union as a bargaining agent would be endangered if this Board does not intervene to prevent the Employer from taking further steps to implement the new sick leave policy pending the final outcome of the arbitration proceedings. The Board encountered a similar argument in the case of *Canadian Union of Public Employees v. Regina District Health Board*, [1994] 4th Quarter Sask. Labour Rep. 156, Labour Relations Board LRB File No. No. 236-94. In that decision, we made this comment, at 159:

> *It is partly because of the pervasiveness of these factors in the health care field that we have come to the conclusion that the Union has failed, on the basis of the material before us at this stage,to draw a connection between the conduct of the Employer which is impugned in this application and the prospect of widespread disaffection with this Union as a bargaining agent which is sufficiently strong that it would justify the granting of an interlocutory order. The Union has had a relationship with this Employer, and the predecessors of this Employer, over a long period of time. Though the Union is facing a period of change, this does not distinguish them from other trade unions in this sector, and in our view, the material filed before us fails to establish that the interest of this Union is in peril to a degree which cannot be addressed when remedies are considered following a hearing of the application on the merits.*

A disagreement of the kind which has arisen between the parties in this case cannot be said to be an unusual event in a collective bargaining relationship. Grievance and arbitration procedures are as ubiquitous as they are precisely because it can be contemplated that sooner or later individual employees or the trade union will take objection to some action of the employer. It would be unreasonable to gauge the effectiveness of the representation provided by the trade union by the degree to which it is able to prevent any conduct of the employer ever having any negative effect on any employee. The quality of representation must in part be assessed on the basis of the promptness, efficiency and persuasiveness of the union in responding to any action which they consider objectionable.

For reasons which it is not necessary to review here, the bargaining relationship between these parties has, for the past several years, been difficult and often acrimonious. It would not be surprising if employees represented by the Union react to some instances of Employer conduct with suspicion, if they experience stress because of the ongoing tensions in the relationship between their Employer and their Union, and if they express their frustrations in a way which suggests they are critical of the Union.

At the hearing, counsel for the Union said, in jest, that perhaps both parties needed to undertake education in collective bargaining. Whether or not such a step would be effective, it is our assessment that the relationship between these parties is a deeply troubled one. The failure to confront the sick leave issue in a timely way seems to us a symptom of a bargaining climate which has become an unhealthy one for a variety of reasons.

In this context, we cannot possibly say that the failure of the Board to intervene by way of an interim

Order will have any deleterious effect on the relationship between the Union and the Employer, or that between the Union and the employees.

The material filed by the Union included a number of affidavits from individual employees giving examples of the hardships they had suffered because of the changes which the Employer has instituted. It is clear that some of these employees have experienced negative consequences because of the changes in the sick leave policy, and one must have some sympathy for them.

The central question here, however, is not whether the action taken by the Employer has occasioned some negative consequences, but whether the harm is of a nature which cannot be rectified effectively by a final determination at arbitration. It must be recalled that interlocutory or interim relief is an extraordinary remedy, which is granted without the benefit of access to all of the evidence which might shed light on the circumstances. As counsel for the Employer pointed out, most grievances filed by trade unions are based on an allegation that someone has suffered some detriment as a result of employer conduct, and it cannot be anticipated that the Board will intervene in all of these circumstances.

There was no suggestion that the Employer has prevented any sick employee from being absent from work. The problems cited by the Union were that employees could not count on being paid for days they were absent from work, and that making the choice between taking unpaid leave, or going to work while unfit, might be expected to be a stressful experience for employees. It is our view that the general uncertainty surrounding the sick leave policy cannot be resolved by an interim order, and that the specific consequences for individual employees can be adequately addressed by means of the remedies available at arbitration.

The Union argued that the policy grievance concerning sick leave is of a different order than ordinary grievances because its outcome affects all of the employees in the bargaining unit, and the adequacy of a sick leave policy has a general bearing on the health and harmony of the workplace. We do not suggest that such a policy does not have some effect on the overall level of satisfaction and security of employees. In this case, however, the urgency which the Union now attaches to this issue has arisen, at least in part, from a failure to appreciate the seriousness of the statements from the Employer of their intent to proceed to make the changes they have now made. Though counsel for the Union described the current status of his client as "cooling their heels" and "awaiting the pleasure of the Employer" with

respect to proceeding to arbitration on the issue, it must be noted that the Union had a number of opportunities to file a grievance which would contest the interpretation the Employer has given to Article 17(a) at least since 1992. In December of 1994, the Employer stated their intention to proceed with a particular policy based on that interpretation. While the Union persuaded the Employer to defer the implementation of the changes until a long term disability plan had been worked out, they were certainly aware of the interpretation which the Employer placed on the provision. At the very least, the Union might have reacted, in October of 1995, when the Employer announced their intention to proceed with the new policy at the beginning of 1996.

The focus of the Board in the *Saskatchewan Power Corporation* decision, *supra*, was on ensuring that the grievance and arbitration procedure which had been put in place to deal with disputes between the parties could operate effectively. It was our view in that case that the deadlines imposed by the Employer concerning the implementation of an early retirement program threatened to render pointless any resort to the grievance procedure, and we intervened in defense of the grievance procedure as an effective instrument for resolving disputes arising out of the bargaining relationship.

In this case, there is nothing to suggest that the grievance procedure is not working as it is intended to work, or that the arbitrator will not be able to address all of the complicated issues which have been thrown up by this dispute. If there have been delays in obtaining a definitive answer to the difference of opinion which divides the parties over the permissible interpretation of Article 17(a), these result to a significant degree from the reluctance of the Union to seek an authoritative interpretation of the collective agreement at an earlier date.

For the reason which we have given here, we have decided that the application for interim relief must be dismissed.

PATRICK MONAGHAN, Applicant and DELTA CATALYTIC INDUSTRIAL SERVICES LTD. AND SASKFERCO PRODUCTS INC., Respondents

LRB File No. 187-95; June 4, 1996
Chairperson: Beth Bilson; Members: Carolyn Jones and Don Bell

For the Applicant: Larry Kowalchuk
For the Respondent, Delta Catalytic Industrial Services Ltd.: Noel Sandomirsky, Q.C.
For the Respondent, SaskFerco Products Inc.: Larry LeBlanc

Collective agreement - Grievance and arbitration procedure - Whether settlement of grievance by union is binding on employee - Board finding that settlement of grievance is generally binding on employee in absence of allegation that union had not represented employee fairly.

Practice and procedure - Parties - Whether it is possible to name client of employer as party to application - Board deciding under some circumstances client may be appropriately named as party.

Unfair labour practice - Discharge - Whether employer was motivated by anti-union animus in laying off employee - Board finding that employer was not motivated by anti-union sentiment.

***The Trade Union Act*, s. 11(1)(e).**

REASONS FOR DECISION

Beth Bilson, Chairperson: In 1992, Delta Catalytic Industrial Services Ltd. ("Delta Catalytic") entered into a contract with SaskFerco Products Inc. ("SaskFerco") to provide maintenance services at the SaskFerco plant at Belle Plaine, Saskatchewan. Mr. Patrick Monaghan, a member of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, began to work as an employee of Delta Catalytic at the SaskFerco plant in March of 1992, and continued to work there until he was laid off on November 10, 1994.

Mr. Monaghan has filed an application citing general ss. 3, 11, 12 and 25.1 of *The Trade Union Act*, R.S.S. 1978, c.T-17. The primary allegation made by Mr. Monaghan is that the decision to lay him off was made in part as a response to his activity on behalf of the Union, and that it thus constituted an unfair labour practice. The application of specific provisions of the *Act* was the subject of a complex argument by counsel on behalf of Mr. Monaghan, which will be discussed at a later point in these

Reasons.

A grievance concerning the layoff of Mr. Monaghan was filed by his Union on November 14, 1994. As a result of discussions involving the International Representative of the Union, Mr. George Henry, and Mr. Shabbir Hakim, the Assistant Manager of Labour Relations for Delta Catalytic, a settlement of the grievance was concluded in March of 1995. One of the conditions of the settlement was the payment to Mr. Monaghan of the sum of $5000.00.

Mr. Monaghan has taken the position that this settlement was reached without his consent, and that it is therefore not valid. He returned the cheque which was issued to him, and at the time of the hearing had heard nothing further from the Union. Although Mr. Monaghan cited s. 25.1 of *The Trade Union Act* as one of the grounds for his application, he informed the Board at the hearing that it was not his intention to proceed with any allegation that the Union had been in breach of the duty to represent him fairly. No representative of the Union appeared to participate in the hearing of the remaining issues raised by the application.

Counsel for Mr. Monaghan took the position as well that whatever settlement was reached between the Union and Delta Catalytic was the result of improper threats, and could not be regarded as valid for that reason.

Delta Catalytic is an experienced maintenance contractor, which has been providing services to SaskFerco as well as to the nearby plant operated by Kalium Chemicals Ltd. In an earlier decision in *Construction Labour Relations Association of Saskatchewan Inc. v. Delta Catalytic Industrial Services Ltd.*, [1995] 1st Quarter Sask. Labour Rep. 226, LRB File No. 232-94, the Board made the following comment at 228:

> *The maintenance sector has traditionally occupied a unique place in the construction industry. Unlike work on construction projects, which is typically transient and of limited duration, the activities of maintenance companies tend to be ongoing or repeated at the same location. Though larger companies are often the subject of separate certification applications from a number of building trades, the jurisdictional lines based on craft tend to be more relaxed in the case of maintenance than regular construction activities.*
>
> *Another distinguishing feature of the maintenance sector is that, for the larger employers at least, there has been a practice of negotiating common agreements at a national level. These are negotiated on behalf of employers by the "General Presidents' Maintenance Committee" with representatives of the building trades*

> *unions. Two of these agreements were filed which cover the activities of the Respondent in Saskatchewan, one relating to Akzo Chemicals Ltd. and the other to Kalium Chemicals Ltd. and SaskFerco Products Inc.*
>
> *The General Presidents' Maintenance Committee levies a charge against the employers who are covered by these agreements to cover the costs of bargaining and monitoring the agreements.*

As a large maintenance contractor, Delta Catalytic is bound by certification Orders relating to thirteen different building trades unions, including the Union of which Mr. Monaghan is a member. SaskFerco retains a small crew of approximately eight tradespersons to perform some maintenance tasks; when they opened their large plant at Belle Plaine, however, they decided that it would be worthwhile to turn over the major responsibility for maintenance to an experienced maintenance contractor.

For this purpose, according to Mr. David Kelly, the Mechanical Maintenance Supervisor for SaskFerco, the company considered bids from five contractors. Two of these were unionized, and three were not unionized. In his evidence, Mr. Kelly stated that the access of Delta Catalytic to a large body of skilled tradespersons, through the building trades unions, as well as their ability to provide equipment, were strong selling features for the Delta Catalytic bid.

When Delta Catalytic took on responsibility for maintenance at the SaskFerco plant, a considerable number of tradespersons were required for the start-up phase of the new facility. Once this phase was completed, the employees of Delta Catalytic were reduced to a smaller "core" crew, consisting of representatives of the "primary trades," to take care of ordinary maintenance requirements and respond to emergency situations. When a shutdown is planned for particular maintenance tasks, the number of tradespersons may be expanded. The "core" crew at the time of the hearing, for example, had been reduced to between twelve and fifteen employees, while in a major shutdown this figure might balloon to two or three hundred members of the building trades.

In the case quoted from earlier, the Board noted certain relevant features of the maintenance industry. It is perhaps worthwhile to comment here on other aspects of the maintenance environment which are of some significance to this application.

In the passage cited from the earlier *Delta Catalytic* case, the Board observed that it is characteristic of the maintenance sector that work may be done more steadily or frequently for one employer than is generally the case in the construction industry. This has certainly been the case for the tradespersons

who have been part of the "core" group of employees of Delta Catalytic; this group has remained fairly consistent in composition since 1993. Other tradespersons outside this group have, of course, been employed by Delta Catalytic on a more sporadic basis; for some of them, working for Delta Catalytic would not be any different than working for a contractor in other parts of the construction industry.

Because of the nature of maintenance work, the building trades have accepted a greater degree of blurring of lines of craft jurisdiction than is the case in other parts of the construction industry. The phenomenon known as "cross-crafting," in which members of building trades unions may regularly perform tasks which are within the jurisdictional scope of another trade, is common. A number of witnesses who gave evidence related to this application spoke of the importance of teamwork in carrying out maintenance; such teamwork requires an ability to allocate responsibilities without strict adherence to ordinary craft lines.

Counsel for Mr. Monaghan suggested that these notions of cross-crafting and teamwork serve to obviate all distinctions based on traditional craft boundaries. In our view, this does not accurately describe the nature of maintenance work. It is certainly the case that employees in the maintenance sector cross over craft boundaries to a larger extent than employees in other parts of the construction industry. This does not mean that craft jurisdiction ceases to have any significance. It continues to play an important role in the recruitment of employees and the allocation of work.

It should also be noted that, though there may be more stability for some employees in maintenance employment than in ordinary construction employment, the pattern of layoff and recall does not differ from that in other construction work. Employees do not hold particular positions, as they do in other sectors. They are recruited and laid off according to the needs of an employer, and seniority does not play a significant role in this process. The criteria by which a trade union chooses to supply the number of employees requested are formulated by the union itself. Each of the building trades commonly maintains a dispatch list; members of a union waiting to be dispatched work their way up the list until they are sent out. When that job is finished, they are put back at the bottom of the list, and must work their way up the list again. In this case, and others, the agreements with employers provide that an employer can "name-hire" a certain proportion of employees; aside from employees who are identified by this process, most union members must wait for work to be allocated according to the dispatch process.

As we have pointed out earlier, Delta Catalytic maintains a "core" mechanical maintenance crew to perform maintenance work between shutdowns. SaskFerco also maintains a small maintenance crew. The numbers of tradespersons working for Delta Catalytic may swell to many times the core number when shutdowns occur.

It should be noted that both SaskFerco and Delta Catalytic also have small crews doing maintenance in the instrumentation and electrical area. The numbers of employees on these crews does not vary much, in contrast to the mechanical side.

The planning process which results in information indicating the requirements for labour and materials is done by employees of SaskFerco. The number of employees required is assessed on the basis of an analysis of the backlog of maintenance work to be done, a standard which is common in the maintenance industry, according to Mr. Kelly. The objective is to maintain the optimum level of backlog, which is set at four to six weeks. If the backlog of work falls lower than four weeks, it becomes difficult to plan so that the equipment, material and labour required for maintenance projects will coincide. If the backlog becomes too long, it suggests that required maintenance is not being done, and this lag may threaten production.

The information about the backlog is generated by computer. This information is set out in a way which makes it possible to tell what the backlog is for each trade, and in some cases for particular kinds of work, like welding, which may be done in different trades. The implications of this information in terms of the requirements for employees are discussed with the Site Supervisor for Delta Catalytic.

At the time of the layoff of Mr. Monaghan, the site supervisor was Mr. Larry Bareham. Mr. Bareham was an in-scope employee, a pipefitter by trade; for much of the time, he worked on the tools, but he was also responsible for the supervision of Delta Catalytic employees on the site, and for the recruiting and layoff of these employees as required. In his role as site supervisor, Mr. Bareham reported to the project superintendent for Delta Catalytic, Mr. Randy Larson, whose responsibilities included the oversight of the Kalium Chemicals contract, and who had his office at the Kalium Chemicals plant.

In October of 1994, the backlog dropped to an unprecedently low figure, and this suggested that it would be necessary to start cutting down the number of employees in the core maintenance crew which

had been in existence with little change since 1993. The general figure was 3.3 weeks, clearly below the four-week figure. For welders, in particular, the backlog was only 63 hours. In addition to a welder employed by SaskFerco, Mr. Gerry Lepine, there were two employees whose primary responsibilities were as welders then working, Mr. Monaghan and Mr. Larry Prill. Mr. Prill was a pipefitter, and a member of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. He had been at the SaskFerco plant since about June of 1992.

According to the evidence of Mr. Kelly, the backlog data clearly indicated that there was only enough work for one Delta Catalytic welder, in addition to the SaskFerco welder. He conveyed this information to Mr. Bareham, without specifying which of the welders should be laid off. Mr. Bareham confirmed this in his evidence. He said that Mr. Kelly said to him he would have to "drop one welder." He denied that Mr. Kelly or anyone else had said that he should lay off "the boilermaker welder" - in other words, Mr. Monaghan.

Mr. Bareham said that the decision as to which welder should be laid off was up to him. He said that he had routinely made such decisions on the basis of the backlog information provided to him by Mr. Kelly, which originated with the SaskFerco planners. He said that, in addition to this information about the backlog of work for the various trades, he would try to anticipate the imminent needs in maintenance. In doing this, he would take into account the combinations of skills possessed by particular employees, and also whether the features of upcoming work fell more naturally within the scope of one trade than another.

In this case, according to Mr. Bareham, he decided that the work which remained to be done, and which was immediately in the offing as far as he could make out, was more accurately described as pipefitter work than boilermaker work. For this reason, he decided that he should retain the services of Mr. Prill and lay off Mr. Monaghan.

Mr. Bareham issued a notice of layoff to Mr. Monaghan on October 21, 1994, indicating that he would be laid off as of November 4. On November 3, Mr. Monaghan was exposed to noxious fumes, and sought medical attention as a result. Mr. Bareham informed Mr. Kelly that he wished to extend the notice period for Mr. Monaghan, as he did not wish the layoff to take effect until he was certain that Mr. Monaghan had not suffered any serious effects from the fumes.

This event was clearly stressful for both Mr. Monaghan and Mr. Bareham.

Mr. Monaghan experienced it as an intimidating and humiliating incident. He said that Mr. Bareham told him to clean out his locker at once, and that security personnel were available to escort him off the site. Mr. Monaghan said that he told Mr. Bareham that security would not be necessary. As Mr. Monaghan recalled the event, Mr. Bareham said that the layoff was not his doing, but that Mr. Monaghan would have to go. He said that Mr. Bareham was in tears.

Mr. Bareham acknowledged that he was upset - tearful, in fact - when he told Mr. Monaghan of the layoff. Though Mr. Bareham had laid off many employees during his time as site supervisor, he said that he had never enjoyed that part of the job, and Mr. Monaghan had been at the plant for a relatively long time. Indeed, Mr. Bareham testified that the stress associated with his role in laying off employees was a major factor in his decision to request that he be relieved of his duties as site supervisor. He said that he decided to meet Mr. Monaghan when he appeared for work, and to get the layoff behind him as soon as possible. Mr. Bareham proceeded on the assumption that it was not necessary to issue a new written layoff notice; he said giving Mr. Monaghan two more weeks pay was in fact extending the period of notice which had already been given on October 21.

Mr. Bareham said that he had been asked by Mr. Robert Harkness, who was acting as maintenance manager, whether he wanted the assistance of security personnel when he laid off Mr. Monaghan. Mr. Bareham declined the offer. He testified that he did tell Mr. Monaghan about this, and that he also expressed his regret to Mr. Monaghan about laying him off. He explained that by this he did not mean to suggest he was being forced to lay off Mr. Monaghan by someone else, but that he regretted that the existing labour requirements did not permit the retention of Mr. Monaghan.

Mr. Bareham indicated that, after laying off Mr. Monaghan, he has not subsequently name-hired him from the Union, or been asked to name-hire him. He indicated Mr. Monaghan was dispatched to SaskFerco for a short period in January of 1995, and that he has worked for Delta Catalytic at Kalium Chemicals on several occasions as well since the layoff.

The basic allegation made by Mr. Monaghan in his application is that his layoff was prompted by his activity on behalf of his Union, and of all unionized employees working for Delta Catalytic at the SaskFerco plant.

Counsel for Mr. Monaghan argued that it is sufficient for the Board and the Respondents to know that Mr. Monaghan is relying on the general purposes and prohibitions suggested in ss. 3, 11 and 12 of *The Trade Union Act*, and that it is not necessary for him to allege that particular clauses of these sections have been violated.

We make considerable efforts to avoid being distracted by the technical aspects of proceedings before the Board from discerning the underlying nature and origins of the disputes which are brought to this forum. Particularly in the case of lay persons who are unrepresented, we are reluctant to allow deficiencies in applications or other documentation to become an obstacle if there appears to be some merit to the allegations which are being made.

On the other hand, the Board must ultimately come to some understanding of how these allegations relate to some aspect of *The Trade Union Act*, and how the evidence which is put forward is thought to support the allegations. Where, as in this case, an applicant is represented by counsel who has had numerous opportunities to gain some insight into the nature of Board proceedings, it is difficult to see any reason why particular violations of *The Trade Union Act* should not be cited as the basis of the allegations which are made.

Though Mr. Monaghan did not cite a specific part of s. 11 in his application, one assumes that he has largely relied on s. 11(1)(e) as the basis of his claim. This provision reads as follows:

> *11(1)(e) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer 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 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.*

In support of his application, Mr. Monaghan described a number of things which he identified as indications that his role in the Union played some part in the decision to lay him off.

One aspect of the environment to which Mr. Monaghan alluded was his relationship with Mr. David Kelly, who was the mechanical maintenance supervisor for SaskFerco. In this position, Mr. Kelly was responsible for general oversight of maintenance on the mechanical side. Though his main formal liaison with the Delta Catalytic maintenance crew was through Mr. Bareham, Mr. Kelly had considerable contact with the employees themselves.

Mr. Kelly was responsible to Mr. Peter Sauvé, the maintenance manager for SaskFerco. During the fall of 1994, Mr. Sauvé took a temporary position elsewhere for a period of three months. His duties were performed in succession by Mr. Kelly, Mr. Harkness, the Instrumentation and Electrical Maintenance Supervisor, and Mr. Bob Holt, an engineer. During the month of October, when the initial layoff notice was issued to Mr. Monaghan, Mr. Kelly was in the position of maintenance manager. By November 10, when Mr. Monaghan was actually laid off, Mr. Harkness was acting in the position.

According to a number of witnesses, Mr. Kelly had a generally cordial relationship with the Delta Catalytic employees, but there were instances of friction. One of these arose in the context of a safety meeting held with the maintenance employees. Mr. Kelly testified that SaskFerco retained general responsibility for safety at the plant, and that regular safety meetings were held, at which both Delta Catalytic and SaskFerco maintenance crews were present. At one of these, Mr. Kelly said he was surprised to find Mr. Sauvé present, as he did not usually attend these routine meetings. According to Mr. Kelly, shortly after the meeting began, a number of employees began peppering Mr. Sauvé with questions, many of which were not related to safety issues. Mr. Kelly eventually suggested that Mr. Sauvé should leave the meeting.

After Mr. Sauvé left the meeting, Mr. Kelly said that he vented his irritation at the employees in no uncertain terms. He said that he told them their conduct was inappropriate, and that if they had issues which they thought should be brought to the attention of Mr. Sauvé they should present them differently. Mr. Kelly acknowledged that he lost his temper; he said that he thought Mr. Sauvé would likely be angry with him, and that he was embarrassed on behalf of Mr. Sauvé as well as himself. He also said that he called the employees together the next day and apologized for his unprofessional

behaviour at the meeting.

The recollection of Mr. Monaghan was that some of the vituperative comments of Mr. Kelly at the meeting had been directed at him. Mr. Kelly did not remember that Mr. Monaghan had played any particularly memorable role at the meeting. He said that his comments had been indiscriminately aimed at all the employees at the meeting; he felt they had all colluded in setting up Mr. Sauvé.

Mr. Monaghan said that he spoke to Mr. Sauvé the day after the safety meeting and told him that Mr. Kelly was not responsible for the course the meeting had taken. Mr. Monaghan said that he thought this had settled any problem caused by the safety meeting.

Another incident described by Mr. Monaghan was related to a proposal made on behalf of the Delta Catalytic maintenance employees for a compressed work week. A shorter work week had been implemented for instrumentation and electrical employees, and a number of employees on the mechanical side had raised the question of whether such a system could be considered for them. According to Mr. Monaghan, he and Mr. Clarence Lipinski, the other boilermaker, agreed to devise a proposal and put it forward. They did submit a proposal to Mr. Kelly, which was signed by members of all of the trades.

One of the reasons advanced in the letter for considering the proposal was the low morale of employees. When Mr. Monaghan presented the letter to Mr. Kelly, Mr. Kelly questioned this statement. According to Mr. Kelly, he said that he was not sure the inclusion of this statement would help to persuade managers to accept the proposal. In any case, Mr. Monaghan testified that he asked whether the statement should be removed. Mr. Kelly said that if the employees had signed it in that form, it should stand.

Mr. Monaghan said that when there was no response after ten days, he began to be concerned that Mr. Sauvé would not become aware of the proposal before he left for his three month leave. He circulated the proposal to some people in operations, hoping that Mr. Sauvé might get to hear about it this way. This apparently had some effect, though perhaps not the effect Mr. Monaghan had hoped for.

Mr. Kelly asked for an opportunity to meet with the Delta Catalytic employees. At the beginning of this meeting, he asked Mr. Bareham to read a letter which had been sent by Mr. Sauvé. In the letter,

Mr. Sauvé was highly critical of the employees for circulating the proposal among other employees before he had a chance to respond to it. The testimony of Mr. Kelly was that it was difficult for Mr. Bareham to read the letter, because of the hubbub among the employees who were present. Mr. Kelly admitted that he again lost his temper, and accused the employees of being childish, and not adhering to proper procedures for raising their concerns. Both Mr. Kelly and Mr. Bareham said that Mr. Sauvé had "slapped their hands" for failing to ensure that the employees followed proper channels.

Mr. Kelly acknowledged that Mr. Monaghan had presented the proposal to him, and that they had discussed it; he also said that Mr. Monaghan had taken responsibility for providing a copy of the proposal to the other employees. He said, however, that he thought Mr. Monaghan was just representing the other maintenance employees, and that his anger at the meeting was not directed particularly at Mr. Monaghan.

Mr. Monaghan testified that, on a number of occasions, Mr. Kelly had told the maintenance employees that they would have to "lose the construction union mentality." Mr. Kelly said that what he in fact said was that employees should abandon the "construction mentality." By this, he said he was referring to the distinction between a construction site and an established industrial facility. He said that he was trying to bring home the importance of safety procedures in a circumstance where all employees had a continuing reliance on a high standard of safety.

Mr. Monaghan said that he and Mr. Lipinski had made representations to Mr. Bareham and Mr. Kelly a number of times concerning the number of boilermakers who were included in the maintenance crew. He said that Mr. Kelly had become impatient with him about this, and had said it was not convenient to hire any more boilermakers.

In his evidence, Mr. Kelly said that there were often complaints from members of one trade or another that there was not sufficient representation from their trade on the crew, or that members of other trades were doing work which properly fell within their craft jurisdiction. He conceded that he was sometimes impatient with these complaints. With respect to the boilermakers, he said that his view was that the major work of the boilermakers occurred during shutdowns, so it was not surprising that only a small number of them were retained at other times.

On one occasion, SaskFerco retained the services of a specialized contractor to carry out maintenance

of rotating equipment at the plant. When the employees of this contractor, Peacock Construction, arrived at the plant, there was a delay in the work they were to do, so they were asked to assist the Delta Catalytic maintenance employees in doing preparatory work. The Delta Catalytic employees raised a strong objection to working alongside non-union employees.

Mr. Randy Larson, the project superintendent for Delta Catalytic, met with the Delta Catalytic maintenance employees. Mr. Bareham was present, but no representatives of SaskFerco attended this meeting. According to the evidence of Mr. Larson, in the course of a frank discussion, he attempted to impress upon them the need to provide satisfactory services to SaskFerco. He said that the maintenance industry is highly competitive, and he said that a refusal to work under these circumstances might create a threat to future relations between SaskFerco and Delta Catalytic.

According to Mr. Larson, the management of Delta Catalytic were highly sensitive to any development which might suggest they enjoyed anything other than a harmonious relationship with their employees. He said that he tried to persuade the employees that it was in their best interest in the long term to co-operate with the Peacock employees as SaskFerco requested. He said that he remembered Mr. Monaghan being at the meeting. He said, however, that he did not recall Mr. Monaghan playing any prominent role; other boilermakers made comments as well.

In the end, the employees agreed to work with the Peacock employees. Indeed, Mr. Monaghan testified that he was chastised by some of his fellow employees for setting the pace in this respect.

Counsel for Mr. Monaghan suggested that one of the indications that the layoff of Mr. Monaghan was based on improper motives was that the procedure used in the layoff constituted a departure from a rating system which was ordinarily used as the basis for laying off employees. Mr. Monaghan stated that he had been informed that he had been rated as "No. 1" among all the employees according to this rating system.

Mr. Kelly said that the idea of a rating system had been devised at a time shortly after the start-up of the plant, when the complement of employees of Delta Catalytic had to be reduced from the large number employed during the start-up phase to the smaller core crew. It was suggested that employees ought to be rated in accordance with some criteria, in order to determine who should remain. He said that the criteria which were formulated were fairly rough ones, and that each employee was rated on a

numbered scale in relation to these criteria. The ratings were done by the SaskFerco maintenance crew, who acted as supervisors during the start-up period. The composite result was used as a guide for the purpose of reducing the size of the Delta Catalytic crew. Mr. Kelly said this was the only instance in which such a ratings system had been used.

Mr. Bareham did not recall that the rating occurred in any written form, but several witnesses recalled that the ratings had indeed been done in the form of written checklists. A number of witnesses supported the testimony of Mr. Kelly that the rating system had not been used for some time.

One witness, Mr. Gerry Lepine, a boilermaker employed by SaskFerco, said that the rating system had been used three, perhaps four, times. When pressed, he could only recall that there had been a trial run of the evaluation after the start-up period, and that the rating had then been conducted thoroughly at that time. He could not actually recall any other specific time the rating system had been used. Mr. Lepine also said that his recollection was that there were only three or four points between the top-ranked and bottom-ranked employees among those who were selected to remain on the core crew.

There was some difference in the recollection of various witnesses about how Mr. Monaghan had been rated in this exercise. Mr. Kelly could not recall ever saying that Mr. Monaghan had been rated "No. 1" in categorical terms, or that he had later argued that Mr. Monaghan was superior to other welders. Mr. Lepine gave evidence that he recalled a conversation in which Mr. Kelly had said that, while another employee might be a superior welder, Mr. Monaghan was a better all-round employee.

Mr. Kelly did say that his opinion at the time of the layoff was that Mr. Prill had superior welding skills, although he thought Mr. Monaghan highly competent as well. Mr. Lepine recalled a difference of opinion with another SaskFerco tradesperson, a pipefitter, over the respective welding skills of Mr. Prill and Mr. Monaghan; he conceded, however, that their skills were comparable.

Even leaving the rating system aside, counsel for Mr. Monaghan suggested that he possessed superior qualifications to other employees, and that the failure to retain him was suspect for this reason. It was not disputed that Mr. Monaghan has a number of specialized trade tickets.

Counsel for Mr. Monaghan suggested that, in addition to these, Mr. Monaghan was the only person in Canada certified to repair Böhler pipe, a high quality stainless steel pipe used in certain processes at

the SaskFerco plant. Mr. Kelly testified that the manufacturing system at the SaskFerco plant was purchased as a turnkey system from a German designer. One aspect of the warranties provided by the designer was a condition that the Böhler pipe could only be repaired and maintained by factory-trained technicians from Germany.

This created some difficulties, according to the recollection of Mr. Kelly. For one thing, a welding protocol had to be filed with the Department of Labour to allow the repairs to proceed; it was difficult for SaskFerco to attest to the welding method which would be used when detailed information was only possessed by the German technicians. For another, the management of SaskFerco was concerned that the German technicians would not be able to follow safety instructions because of their unfamiliarity with English. For these reasons, some of the maintenance personnel at the plant were assigned to accompany the German technicians to monitor their compliance with safety procedures. Mr. Kelly conceded that it was possible that Mr. Monaghan had been involved in this, but it was his understanding that there was no certification available as a welder on the Böhler pipe.

A further circumstance which was identified by Mr. Monaghan as an indication of the improper origins of his layoff was the fact that five new maintenance employees were hired within a couple of days after his layoff, and that one or more of them continued to work until the time of the hearing. Mr. Bareham acknowledged that he had hired five pipefitters, including two pipefitter welders, for a minor shutdown which took place the week following the layoff of Mr. Monaghan. He said that the possibility of this shutdown had existed for some time, but that it was not definite until November 10, the day Mr. Monaghan was laid off. The information which came to him from the SaskFerco planners indicated that the project would require three pipefitters and two pipefitter welders.

Mr. Bareham said that it did occur to him to put Mr. Monaghan to work on the shutdown work rather than laying him off. The project was only a week in length, however. He said that one of the reasons he chose to proceed with the layoff was that he was reluctant to go through the process of laying off Mr. Monaghan again so soon. He also said, however, that he thought he was doing Mr. Monaghan a favour, because he would have a week of wages in lieu of notice instead of having to go to work. He said that there was some criticism of his decision, because it meant that Delta Catalytic had to pay an additional employee for the week of the shutdown work.

Mr. Bareham conceded that Mr. Monaghan had a number of specialized tickets. He said, however,

that his assessment of the work required on the shutdown project was that it lay more directly within the craft jurisdiction of the pipefitters rather than the boilermakers. He said that the work did not require advanced skills, and that he regarded it as a matter of allocating it correctly in terms of trade rather than seeking someone with highly specialized qualifications.

One of the assertions made by Mr. Monaghan was that he functioned as the job steward for the Union on the site. He stated that he became job steward by virtue of the fact that he was the first boilermaker to arrive on the site, and that he continued to represent the interests of the boilermakers throughout the period of his service at the plant.

There were some differences in the views expressed by other witnesses on this point. Mr. Armand Levesque is an insulator who works as part of the SaskFerco maintenance crew. He expressed his support for Mr. Monaghan in strongly partisan terms at the time of his layoff; in fact, he was eventually advised by Mr. Kelly that he had become too emotionally committed to this issue. Mr. Levesque testified that he was never sure whether Mr. Monaghan was speaking on behalf of the Union or in his own personal interest when he raised issues with management.

Most of the witnesses who testified acknowledged that Mr. Monaghan had acted as a spokesperson for members of the Union, although not all of them were sure whether he held the title of job steward.

The General Presidents Agreement, to which Delta Catalytic was a signatory, contains a section dealing with the privileges of job stewards, which reads as follows:

> *(1) Article 10.000 - Steward*
>
> *10.100 Each Union signatory to this Agreement may appoint or select one (1) working Steward from among the Company employees to act as a representative of the Union in connection with Union business. Each Union may also appoint an acting Steward for afternoon or midnight shifts. These Stewards shall be allowed reasonable time to conduct Union business related to this project. The Business Manager of the applicable Local Union shall be consulted in advance of the termination of the Steward.*
>
> *10.200 Steward designations must be confirmed in writing to each job superintendent in order to allow recognition of Steward's privileges.*
>
> *10.300 The Steward shall not be discriminated against and shall receive his fair share of overtime work for which he is qualified.*
>
> *10.400 In such circumstances when the number of craftsmen employed on a project*

> *are small, and the appointed Steward does not have the necessary experience, the appointed Steward may be terminated by the Company, when the Business Manager of the Craft Local concerned will arrange the appointment of another Steward.*

It was not disputed that no written notification was ever given to Delta Catalytic identifying Mr. Monaghan as the job steward. Mr. Hakim testified that, without such formal notification, the company did not acknowledge that Mr. Monaghan was a job steward, or that any of the terms of Article 10 would apply to him.

When Mr. Monaghan was laid off, another member of the Union, Mr. Clarence Lipinski, continued to be employed. It will be recalled that both Mr. Lipinski and Mr. Monaghan had been involved in making representations about the number of boilermakers on the site. Mr. Bareham testified that it never occurred to him to lay off Mr. Lipinski instead of Mr. Monaghan. Mr. Bareham said that the choice he was making concerned different kinds of welding capabilities, and that this issue was not relevant to Mr. Lipinski. He said that, although Mr. Lipinski was not qualified as a welder, he was the most experienced and skilled at the core duties of boilermakers; in addition to this, he had superior supervisory skills and was highly respected by other tradespersons.

Mr. Bareham said that the choice open to him on the basis of the information which came to him from the SaskFerco planners was to lay off Mr. Monaghan or Mr. Prill, both of whom were welders, and both of whom were members of the core Delta Catalytic maintenance crew. Mr. Bareham also pointed out that if Mr. Monaghan could be characterized as the job steward for the boilermakers, Mr. Prill had a equal claim to be job steward for the pipefitters.

Mr. Lipinski himself testified that he had been "furious" when Mr. Monaghan was laid off, although not on the grounds that he was a job steward. Mr. Lipinski said that the source of his anger was the method which was used to get Mr. Monaghan off the site. When he was informed that Mr. Kelly was absent, he went to the office of Mr. Harkness, and vented his frustration in a way which led Mr. Harkness to suggest he should "cool off" before they continued the discussion. Mr. Lipinski said that Mr. Harkness had attempted to deflect responsibility for the decision from Mr. Kelly, saying that it was "not Kelly's call." Mr. Lipinski said that he understood Mr. Harkness to be saying the decision had been made "higher up" in SaskFerco, but he conceded that his discussion with Mr. Harkness was not of a calm or rational nature.

Mr. Harkness himself did not remember the details of the conversation, although he recalled having some sort of exchange with Mr. Lipinski. He said that he could not imagine why he would have said that the decision to lay off Mr. Monaghan came from "higher up" in SaskFerco; as far as he knew, it was just a standard layoff. He said he may well have denied that he or Mr. Kelly had anything to do with the layoff, as he believed this to be the case.

In many earlier cases, this Board has underlined the significance of the prohibition against discriminatory discharge within the scheme of *The Trade Union Act*. In a decision in *Saskatchewan Government Employees' Union v. Regina Native Youth and Community Services Inc.*, [1995] 1st Quarter Sask. Labour Rep. 118, LRB File Nos. 144-94, 159-94 and 160-94, the Board made this comment at 123:

> *It is clear from the terms of s. 11(1)(e) of The Trade Union Act that any decision to dismiss or suspend an employee which is influenced by the presence of trade union activity must be regarded as a very serious matter. If an employer is inclined to discourage activity in support of a trade union, there are few signals which can be sent to employees more powerful than those which suggest that their employment maybe in jeopardy. The seriousness with which the legislature regards conduct of this kind is indicated by the fact that the onus rests on the employer to show that trade union activity played no part in the decision to discharge an employee.*

The Board also made this observation about the significance of the reverse onus in *United Steelworkers of America v. Eisbrenner Pontiac Asüna Buick Cadillac GMC Ltd.*, [1992] 3rd Quarter Sask. Labour Rep. 135, LRB File Nos. 161-92, 162-92 and 163-92 at 139-140:

> *When it is alleged that what purports to be a layoff or dismissal of an employee is tainted by anti-union sentiment on the part of an employer, this Board has consistently held, as have tribunals in other jurisdictions, that it is not sufficient for that employer to show that there is a plausible reason for the decision. Even if the employer is able to establish a coherent and credible reason for dismissing or laying off the employee - and we are not persuaded that the reasons put forward by Eisbrenner are entirely convincing - those reasons will only be acceptable as a defence to an unfair labour practice charge under s. 11(1)(e) if it can be shown that they are not accompanied by anything which indicates that anti-union feeling was a factor in the decision.*

As we have pointed out on a number of occasions, for the purpose of assessing whether the termination of employment is improperly motivated, the Board does not enter directly into an evaluation of the merits of the decision. The fact that a decision is ill-advised or unfair does not render it an unfair labour practice. What is our concern is whether the decision rests, even in part, on a desire to discourage or punish trade union activity, and the apparent soundness or logic of the decision may hold

a clue to whether such an improper motive was a factor. In *The Newspaper Guild v. The Leader-Post*, [1994] 1st Quarter Sask. Labour Rep. 242, LRB File Nos. 251-93, 252-93 and 253-93, the Board commented at 248-249:

> *For our purposes, however, the motivation of the Employer is the central issue, and in this connection the credibility and coherence of the explanation for the dismissal put forward by the Employer is, of course, a relevant consideration. We are not required, as an arbitrator is, to decide whether a particular cause for dismissal has been established. Nor, like a court, are we asked to assess the sufficiency of a cause or of a notice period in the context of common law principles. Our task is to consider whether the explanation given by an employer holds up when the dismissal of an employee and some steps taken in exercise of rights under The Trade Union Act coincide. The strength or weakness of the case an employer offers in defence of the termination is one indicator of whether union activity may also have entered the mind of the Employer.*

In *Warne et al. v. Regina Exhibition Association Ltd.*, [1996] Sask. L.R.B.R. 5, LRB File Nos. 146-95 to 166-95, the Board, at 19, affirmed its commitment to vigilance with respect to termination of employment which is unlawful, but stated that a standard has not been - and should not be - set which it is impossible for an employer to meet:

> *There is no doubt that the approach taken by the Board to the issue of discriminatory termination of employment, and the seriousness with which we regard allegations brought under s. 11(1)(e), impose a significant burden on an employer who is attempting to demonstrate that their decision was untainted by any hostility to trade union activity on the part of employees. The imposition of such a demanding standard seems appropriate to us in light of the threat which is posed to the aims of The Trade Union Act by the illicit deployment of the power of an employer to terminate employment. The Board has pointed out, however, that this does not mean that an employer can never demonstrate that the decision to terminate was made in a way which did not violate the Act. In [Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Versa Services, [1994] 3rd Quarter Sask. Labour Rep. 176, LRB File Nos. 090-94, 091-94, and 092-94], the Board made this comment:*
>
> > *Stringent as this test is, it does not and cannot mean that employees who are engaged in protected activity cannot be discharged for just cause. For example, in Metal Fabricating Services Ltd., [1990] Spring Sask. Labour Rep. 70, the Board considered the layoff of employees for lack of work in circumstances that gave rise to a presumption of anti-union animus. The Board stated:*
> >
> > > *In our view, even if there is evidence of anti-union animus, that in itself does not mean the employer is thereafter unable to lay off employees in the normal course of business for just cause or for economic reasons. The presumption that arises in such situations is rebuttable, not conclusive.*

As counsel for Mr. Monaghan rightly pointed out, there are many possible clues that the decision made by an employer is tainted by anti-union motives, and these include such things as the targeting of union activists, the termination of an employee who is manifestly more qualified than others, or the manufacturing of conflicts which provide an excuse for termination.

In this case, the arguments put forward by counsel for Mr. Monaghan identified three possible sources of improper motives for the decision to lay off Mr. Monaghan. These were Delta Catalytic, Mr. Kelly and someone "higher up" in the management of SaskFerco.

To begin with, it is perhaps necessary to comment at this point on an argument which was strongly advanced by counsel for SaskFerco, which was that any conduct by SaskFerco in connection with the layoff of Mr. Kelly is irrelevant, as SaskFerco was never his employer, and cannot therefore be found guilty of any unfair labour practice in this regard.

We do not propose to examine at length the evidence and arguments which were put forward concerning the question of whether SaskFerco or Delta Catalytic was the entity which employed Mr. Monaghan. There can be little doubt, in our view, that Delta Catalytic was the employer of Mr. Monaghan.

On the other hand, we do not agree with the broad proposition put forward by counsel for SaskFerco that the relationship which exists between SaskFerco, Delta Catalytic and the employees of Delta Catalytic could never be the basis of an unfair labour practice complaint against SaskFerco. It is not necessary, given the conclusion we have reached about the conduct of representatives of SaskFerco, to enter into an extensive analysis of the legal basis for such a finding. It is sufficient to suggest that, where a client like SaskFerco is in a position to exercise a direct and continuing influence on the terms and conditions of employment of the employees of a contractor, it is difficult to believe that the client would be immune from sanctions for taking actions which prevent or discourage union activity on the part of employees.

There were a number of suggestions made as to how SaskFerco might have had an improper influence on the decision to lay off Mr. Monaghan. The most obvious point at which this could have been done would be through the vehicle of Mr. Kelly, who had the most direct contact with the Delta Catalytic employees. Much of the testimony of Mr. Monaghan himself highlighted his differences of opinion

with Mr. Kelly, and conveyed the impression that Mr. Kelly was his own major suspect for an improper layoff decision.

Mr. Kelly did not deny that some of his contacts with Delta Catalytic employees had been marked by tension. At the time of the safety meeting at which Mr. Sauvé had been present, for example, he acknowledged that his own behaviour had been less than professional, and he apologized to the employees about this. He did say that he did not remember Mr. Monaghan playing a more prominent or memorable role than others in these incidents, however, and that he did not target Mr. Monaghan in his response.

Mr. Monaghan claimed to have played a prominent role in the discussions of various labour relations issues with Mr. Kelly - the safety concerns, the proposal for a shorter work week, the proportion of boilermakers who were present on the site. He also claimed to have represented an employee who was disciplined for an improper weld, though Mr. Kelly denied having any contact with Mr. Monaghan in the course of that affair. Though there may be some question as to whether Mr. Monaghan held the position of job steward in any formal sense, there seems to be agreement that he was on occasion a vocal and forceful spokesperson for the interests of the boilermakers and other unionized employees.

Insofar as he advanced labour relations concerns with Mr. Kelly and others, it is not surprising that Mr. Monaghan would encounter differences of opinion over the issues he raised, that being the character of much of such discussion. The Board must always be alert to the possibility, of course, that workplace activists are being singled out for discriminatory treatment. On the other hand, every difference of opinion or sharp exchange between an employer and a representative of employees cannot be interpreted as an unfair labour practice. We do not find that there was anything to suggest that the interchange between Mr. Kelly and Mr. Monaghan ever exceeded the proper boundaries of such a relationship.

In any case, Mr. Kelly denied that he had anything to do with the decision to lay Mr. Monaghan off, other than to transmit to Mr. Bareham the information that the complement of employees would have to be reduced by one welder. The evidence of Mr. Kelly concerning the process by which the decision was reached that Mr. Monaghan should be laid off was supported by Mr. Bareham in his testimony.

It seems fair to say that counsel for Mr. Monaghan was somewhat taken aback by the evidence given

by Mr. Kelly and Mr. Bareham in this respect. He indicated some surprise when Mr. Bareham took sole responsibility for the decision to lay off Mr. Monaghan, and when Mr. Kelly gave vent to evident distress at being accused of improper conduct. This led counsel for Mr. Monaghan to argue that the real impulse behind the decision to lay off Mr. Monaghan would be found somewhere "higher up" in the management of SaskFerco.

One possible indication of this, counsel suggested, was a threat that Delta Catalytic would lose the contract at SaskFerco unless they got rid of Mr. Monaghan. Counsel intimated that Mr. Sauvé, or possibly someone else, saw Mr. Monaghan as a troublemaker, and exerted pressure to get rid of him. This notion did seem to have some life, if only as a rumour, according to the testimony of some of the employees. Mr. Sauvé himself was not present during October when the decision to lay off Mr. Monaghan was made, and one employee put forward the theory that the decision was not made until Mr. Sauvé left so that Mr. Kelly would have an opportunity to get rid of Mr. Monaghan.

Both Mr. Hakim and Mr. Larson admitted that there was a concern about the possibility of losing the SaskFerco contract. They said, however, that this concern did not originate in any direct threat from SaskFerco, but within Delta Catalytic management itself. They said that, both at the time of the disruption over the Peacock employees, and again at the time when the grievance filed on behalf of Mr. Monaghan was being dealt with, there were discussions of the need to go to great lengths to maintain industrial relations harmony in order to make a good impression on SaskFerco and other clients. The fact that the Monaghan grievance was the first grievance which the company had faced suggests that these efforts had been successful to a considerable degree.

Mr. Larson said that, when there was a possibility that the Delta Catalytic employees would not work with the Peacock employees, the management of SaskFerco were upset about the possibility that there would be an interruption of work, but they left it up to him to straighten it out with the employees. Given the testimony of Mr. Monaghan that he had led the way in persuading other employees to work with the Peacock employees in order to remain in the good graces of the client, it seems likely that his role in this incident would be remembered in a positive rather than a negative way.

We are of the view that the evidence does not show that there was any conduct on the part of SaskFerco which was motivated by an unlawful wish to restrain the trade union activity of Delta Catalytic employees.

The evidence of Mr. Bareham was that the decision to lay off Mr. Monaghan was done in a routine manner, on the basis of the planning information, although he acknowledged that it was not a routine matter to make a decision which would start cutting into the core crew which had been working at the SaskFerco plant for a considerable period of time. Mr. Bareham said that he did not like having to lay people off, even though he had done it a great many times. His usual distress was augmented in this case by the fact that the decision affected someone of such long service. He denied that his distress arose from the fact that he thought there was anything illicit or unfair about the decision itself.

A number of factors were put forward to suggest that the decision itself must be suspect. Some of these related to the skills and qualifications of Mr. Monaghan. Every witness who was in a position to express a view on the question acknowledged that Mr. Monaghan is a highly skilled, experienced and conscientious tradesperson. No suggestion was made that any defect in the work he had done at SaskFerco played any role in the decision to lay him off.

On the other hand, the evidence suggested that his skills and qualifications were not such as to overwhelm those possessed by Mr. Prill or Mr. Lipinski. Whether or not he had achieved a high result in the rating system which was described by various witnesses, there was evidence indicating that the differences between various members of the core crew were relatively small. Mr. Lepine, who expressed himself strongly about the layoff of Mr. Monaghan, conceded that Mr. Prill and Mr. Monaghan had comparable skills. Mr. Bareham stated that, in arriving at decisions about hiring and layoffs, he had to take into account the kind of work which had to be done, the equitable distribution of work among the building trades, and whether particular skills were required. In this light, he decided that the work which remained should be allocated to a pipefitter welder, rather than a boilermaker welder. He further decided, when planning the shutdown project which occurred the week following the layoff of Mr. Monaghan, that it was properly pipefitting work, and that it could be done by more generally qualified pipefitter welders, rather than requiring any of the specialized qualifications possessed by Mr. Monaghan.

With respect to the fact that Mr. Monaghan was, if not a job steward, a spokesperson for other unionized employees, the same might have been said, as far as Mr. Bareham was aware, of Mr. Prill or Mr. Lipinski.

It is our view that the explanation for the decision given by Mr. Bareham was, to use terms we have

used before, a coherent, credible and plausible one, and that it was not tainted by improper motives on his part.

We should comment at this point on an argument put forward by Delta Catalytic to the effect that the settlement between the Employer and the Union of the grievance filed on behalf of Mr. Monaghan should be a ground in itself for dismissing the application.

We do not accept this proposition in this categorical form. There are circumstances in which the settlement of a grievance could not be taken to resolve all questions about whether the conduct of an employer might constitute an unfair labour practice within the meaning of *The Trade Union Act* as well as a violation of the collective agreement.

On the other hand, there can be no question that serious attention should be paid to the results of the grievance and arbitration procedure where the circumstances which gave rise to the grievance are closely related to or indistinguishable from the situation which is the subject of an application before us. It is desirable for the Board to offer relief for aspects of improper conduct which cannot be adequately dealt with by the grievance procedure. It is less desirable for the Board to stand by to offer an alternative forum if an employee is unhappy with what has been achieved by means of the mechanisms provided under the collective agreement.

There was some evidence at the hearing that representatives of Delta Catalytic had discussed the possible implications for their contract with SaskFerco of being unable to deal with the grievance in an expeditious and satisfactory way. This indeed appears to have led to consideration by some within the management of Delta Catalytic management, notably Mr. Hakim, of the option of returning Mr. Monaghan to work at the SaskFerco plant. There was also evidence that the concerns about the future of the SaskFerco contract were communicated to the Union in the course of the discussions about the disposition of the grievance.

Mr. Monaghan chose to resile from any allegation that he was not represented properly by the Union in the course of the grievance procedure. In the absence of any evidence to the contrary, one must assume that the Union was capable of assessing the rights and interests of Mr. Monaghan under the collective agreement, and of pursuing the grievance in accordance with those rights and interests. The suggestion that delays in resolving the grievance might represent a threat to future work at SaskFerco seems to us

fairly typical of the kinds of arguments made by employers in negotiating disputes with trade unions, and there was no indication that this argument affected the approach taken by the Union to the grievance. The Union does not appear to have made any claim under Article 10 of the collective agreement based on the position of Mr. Monaghan as a job steward.

On a number of occasions, the Board has commented on the responsibility which a trade union has as the steward of the interests of the members who depend on the union to represent them. We have made it clear that we expect trade unions to take the interests of their members seriously, and to consider any redress which may be available in the event of an infringement of those interests. We have also said, however, that it is not the individual employee, but the union, which must make the ultimate decision as to how or whether these issues should be pursued. It is not surprising that, for individual employees, their own interests occupy much of the horizon, and that they may develop firm views about how those interests should be protected.

The fact that a trade union does not share the same view of their significance, or that the union elects a course of action which does not comply with demands made by an employee, does not in itself invalidate the decisions of the trade union, or make the results of that decision any less binding on the employer and the affected employee or employees.

There may be circumstances, particularly where we find that a trade union has been derelict in carrying out the duty to represent employees, in which the Board must be able to offer a recourse to an employee in the face of an apparent abandonment or settlement of a grievance. In the absence of any allegation that the Union was in breach of any responsibility toward Mr. Monaghan, the silence of the Union on this application suggests that they were unable to support his allegation in this forum, and that they continue to consider themselves - and Mr. Monaghan - bound by the settlement of the grievance reached with Delta Catalytic. Mr. Monaghan himself clearly did not accept the settlement as a satisfactory resolution of the grievance; as we have said, this in itself is not a sufficient basis for finding that the settlement was not legitimate.

We have considerable sympathy for Mr. Monaghan. His inclusion as part of the core maintenance crew at the SaskFerco plant gave him work which was of an unusually stable character and long duration compared to much other work for members of the building trades. It is natural that he would feel the loss of this work keenly.

For the reasons we have given, however, we cannot find that the decision to lay him off was based on anything other than the normal criteria used by Delta Catalytic for the hiring and layoff of employees, and we have decided that the application must be dismissed.

PUBLIC SERVICE ALLIANCE OF CANADA, Applicant and CASINO REGINA - SASKATCHEWAN GAMING CORPORATION, Respondent and CANADIAN UNION OF PUBLIC EMPLOYEES, Intervenor

LRB File No. 068-96; June 4, 1996
Chairperson: Beth Bilson; Members: Bruce McDonald and Don Bell

For the Applicant: Rick Engel
For the Respondent: Larry LeBlanc
For the Intervenor: Doug Lavallee

Bargaining unit - Appropriate bargaining unit - Whether unit which does not include head office administrative staff is appropriate - Board deciding operational unit is appropriate unit.

Practice and procedure - Evidence - Evidence of support - Whether board should require some minimum level of support in order to allow intervenor union to be considered option in vote - Board deciding minimal level of support is necessary, declining to set minimum.

***The Trade Union Act*, ss. 5(a) and 6.**

REASONS FOR DECISION

Beth Bilson, Chairperson: The Public Service Alliance of Canada ("P.S.A.C.") has filed this application seeking to be designated as the bargaining agent for a unit of employees of the Saskatchewan Gaming Corporation at Casino Regina. The Canadian Union of Public Employees ("C.U.P.E.") was granted intervenor status in connection with this application in order to make representations on a number of issues.

In an earlier application, designated as LRB File No. 055-96, the P.S.A.C. applied to represent a unit which was composed of dealers and supervisors at Casino Regina. That application, which was filed on March 12, 1996, was subsequently withdrawn, and replaced by this application, which described the proposed bargaining unit in more comprehensive terms. The original description of the proposed bargaining unit read as follows:

> *All Casino Regina - Saskatchewan Gaming Corporation employees, save and except Pit Bosses, those above the rank of Pit Boss, Managers, Assistant Bank Manager, Head Office Administrative and Clerical staff, Surveillance Officers and Level II Security Officers, constitutes an appropriate unit of employees for the purpose of bargaining collectively.*

P.S.A.C. proposed the exclusion from the bargaining unit of the classification of security officer II on the basis of their concern about the potential conflict of interest of having employees within the bargaining unit who are responsible for conducting surveillance on the activities of other employees. In the course of pre-hearing discussions with the Employer, however, P.S.A.C. withdrew their objection to the inclusion of this classification of employee, although they acknowledged that one of the implications of this decision might be that the question of majority support might have to be submitted to a vote.

In their intervention in the application, the representatives of C.U.P.E. argued that any ballot directed by the Board should give employees an opportunity to choose to be represented by C.U.P.E. rather than P.S.A.C. They argued that the bargaining unit which was proposed by P.S.A.C., which was not opposed by the Employer, was not an appropriate one. The position of C.U.P.E. was that the bargaining unit would be more appropriate if it were to include the clerical and administrative support staff in the corporate head office of the Employer.

Counsel for P.S.A.C. argued that the selection of C.U.P.E. should not be made an option on the ballot among the employees unless C.U.P.E. had filed evidence of support from at least 25 per cent of the employees as of the date when this application was filed, that is, March 25, 1996.

P.S.A.C. presented evidence concerning the organizing campaign which they had conducted among the employees at Casino Regina. Mr. Blaine Pilatzke, a staff representative of P.S.A.C., testified that his Union had begun making exploratory contact with employees even prior to the formal opening of Casino Regina on January 26, 1996. He said that, prior to setting up a committee of Casino Regina employees, they had utilized the services of several staff representatives, and a contract organizer familiar with the casino environment in Regina. Mr. Pilatzke said that the Union held some discussions with the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union ("S.J.B.R.W.D.S.U."), who claimed that the Saskatchewan Federation of Labour had indicated Casino Regina to be under their jurisdiction in organizing terms. Following these discussions, which occurred in mid-February, P.S.A.C. decided to proceed with their organizing campaign.

Mr. Wilf Bartlett, an employee of Casino Regina who was on the organizing committee, said that he had been interested in obtaining representation by a trade union from the time the casino opened. He said that he had attended an open house held by S.J.B.R.W.D.S.U., and had signed a card there. He

said, however, that after discussing the matter with some of his fellow employees, they asked him to obtain information about alternatives. He telephoned the office of C.U.P.E., and was informed that C.U.P.E. would not be undertaking any organizing activities because of the presence of the S.J.B.R.W.D.S.U. A few days later, on or about February 15, he received a letter from P.S.A.C., and became involved in their organizing campaign.

Mr. Don Moran, who was involved in the C.U.P.E. campaign at Casino Regina, said that his union was approached by some employees who wanted to be represented by C.U.P.E. He said that C.U.P.E. formed an organizing committee, and collected support from a number of employees.

Mr. Doug Lavallee, who represented C.U.P.E. at the hearing, acknowledged that his Union had not enjoyed the support of 25 per cent of the employees either at the time the original application was filed on March 12, or when this application was filed on March 25. He argued, however, that it would be appropriate for the Board to exercise our discretion to direct that a vote be conducted to determine whether C.U.P.E. or P.S.A.C. has the support of the majority of employees in the bargaining unit. In this connection, he suggested that C.U.P.E. now has the support of a significant number of employees.

Counsel for P.S.A.C. conceded that there is not at present any indication in *The Trade Union Act*, R.S.S. 1978, c. T-17, as to what level of support might justify permitting a second union to participate in a vote held to determine what union should represent a unit of employees. Prior to 1983, the *Act* contained a provision setting out that such a direction should be given when a second union could demonstrate the support of at least 25 per cent of the employees. This section, which was removed in 1983, was consistent with the current provision, s. 6(2), which covers the situation in which one trade union seeks to conduct a "raid" when there is already a certified union in place. Section 6(2) reads as follows:

> *6 (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 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;*

> *the board shall, subject to clause 5(k), 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.*

Counsel for P.S.A.C. argued that, although the provisions of the *Act* as it currently stands leave it up to the discretion of the Board to determine what the terms of a vote should be, it would be a mistake for us not to require at least some reasonable level of support before a second union could be included on the ballot.

In a decision in *Health Sciences Association of Saskatchewan v. Regina District Health Board*, [1995] 3rd Quarter Sask. Labour Rep. 131, LRB File Nos. 025-95 and 118-95, the Board denied a request for intervenor status made on behalf of the Saskatchewan Union of Nurses. That trade union wished to respond to a certification application by filing a "counter-application" based on support which had been gathered subsequent to the filing of the principal application. The Board commented, at 133:

> *The Board denied the request for intervenor status by the Saskatchewan Union of Nurses. The procedures adopted by the Board are in general marked by considerable flexibility, which assists us to accommodate the peculiar circumstances of particular cases and the needs of the parties to the applications which are brought before us. One exception to this is our adherence to a policy of considering evidence of support for a certification application as of the date of the application. Though it has sometimes been urged upon us to show more flexibility in the application of this policy, we have reiterated firmly on a number of occasions our position that, if evidence of support for a certification application,- or of withdrawal of support or of support for some other trade union - is to be considered by the Board, it must be in the hands of the Board in its original form by the date on which the application is filed with the Board. The Board reiterated this point recently in a decision in Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Brown Industries (1976) Ltd., [1995] 2nd Quarter Sask. Labour Rep. 71, LRB Files No. 010-95 and 012-95.*
>
> *Where the claim is made that employees are not only withdrawing their support for the certification application, but also lending their support to a second application for certification, the same principle applies. In a number of decisions, the Board has confirmed that the first of two competing trade unions to apply for certification will have that application determined without regard to any subsequent application received from the second trade union.*

The Board has made an exception to this general policy in circumstances where the second union has

presented sufficient evidence of support prior to the filing of the other application. In *International Union of Operating Engineers v. Penn-Co Construction Ltd. and Construction Workers Association*, [1990] Summer Sask. Labour Rep. 39, LRB File No. 187-89, the Board made the following statement, at 40:

> *In situations where an application for certification by one union is received and a subsequent intervenor and request for certification by another is filed, the Board has consistently taken the position that:*
>
> > *"only evidence of support gathered prior to the filing of the first application for certification will be considered . . . in determining an intervening union's status to request and participate in a representation vote".*

In the *Penn-Co Construction* case, both of the unions seeking certification had filed evidence of majority support from the employees at the date of the application. Thus, there was no question in that case, as there is in this one, of whether the Board should impose some requirement for a minimum level of support before allowing a second union to take part in a vote on which to base a certification Order.

On the one hand, since a vote is typically held only when the applicant trade union has failed to file evidence of majority support, it would seem rather draconian to require that a second union present evidence of majority support in order to be allowed to take part in a vote. On the other hand, we share the concern of counsel for P.S.A.C. that, in the absence of any standard for the Board to use in exercising our discretion, we would leave the field open for opportunistic attempts by trade unions to exploit the organizing efforts of others, or for intervention by small groups of employees who are disgruntled or who are acting at the behest of an employer.

We do not wish to suggest that any of these scenarios is indicated by the evidence which we heard in connection with this application. We have stated before, however, that we think it unwise to relax the standards which we apply for the reception of evidence connected with applications for certification. In the *Regina District Health Board* decision, *supra*, the Board made the following comment, at 135:

> *There are clearly occasions when some party which claims to be affected by the applications will be disadvantaged by the strict observance of such a rule. Overall, however, it is our view that the policy provides everyone involved with a standard which is predictable and easily understood. It also protects employees from whatever subtle efforts might be used by employers once an application has been filed to induce them to withdraw their support for the certification application.*

It is not necessary, in our view, to make a categorical finding that the 25 per cent figure for support

which was supported by counsel for P.S.A.C. should be institutionalized in our procedures, although we must say that our first impression is that this figure makes as much sense as any. Our review of the evidence of support for representation by C.U.P.E. which was filed with the Board relating to the period up to the date of the filing of this application falls short of that level by a significant margin, and we have concluded that there is no basis for altering our practice of requiring the presentation of sufficient support by the time an application is filed.

This no doubt seems harsh to C.U.P.E., who seem to have abstained originally from embarking on an organizing campaign out of respect for what they understood to be the jurisdictional claims of the S.J.B.R.W.D.S.U. It is our view, however, that the procedures which the Board has developed in connection with the determination of representational claims must be adhered to rigorously in order to maintain the credibility of the process and to protect the procedures from abuse or manipulation by less scrupulous parties.

Counsel for the Employer argued that, in the event the Board determines that it should not be open to employees, in a vote, to choose to be represented by C.U.P.E., the Board should not inquire into the appropriateness of the bargaining unit which has been delineated by agreement between the parties. We have often stated our disagreement with this proposition in its most categorical form, on the grounds that this Board must always maintain our ability to assess the appropriateness of bargaining units, even where a particular configuration has been agreed to by the parties.

The bargaining unit which P.S.A.C. proposes to represent consists of various classifications of employees who are involved in gaming and security in the casino itself; counsel referred to the proposed unit as an "operational" unit. The group of employees which C.U.P.E. proposed to add provide clerical and administrative support in the corporate head office, which is located on an upper floor in the same building as Casino Regina.

Evidence was adduced on behalf of the Employer to show that there are considerable differences between the terms of employment and working conditions of the employees who are included in the bargaining unit described in the application, and the head office employees. Such differences include distinctions in hours of work, dress code, contact with the public and the formula for payment for overtime. It is not necessary to review these points of difference in detail here; we are satisfied that there are considerable dissimilarities between the two groups of employees. It should also be noted

that, though there are currently no casinos other than Casino Regina under the control of the Employer, the administrative system in the head office is designed to serve the needs of additional casinos should the need arise.

In a decision in *Hotel Employees and Restaurant Employees Union v. Courtyard Inns Ltd.*, [1988] Winter Sask. Labour Rep. 51, LRB File No. 116-88, the Board reiterated a preference for the most inclusive possible bargaining units at 51:

> *The Board has frequently stated that there is no single test for determining whether a proposed unit of employees is appropriate for the purpose of bargaining collectively. Rather the Board considers a number of factors, including whether the proposed unit would be viable, whether it would contribute to industrial stability, whether groups of employees have a particular community of interest, whether the proposed unit would interfere with lateral mobility among employees, historical patterns of organization in the particular industry, and other concerns of the employees, the union and the employer.*
>
> *No two cases are exactly the same, but it is fair to say that outside of the construction industry the Board has generally preferred larger and fewer bargaining units in each workplace, with one all employee unit often considered ideal...*

In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, [1994] 3rd Quarter Sask. Labour Rep. 87, LRB File No. 088-94, the Board made this comment, at 89:

> *Though, as these extracts make clear, the Board has been guided by a wide range of factors in assessing the appropriateness of proposed bargaining units, our general approach has been to attempt to balance a policy interest in stable and coherent bargaining units as a basis for healthy collective bargaining, with the right of employees stated in Section 3 of The Trade Union Act to have access to collective bargaining as a means of dealing with their employers. Not every configuration of employees suggested can provide a foundation for strong collective bargaining. On the other hand, the Board has pointed out on numerous occasions that a proposed unit need not be the most appropriate bargaining unit which can be imagined; it is sufficient for it to be an appropriate unit.*

We must confess that we share some of the concern expressed by Mr. Lavallee on behalf of C.U.P.E. that it may be difficult for the head office employees to obtain alternative trade union representation if they are not included in the bargaining unit which is the subject of this application. On the other hand, the bargaining unit which has now been agreed between P.S.A.C. and the Employer is a perfectly

coherent one, and one which may form the basis of viable collective bargaining in our view. The orientation of the head office employees, the absence of interaction between the two groups of employees, and the differences in the terms and conditions of employment of the head office and casino employees, persuade us that it is acceptable in this instance to grant a certification Order in the terms contained in the amended application.

We will, therefore, direct that a vote be held as early as possible among the employees in the bargaining unit which is described in the amended application.

The final point which should be noted concerns the request which was made by representatives of the S.J.B.R.W.D.S.U. that the description of the bargaining unit should contain a clear exclusion of the employees engaged in food and beverage services in the casino, as there is an outstanding certification application from that union regarding those employees. Counsel for the Employer suggested that it was not necessary to put such a proviso in the description of the bargaining unit. If those employees are not found to be employed by this Employer, their exclusion in the certification Order will be meaningless; if the Saskatchewan Gaming Corporation is found to be the employer for those employees, an amendment can be made at that time. Mr. Hollyoak, speaking for the S.J.B.R.W.D.S.U., said that his Union would prefer to have the exclusion made explicit no matter who the employer is currently found to be.

In our view, the description of a bargaining unit should be as clear as possible, both with respect to who is included and, perhaps more significantly on some occasions, with respect to who is excluded. Even if there is a finding that the Employer is not the employer of the food and beverage service employees, there is nothing wrong with making it clear in any certification Order issued as a result of this application that those employees are clearly outside the scope of the bargaining unit. We will attempt to find a way to make this clear in the Orders which are issued in connection with this application.

TATUKOSE INDUSTRIES LTD., Applicant and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Respondent

LRB File No. 219-95; June 5, 1996
Vice-Chairperson: Gwen Gray; Members: Terry Verbeke and Bruce McDonald

For the Applicant: Larry LeBlanc
For the Respondent: Bob Todd

Reconsideration - Criteria - Whether Board should rescind certification order granted in circumstances where union's estimate of number of employees in bargaining unit was less than number of support cards filed by Union with its application - Board deciding that issue raised is one that meets criteria adopted for reconsideration but deciding not to exercise its power to reconsider and rescind order.

Certification - Practice and procedure - Number of employees - Board confirming practice of identifying anomalies in estimates of numbers of employees on application form compared to statement of employment.

***The Trade Union Act*, ss. 5(a),(b),(c) and (j).**

REASONS FOR DECISION
APPLICATION FOR RECONSIDERATION

Gwen Gray, Vice-Chairperson: The Employer applied to the Board to reconsider a certification Order made by the Board on October 30, 1995 on the grounds that the Union filed support cards in excess of the number of employees estimated by the Union in its application for certification to fall within the bargaining unit.

The bargaining unit applied for was the craft unit of "journeymen carpenters, carpenters, carpenter apprentices and carpenter foremen" which conforms with the standard bargaining unit set for the carpentry trade by the Board in *Construction and General Workers, Local Union 890 v. International Erectors and Riggers, A Division of Newbery Energy Ltd.*, [1979] Sept. Sask. Labour Rep. 37, LRB File No. 114-79. The Union estimated in paragraph 5(a) of its application that there were approximately five employees in the bargaining unit. The employer filed a statement of employment indicating that there were 19 employees who fell within the classifications listed in the bargaining unit description. In its reply, the Employer indicated that it employed at least 17 persons who fell within the bargaining unit on the date the application was filed.

Anticipating that the Union would dispute some of the names listed on the statement of employment, counsel for the Employer requested that the Board schedule one day for a hearing of the matter. The Board Vice-Chairperson contacted the Union to confirm that the statement of employment was in dispute and was advised by the Union representative that it did not dispute the names listed in the statement of employment filed by the Employer. This information was conveyed to counsel for the Employer by letter from the Board Vice-Chairperson.

The matter proceeded to be heard by the Board on October 24th, 1995 on the basis of the material filed by the Union and the Employer. The Board issued an Order certifying the Union as the bargaining agent on October 30, 1995. At that point, it became clear to the Employer, based on the number of support cards required to obtain an Order from the Board, that the Union had filed support cards from more employees than it estimated were employed in the bargaining unit.

The Employer applied to the Board to reconsider and revoke the certification Order on the grounds that the Employer did not know the case it had to meet; that the Union's application misled the Employer; and that the Union should not be permitted to camouflage the true issues in dispute. Mr. LeBlanc referred the Board to the Alberta Labour Relations Board's decision in *U.A., Local No. 488 v. Driver Industrial Ltd.*, [1995] Alta. L.R.B.R. 280 where the Board rescinded a certification Order granted as a result of the concealment by the parties of a voluntary recognition agreement. The Board summarized the obligations of the parties appearing before it as follows at 286:

> *What are the obligations of the parties? We agree the applicant trade union has an obligation to inform the Board of facts relevant to the application. The questions on the application for certification attempt to prompt the union to provide the information. Similarly, the Board officer's investigation is another way to prompt the release of relevant information. Honest, full and informed disclosure in response to both the questions on the application form and the officer's inquiries form the foundation of the application. If the Board learns that this duty of disclosure has not been met in a way that is material to its decision to certify, it will have no hesitation in reconsidering and vacating the certificate.*

He also referred the Board to *Technair Aviation Ltee. v. I.B.T., Local 1999* (1990), 14 C.L.R.B.R. (2d) 68, wherein the Canada Labour Relations Board dismissed an application for certification by I.B.T., Local 1999 on the grounds that membership cards contained fraudulent signatures. The Canada Board stated at 78 as follows:

> *The Board is applying these principles in the instant case. As we stated earlier, the applicant union is responsible for the entire union organizing process, from start to*

> *finish. If it is granted certification, it will exercise the rights and obligations that accompany certification, in particular bargaining and the interpretation and administration of the collective agreement. These responsibilities require that the union demonstrate its good faith at each and every step of the process leading to the issuing of a certification order. However, unintentional or minor errors may occur and mistakes made by inexperienced or inadequately informed employees or union representatives may result in irregularities that are unlikely to have any repercussions on the union organizing process.*

Mr. LeBlanc also referred to a previous decision of this Board in *International Union of Operating Engineers, Hoisting, Portable & Stationary v. Ramco Installations Ltd.*, [1996] Sask. L.R.B.R. 1, LRB File No. 247-95, which involved a request for reconsideration based in part on the failure of the Union to provide the Board in its application with an estimate of the number of employees in the proposed bargaining unit. In that instance, the Board stated at 4:

> *The third basis suggested for reconsideration was the failure of the Union in the application to estimate the number of employees in the bargaining unit. Counsel for the Employer argued that, in the absence of such an estimate, the Union has not presented evidence which might be the basis of a conclusion that they have obtained the support of a majority of employees in the proposed bargaining unit.*
>
> *Technically, this argument has considerable force, and the Board should perhaps have requested that the Union provide an estimate of the size of the bargaining unit. On the other hand, it must be recognized that what is required of the Union in an application for certification is only an estimate; it must be anticipated that an employer is in possession of the information required to establish the number of employees with precision.*
>
> *It should further be noted that the application for certification takes the form of a statutory declaration in which a trade union attests that they claim to represent a majority of employees in the bargaining unit of employees they put forward as a basis for collective bargaining. In the absence of any contrary representations from an employer, it is our view that it is appropriate to accept the claim made by the trade union, and that the absence of an estimate of the number of employees does not in itself constitute a fatal flaw in the application.*

Employer's counsel argued that the integrity of the Board's process demanded that the application for reconsideration be allowed and the Order vacated because of the lack of full disclosure on the part of the Union in its application for certification.

In his argument before the Board, Mr. Todd, representative of the Union, explained that the organizing campaign in this instance was conducted "by remote control" as Union representatives were not allowed access to the construction site and organizing was conducted by employees inexperienced in the business of certifying a trade union.

Mr. Todd explained the process of certification, including the issue of which employees should be included in the bargaining unit, to the employees over the telephone. He indicated that there was some concern raised about how employees were classified by the Employer and which employees were actually performing carpentry work. He advised the organizers to sign as many other employees as possible. From the information provided to him by the employees, he concluded that there were five people who would clearly fall in the carpenters' standard bargaining unit. He used this number as the estimate required in paragraph 5 of the application. He explained that, because of his inability to attend the site and speak with the employees, he was not able to say with certainty if the persons who signed support cards did fall within the standard bargaining unit. In any event, he filed all of the support cards which were forwarded to him as he knew he would be unable to file the support cards after the date the application was filed. When he calculated the percentage of support against the statement of employment he realized that the Union had majority support and, as a result, he did not challenge the statement of employment.

In *Remai Investment Corporation (Imperial 400 Motel) v. S.J.B.R.W.D.S.U. and Sharon Ruff*, [1993] 3rd Quarter Sask. Labour Rep. 103, the Board held that the Act does permit the Board to exercise a power of reconsideration. The Board concluded at 106:

> *In spite of the differences in wording, we are of the opinion that the Board possesses extensive power to review, and if necessary to rescind or amend decisions it has already reached. In light of the intended finality of the decisions made by the Board underlined by the privative clause in Section 21 of the Act, it is important that the Board be able to address allegations that there has been some error or injustice in a decision which it has made, and to make amends if such error or injustice can be established.*

In the *Remai Investment Corporation* case, *supra*, at 108, the Board referred to criteria developed by the British Columbia Labour Relations Board in various decisions for reconsidering its decisions as follows:

1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
2. *if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
3. *if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
4. *if the original decision turned on a conclusion of law or general policy*

> *under the Code which law or policy was not properly interpreted by the original panel; or,*
>
> 5. *if the original decision is tainted by a breach of natural justice; or,*
>
> 6. *if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

In the present instance, it would be fair to categorize the Application for Reconsideration as falling within category 5 above and raising a matter of sufficient concern to allow the Board to exercise its power to reconsider the certification Order issued in the original application.

The Board has since the hearing of this matter issued Reasons for Decision involving the same factual situation as the present application: *United Brotherhood of Carpenters and Joiners of America v. Can Am Construction Inc.*, [1996] Sask. L.R.B.R. 378, LRB File No. 196-95. The Board explained the purpose of requesting the Union to estimate the number of employees in a proposed bargaining unit and the use the Board makes of such estimate as follows at 381-382:

> *This brings us to the question of the status and effect of the estimate which a trade union is asked to provide in paragraph 5(a) of the application form. Though the trade union is asked to estimate the number of employees in the bargaining unit which they propose as the basis for certification, an employer is generally in a better position to know the precise numbers of employees who fall within the scope of the bargaining unit which is described in the application. In a practical sense, the most telling factor in the assessment by the Board is the comparison of the evidence of support with the list of the names on the Statement of Employment filed by the employer. Unless the trade union makes some objection to the Statement of Employment, this comparison is generally the basis on which the application is determined.*
>
> *The estimate made by the trade union of the number of employees has a more marginal role in the assessment under these circumstances. As is often the case, an exception must be made to this proposition in the case of the construction industry. In a large number of cases, employers have chosen not to file a Statement of Employment, not to reply to the application, and not to appear before the Board. In these cases, the Board refers to the estimate made by the trade union as a basis for determining whether the trade union claiming to represent a majority of employees is well-founded.*
>
> *In International Union of Operating Engineers v. Ramco Installations Ltd., [1996] Sask. L.R.B.R. 1, LRB File No. 247-95, the Board addressed a related issue in the context of a request for reconsideration of an earlier decision to issue a certification Order. One of the grounds on which reconsideration was sought was the failure of the trade union to make an estimate of the number of employees in the proposed bargaining unit. The Board made the following comment on this point:*

> *Technically, this argument has considerable force, and the Board should perhaps have requested that the Union provide an estimate of the size of the bargaining unit. On the other hand, it must be recognized that what is required of the Union in an application for certification is only an estimate; it must be anticipated that an employer is in possession of the information required to establish the number of employees with precision.*
>
> > *It should further be noted that the application for certification takes the form of a statutory declaration in which a trade union attests that they claim to represent a majority of employees in the bargaining unit of employees they put forward as a basis for collective bargaining. In the absence of any contrary representations from an employer, it is our view that it is appropriate to accept the claim made by the trade union, and that the absence of an estimate of the number of employees does not in itself constitute a fatal flaw in the application.*
>
> *On reviewing this statement, we have come to the conclusion that we may have overstated the point in the Ramco case, supra. In that case, a certification Order had been issued in circumstances where the employer had not responded at all to the application. Though the Board found that other procedural defects justified a reconsideration, we wished to make the point, in connection with the issue of the absence of an estimate, that one cannot have too much sympathy for an employer who wishes to overturn a certification Order on purely technical grounds when they have not taken earlier opportunities to address before the Board any legitimate concerns they may have.*
>
> *On the other hand, we are now of the view that another aspect of this comment, which might be taken to suggest that there is no onus on a trade union to supply the Board with the estimate asked for in paragraph 5(a) of the application form, was somewhat misleading. Though we did not, in that case, view the absence of the estimate as a sufficient ground for reconsideration of the decision to issue a certification Order, we should not have left the impression that we do not or should not require trade unions to supply us with the estimate which the application form requests.*

The Board in the *Can Am Construction* decision, *supra*, went on to hold at 384 that an employer is not entitled to rely on the discrepancy between the estimate provided by the trade union and the number of employees listed in the statement of employment for these reasons:

> *We have commented earlier that we do not accept the proposition that an employer is entitled to rely on the discrepancy between the estimate provided by the trade union and the numbers included in the Statement of Employment. The Employer put forward a number of names; the Union accepted that all of these employees should be included within the bargaining unit. Assuming the Employer was providing accurate information to the Board, it is difficult to see what difference it would have made to the representations made by the Employer if the Union had estimated the number of employees differently. The only situation in which an employer could claim to "rely" on such an anomaly to defeat the certification application would be*

> *where the Statement of Employment was not compiled in good faith, and we do not think it necessary to contemplate that possibility in this case. In our view, there are no grounds for concluding in this case that either party acted fraudulently or in bad faith.*

The Board in *Can Am Construction*, *supra*, however, accepted responsibility for "maintaining a procedure for the assessment of the evidence presented in connection with certification applications which is as transparent as possible under the circumstances, and which brings to light all issues which it may be necessary to resolve before issuing or refusing a certification Order" (at 384). The Board undertook to review the Board procedures to ensure that such issues as were raised in this application are brought to the attention of both parties prior to a hearing of the matter so that any misunderstanding that may exist concerning the scope of the bargaining unit may be dealt with and resolved at the hearing.

The Board in the present case adopts the reasoning set out in the *Can Am Construction* case, *supra*. There is no evidence to suggest that either the Union acted in a manner that was fraudulent or in bad faith, and no reason to believe that the Employer was deliberately padding the statement of employment in order to attempt to defeat the certification application. Unlike *Driver Industrial*, *supra*, and *Technair Aviation*, *supra*, the material filed by the Union was not fraudulent, nor did it mislead the Board on a material matter. For these reasons, the application for reconsideration and rescission of the Order is dismissed.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant and MADISON DEVELOPMENT GROUP INC., Respondent

LRB File No. 053-96; June 10, 1996
Chairperson: Beth Bilson; Members: Hugh Wagner and Bob Cunningham

For the Applicant: Drew S. Plaxton
For the Respondent: Kevin C. Wilson

Collective agreement - First collective agreement - Policy and procedure - Board agent - Board sets out terms of reference for board agent.

Practice and procedure - First collective agreement - Board agent - Board sets out terms of reference for appointment of board agent.

Remedy - First collective agreement - Whether Board should undertake first contract arbitration - Board deciding to appoint agent to recommend agreement.

***The Trade Union Act*, s. 26.5.**

REASONS FOR DECISION
APPLICATION FOR FIRST CONTRACT ARBITRATION:
APPOINTMENT OF BOARD AGENT

Beth Bilson, Chairperson: The United Food and Commercial Workers, Local 1400, were designated in a certification Order dated October 7, 1994, as the bargaining agent for a unit of employees of Madison Development Group Inc. at the Madison Inn in Prince Albert.

In this application, the Union has asked for first contract arbitration pursuant to s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17, which reads as follows:

> *First collective bargaining agreements*
>
> *26.5(1) Either party may apply to the board for assistance in the conclusion of a first collective bargaining agreement, and the board may provide assistance pursuant to subsection (6), if:*
>
> *(a) the board has made an order pursuant to clause 5(a), (b) or (c);*
> *(b) the trade union and an employer has bargained collectively and have failed to conclude a first collective bargaining agreement; and*
> *(c) any of the following circumstances exist:*
> *(i) the trade union has taken a strike vote and the*

majority of those employees who voted have voted for a strike;

(ii) the employer has commenced a lock-out; or

(iii) the board has made a determination pursuant to clause 11(1)(c) or 11(2)(c) and, in the opinion of the board, it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement pursuant to subsection (6).

(2) If an application is made pursuant to subsection (1), an employee shall not strike or continue to strike, and the employer shall not lock out or continue to lock out the employees.

(3) An application pursuant to subsection (1) must include a list of the disputed issues and a statement of the position of the applicant on those issues, including the applicant's last offer on those issues.

(4) All materials filed with the board in support of an application pursuant to subsection (1) must be served on the other party within 24 hours after filing the application with the board.

(5) Within 14 days after receiving the information mentioned in subsection (4), the other party must:

(a) file with the board a list of the issues in dispute and a statement of the position of that party on those issues, including that party's last offer on those issues; and

(b) serve on the applicant a copy of the list and statement.

(6) On receipt of an application pursuant to subsection (1):

(a) the board may require the parties to submit the matter to conciliation if they have not already done so; and

(b) if the parties have submitted the matter to conciliation or 120 days have elapsed since the appointment of a conciliator, the board may do any of the following:

(i) conclude, within 45 days after undertaking to do so, any term of terms of a first collective bargaining agreement between the parties;

(ii) order arbitration by a single arbitrator to conclude, within 45 days after the date of the order, any term or terms of the first collective bargaining agreement.

(7) Before concluding any term or terms of a first collective bargaining agreement, the board or a single arbitrator may hear:

(a) evidence adduced relating to the parties' positions on disputed issues; and

(b) argument by the parties or their counsel.

(8) Notwithstanding section 33 but subject to subsections (9) and (10), the expiry date of a collective bargaining agreement concluded pursuant to this section is deemed to be two years from its effective date or any other date that the parties

agree on.

(9) Notwithstanding section 33 not less than 30 days or more than 60 days before the expiry date of a collective bargaining agreement concluded pursuant to this section, either party may give notice in writing to terminate the agreement or to negotiate a revision of the agreement.

(10) Where a notice is given pursuant to subsection (9), the parties shall immediately bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.

Section 26.5 was added to *The Trade Union Act* in October of 1994, and the Board has had relatively little experience with the interpretation and application of this provision. In the context of an earlier application for first contract arbitration, in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, [1996] Sask. L.R.B.R. 36, LRB File No. 201-95, the Board issued some preliminary guidelines to suggest the approach which we proposed to take with respect to applications for first contract arbitration. In these guidelines, at 47, the Board described as follows the general features of first contract arbitration provisions in other Canadian jurisdictions:

A number of features can be identified, however, from examining the experience in other jurisdictions than our own. We can see, for example, that all of the legislative initiatives which have been put in place represent an acknowledgment of the peculiar problems which can arise in the context of an infant collective bargaining relationship. A review of the jurisprudence shows that the problem which most often gives rise to the use of first contract arbitration is the obduracy or illegal conduct of an employer who is determined to thwart or ignore the trade union. Other problems may also threaten to destroy the relationship, such as, for example, the emergence of an insoluble industrial dispute, or roadblocks created by the incompetence or inexperience of negotiators on either side.

We can also discern in the experience of other jurisdictions a continuing effort to draw a sustainable balance between the underlying objective of promoting healthy and independent bargaining by the parties themselves, and that of avoiding a situation where the bargaining process is exposed to the risk of damage or destruction because of the conduct or inexperience of the parties. In attempting to draw this balance, legislatures have adopted one of two general models - one which requires some determination of the necessity for first contract arbitration, and one which allows the parties themselves to decide when to avail themselves of this mechanism. The former model is exemplified by the legislation in British Columbia, Ontario, Newfoundland and the federal jurisdiction, and the latter by the Manitoba and Quebec statutes.

In this context, tribunals and commentators in all jurisdictions have laid great stress on the proposition that first contract arbitration is not intended to replace bargaining between the parties, but to foster and support it.

A third general point which may be made is that, while first contract arbitration has had its fierce critics, and its less fierce proponents, the result of historical

> *experience seems to have been a conclusion that first contract arbitration can be neither an exclusive nor a comprehensive remedy for the problems which may arise early in a collective bargaining relationship. It fills a modest role as an adjunct to other remedies and mechanisms which address related issues.*

The guidelines issued in the instance of *Prairie Micro-Tech Inc.* contained the following summary of our view of the place of first contract arbitration in the context of a collective bargaining relationship at 51:

> *In commenting on these and other criteria in [Yarrow Lodge Ltd. v. Hospital Employees' Union (1993), 21 C.L.R.B.R. (2d) 1 at 45-46], the British Columbia Labour Relations Board made the following observations:*
>
> > *The unions in these applications clearly want the Board to impose master or standard agreements on newly certified units. The employers clearly want a collective agreement that reflects the employment status quo. In resolving this policy issue, the Board first returns to the several principles it enunciated in this decision with regard to the interpretation of the first contract provisions as whole: first, Section 55 is a remedy for the breakdown of negotiations, not an unfair labour practice remedy; second, collective bargaining is the preferred vehicle for achieving first collective agreements; third, mediation is the policy choice for the resolution of first collective disputes; and fourth, the remedy is to be timely.*
> >
> > *Although it may seem self-evident or that we are simply stating the obvious, the policy of Section 55 is that the terms and conditions of a first contract are to be negotiated, not arbitrated. If the Board were to adopt the unions' position, as a matter of course, and impose the standard agreement, or adopt the employers' position and impose the status quo, that would be the end of collective bargaining under Section 55.*
>
> *Though this passage reflects the particulars of a different statutory regime, notably in the utilization of mediation at every stage of the process, the essential point - that first contract arbitration should reinforce rather than replace collective bargaining - is one which seems as important under our own legislation as under the provisions which are in place in British Columbia.*
>
> *It is impossible to say how hard or soft this Board would be in its application of these criteria in any particular circumstances. Clearly, the conduct of the parties, the course of bargaining, the effectiveness of third party intervention, and other factors would all have an effect on the degree to which it is appropriate to intervene. What we are trying to signal here is that this Board intends to take a cautious approach to providing assistance with the conclusion of first collective agreements, and that we will do everything we can to ensure that the onus continues to rest on the parties to reach a solution through bargaining.*

We have reviewed the sets of bargaining proposals which were submitted by the parties in connection with the application. It is evident that, although agreement has been reached on a number of matters, there are considerable differences between the two sets of proposals. Some of these may be minor in nature, but it is evident to us that the parties are divided on a number of significant issues. It would appear, for example, that the Employer has not yet made a proposal on wage rates, which is typically a matter of some importance in collective bargaining relationships.

Given the history of the relationship between these parties, we have concluded that it is unlikely that they would be able to reach an agreement if we were simply to allow them to continue bargaining as they have been. We have decided, pursuant to s. 42 of the *Act*, to appoint a Board agent to assist the parties in attempting to reach a collective agreement, and to report to the Board on the outcome of that process. This agent is being appointed according to the following terms:

- Mr. Fred Cuddington is hereby appointed as an agent of the Board for the purposes of this application.
- Mr. Cuddington will be permitted to assist the parties in whatever way he sees fit in an effort to resolve the outstanding issues between them. In the course of this process, he may refer to the Board any issues which he thinks the Board could appropriately clarify or determine. Without precluding consideration of other matters, these issues might include points of interpretation of *The Trade Union Act*, or questions arising out of these terms of reference. Mr. Cuddington may decide whether these issues should be referred to the Board with or without the participation of the parties.
- Mr. Cuddington will be expected to make a progress report to the Board at least every 15 days.
- Within 60 days of the date of this Order, Mr. Cuddington will make a final report to the Board. This report will contain his recommendations as to the terms which should be included in a first collective agreement between the parties. These recommendations will be made to the parties at the same time they are made to the Board. They will not be binding on the parties or on the Board. In addition to the recommendations, Mr. Cuddington may report to the Board on any other matter.
- The Board may extend the 60-day time period at the request of Mr. Cuddington.
- If either or both parties reject the recommendations, the Board will hold a hearing, at which the

parties will be asked to state the grounds on which they have rejected the recommendations. The Board may then proceed to make a decision whether to accept the recommendations in the report of the Board agent, or to hold further hearings at which the parties would be allowed to make further representations on issues defined by the Board.

- Mr. Cuddington will be supplied with a copy of the preliminary guidelines issued in connection with the *Prairie Micro-Tech* application, *supra*, as well as copies of the decisions of the Board relating to the collective bargaining relationship between these parties.

ALAN BUSSIERE AND ROWLAND BERNDT, Applicants and GRAIN SERVICES UNION, Respondent

LRB File Nos. 222-94 & 223-94; June 13, 1996
Chairperson: Beth Bilson; Members: Carolyn Jones and Gordon Hamilton

For the Applicants: Diane Bussiere
For the Respondent: Neil McLeod

Duty of fair representation - Scope of duty - Whether union is under absolute obligation to file grievance within time limits - Board deciding union is entitled to assess merits of grievance and to decide no grievance can be made.

Duty of fair representation - Scope of duty - Whether union discriminated against applicants by not obtaining severance package in circumstances where other employees getting early retirement of severance - Board accepting union explanation about distinctions among cases.

***The Trade Union Act*, s. 25.1.**

REASONS FOR DECISION

Beth Bilson, Chairperson: The Grain Services Union represents a bargaining unit of employees of PrintWest Communications Ltd.. This Employer is the successor of MC Graphics Ltd. Mr. Alan Bussiere and Mr. Rowland Berndt have filed an application in which they allege that the Union failed to represent them fairly in connection with issues arising from their layoff in the summer of 1991.

The original certification Order held by the Union was issued in 1955, and covered the employees of the *Western Producer*, a news publication distributed throughout the prairie provinces, and Modern Press, which carried out commercial printing as well as printing the newspaper. These entities were both owned and managed by the Saskatchewan Wheat Pool. According to Mr. Hugh Wagner, the General Secretary of the Union, the negotiation of collective agreements covering these employees were at that time conducted by representatives of the Saskatchewan Wheat Pool; he said that it was not until 1995 that representatives of the *Western Producer* were present at the bargaining table.

In 1987, the Saskatchewan Wheat Pool merged Modern Press with another printing company. The new company was called MC Graphics. Although the Saskatchewan Wheat Pool continued to own approximately 90 percent of the shares of the new company, the management of the company passed

into the hands of the minority shareholders, who had been owners of the other company. MC Graphics acknowledged that it was a successor of Modern Press for collective bargaining purposes. The Union formed a separate local to represent employees of MC Graphics from that which continued to represent the employees at the *Western Producer*. The new company continued to operate from a facility in the north end of Saskatoon adjacent to the premises occupied by the *Western Producer*.

It should be noted that a parallel process took place for two other groups of unionized employees, the pressmen and lithographers, who were represented by the Graphic Communications International Union ("G.C.I.U."), and the typesetters, who were represented by a division of the Communications Workers of America.

Mr. Wagner described the negotiations which commenced with the new company as difficult. He said that the Employer viewed the existing collective agreement as unduly generous in the context of conditions in the commercial printing industry. Among the changes which the Employer proposed were alterations in the pension plan and other benefits, an increase in hours of work, the elimination of the Supplementary Unemployment Benefit provision, and the removal of the sales staff from the scope of the bargaining unit.

The Union conducted a strike for five weeks in November and December of 1990 and, in the opinion of Mr. Wagner, managed to preserve the collective agreement more or less intact.

In early 1991, the unit of pressmen represented by the G.C.I.U. went on strike for a short period, which resulted in a reduction in the printing work done by the company. Even after this strike ended, the company continued through the spring of 1991 to communicate pessimistic reports of the financial outlook. At one meeting with representatives of the unions, the management asked them to forego the wage increases which had been included in the new collective agreements, and to make concessions concerning notice of layoffs and seniority provisions.

In response to the initial proposals for concessions, Mr. Wagner stated that the Union had made efforts to accommodate the Employer, but could not agree to the new demands made by management. Mr. Wagner suggested, however, that the Union might be prepared to consider the concessions if the Employer would consider provisions for severance. In a letter dated April 11, 1991, addressed to Mr. John Hudson, the President of MC Graphics, Mr. Wagner wrote as follows:

Dear Mr. Hudson:

Re: Company Financial Situation

Further to our meeting of April 9, 1991, this is to confirm the union proposal of a severance package. In our view a severance package in return for the concessions being proposed by the company is a reasonable and equitable arrangement that all concerned would support.

We would like the company to give positive consideration to the union's proposal. When one considers the length of service and dedication that employees have shown to the company's enterprise, we are certain that you will come to agree that a severance package is a desirable element of security which will enhance all joint efforts at turning around the business situation.

Yours truly,

H.J. Wagner,
Secretary-Manager.

Mr. Wagner testified that the proposal to discuss severance provisions arose from a fear that the company was in danger of going under, and that the Union was concerned about the implications of this for the employees. Mr. Hudson replied to Mr. Laurie Hopkins, the President of the local Union, in a letter dated April 29, that the company was unwilling to discuss severance, and urged the Union to give further consideration to the possibility of a wage freeze as a means of assisting the company in resolving the financial difficulties.

Shortly after this, the company entered into a work-sharing agreement with the Unemployment Insurance Commission, under which employees who were covered by the program were laid off for one day each week, and paid from by the Unemployment Insurance Commission during that time. As part of the application for access to this program, the Employer was required to state what steps had been taken to ensure that the shortage of work would be temporary. The following things were listed on the application:

1. *Retraining of employees.*
2. *Additional training of staff so they can work in other areas.*
3. *Accepting smaller printing orders.*
4. *Reduction of part-time staff.*
5. *Increased sales thrust.*
6. *Discounts and incentives offered to clients.*
7. *Staff encouraged to use vacation time during slow periods.*
8. *More preventative maintenance done on machinery to provide work for employees.*

Mr. Wagner said that he was not involved in any of the discussions of this program. He said that, where such programs are being implemented, it is the practice of the Union to ensure that any

discussions involve only the local officers of the Union, so that he and other staff from the head office of the Union can address any complaints which employees may raise. The work-sharing program went on till the end of June of 1991.

In the summer of 1991, Mr. Rowland Berndt, also known as "Reinie," was a mechanical supervisor in the machine shop. In this position, he was responsible for maintenance work on the presses and other machinery. Mr. Berndt had at one time been within the bargaining unit represented by the G.C.I.U., but had come within the jurisdiction of the Union in 1980. On July 24, 1991, Mr. Berndt was given a letter by Mr. Don Breher, the General Manager, which read as follows:

> *Dear Reinie:*
>
> *M.C. Graphics Inc. regrets to inform you that as a result of lack of work, the company has been required to reduce staff. Accordingly, your position is being terminated in accordance with Article 14 2(b) of the Collective Bargaining Agreement and your last day of work will be July 24, 1991. You have the following options and we request that you exercise one of these options on or before the close of business on Monday, July 29, 1991:*
>
> *(a) You may elect to exercise your seniority rights pursuant to Article 12 2(a) of the Collective Agreement between M.C. Graphics and the Grain Services Union to obtain another job for which you have the qualifications, ability and merit. For your information, a copy of the seniority list is attached. You may exercise your seniority rights to obtain any position for which you have the qualifications, ability and merit which is at the or below the pay grade which you currently receive. If you elect to exercise your seniority rights, please advise us immediately what position you would like to claim for which you believe you have the necessary qualifications, ability and merit;*
>
> *OR,*
>
> *(b) You may elect to be placed on lay-off effective July 24, 1991. If you do so, you will receive a cheque which represents fourteen days' pay in lieu of notice in accordance with Article 14 2(b) of the Collective Agreement. You may be recalled to work as and when sufficient work becomes available although we have no idea when this might be. Further, pursuant to Article 12 (7) of the Collective Agreement, you may be eligible for supplementary unemployment benefits. If you elect to be placed on lay-off and establish Unemployment Insurance eligibility, you should contact Joanne Robinson.*
>
> *Yours truly,*
>
> *Don Breher,*
> *General Manager*

When he handed Mr. Berndt the letter, Mr. Breher told Mr. Berndt that he could finish the job he was doing or he could leave immediately. Mr. Berndt sought the advice of the shop steward, Mr. Lyle

Boulton. Mr. Boulton advised Mr. Berndt to keep on working until the Union had an opportunity to arrange for him to bump into another position. When Mr. Berndt returned to work the following day, however, he was instructed by Mr. Breher to leave the premises at once.

Mr. Alan Bussiere was at this time working as a customer services representative, a position he had held since 1986. On July 24, Mr. Bussiere was given a letter by Mr. Breher which contained a notice identical to that given to Mr. Berndt. Mr. Bussiere testified that when he was proceeding to his desk to clear it out, he encountered Mr. Kevin Reese, the Vice-President of Finance of the Employer, who advised him that there was a chance he might be recalled to work, but it might be one or two years before this happened.

Mr. Wagner testified that the Union had no advance notice of the layoffs of Mr. Berndt, Mr. Bussiere, and a third employee, Ms. Wendy McDougall. He said that he had talked to Mr. Breher a couple of days prior to July 24, and the layoffs had not been mentioned. On July 24, he was out of the province, but was informed by Mr. Boulton shortly after the layoffs occurred. He said that he reached Mr. Bussiere by telephone at his home, and they had a brief discussion of the layoff notice. Mr. Wagner said that he spoke to Mr. Boulton again, and following that, he had another conversation with Mr. Bussiere.

Mr. Wagner said that all of the parties involved in these various conversations - Mr. Bussiere, Mr. Boulton and himself - were quite upset at the suddenness of the layoffs and the lack of consideration shown by the Employer. He said that he did provide some information to Mr. Bussiere about the options outlined in the letter, which included bumping into another position and taking the layoff subject to the right to be recalled. Mr. Wagner said that he specifically said that he was not optimistic about the possibility that Mr. Bussiere would be recalled to work, but that he regarded it as a decision for Mr. Bussiere to make.

In a letter dated July 31, 1991, Mr. Bussiere indicated to the Employer that his decision was to accept the layoff subject to the right of recall under the collective agreement. He was paid his accumulated vacation pay, as well as the wages for fourteen days in lieu of notice which were referred to in the letter from Mr. Breher. According to Mr. Wagner, he had talked to Mr. Bussiere again the day before this letter was sent, to ensure that Mr. Bussiere was clear about his options.

Mr. Wagner testified that he discussed the possibility of bumping into another position with Mr. Bussiere. Mr. Bussiere said that he was not interested in bumping into a position which was at a lower point on the pay scale. This left several positions for which Mr. Bussiere felt he did not have the qualifications. In the case of one of these, Mr. Wagner said that the Union would have been prepared to argue that Mr. Bussiere could easily be moved into the position; Mr. Bussiere said that he had assumed he did not have the proper qualifications. It is not clear that the two ever reached a firm conclusion on this issue.

Mr. Wagner said that he only spoke to Mr. Berndt once, though Mr. Boulton and Mr. Hopkins also spoke to him. Mr. Wagner said that he understood Mr. Berndt was not interested in bumping into a position at a lower wage. There were other positions for which he was not qualified, and he was not really interested in moving into a position in the office.

Mr. Wagner sent a letter bearing the date of July 24 to Mr. Breher, in the following terms:

> *Dear Mr. Breher:*
>
> *Re: POSITION ELIMINATIONS*
> *R. Berndt, A. Bussiere, and W. McDougall*
>
> *I am advised that you have informed the above noted employees that their positions with the Company have been eliminated as of this date. Given the fact that we met last week to discuss a variety of concerns, I am surprised at the fact and take exception to your failure to give the Union any kind of indication that action of this severity was going to happen.*
>
> *In addition to the foregoing, we take exception to the fact that once again management has refused to follow the proper notice provisions with regard to layoff and/or termination of employment. It seems that you have the view that there are one set of labour standards for M.C. Graphics and another for other employers. Furthermore, your indicated views regarding bumping rights do not appear to be consistent with the collective agreement.*
>
> *I would appreciate it if you would call me between the hours of 9:00 a.m. and 10:00 a.m. on Thursday, July 25, at (403) 948-3838, Room 326.*
>
> *Yours truly,*
>
> *Hugh J. Wagner,*
> *Secretary-Manager*

In his testimony, Mr. Wagner said that he also telephoned Mr. Breher the following day and expressed displeasure at the abruptness of the layoffs. Given the somewhat strained relationship which had existed between the Union and the Employer following the strike, Mr. Wagner said that he was

suspicious of the layoffs. He said that he consulted with Mr. Hopkins and Mr. Boulton, as well as asking some questions when he talked to Mr. Bussiere. He said that the consensus was that business had fallen off. In his own testimony, Mr. Boulton said that "everybody knew" that the Employer was having financial difficulty.

Mr. Wagner dispatched another experienced representative of the Union, Mr. Walter Eberle, to Saskatoon, to investigate the situation and to assess whether any action could be taken on behalf of the laid off employees. Mr. Eberle suggested that a grievance could be filed concerning the length of notice which had been given to the employees. Although the fourteen days' pay in lieu of notice accorded with the provisions of the collective agreement, it was less than the notice required under *The Labour Standards Act*, R.S.S. 1978, c.L-1.

In a grievance dated August 1, 1991, the Union raised this issue on behalf of Mr. Berndt, Mr. Bussiere and Mr. Curtis Roussel, an employee who had been laid off at an earlier date. The grievance indicated the position of the Union that in the case of Mr. Berndt, the appropriate amount of notice would be six weeks, and in the case of Mr. Bussiere, two weeks. The period of notice claimed for Mr. Bussiere was subsequently amended to eight weeks.

The Employer took the position in response to the grievance that a claim for the notice provided under *The Labour Standards Act* was not arbitrable under the collective agreement. The Union took the position that an arbitrator could interpret the collective agreement in light of *The Labour Standards Act*, and continued to advance this argument. At the same time, however, they decided to file a complaint with the Labour Standards Branch in the Department of Labour. While this complaint was being processed, the Union declined to withdraw the grievance, and continued to pursue it through the steps of the grievance procedure.

The labour standards complaint with respect to the appropriate pay in lieu of notice was ultimately pursued through the courts. A solicitor was retained at the expense of the Union, and the complaint was eventually successful. The Union had to have the decision of the court enforced against the Employer, and the money was not paid to Mr. Berndt and Mr. Bussiere until October of 1992.

In a letter dated September 26, 1991, the Saskatchewan Wheat Pool sent a letter to Mr. Bussiere outlining the available options for dealing with his accrued contributions to the Saskatchewan Wheat

Pool Pension Plan. Mr. Bussiere sent a copy of this letter to Mr. Wagner asking for his advice.

Mr. Wagner said that he noticed that the letter began by referring to the "termination" of Mr. Bussiere. He said that he told Mr. Bussiere this was an error, and that he would ask the author of the letter to issue a new letter correcting this and other minor errors. He had no knowledge of whether such an amended letter was provided to Mr. Bussiere.

Mr. Wagner said that he explained the implications of the options contained in the letter to Mr. Bussiere. He said that, in the case of an employee with relatively short service, the withdrawal of contributions from the plan and their investment in a private retirement savings plan often leads to a higher financial return. The alternative would be to let the contributions remain in the pension plan until the employee reached the retirement age provided for by the plan.

Mr. Wagner testified that he was certain he had explained to Mr. Bussiere that the withdrawal of pension contributions from the plan could only be done if Mr. Bussiere was prepared to sever his employment relationship with the Employer. The recollection of Mr. Wagner was that Mr. Bussiere said that he was "through with" MC Graphics, and was considering taking employment elsewhere. Mr. Wagner said that he advised Mr. Bussiere, as he would advise any employee in these circumstances, to seek the advice of a financial adviser before making a decision.

Mr. Bussiere said that he did not understand that the withdrawal of his pension contributions would mean he was no longer an employee, and that he did not remember Mr. Wagner telling him this. He did seek the advice of a financial counselor, who informed him that the withdrawal of his contributions from the pension plan would be financially advantageous to him. Mr. Bussiere proceeded with the option of withdrawing from the pension plan, a fact of which Mr. Wagner became aware as a trustee of the pension plan.

Around the same time, Mr. Wagner was informed by Mr. Boulton that Mr. Berndt had accepted early retirement from the Employer. He had not discussed this with local representatives of the Union or with Mr. Wagner prior to retiring. Mr. Wagner said that he discussed with Mr. Boulton the impact this might have on the ability of Mr. Berndt to take advantage of the full amount of Supplementary Unemployment Benefits provided under the collective agreement. He said that, through some administrative oversight, Mr. Berndt did continue to receive these in any case.

Mr. Wagner continued to be in contact with Mr. Berndt, and with Mr. Bussiere and his wife, who were interested in knowing whether there was anything else the Union could do for the two employees.

The collective agreement between the Union and MC Graphics was due to expire at the end of January, 1992. At a meeting in November of 1991, members of the local discussed possible bargaining proposals. According to Mr. Wagner, the continuing financial difficulties of successive employers had led the Union to become painfully aware that the collective agreement did not provide for severance pay, aside from the minimal amount in lieu of notice, or for an early retirement plan, except in those portions of the agreement dealing with technological change. It will be recalled that the Union had raised the issue of severance pay in connection with the demands made by the Employer for a wage freeze.

At the membership meeting, resolutions were passed calling for proposals for a "severance allowance of two weeks' pay to cover all cases of job elimination," and for an early retirement plan. In the resolution concerning the severance allowance, the membership directed the bargaining committee to attempt to have a severance allowance applied retroactively to the cases of Mr. Berndt and Mr. Bussiere, who were identified in the resolution by name.

The collective agreements between the Union and the Saskatchewan Wheat Pool were also expiring at the end of January, 1992. Mr. Milt Fair, the Chief Executive Officer of the Saskatchewan Wheat Pool at that time, suggested that he would like to try reaching agreement through informal discussions with Mr. Wagner on bargaining issues, rather than having a full-scale set of negotiations. Mr. Wagner agreed, and he and Mr. Fair discussed of a number of issues in December of 1991.

Just prior to this, the decision had been made to eliminate Prairie Books, a division of the *Western Producer*, with attendant loss of approximately six jobs. In his conversations with Mr. Fair, Mr. Wagner asked the Saskatchewan Wheat Pool to consider a severance settlement for the employees of Prairie Books, as well as Mr. Berndt and Mr. Bussiere. In the end, Mr. Fair and Mr. Wagner agreed on a severance settlement to be given to the Prairie Books employees; this settlement was on an *ad hoc* basis, and did not represent an acceptance of a general severance provision. With respect to Mr. Berndt and Mr. Bussiere, however, Mr. Fair took the position that they were not employees of the Saskatchewan Wheat Pool, and that any discussion of a severance settlement for them would have to be conducted with MC Graphics.

In preparation for the hearing of these applications, Ms. Bussiere wrote to Mr. Fair, to Mr. Don Loewen, the current Chief Executive Officer of the Saskatchewan Wheat Pool, and to Mr. Jacques Pelletier, their Manager of Employee Relations, asking them if the Union had ever made representations to them concerning the possibility of a severance settlement for Mr. Bussiere and Mr. Berndt. Mr. Pelletier and Mr. Loewen denied any recollection of such approaches. Mr. Fair replied in the following terms:

> *Re: Labour Relations Board Hearing - Alan Bussiere*
> *and Rowland Berndt*
> *MC Graphics/Print West Communications, Saskatoon*
>
> *In response to your query of February 14, 1996, Saskatchewan Wheat Pool had no responsibility for employees following transfer of the printing operations to MC Graphics. At this stage I do not recall details of any discussions which may have occurred in the months of November/December 1991 with respect to the two named individuals.*
>
> *Yours truly,*
> *J.M. Fair*

It is not surprising that neither Mr. Loewen nor Mr. Pelletier had any recollection of discussions concerning Mr. Berndt and Mr. Bussiere, given that they were not involved in the conversations with Mr. Wagner. Though Mr. Fair said that he did not remember the details of conversations with Mr. Wagner, he did not deny that such conversations had taken place, and his position with respect to the separate corporate nature of MC Graphics is consistent with the position Mr. Wagner recalled him to have taken at the time.

Early in 1992, Mr. Wagner and Mr. John Hudson had some conversations off the record, similar to those which Mr. Wagner had with Mr. Fair concerning the terms and conditions for employees of MC Graphics. These discussions reached no conclusion, and the bargaining committees of the Union and the Employer began to meet on April 22, 1992.

The negotiations were complicated by the fact that another phase of corporate reorganization was in progress. A plan to merge several printing firms in Saskatoon and Regina culminated with the announcement in June of 1992 of the formation of PrintWest Communications Ltd. The new Employer agreed to assume the obligation of collective bargaining with the Union.

While the plans for the new entity were being finalized, bargaining continued between the Union and MC Graphics. The Employer was, as Mr. Wagner put it, "adamant" that they would not consider a

general severance provision, and they were particularly resistant to the idea of giving any severance settlement retroactive effect so that it would cover Mr. Berndt and Mr. Bussiere. The Employer renewed their proposal that the sales staff be removed from the scope of the bargaining unit.

As the administrative reorganization went on, the Union became concerned that the Employer might be intending to close down the Saskatoon plant altogether, and to operate from facilities in Regina. The Employer denied that this was their intention, but it became clear that they intended to move the accounting and payroll functions to Regina, to avoid duplication of computer systems. The Union took the position that this was a technological change, and that any bargaining unit employees who were affected would be covered by the severance or early retirement provisions of the collective agreement. This was a position which the Employer ultimately agreed to, and a severance settlement was given to two accounting employees in the bargaining unit.

The Employer eventually withdrew the proposal that the sales staff be removed from the bargaining unit. They had put the remuneration of new sales staff on the basis of a commission rather than a salary, with the result that only two employees, Mr. Hopkins and Mr. George Walker, remained on salary. The Employer proposed that these employees be given an early retirement offer in order to accomplish the objective of having the entire sales staff on commission.

In response to the proposal that Mr. Hopkins and Mr. Walker should be given early retirement, the Union pressed for them to be given severance pay on a more generous basis. Mr. Wagner said that it was his recollection that the position of the Employer on this issue hardened in the fall of 1992 after the Union had been successful with the labour standards complaint related to Mr. Bussiere and Mr. Berndt.

Mr. Wagner made a report to the Union membership on December 17, 1992, which was summarized in the minutes as follows:

> *Secretary-Manager Wagner advised that the main outstanding issues were the benefit plans continuation, hours of work, early retirement, and severance benefits. He advised that the Company Management was resisting any improvement related to early retirement or expansion of the severance benefits to employees who had already been terminated.*

In early January of 1993, Mr. Keith Critchley, the Chief Executive Officer of PrintWest Communications Ltd., assumed primary responsibility for negotiations with the Union. He, along with Mr. Hudson and Mr. Breher, met with the Union bargaining committee on January 5. Mr. Wagner

said that Mr. Critchley expressed dissatisfaction with the proposals which had been made to that point, and withdrew the offer previously made by the Employer. A new proposal was put to the Union, the elements of which were reported to the Union membership on January 11 as follows:

> *1. The proposed agreement was for the period of February 1, 1992, to January 31, 1995.*
>
> *2. The Management proposed a wage freeze for the first two years with a general wage increase of 3% to be effective February 1, 1994.*
>
> *3. In addition to the foregoing, Management was proposing a thirty-seven and one-half hour work week which was an increase of two and one-half hours per week from the previous standard of thirty-five hours.*
>
> *4. The issue of the salary plan for Sales Representatives was unresolved and the parties were to continue bargaining with regard to a system for new hires. Existing employees would continue with the old compensation system.*
>
> *5. The Company was not willing to revise and extend the severance allowance provisions to all situations of job elimination.*
>
> *6. The Company had agreed to an early retirement package for George Walker and Laurie Hopkins which was patterned after the one negotiated between the Union and Saskatchewan Wheat Pool.*

Mr. Wagner told the members of the Union that the only choices available to them were to accept this offer or to be prepared to go on strike in an attempt to achieve a better settlement. After discussion, the membership voted to accept the offer. Mr. Wagner testified that the Memorandum of Agreement was, in fact, never signed, because the Employer never put forward a formula for remuneration of the sales staff as the settlement contemplated.

Though the membership had voted to accept an agreement which did not include any provision for severance for Mr. Berndt and Mr. Bussiere, Mr. Wagner made a further approach to Mr. Critchley concerning this issue, in a letter dated April 6, 1993, which read as follows:

> *Dear Mr. Critchley:*
>
> *Re: <u>Severance Benefits</u>*
>
> *Certain former employees whose services were terminated as a result of a business downturn have learned that other employees have since received severance allowances. Quite naturally, the previously disenfranchised employees are seeking financial compensation in recognition of their service to Modern Press/MC Graphics.*
>
> *The employees in question are: Rowland Berndt, Alan Bussiere and Curtis Roussel. I would appreciate if you would consider the situation of these individuals with a view to compensating them.*

Thank you for your consideration.

Yours truly,
Hugh J. Wagner
Secretary-Manager

Just prior to this, Mr. Berndt had contacted Mr. Wagner to ask why the employees who had been displaced as a result of the move of the accounting functions to Regina had received severance, while he and Mr. Bussiere had not. Mr. Wagner replied in a letter, also dated April 6, 1993, of which the final paragraphs were as follows:

> *The employees who your letter refers to are receiving severance pay because their work is being transferred to Regina as a result of a reorganization that is arguably part of a technological change. In your instance the Management argues that the termination of employment occurred because there was a shortage of work, not a transfer of work nor a technological change.*
>
> *Given your status as a retired employee and/or a severed employee, I do not think that a grievance seeking severance pay would succeed. At present, agreement renewal bargaining is not an option; therefore, I am at a loss as to further action.*
>
> *Notwithstanding the foregoing, I will approach Company Management to urge a reconsideration of your situation. Considering their past responses and present circumstances, I am not optimistic.*
>
> *Yours truly,*
> *Hugh J. Wagner*
> *Secretary-Manager*

In a letter dated April 15, 1993, Mr. Critchley responded to Mr. Wagner in the following terms:

> *Dear Hugh:*
>
> *RE: Severance Benefits*
>
> *Rowland Berndt, Alan Bussiere and Curtis Roussel were employees terminated as a result of a merger. They will not be receiving additional compensation.*
>
> *It concerns me that your membership appears not to have grasped the severity of our current financial situation. PrintWest does not have the financial or human resources to start examining previous terminations with the view to changing the conditions under which people left our employ. Furthermore, our current turnaround plan to break even by the end of the 1994 fiscal year is based upon exact budget figures for Labour.*
>
> *Should these projections change, so, too, would our future as a company.*
>
> *I appreciate your understanding in this matter.*
>
> *Sincerely,*
> *F. Keith Critchley*
> *President*

Sometime in the early months of 1993, Mr. Wagner had some discussion with Ms. Bussiere about the results of the bargaining which had taken place in 1992. According to Mr. Bussiere, he and his wife had encountered Mr. Hopkins, and had been informed that the settlement had been reached without any agreement that a severance settlement should be paid to Mr. Berndt and Mr. Bussiere. Mr. Wagner said that he explained to Mr. Bussiere the course of events which had led to this.

In a letter of May 14, 1993, Mr. Bussiere wrote to Mr. Wagner posing a number of questions about the status of the severance pay issue from the time of the layoff. He cited the payments made to the accounting employees, and to the Prairie Books employees. Mr. Wagner replied to these questions in a letter dated July 7, 1993. This letter concluded with the following statements:

> *I certainly think that you and the others should have received a severance package; however, aside from bargaining, I have had no legal basis on which to secure one. As for bargaining, the reluctance of members to hold another strike certainly removes our ability to apply pressure.*
>
> *I enclose a copy of the collective agreement. Management's reaction to my severance pay proposal of April 6, 1993, was an emphatic no.*
>
> *I wish I could be more positive about the proposals, but I just do not see where we would have a foothold for a legal action in this instance. If you have a suggestion, please convey same.*
>
> *In Solidarity,*
> *Hugh J. Wagner*
> *Secretary-Manager*

Though the specific date is unclear, at some time in the spring or summer of 1993 an advertisement appeared, apparently placed by the Employer, for a customer service representative. Mr. Wagner said that a copy of the advertisement was supplied to him by Ms. Bussiere or Mr. Bussiere. At the time, he said, he was of the opinion that, as Mr. Bussiere had severed his employment with the Employer, he could make no prior claim to this job, although it was open to him to apply. He said Mr. Bussiere never suggested that he wished to apply for the position, and it was filled by another bargaining unit employee.

The financial situation of the Employer continued to deteriorate over the course of 1993, and in December of 1993, the Union agreed to a 9.5% wage rollback of one year in duration to allow the capital position of the company to improve.

In January of 1994, Mr. Bussiere sent Mr. Wagner a letter which read as follows:

Dear Mr. Wagner:

Re: Severance Pay - Alan Bussiere and Rowland Berndt

Please provide us with a copy of the following information:

- *All proposal packages (both Management and Union) that were used for bargaining the Contract commencing February 1, 1990 - January 31, 1992, for the employees of M.C. Graphics and also proposal packages for the Contract commencing February 1, 1992.*

- *All proposal packages (both Management and Union) that were used for negotiating the Contract for the Prairie Books employees and any correspondence that pursued the severance package that was achieved and applied retroactively on their behalf for the same time period.*

- *Any correspondence regarding pursuing a severance package for either Rowland or myself, other than your letter of April 6, 1993, which was sent following Rowland Berndt's request to do so.*

- *The job postings transferring Jo-Anne Robinson and Bonnie Ewing's positions to the Regina plant.*

- *Any correspondence that pursued the severance packages for Jo-Anne and Bonnie; or were their packages just offered by the Company?*

- *A copy of all Local Union meeting minutes, from the time of our termination/layoff (July 1991) until the present. The minutes were transferred to Lyle Boulton upon Bonnie Ewing's termination.*

MC Graphics posted and filled a Customer Services Representative position (a copy of the Star Phoenix Ad attached) in May 1993. Was the Union notified of the posting? What was the Employer's obligations under the Lay-Off clause in the Collective Agreement?

Do employees remain on a recall list for a period of six months when laid off? The Contract is not clear on this issue. It does speak to Supplemental Unemployment Benefits ceasing after 6 months and Enhanced Early Retirement being offered following that period.

As you are aware, we will likely be filing a claim under Section 25.1 - Fair Representation, of The Trade Union Act with the Labour Relations Board. It is unfortunate that this route has to be pursued, however Rowland and I have a combined total of approximately 55 years of seniority with the Company, and have always been active supporters of our Union. The Company has been allowed to discriminate against us. We feel that all possible avenues should have been pursued, including filing a grievance, to obtain lump-sum severance packages for us - as was done for others.

Please provide us with the requested information as soon as possible so that we can determine whether the Union made a reasonable effort to attain a severance package for us.

We will advise you of our decision regarding proceeding.

Yours truly,

Alan Bussiere

In a letter dated January 27, 1994, Mr. Wagner replied in the following manner:

Dear Mr. Bussiere:

Re: Severance Pay - Rowland Berndt and You

This is to acknowledge receipt and to reply to your letter of January 24, 1994 (received January 27, 1994).

By previous correspondence, I have addressed every question that you have raised with respect to your desire for severance pay. Unfortunately, there was no legal, contractual, or bargaining pressure that we were able to bring to bear so as to obtain severance pay for you and Mr. Berndt. We spared no effort and tried our best but we were unsuccessful. In large measure, our lack of success stemmed from the fact that you chose to voluntarily sever yourself from the workplace, thereby relinquishing any other claims you might have had, such as supplementary unemployment benefits. As far as I am aware, you took this action without consulting me or any other officer of the Union or me.

I will not be forwarding any additional material since I have been more than patient and forthcoming with respect to your prior requests for information. It seems to me that you are prepared to blame the Union for regretful consequences that it was in no position to change, but you have failed to address the central issue and that was your own action of severing your employment even prior to the commencement of bargaining in 1992. Notwithstanding your act of quitting, we did pursue the issue of severance benefits for you and Mr. Berndt. We were not successful.

Yours truly,
Hugh J. Wagner,
Secretary-Manager

In their application, Mr. Bussiere and Mr. Berndt have alleged that the Union was in breach of the duty to represent them fairly. They have cited a number of instances of conduct on the part of the Union which constitute, in their view, violations of the duty which is owed to them; these include the failure of representatives of the Union to provide them with appropriate information on a number of occasions, and lack of access to copies of the collective agreement. There are two major grounds, however, which form the basis of their claims, and the preponderance of the evidence at the hearing was connected with these two issues.

The first of these complaints was that the Union did not file a grievance on behalf of Mr. Bussiere and Mr. Berndt contesting the layoffs themselves. The second was that the Union failed to pursue a severance package for the two employees with sufficient vigour, notwithstanding the fact that a number

of other employees received severance packages or early retirement packages shortly after the layoffs of Mr. Bussiere and Mr. Berndt.

In a decision in *Banga v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93, the Board made the following observation concerning the rationale for the recognition of a duty on the part of trade unions to represent employees fairly, at 97:

> *This Board has had occasion in a number of recent cases to consider the nature of the obligation resting on trade unions to represent their members fairly. As we have pointed out before, the duty of fair representation arose as the quid pro quo for the exclusive status as bargaining agent which was granted to trade unions under North American collective bargaining legislation. Once a certification order is granted on the basis of majority support, members of the bargaining unit have no choice as to who will represent them, whether or not they were among those who supported the union. This exclusive status gave trade unions security and influence; it was, however, viewed as imposing upon them an obligation to represent all of those they represented in a way which was not arbitrary, discriminatory or in bad faith.*

As Mr. Bussiere and Mr. Berndt discovered when they obtained advice from solicitors in the fall of 1991, the advent of a collective bargaining relationship signifies the displacement of the previous relationship of employer and employees which was based on concepts drawn from the common law of contracts. The trade union has, by virtue of the certification Order, obtained the exclusive right to negotiate with the employer the terms and conditions of employment which will apply to employees in the bargaining unit which the trade union represents. The recourse which employees might have had to common law remedies through the civil courts is replaced by recourse to the relief which the trade union may be able to obtain, either through the grievance procedure or through negotiation with the employer.

As the passage quoted above from the *Banga* decision, *supra*, suggests, this does not mean the decisions of a trade union escape all scrutiny with respect to the quality of representation offered to employees, or that a trade union is at liberty to make whatever decisions it pleases. The formulation and refinement of the concept that trade unions owe to the employees who depend on their representation an obligation to carry out that responsibility in a fair, conscientious and even-handed manner has resulted in the imposition of certain requirements for trade union decision-making.

The nature of the obligation of a trade union towards bargaining unit employees has generally been summarized by saying that the trade union must not act in a way which is arbitrary, discriminatory or in bad faith. These terms, indeed, are used in s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c.T-17,

which reads as follows:

> *25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*

In *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, the Supreme Court of Canada provided a summary of the principles which describe the duty of fair representation, at 527:

> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *1. The exclusive power conferred on a union to act as a spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employees.*

In formulating these principles, the Supreme Court alluded to the remarks of the British Columbia Labour Relations Board in *Rayonier Canada (B.C.) Ltd. v. International Woodworkers of America and Ross Anderson*, [1975] 2 Can.L.R.B.R. 196, at 201-202:

> *...The union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory matter. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*

In a decision in *Chrispen v. International Association of Fire Fighters*, [1992] 4th Quarter Sask. Labour Rep. 134, LRB File No. 003-92, the Board made this comment on the nature of the duty of fair representation, at 150-151:

> *The reason why cases involving allegations of arbitrariness are the most vexing and difficult is because they require the Board to set standards of quality in the context of a statutory scheme which contemplates that employees will frequently be represented in grievance proceedings by part-time union representatives or even other co-workers. Even when the union representatives are full-time employees of the union, they are rarely lawyers and may have few qualifications for the responsibilities which this statutory scheme can place upon them.*
>
> *In order to make this system work, the legislature recognized that union representatives must be permitted considerable latitude. If their decisions are reversed too often, they will be hesitant to settle any grievance short of arbitration. Moreover, the employer will be hesitant to rely upon any settlement achieved with the union if labour boards are going to interfere whenever they take a view different from that of a union. The damage this would do to union credibility and the resulting uncertainty would adversely affect the entire relationship. However, at the same time, by voluntarily applying for exclusive representative status, the union must be prepared to accept a significant degree of responsibility for employees, especially if an employee's employment depends upon the grievance.*
>
> *In an effort to accommodate these competing interests, the American courts, then the various labour relations boards... and finally the Legislatures, determined that the appropriate standard of care for union representatives was a negative one; a union must not represent its members in a manner that is arbitrary, discriminatory or in bad faith. The Board's inquiry is limited to a search for arbitrariness, discrimination and bad faith. If the union's decision is free from these three elements, there is no violation of the duty of fair representation and no redress available to the employee, even though the Board might be of the view that the union made an error in the handling or disposition of the grievance.*

The Board has subsequently attempted to describe the duty of fair representation in a number of cases. An example may be found in *Radke v. Canadian Paperworkers Union*, [1993] 2nd Quarter, Sask. Labour Rep. 57, LRB File No. 262-92, at 64-65:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*

A further example is contained in the following comment made in the decision in *Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter, Sask. Labour Rep. 65, LRB File No. 134-93, at 73:

> *Though an employee embroiled in a situation in which the assistance of his trade union is required may be expected to regard his own objectives and interests as being of preeminent importance, the trade union is not obligated to give them the same priority. The interests of other employees, the overall strategies being pursued by the union, the likelihood of success if a particular course is followed - all of these are things the union is entitled to weigh in making its assessment of the circumstances. The union is not expected to be right all the time, or to have an unusual degree of prescience. In representing each of its members, the union is, however, expected to evaluate their interests honestly, conscientiously, and with attention to all of the facets of the situation which are relevant. If the trade union has done that, they are entitled to pursue a course which may differ from that desired by an employee.*

It will be noted from these descriptions, and others which have been given by this and other labour relations boards, that the duty of fair representation imposes a responsibility on trade unions to make their decisions in a thoughtful and impartial way. This responsibility is grounded in the exclusive nature of their representational role, and the seriousness of the employee interests which lie within the scope of their stewardship.

It will also be noted, however, that the duty to represent employees fairly does not necessarily entail making decisions so that they will accord with what individual employees prefer, desire or demand. In defining the duty which rests on trade unions, labour relations boards and courts have taken into account, among other things, the complex and entangled nature of the issues which trade unions must address, the democratic character of much union decision-making, and the labour relations environment in which decisions are made.

In assessing the conduct of a trade union in any particular case, the Board must keep in mind that the role of the union with respect to an individual employee is not that of a solicitor retained by the employee to carry out instructions, but that of a representative who must consider and balance many interests in addition to that of the individual. In *Barabe v. Communications, Energy and Paperworkers Union*, [1994] 3rd Quarter, Sask. Labour Rep. 162, LRB File No. 116-94, the Board made this comment, at 171:

> *As the Board pointed out in the Chrispen decision, [supra], the responsibility of a labour relations tribunal charged with assessing the conduct of a trade union in relation to the duty of fair representation is not to pronounce on the merits of the decision the union has made, nor to confine decision-making by trade unions within the boundaries of rigid or unrealistic criteria, but to evaluate the quality of the representation which a trade union has given to one of its members in particular circumstances. The factors which enter into a trade union decision may be variable;*

> *the same may be true of the factors the Board considers relevant to assessing the conduct of the trade union. The point is not to second guess the union, to trip it up with technical or procedural requirements or to require standards which could not reasonably be met, but to examine whether the union has conscientiously and reasonably represented the interests of a member who has no alternate recourse for the protection of those interests.*

Ms. Bussiere, making representations on behalf of Mr. Bussiere and Mr. Berndt, argued that the Union had been guilty of a breach of the duty of fair representation in not filing a grievance contesting the layoff of Mr. Bussiere and Mr. Berndt. She argued that it is incumbent on a trade union to file a grievance within the existing time limits, and that by failing to do this, the Union had allowed an opportunity for redress for Mr. Bussiere and Mr. Berndt to slip away.

Though it was not altogether clear from the evidence and argument put forward on behalf of the Applicants, it would appear that their view was that a grievance should both have attacked the layoffs themselves, and advanced a claim for severance. Both Ms. Bussiere and Mr. Bussiere said that they had relied, as they were entitled to do, on the expertise of the Union in formulating a grievance. Ms. Bussiere argued that a grievance might have taken either, or perhaps both, of these approaches; the important thing, as she saw it, was to file a grievance which would comply with the time limits under the collective agreement.

Mr. Wagner testified that, because the layoffs occurred in fairly close proximity to the strike which had occurred at the end of 1990, the Union was particularly vigilant with respect to any conduct of the Employer which might be characterized as punitive. He said that he personally checked with some of the Union officials at the local level, in an effort to ensure that the reason given for the layoffs - lack of work - represented a plausible explanation for the reduction in the work force. He said that everyone he spoke to confirmed that the Employer was having financial difficulties, and that the amount of work had decreased. In his evidence, Mr. Boulton went so far as to say "everyone could see" that the company was having trouble.

Ms. Bussiere argued that the Union should, nonetheless, have filed a grievance challenging the reason given for the layoffs. She said, indeed, that she had asked this very question of Mr. McLeod, who appeared as counsel for the Union, at a workshop she had attended; she said that he had replied that the correct course of action was for the Union to file a grievance as soon as possible, in order to avoid the difficulties which would arise if the grievance were out of time.

With respect to the possibility of filing a grievance which asked for a severance settlement for Mr. Bussiere and Mr. Berndt, Mr. Wagner said that he and Mr. Eberle had reviewed the collective agreement, and had decided that there was no foundation for such a claim, except in circumstances which amounted to technological change. Mr. Wagner said that his assessment at the time was that the layoffs did not constitute a technological change within the meaning of that term as used in the collective agreement. He further said that the Union had identified the absence of severance provisions as a general weakness of a number of collective agreements around this time, and he acknowledged that employees were not well-protected in the case of a business downturn of the kind to which the Employer referred as the basis for the layoffs.

In a letter dated August 6, 1991, Mr. Bussiere wrote to Mr. Wagner in the following terms:

> *Attached is a copy of the letter given to M.C. Graphics regarding my lay-off notice. Also attached is a copy of their letter to me with severance and vacation pay calculations.*
>
> *Could you please review the Labour Standards Act and advise me what I am eligible for in regards to severance pay out. I have worked for the Wheat Pool for 22 years. If a grievance would have to be filed, how many days do I have to file it?*
>
> *Thanks.*
>
> *Alan - residence phone 242-8117*

Ms. Bussiere argued that this represented a clear request for the filing of a grievance on the severance issue. Mr. Wagner said that he had read this request as relating to the issue of appropriate notice of layoff. It was this issue which was raised by the Union in the grievance which was filed on behalf of Mr. Bussiere and Mr. Berndt. The Union also pursued the matter by means of a labour standards complaint, and underwrote the legal costs so that the complaint could be taken to court.

In a general sense, it is difficult to argue with the proposition that it is usually sound practice for a Union to preserve the rights of employees by filing a grievance, even if they are not altogether sure the grievance can be sustained, in order not to lose the opportunity to pursue the matter through the grievance procedure. This does not mean that a trade union has an absolute obligation to file a grievance on every occasion when something occurs which is to the detriment of an employee.

A grievance is not simply a statement that an employee - or the Union - is unhappy with something that has happened. It is an allegation that the employer is guilty of the violation of some right laid out in the collective agreement. Trade unions certainly file grievances in situations where they have some doubt

as to whether they will ultimately be able to establish a case because of an absence of evidence or some other deficiency. Even in these cases, however, they generally have a clear idea of what they are alleging the employer to have done which can be characterized as violating a provision of the collective agreement.

In this case, Mr. Wagner and Mr. Eberle, both of whom have considerable experience in handling grievances, and in dealing with a variety of employers, concluded that there would be no foundation for any allegation that the layoffs were not in fact based on a lack of work, and constituted dismissal for cause. In making this judgment, they consulted with persons in the local who could provide them with information about the current state of affairs in the workplace.

It is not the role of this Board to determine whether Mr. Wagner and Mr. Eberle were right or wrong in coming to this conclusion. It is, instead, our responsibility to assess whether there was anything about the decision which suggests that it fell below the standards required by the duty of fair representation. In our view, Mr. Wagner and other representatives of the Union obtained appropriate information and considered all of the factors which might be relevant to the decision, and there is nothing to indicate that the decision was based on bad faith or any discrimination against Mr. Bussiere and Mr. Berndt. On the surface, the conclusion itself seems a reasonable one, particularly in light of the subsequent concessions made by the Union in an attempt to prevent financial catastrophe for the Employer.

With respect to the question of whether the Union should have filed a grievance claiming a severance settlement for the two employees, Mr. Wagner testified that he was of the opinion that there was no provision of the collective agreement which could be cited as the basis for such a claim. He said that he did not recall Mr. Bussiere or Mr. Berndt initiating discussion of such a grievance. In particular, he said, he did not interpret the letter from Mr. Bussiere bearing the date of August 6 as raising this issue.

In our view, the opinion of Mr. Wagner and others in the Union that there was no provision in the collective agreement which could form the basis for a claim for a severance at the time of the layoffs was a reasonable one. In light of this opinion, it was also reasonable for them to conclude that there was no way a grievance could be filed claiming severance payments.

The Union did identify the possibility of a grievance in connection with the provision of the collective agreement which provided a period of notice, or pay in lieu of notice. This provision had been based

on the comparable provisions of *The Labour Standards Act*, which had subsequently been amended to provide for a longer period of notice. The question raised in the grievance was whether the Employer was entitled to rely on a notice provision less generous than that in *The Labour Standards Act*. The Union pursued this issue with diligence, and ultimately succeeded in obtaining payment for a notice period considerably in excess of that outlined in the collective agreement in the cases of both employees.

The second major complaint made by the Applicants is that the Union failed to pursue the possibility of a severance settlement for these two employees, despite the fact that a number of other employees obtained severance payments or early retirement packages some months after Mr. Bussiere and Mr. Berndt were laid off. It was clear from their evidence that Mr. Bussiere and Mr. Berndt regarded the failure on the part of the Union to obtain comparable settlements for them was indicative of some discrimination or other unfairness by the Union.

Our earlier review of the facts indicates that the issue of severance for Mr. Bussiere and Mr. Berndt was raised by the Union in a number of ways. At the direction of the members of the bargaining unit in November of 1991, Mr. Wagner and other members of the Union bargaining committee included the issue of severance payments to Mr. Bussiere and Mr. Berndt among the proposals placed on the bargaining table by the Union. It is true that this issue was ultimately withdrawn, but it was one of the issues considered in relation to the choice of accepting the last offer of the Employer or taking industrial action.

Mr. Wagner raised with Mr. Fair the issue of severance for the two employees in the conversations off the record which occurred in December of 1991. Mr. Fair took the position that the Saskatchewan Wheat Pool had no interest in doing anything for Mr. Bussiere and Mr. Berndt because they were no longer employed by the Saskatchewan Wheat Pool.

As late as April of 1993, Mr. Wagner raised the issue again with Mr. Critchley, who represented the new Employer of the bargaining unit employees, who flatly refused to consider it further.

In an earlier section of these Reasons, we discussed whether it was reasonable on the part of the Union to conclude that there was no right enshrined in the collective agreement on the basis of which to assert a claim on behalf of Mr. Bussiere and Mr. Berndt. In the absence of obligations to which a trade union

can hold an employer through the grievance procedure, decisions about how and when to raise issues, and when to drop them, must be made in a more contingent context.

It must be remembered, as well, that the position of the Union to make claims on behalf of these employees was considerably weakened by the fact that both of them had severed their employment connection with the Employer. Neither of them was any longer in the position of a laid off employee retaining a notional right to recall. Mr. Berndt had chosen to accept an early retirement package, without consulting the Union. Mr. Bussiere had chosen to withdraw his contributions to the pension plan, which had the effect of severing his employment relationship.

Mr. Bussiere testified that he had not understood that his decision to withdraw from the pension plan would have this effect. It would also appear that Mr. Berndt continued to think of himself as an employee, particularly as he subsequently obtained casual employment in the same workplace, apparently without the knowledge of the Union. Whether or not either or both of the employees understood their employment status is difficult to say. We are persuaded, however, that Mr. Wagner and other representatives of the Union took reasonable steps to explain the situation to the employees, and pointed out the implications of taking various courses of action.

Mr. Berndt and Mr. Bussiere cited the examples of a number of other employees who obtained severance or early retirement packages in the months following their layoffs. In his evidence, Mr. Wagner provided an explanation of the differing circumstances of all of these employees.

Mr. Norm Williams testified that he had received a payment of three months' salary when his employment had been terminated at the end of a short employment period. According to Mr. Wagner, however, the Employer had purported to dismiss Mr. Williams for cause, and the payment to him represented the settlement of a grievance filed by the Union against the dismissal.

We have briefly described the course of events which led to severance payments for the Prairie Books employees when their employment was terminated. As Mr. Wagner explained, however, the employer of those working at Prairie Books was the Saskatchewan Wheat Pool. In his informal discussions with Mr. Fair, Mr. Wagner was able to convince him that the Saskatchewan Wheat Pool should assume the responsibility for paying severance to these employees, whereas Mr. Fair refused to engage in any such discussion in relation to Mr. Berndt and Mr. Bussiere.

When the employment of the accounting employees was terminated following the creation of PrintWest Communications Ltd., the Union took the position that the consolidation of accounting and payroll functions in Regina did constitute a technological change under the collective agreement, and that the employees were thus entitled to the severance payments contemplated in the agreement. The Employer accepted this argument, and paid the severance settlements to them.

In the case of the early retirement packages offered to Mr. Hopkins and Mr. Walker, the application alleged that the Union had elected to drop the issue of severance for Mr. Berndt and Mr. Bussiere in order to persuade the Employer to accept the idea of early retirement for Mr. Walker and Mr. Hopkins.

The description given by Mr. Wagner of the course of bargaining on these issues differed considerably from this scenario. It will be recalled that the members of the bargaining unit had directed the bargaining committee to make proposals concerning both general severance provisions and an early retirement package for all employees. In addition, they had directed the bargaining committee to ask that the severance package be retroactive to cover Mr. Berndt and Mr. Bussiere.

Mr. Wagner said that the Employer was exceedingly resistant to the idea of incorporating any general provision for severance in the agreement, and refused to consider the idea of extending severance payments to Mr. Bussiere and Mr. Berndt. The Employer had their own reason for proposing early retirement to Mr. Hopkins and Mr. Walker, however, which was that they wished to have the entire sales force working on commission. The Union regarded this as less desirable than severance, but in the end accepted the proposal of early retirement for the two employees. Mr. Wagner denied that there was any link between this proposal and the proposal concerning severance for Mr. Berndt and Mr. Bussiere, much less that they were traded off against each other. In the end, according to Mr. Wagner, the membership were asked whether they were willing to go on strike in order to obtain severance payments for Mr. Bussiere and Mr. Berndt; though members discussed the matter, they voted to accept the offer of the Employer which did not include a severance package.

Although all of these events occurred in the context of organizational changes which affected units which had once all been part of the same entity, and of financial problems which made severance and early retirement recurring themes, the circumstances of all of these employees were quite different. The fact that the Union succeeded in obtaining, or acceded to, settlements for those employees did not mean that those situations could be compared to that of Mr. Bussiere and Mr. Berndt.

In all of the efforts which were made from the late fall of 1991, the Union relied on a repertoire of negotiating tactics, the informal contacts and goodwill enjoyed by the Union with both the Employer of these employees and the Saskatchewan Wheat Pool, whatever support could be gained from the bargaining unit members, and the personal capital of Mr. Wagner. The Union had made a decision that they could find no claim on rights contained in the collective agreement, aside from the claim for a lengthened notice period. These efforts took place on behalf of two persons for whom the Union had no longer any legal bargaining rights, and towards whom the Employer had no further obligations deriving from the employment relationship.

We have concluded that the continued steps taken by the Union to place the severance issue before the Employer on behalf of Mr. Berndt and Mr. Bussiere were not offhand, nor were they taken on a discriminatory basis. On the contrary, we are of the view that the Union made extraordinary efforts to persuade the Employer to make what would have been an *ex gratia* settlement in favour of two persons who had no legal leg to stand on and for whom it was doubtful the Union continued to enjoy representational rights.

Ms. Bussiere argued that it was unfair of the Union to conduct a meeting at which the decision was made to accept the proposals offered by the Employer, and to drop the severance issue, without giving Mr. Bussiere and Mr. Berndt an opportunity to address the question. Mr. Wagner said that there was no conscious decision made to exclude the Applicants from the discussion, and acknowledged that it might have been preferable for them to be there. He pointed out, however, that the procedure used to summon employees to Union meetings is calculated to reach employees, and not persons who have ceased to have any connection with the Employer.

We agree that the meeting which was held in the absence of the Applicants must be assessed in the context of their status at the time. The decision of their colleagues to press for a severance settlement for them was undertaken gratuitously, and Mr. Berndt and Mr. Bussiere could make no right-based claim to force the Union to continue to bargain on this issue. The membership did not proceed to vote on the settlement package without being advised by Mr. Wagner of the options open to them, or without discussing and considering the implications of these options for the situation of Mr. Bussiere and Mr. Berndt.

There are few instances in which one can look back over a sequence of events and not find examples of

conduct by the actors which warrant criticism, and this is no exception. Mr. Wagner conceded, for example, that the Union might have taken steps to ensure that the Applicants were formally notified of the decision to settle the agreement without obtaining agreement on a severance settlement.

On the whole, however, we do not think the evidence establishes the allegations that the Union failed to represent Mr. Bussiere and Mr. Berndt with fairness. The Union was functioning in a difficult industrial relations environment, and in the context of significant restructuring which brought them into a bargaining relationship with three different employers in a short period of time. In spite of these difficulties, and in spite of the fact that there was no entitlement under the collective agreement on which to rely, the Union made considerable efforts to achieve a severance settlement for Mr. Bussiere and Mr. Berndt.

Mr. Berndt and Mr. Bussiere were clearly sincere in their sentiment that they had been harshly dealt with after a long period of faithful service, and one must have considerable sympathy for them. Their allegations that they were not properly represented by the Union are not, however, well-founded, and the application must be dismissed.

BOARD OF EDUCATION OF THE TISDALE SCHOOL DIVISION NO. 53, Applicant and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3759, Respondent

LRB File No. 078-96; June 13, 1996
Chairperson: Beth Bilson; Members: Terry Verbeke and Bob Todd

For the Applicant: Bill Wells
For the Respondent: Paulette Caron

Remedies - First collective agreement - Whether applicant meeting requirements for intervention by board - Board deciding requirements are not met.

***The Trade Union Act*, s. 26.5.**

REASONS FOR DECISION

Beth Bilson, Chairperson: The Canadian Union of Public Employees, Local 3759, was designated in an Order of this Board dated June 20, 1994, as the bargaining agent for a unit of employees of the Board of Education of the Tisdale School Division No. 53.

The Employer has made an application seeking the assistance of the Board in achieving a first collective agreement, pursuant to s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17, which reads as follows:

> *First collective bargaining agreements*
> *26.5(1) Either party may apply to the board for assistance in the conclusion of a first collective bargaining agreement, and the board may provide assistance pursuant to subsection (6), if:*
> > *(a) the board has made an order pursuant to clause 5(a), (b) or (c);*
> > *(b) the trade union and an employer has bargained collectively and have failed to conclude a first collective bargaining agreement; and*
> > *(c) any of the following circumstances exist:*
> > > *(i) the trade union has taken a strike vote and the majority of those employees who voted have voted for a strike;*
> > > *(ii) the employer has commenced a lock-out; or*
> > > *(iii) the board has made a determination pursuant to clause 11(1)(c) or 11(2)(c) and, in the opinion of the board, it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement pursuant to subsection (6).*

(2) If an application is made pursuant to subsection (1), an employee shall not strike or continue to strike, and the employer shall not lock out or continue to lock out the employees.

(3) An application pursuant to subsection (1) must include a list of the disputed issues and a statement of the position of the applicant on those issues, including the applicant's last offer on those issues.

(4) All materials filed with the board in support of an application pursuant to subsection (1) must be served on the other party within 24 hours after filing the application with the board.

(5) Within 14 days after receiving the information mentioned in subsection (4), the other party must:

(a) file with the board a list of the issues in dispute and a statement of the position of that party on those issues, including that party's last offer on those issues; and

(b) serve on the applicant a copy of the list and statement.

(6) On receipt of an application pursuant to subsection (1):

(a) the board may require the parties to submit the matter to conciliation if they have not already done so; and

(b) if the parties have submitted the matter to conciliation or 120 days have elapsed since the appointment of a conciliator, the board may do any of the following:

(i) conclude, within 45 days after undertaking to do so, any term of terms of a first collective bargaining agreement between the parties;

(ii) order arbitration by a single arbitrator to conclude, within 45 days after the date of the order, any term or terms of the first collective bargaining agreement.

(7) Before concluding any term or terms of a first collective bargaining agreement, the board or a single arbitrator may hear:

(a) evidence adduced relating to the parties' positions on disputed issues; and

(b) argument by the parties or their counsel.

(8) Notwithstanding section 33 but subject to subsections (9) and (10), the expiry date of a collective bargaining agreement concluded pursuant to this section is deemed to be two years from its effective date or any other date that the parties agree on.

(9) Notwithstanding section 33 not less than 30 days or more than 60 days before the expiry date of a collective bargaining agreement concluded pursuant to this section, either party may give notice in writing to terminate the agreement or to negotiate a revision of the agreement.

> *(10) Where a notice is given pursuant to subsection (9), the parties shall immediately bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.*

According to the representations made on behalf of the parties at the hearing before the Board, the Union and the Employer entered into negotiations with a view to concluding a collective agreement shortly after the certification Order was issued. There was an agreement between the parties that there would not be discussion of the issue of wage rates until agreement had been reached on the "language issues" related to the collective agreement. As the representative of the Employer pointed out, a number of the provisions included within this category had financial ramifications for the Employer.

The parties were successful in reaching agreement on the language issues by the end of 1995, and turned to a consideration of the question of wage rates. According to the representative of the Employer, the employees in the bargaining unit had been given a wage increase of five per cent in 1993, when they became employees of the Employer rather than independent contractors. The initial wage proposal put forward by the Employer contemplated a wage increase, over a three-year term, of 0 per cent, 0 per cent and 2.5 per cent, which was regarded as consistent with other wage increases for employees in the public sector during the same period. The representatives of the Employer indicated a willingness to consider a different term, or a different allocation of the wage increases.

The Union took the position that the members of the bargaining unit should achieve parity with the wages of bus drivers in other school divisions over the first 18 months of an agreement.

A revised wage offer made by the Employer in March of 1996 was rejected by a majority vote among the employees. The Union advised the Employer of the outcome of the vote, and the representatives of the Employer put a further offer on the table on April 1, 1996. The bargaining committee for the Union considered this offer, and made a counter-proposal at the same bargaining session.

The Employer did not directly respond to this counter-offer, but made this application in a letter to the Board, also dated April 1, 1996. In the application, the Employer outlined the history of bargaining between the parties. They described the grounds for the current application in the following terms:

> *The Union's financial proposal and subsequent positions will be left to the Union to articulate however, we have attached a recent letter, March 26th, 1996, provided by the Union which we believe meets the requirements of Clause 11 (2)(c) of The Trade Union Act as required by Clause 26.5(1)(c)(iii) of The Trade Union Act.*

The letter from the Union, bearing the date March 26, 1996, to which the Employer alluded in the application, read as follows:

> *After our last negotiation meeting on March 22, we took the Board's monetary offer to the membership. The Union voted unanimously to reject that offer.*
>
> *The membership further instructed the Committee to continue to negotiate; however if the current impasse cannot be resolved to explore other options available to the Union.*
>
> *The Committee is prepared to meet April 1, 1996 as scheduled, if the Board is prepared to augment their last proposal.*
>
> *Please contact me by Friday, May 29, 1996 so that I can inform the Committee members if we will be meeting with you on April 1st.*

At the hearing, the representative of the Board also referred to a letter from the Union which was circulated to local school trustees, which read as follows:

> *April 23, 1996*
>
> *Arborfield Local School Board*
> *c/o Lavinia Campbell*
> *Box 445*
> *Arborfield, Saskatchewan*
> *S0E 0A0*
>
> *Dear Members of the Board:*
>
> *We are writing to address the state of contract negotiations between the Tisdale School Division and its bus drivers. We are not violating any protocol of bargaining here. We just want to make sure that you understand our position.*
>
> *We take our work seriously. We think we provide an important service to the Division. Our record speaks for itself. Many of us are supporting families through our Division jobs - to some, it is a primary source of income.*
>
> *All of us have looked with growing frustration at the rates paid to our counterparts in Tiger Lily (Melfort) and Nipawin. In 1994 the Tisdale Board sent a survey to 41 Saskatchewan School Divisions and received 33 replies. The survey showed the average wage of $7,008 (per 90-mile route) paid to the Tisdale bus drivers is well below the average of $8,255. No agreements have since been negotiated with drivers in surrounding districts, such as Tiger Lily increasing the discrepancy even more.*
>
> *The recent settlement in Tiger Lily provides $30.75 plus $0.1177 for every kilometre driven. The latest advertisement for Nipawin shows drivers are paid $30.40 for the first 40 miles plus $.265 for every mile after 40. Tisdale drivers receive $26.50 for the first 50 miles plus $.25 for each additional mile. Why is this job worth so much less in the Tisdale School Division? All we are asking is to reach the average of the 1994 survey.*
>
> *It was a lack of recognition for our work that first led us to organize into a union. Yet, we still seem to be at the bottom of the Division's priority list.*

> *In an attempt to reach an agreement, we have withdrawn many of our original monetary requests, such as a benefits package and other Articles dealing with working conditions.*
>
> *We met with the Board April 1 in hopes of achieving a fair settlement. We proposed a wage settlement that would provide an annual salary of $7,850.88 (on a 90-mile route) by the beginning of 1998. We were advised at that meeting that the Board would be applying to the Labour Relations Board for first agreement conciliation or arbitration.*
>
> *Our members are strongly committed to achieving a fair and equitable settlement. While we are open to any help the Labour Relations Board may offer, we feel a settlement could be reached without the benefit of third party assistance.*
>
> *We understand that economic times are difficult - all the more reason not to hold down the incomes of the personnel who can least afford it.*
>
> *We certainly do not want a conflict with the Division. We hope and trust that you will support the need for a just settlement with your bus drivers. Make us a priority this time.*
>
> *Sincerely,*
> *Holly Currey,*
> *President, CUPE Local 3759*

In a decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, [1996] Sask. L.R.B.R. 36, LRB File No. 201-95, the Board attempted to outline the general approach which would be taken towards applications requesting the assistance of the Board with a first contract. The Board described the rationale for providing these preliminary guidelines as follows, at 38:

> *Our purpose in doing this is twofold. Our first goal, and the one of more general significance, is to set out some clues to the general policy approach we propose to adopt with respect to applications under Section 26.5. The other goal, which is more specifically related to the application involving these particular parties, is to inform those parties of the initial response of the Board to the application, in order to guide them as they respond, in turn, to the direction which we will be making.*

In the *Prairie Micro-Tech* decision, *supra* at 51, the Board made the following observation concerning the purpose of the remedy provided under s. 26.5:

> *In commenting on these and other criteria in the [Yarrow Lodge Ltd. v. Hospital Employees Union (1993), 21 C.L.R.B.R. (2d) 1], the British Columbia Labour Relations Board made the following observations:*
>
> > *The unions in these applications clearly want the Board to impose master or standard agreements on newly certified units. The employers clearly want a collective agreement that reflects the employment status quo. In resolving this policy issue, the Board*

> *first returns to the several principles it enunciated in this decision with regard to the interpretation of the first contract provisions as whole: first, Section 55 is a remedy for the breakdown of negotiations, not an unfair labour practice remedy; second, collective bargaining is the preferred vehicle for achieving first collective agreements; third, mediation is the policy choice for the resolution of the first collective disputes; and fourth, the remedy is to be timely.*
>
> *Although it may seem self-evident or that we are simply stating the obvious, the policy of Section 55 is that the terms and conditions of a first contract are to be negotiated, not arbitrated. If the Board were to adopt the unions' position, as a matter of course, and impose the standard agreement, or adopt the employers' position and impose the status quo, that would be the end of collective bargaining under Section 55.*
>
> *Though this passage reflects the particulars of a different statutory regime, notably in the utilization of mediation at every stage of the process, the essential point - that first contract arbitration should reinforce rather than replace collective bargaining - is one which seems as important under our own legislation as under the provisions which are in place in British Columbia.*

The Board also commented in the decision on the significance of the threshold criteria for Board intervention which are set out in s. 26.5(1)(c). The Board is entitled to intervene under s. 26.5 in the event of a labour dispute, or in the event that a determination has been made concerning the duty of the parties to bargain collectively. The Board made the following comment in relation to the latter basis for a request for assistance under s. 26.5, at 49:

> *The first two conditions permit either party to apply to the Board if bargaining has broken down and a strike is in the offing, or a lock-out has occurred.*
>
> *The third requires the Board to examine the conduct of either or both of the parties in the light of the obligation to bargain set out in s. 11 (1)(c) and s. 11 (2)(c). Our reading of Section 26.5 (1)(c)(iii) is that, even if the Board determines that there has been no violation of the duty to bargain collectively, it is open to us to decide that it would be appropriate to assist the parties in the conclusion of a first collective agreement.*

The Board went on, in the same passage, to make the following observation:

> *Section 26.5 as a whole allows the Board to make the determination as to whether assistance with the first agreement is appropriate. It is our opinion that, in assessing the circumstances of any application, the Board should be mindful of our overall objective of promoting - rather than replacing - collective bargaining. The occurrence of an industrial dispute, or the commission of one or more unfair labour practices under Section 11 (1)(c) or 11(2)(c), do not in themselves confer on either party an automatic entitlement to the imposition of a first contract. Even in the context of the conclusion of a first agreement, an industrial dispute may be a*

tolerable component of a course of bargaining which is essentially healthy.

The Board made it clear, in the following passage, at 51, that the circumstances in which a particular application is brought will have a significant bearing on our decision as to whether it is appropriate to intervene:

> *It is impossible to say how hard or soft this Board would be in its application of these criteria in any particular circumstances. Clearly, the conduct of the parties, the course of bargaining, the effectiveness of third party intervention, and other factors would all have an effect on the degree to which it is appropriate to intervene. What we are trying to signal here is that this Board intends to take a cautious approach to providing assistance with the conclusion of first collective agreements, and that we will do everything we can to ensure that the onus continues to rest on the parties to reach a solution through bargaining.*

The primary interest of the Board in considering whether to intervene in the conclusion of a first contract is to ensure that the health and vigour of a new collective bargaining relationship is not endangered by the difficulties attendant upon reaching an initial collective agreement. In this respect, the resort to industrial action by one or other of the parties, or conduct on the part of one or other of the parties which betrays an unwillingness to make efforts in good faith to reach an agreement, may be important indicators that the problems inherent in a particular relationship go beyond the teething troubles, misunderstandings and awkwardness which may be regarded as within the scope of the normal attributes of a new collective bargaining relationship.

The Board stated in the guidelines provided in *Prairie Micro-Tech*, *supra*, that these indicators are not in themselves determinative of whether the situation is one in which it is appropriate that the Board intervene. On the other hand, as the Board suggested, something short of a finding by the Board that one party or the other has committed an unfair labour practice may nonetheless be indicative to the Board of a sufficient threat to sound collective bargaining to justify our intervention. Our concern is that any intervention be aimed at fostering, rather than replacing, collective bargaining between the parties.

In this case, the Board finds nothing in the representations made by the parties to suggest that they have encountered difficulties in bargaining which would justify the involvement of the Board at this stage. Though the Employer alluded to certain conduct on the part of the Union which they felt constituted a breach of the duty to bargain, the facts as they were put before us do not support such a finding. It is true that the course of negotiations has not run as smoothly in recent months as it did when the parties

were dealing with the language to be included in the collective agreement. They were justly pleased by the significant progress they had made towards the conclusion of an agreement, and may be forgiven for experiencing some frustration and disappointment at the difficulties they have had to confront once the issue of wages came under discussion.

Their frustration and disappointment does not seem to us, however, to lie outside the range of the normal experience of bargaining parties who must resolve thorny issues within the limits of various constraining factors.

For the reasons we have given here, we have concluded that the application must be dismissed.

In the course of his presentation to the Board, the representative of the Employer indicated that the Employer had ruled out making a request for the assistance of a conciliator on the basis of an assumption that the Union would not consent to such a request. At the hearing, the representative of the Union stated a preference for the conclusion of a collective agreement through discussions between the parties themselves; she stated, however, that in the circumstances which face the parties in this case, the Union was willing to agree to use the services of a third party in an attempt to bring the negotiations to a conclusion.

At the hearing, the Board recessed briefly, and conveyed to the parties orally our conclusion that the circumstances of the parties do not at this time constitute a basis for the intervention of the Board under s. 26.5. We did undertake, however, to arrange the assistance of a third party to facilitate the conclusion of an agreement between the parties.

To this end, we have alerted Mr. Terry Stevens, the Director of the Labour Relations Branch of the Department of Labour, to the circumstances of this case. The parties may seek his assistance by written notification of their wish for his assistance, or by telephoning his office at (306) 787-5050.

WALTER V. CHOPONIS, Applicant and MADISON DEVELOPMENT GROUP INC. OPERATING AS MADISON AND UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondents

LRB File No. 226-95; June 20, 1996
Chairperson: Beth Bilson: Members: Brenda Cuthbert and Bob Todd

For the Applicant: Scott Spencer
For the Respondent, Madison Development Group Inc.: Kevin Wilson
For the Respondent, U.F.C.W., Local 1400: Drew Plaxton

Remedy - First collective agreement - Relationship between application for rescission, coincident application for first contract arbitration - Board deciding to suspend vote on rescission application pending disposition of first contract application.

Decertification - Employer influence - Whether interference by employer in rescission application is sufficient to justify dismissal of application - Board deciding not sufficient evidence of employer influence to dismiss application.

Decertification - Employer influence - Whether earlier findings that employer had failed to bargain had impact on rescission application - Board deciding failure to conclude collective agreement is one of factors in rescission application.

***The Trade Union Act*, ss. 9 and 26.5.**

REASONS FOR DECISION

Beth Bilson, Chairperson: The United Food and Commercial Workers, Local 1400, were designated by this Board in a certification Order dated October 7, 1994, as the bargaining agent for a unit of employees of Madison Development Group Inc.. Mr. Walter Choponis has now filed an application, on behalf of himself and other employees, asking the Board to rescind the certification Order.

The Union asked the Board to dismiss the application on the basis of s. 9 of *The Trade Union Act*, R.S.S. 1978, c. T-17, which reads as follows:

> *9 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.*

Mr. Choponis has been employed to perform maintenance at the Madison Inn since July of 1994. Prior to that, he performed many of the same duties as an independent contractor. In addition to his responsibilities at the Madison Inn, Mr. Choponis is from time to time asked to provide maintenance services to other enterprises owned by the Madison Development Group Inc.

In his evidence, Mr. Choponis said that when he became an employee at the Madison Inn, he was not certain whether there was a trade union in place or not. He said that he first became aware of the activities of the Union at a later time, when he attended a Union meeting, at which employees were informed that they should sign Union cards. He said that he was irritated that he had not been consulted about the certification of the Union. He did not recollect signing a Union card.

In April of 1995, he recalled that a Union meeting was held to discuss the possibility of taking industrial action. Mr. Choponis said that he was initially denied admittance to the meeting on the grounds that he was not a bargaining unit employee. Although he was ultimately allowed to attend the meeting, he was told that if he cast a vote on the question of a strike, it would delay the resolution of the issue, because the Union would have to seek clarification of his employment status. He decided to refrain from voting in order to allow the vote to proceed expeditiously.

Mr. Choponis testified that he had become aware that a number of employees had signed a petition which asked to have the certification Order rescinded. He was not certain of the date of this petition. He did, however, learn from talking to employees at another hotel that a petition would not be effective in any effort to seek rescission.

In conversation with other employees who supported rescission, he agreed to look into the proper way of making an application. He said that he first found some information in a pamphlet about Saskatchewan labour legislation dating back to 1982. Although he recognized that much of it was out of date, he did find out about the idea of what he referred to as a "window period" for making a rescission application.

One of his fellow employees had approached the office of this Board for information. The Board sent out the standard letter, with a copy of *The Trade Union Act*. Mr. Choponis and the other employees immediately realized that this did not provide any assistance in identifying the appropriate procedure for making an application for rescission. He then went to see a lawyer in Prince Albert, who

acknowledged that he had no familiarity with collective bargaining legislation. Mr. Choponis was then advised by his brother that he might obtain advice from the firm with which Mr. Spencer is associated.

Mr. Choponis said that he obtained information and advice from Mr. Spencer, including copies of forms which individual employees should be asked to sign. Mr. Choponis and several other employees then proceeded to ask other employees to sign the forms. He said that, as far as he was aware, the organizing was done off the premises, and he kept the completed forms in his car, although there were some copies of the forms kept in the desk in the hotel maintenance area.

He testified that he was aware that the employees would have to underwrite the legal expenses incurred in bringing the rescission application, and that he had explained this to them when the signatures were being collected. He said that he had received some contributions towards the legal fees, and was confident that he would obtain the full amount from other employees.

He said that it was his understanding that the support for the rescission application was based on a dissatisfaction among the employees with their relationship with the Union. He said that the employees felt the Union was not providing them with sufficient information, and that they disliked the way the representatives of the Union spoke to them and attempted to put pressure on them. Under cross-examination, he conceded that one of the sources of dissatisfaction was the failure of the Union to obtain any obvious results from the collective bargaining process.

Counsel for the Union argued that the rescission application should be dismissed for a number of reasons. One of these concerned the employment status of Mr. Choponis. In cross-examination, counsel attempted to demonstrate that Mr. Choponis cannot really be regarded as a bargaining unit employee because of the work he does at other enterprises owned by the Employer. In our view, counsel failed in this attempt. At the time of the strike vote, it may have been reasonable for the Union to challenge the status of Mr. Choponis, and his own pique at not being allowed to vote may not have been justified. It is clear from the evidence of Mr. Choponis, however, that he is an employee in the bargaining unit. Though he performs duties elsewhere from time to time, he spends most of his time at the Madison Inn, and is given his instructions by the manager there.

Counsel also asked the Board to draw an inference that, in agreeing to undertake organizing support for the rescission application, Mr. Choponis must have been actuated by the hope that he would be

rewarded by the Employer. There was, however, no evidence from which the Board could draw such an inference.

Finally, counsel asked the Board to dismiss the application on the grounds that the conduct of the Employer has had a negative effect on the relationship between the Union and the employees.

The relationship between the Union and the Employer has been the subject of a succession of proceedings before this Board. In *United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc.*, [1994] 4th Quarter Sask. Labour Rep. 77, LRB File No. 189-94, at 82, the Board commented in the following terms on the conduct of the Employer in relation to the certification proceedings:

> *In this case, we would be placing form over substance if we concluded that there was any difference between Madison Inns and Madison Development Group Inc. for the purpose of these proceedings. Mr. Hansen repeatedly stressed that Madison Inns Corporation was nothing more than a name and we agree with one proviso; it is a name registered exclusively to Madison Development Group Inc. Madison Inns lives and breathes entirely through Madison Development Group Inc. and is inseparable from it and has no existence apart from it. All of the decisions and choices that have been made with respect to these proceedings were made by Madison Development Group Inc. and this is not a case where the procedural rights of Madison Development Group Inc. have been violated in anything other than appearance. Rather, the proper characterization of what happened is of an Employer who is itself attempting to take advantage of and manipulate the Board's process for the purpose of delaying and obstructing these proceedings. No other reasonable conclusion can be drawn from an examination of the Employer's conduct. When a party decides to engage in this kind of high stakes gamesmanship, it either wins or loses and if it loses, it is not entitled to the consideration that might be extended to the inadvertent or even to the negligent.*

In *United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc.*, [1996] Sask. L.R.B.R. 75, LRB File No. 131-95, the Board summarized as follows the history of the bargaining relationship between the parties at 108:

> *The duty to bargain with the certified trade union is a legal obligation, not a responsibility which the employer may take up or not according to whim. The duty to bargain includes, but is not limited to, the conclusion of a collective agreement at the bargaining table. It covers all aspects of the dealings an employer may have with employees with respect to terms and conditions of employment, and requires that the employer deal with the trade union, and only with the trade union, in connection with these questions. It requires that the employer make a genuine and positive effort to resolve issues raised by the trade union on behalf of the employees. The fact that an issue is raised or a request made away from the bargaining table is*

> *of no consequence if it concerns a matter which is within the scope of the representational rights of the trade union.*
>
> *The evidence makes it clear that this Employer has not, from the beginning, appreciated the duty to bargain in these terms. There has been no sign that the Employer is sincere about getting to grips with the issues vital to the conclusion of a collective agreement. The pattern has been one of delays, recalcitrance, distractions, challenges to the right of the Union to manage its affairs and other behaviour which threatens to make it impossible for the Union to continue to represent the employees.*

Counsel referred us to previous cases in which the Board has contemplated the possibility that the conduct of an employer may so affect the status and credibility of a trade union that an expression of opinion by employees concerning whether they wish to continue to be represented by the union cannot be relied on. In *Dreher v. WaterGroup Canada Ltd. and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1993] 3rd Quarter Sask. Labour Rep. 131, LRB File No. 033-93, at 142-143, the Board made the following statement:

> *As always in these cases, we begin with the purpose of the Act which is found in s. 3. It states that employees have the right to determine for themselves whether or not they will bargain collectively and, if so, through which union. Various sections of the Act prohibit the employer from interfering with this right and s. 9 makes it clear that the Board has a duty to reject any application by employees to renounce their right to bargain collectively that in reality reflects the will of the employer (see: Confederation Flag Inn (1989) Limited, [1990] Summer Sask. Labour Rep. 61).*
>
> *The rationale for vesting this discretion in the Board was the recognition by the legislature that the employee's right to bargain collectively would be without substance if an employer was allowed to make work life so miserable for employees who chose to bargain collectively that they file for decertification at the first opportunity. It would say to employers that if they are prepared to be ruthless and miserable enough, although they may not be able to stop certification, they can probably force a decertification application to be filed within 10 months. All they have to do is shut the door in the face of the union, make sure no progress is made towards a first agreement, retaliate against identifiable union supporters, tamper with wages and other terms and conditions of employment, bypass the union by dealing directly with the employees and above all, make it clear that things will never get back to normal until the employees "fix it." Never waiver, and if the pressure is great enough, the employees will get rid of the union all on their own. That is not the scheme of the Act.*
>
> *When faced with an employer of this variety, a union may well find itself in difficulty whether it resists the employer's conduct or whether it does not. If it resists and files unfair labour practices it risks being labelled as confrontational, litigious and even petty and vindictive. This risk exists whether the Union wins or loses the unfair labour practices. If the union does nothing in order to avoid being perceived as litigious or militant, it appears ineffectual against the employer and this further*

> *undermines employee support and confidence in the union and their willingness to align themselves with the union when sides must finally be chosen.*
>
> *This is not the way the legislature intended collective bargaining to work and a choice between collectively bargaining that doesn't work because of the employers non-co-operation or no collective bargaining at all is not the choice that the legislature intended employees to have to make when a decertification application is filed. When the Board is satisfied that this is the choice that the employer has managed to place before the employees, the Board will disregard any expression by the employees of a desire to give up their right to bargain collectively. For the Board to do otherwise and fall into line by directing a vote would amount to complicity in the employer's subversion of the law.*

The Board took up this issue again in a decision in *United Food and Commercial Workers, Local 1400 v. F.W. Woolworth Co. Limited*, [1994] 1st Quarter Sask. Labour Rep. 169, LRB File Nos. 148-93, 151-93, 192-93, 193-93 and 194-93, at 202-203:

> *The Employer submitted that the Board, in order to dismiss an application under Section 9, must have evidence that directly connects the Employer in some way to one or more of the employees who initiate or pursue the application, or to the gathering of evidence of employee support. He relies upon the Board's decision in Holiday Inn, 1989 Spring, Sask. Labour Report, p. 72.*
>
> *Certainly, the Holiday Inn decision is correct as far as it goes, but the better and more comprehensive view, when a decertification application is brought after a union has been certified for only ten months and after the employer has been found guilty of numerous unfair labour practices, including ones intended to discourage employees from supporting the union and, then having lost the certification battle, further unfair labour practices designed to ensure that collective bargaining is a failure and that the union provides no useful service, was set forth earlier in these reasons (see: the quotations from [Dreher v. Watergroup Canada Ltd.and Aquafine Water Inc. & Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, [1993] 3rd Quarter Sask. Labour Rep. 131].).*
>
> *In making these comments in Watergroup Canada Ltd. and then applying them to this case, the Board was not unmindful that at times The Trade Union Act permits a bare-knuckle power struggle between unions and employers, but what concerns the Board is when the parties ignore the clear limits which the Act sets for this struggle. These limits were commented on by the Board in WaterGroup Canada Ltd., [supra at 143-144]:*
>
> > *In making this decision the Board is not unmindful that in one sense collective bargaining and The Trade Union Act are about conflict and the use of power. The Act itself contemplates a power struggle between employers and unions that can become quite unpleasant. A certain kind of conflict falls well within the statutory scheme and cannot provide the basis for dismissing an application under s. 9. However, the Act clearly provides limits to this conflict, and in particular the Act makes it clear that this conflict is to be over the content of collective bargaining agreements, not over whether*

> *employees are entitled to bargain collectively at all. The Act does not contemplate, and in fact expressly prohibits, any opposition by the employer to the exercise by employees of their s. 3 rights. When the conflict shifts from the content of a collective bargaining agreement to the employee's right to bargain collectively, the Board must be extremely cautious if the employees attempt to decertify their union during such a conflict.*

This case differs in important respects from the situations in *WaterGroup* and *F.W. Woolworth*. With a few exceptions, the conduct of the Employer in this case was not characterized by punitive or discriminatory action against individual employees, or by attempts to influence the thinking of employees through coercive or intimidating communications. Rather, as the quotations from earlier Board decisions involving these parties suggest, the Employer failed and refused to carry on with the Union a collective bargaining relationship of any substance, and approached negotiations with the Union in a way which prevented any substantial progress towards the conclusion of a collective agreement.

It is difficult to believe that the conduct of the Employer, which the Board has found on a number of occasions to be in violation of *The Trade Union Act*, was not a contributing factor to the frustrations of the employees which have resulted in the filing of this application. Indeed, Mr. Choponis acknowledged in his evidence that one of the components of the frustrations of the employees was the fact that the Union did not have anything to show for the negotiations which had been going on for some time.

The difficulties in obtaining an agreement ultimately led the Union to file an application, designated as LRB File No. 053-96, asking the Board to intervene in relation to the achievement of a first contract, pursuant to s. 26.5 of *The Trade Union Act*. The panel of the Board which has been convened to consider that application has now decided to appoint an agent of the Board to facilitate discussions between the parties, with a view to recommending to them, and to the Board, what terms should be included in the collective agreement.

The interrelated nature of all of these proceedings creates something of a dilemma for the Board in determining what is the best way of ensuring that the improper conduct of the Employer is not a factor which affects the outcome of any expression of employee wishes with respect to continued representation by the Union.

On the one hand, we are satisfied that the application for rescission as such was not encouraged or influenced by the Employer. On the other, to the extent that the Employer has had a hand in frustrating the process for reaching a collective agreement, and to the extent that this has added to the discontent of the employees, we are of the view that the absence of a collective agreement should not be a factor in an expression of employee opinion.

In order to counteract the possibility that the absence of a collective agreement might be a factor in the outcome of a vote, we have decided to suspend the holding of a vote until such time as the application for first contract arbitration has been disposed of, and until the Union has had a reasonable opportunity to present the resulting agreement to the employees in the bargaining unit.

We will therefore remain seized of this application in order to ensure that any further issues arising prior to the holding of a vote may be dealt with.

INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING, PORTABLE & STATIONARY, Applicant and ALUMA SYSTEMS CANADA INC., Respondent

LRB File No. 002-96; June 27, 1996
Vice-Chairperson: Gwen Gray; Members: Bob Cunningham and Donna Ottenson

For the Applicant: Brian Woznesensky
For the Respondent: Derek Traylor

Reconsideration - Criteria - Natural justice - Untimely notice of board hearing - Board agrees to reconsider application for certification where employer with out-of-province address alleges that it did not receive notice of hearing in a timely fashion.

Certification - Bar - Employer alleges the existence of "gentlemen's agreement" where union agreed not to apply for certification - Board decides that informal agreement is not a bar to certification application and refuses to reconsider order on this basis.

Certification - Craft unit - Whether certification order should be reconsidered where employer has president's agreement with other craft union - Board holds that potential for inter-union conflict is insufficient reason for deviating from standard craft bargaining units.

Practice and procedure - Construction - Certification - Employer with out of province address - Board adopts practice of forwarding copy of certification order and other notices to employer's registered office or office of registered power of attorney.

***The Trade Union Act*, s. 5(j).**

REASONS FOR DECISION

Gwen Gray, Vice Chairperson: The Union filed an application for certification on January 4, 1996, a copy of which application was forwarded by registered mail to the Employer at its Ontario address by the Board. The Employer acknowledged receipt of the application on January 16, 1996. The application was heard by the Board, in the absence of any Employer representative, on February 5, 1996 and an Order of the Board issued granting the certification on February 7, 1996. On February 6, 1996 the Employer filed a reply to the application through its Edmonton offices. On February 20, 1996 the Board received further correspondence from the Edmonton office of the Employer requesting

that the Board reconsider the application on the ground that the Employer had not received notification of the hearing. A reconsideration hearing was held on April 8, 1996 with the Union and the Employer in attendance.

At the reconsideration hearing, Mr. Derek Traylor, Contracts Manager for the Employer, argued for reconsideration and rescission of the certification Order on two grounds. First, he argued that a "gentlemen's agreement" existed between the Employer and the Union to the effect that the Union would not seek certification of the Employer, provided the Employer hired operating engineers through the Union's hiring hall and paid them in accordance with the Union's collective agreement. Second, Mr. Traylor argued that the Employer is signatory to a President's agreement with the carpenters' union and it wanted to avoid inter-jurisdictional disputes between the carpenters' union and any other union. He indicated that the Employer's normal practice, when it required tradespeople other than carpenters, was to employ such tradespeople under a permit arrangement with the appropriate trade union.

Mr. Woznesensky for the Union advised the Board that members of his Union had requested that the application for certification be filed and he felt obligated to comply with their wishes.

There is no dispute that the employees who are subject to this application worked as forklift operators, work which falls within the craft jurisdiction normally assigned to the operating engineers.

The Board's power to reconsider a matter has been confirmed in a number of Board decisions, the first of which was *Remai Investment Corp. v. Ruff and Retail, Wholesale, Department Store Union*, [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File 132-93, where the Board held at 106:

> *In spite of the differences in wording, we are of the opinion that the Board possesses extensive power to review, and if necessary to rescind or amend decisions it has already reached. In light of the intended finality of the decisions made by the Board underlined by the privative clause in Section 21 of the Act, it is important that the Board be able to address allegations that there has been some error or injustice in a decision which it has made, and to make amends if such error or injustice can be established.*

The Employer's request for reconsideration in the present case rests on an alleged breach of the rules of natural justice on the grounds that the Employer did not receive timely notice of the hearing of the application for certification. In the *International Union of Operating Engineers, Hoisting, Portable and Stationary v. Ramco Installations Ltd.*, [1996] Sask. L.R.B.R. 1, LRB File No. 247-95, the Board

did reconsider a certification application on similar grounds where the Employer did not received notice of the certification application due, in part, to the use of an incorrect employer name on the Union's application.

In the present case, as we have noted above, the application was received by the Employer on January 16, 1996. The agenda setting out the date for hearing was forwarded to the Employer's Ontario address by ordinary mail in advance of the hearing. The Employer's reply was dated February 2, 1996 and was filed in the Board's office on February 6, 1996. Although the time for filing a reply to an application is reduced significantly for a company who relies on an out-of-province address, this delay could be avoided by the Employer if it established an in-province address or if, on receipt of the application for certification, it notified the Board of the address of its office which should receive further notices of the Board proceedings.

In response to the growing number of out-of-province employers in the construction sector and the delays caused by forwarding applications by registered mail to such addresses, the Board has notified employers and trade unions in the construction sector that applications for certification will be forwarded to the registered office or office of the power of attorney registered for the employer within the province of Saskatchewan. Employers operating without registered offices or powers of attorney registered in the province will have applications for certification forwarded to them at the address provided by the union in the application. In these circumstances, the Board will not be sympathetic to complaints that the application or other notices were not received in a timely fashion. Where notice of the application has been received by the employer in reasonable time before a hearing is scheduled, the Board will be reluctant to entertain applications for reconsideration of its original Order.

In the present case, the Board is willing to reconsider the application as it was filed before the Board altered its practice of notifying employers. The Board, however, is not convinced that the original Order should be set aside for the following reasons:

1. The right to join a trade union of their own choosing is a right granted by s. 3 of *The Trade Union Act*, R.S.S. 1978, c.T-17, to employees, not to trade unions. This right is the central legislative policy expressed in the *Act* and it is the foundation on which the remaining provisions in the *Act* are built. Any agreement between an employer and trade union to restrict the rights granted under s. 3 is inconsistent with the express legislative policy and is not binding on either the members of the trade

union or the Board. Once employees indicate their support for a trade union and the union files for certification, the Board will respect the employees' choice and grant an Order, provided the application for certification meets the requirements set out in the *Act*. We find that the alleged "gentlemen's agreement" does not bar the application for certification.

2. The Board is also not convinced that the potential of inter-union conflict is a matter that should properly be taken into account by the Board on an application for certification in the construction sector. The craft nature of the certification orders in this industry and the corresponding bargaining rights that attach to the orders place all construction trade unions in potential conflict over the scope of their respective craft jurisdictions. This fact alone, however, does not justify the Board retreating on an *ad hoc* basis from the standard craft bargaining units that were set for this industry in *Construction and General Workers, Local Union No. 890 v. International Erectors and Riggers, A Division of Newbury Energy Ltd.* [1979] Sept. Sask. Labour Rep. 37, LRB File No. 114-79. There is no question on the facts of the present application that members of the applicant Union were engaged in work falling within the Union's standard craft bargaining unit. The Board is unwilling to rescind the original Order on this ground.

The Board, having considered the arguments raised by the parties, therefore dismisses the application for reconsideration and confirms its original Order.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and SASKATCHEWAN GAMING CORPORATIONS AND MARWEST FOOD SYSTEMS LTD., Respondents

LRB File No. 083-96; June 27, 1996
Vice-Chairperson: Gwen Gray; Members: Terry Verbeke and Gloria Cymbalisty

For the Applicant: Larry Kowalchuk
For the Respondent, Saskatchewan Gaming Corporations: Larry LeBlanc
For the Respondent, Marwest Foods Systems Ltd.: Susan Barber

Employer - Definition - Principal or contractor - Whether owner of Casino should be designated employer of employees working for food and beverage contractor - Board holds that designation of principal in circumstances would be inappropriate.

***The Trade Union Act*, s. 2(g)(iii).**

REASONS FOR DECISION

Gwen Gray, Vice Chairperson: The Union applied to be certified for "all employees of the Saskatchewan Gaming Corporation ("SGC") in the City of Regina working at Casino Regina who perform food and beverage service work through contract or otherwise including Marwest Food Systems Ltd. ("Marwest") with certain managerial exceptions. Food and beverage employees at Casino Regina are employed by Marwest which operates under a contract with SGC. The Casino is owned and operated by SGC. The contentious issue on this application is whether SGC should be designated the employer pursuant to the discretion granted to the Board under s. 2(g)(iii) of *The Trade Union Act*, R.S.S. 1978, c. T-17, which states:

> *(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;*

Counsel for the Union argued that SGC should be designated as the "employer" under s.2(g)(iii)

because it controls the selection of the food and beverage contractor at Casino Regina. Counsel pointed out that the Union will face an uncertain status under the successorship provisions of *The Trade Union Act* if the food and beverage contractor is changed from Marwest to another contractor or to no contractor. He argued that the provisions contained in s. 37.1 of the Act may not apply to all of functions performed by employees of Marwest. In particular, the Union expressed concern that s. 37.1 would not apply to the provision of beverage services by Marwest.

Section 37.1 of the Act contains a special provision dealing with cafeteria and food service contractors in public institutions. It provides as follows:

> *37.1(1) In this section, "services" means cafeteria or food services, janitorial or cleaning services or security services that are provided to:*
>
> > *(a) the owner or manager of a building owned by the Government of Saskatchewan or a municipal government; or*
> > *(b) a hospital, university or other public institution.*
>
> *(2) For the purposes of section 37, a sale of a business is deemed to have occurred if:*
>
> > *(a) employees perform services at a building or site and the building or site is their principal place of work;*
> > *(b) the employer of employees mentioned in clause (a) ceases, in whole or in part, to provide the services at the building or site; and*
> > *(c) substantially similar services are subsequently provided at the building or site under the direction of another employer.*
>
> *(3) For the purposes of section 37, the employer mentioned in clause (2)(c) is deemed to be the person acquiring the business or part of the business.*

Counsel for the Union also made reference to the "related employer" provisions contained in s.37.3 of *The Trade Union Act* although the Union did not rely on the provision in its application. Section 37.3 states as follows:

> *37.3(1) If, in the board's opinion, associated or related businesses, undertakings or other activities are carried on by or through more than one corporation, partnership, individual or association, or a combination of them under common control or direction, the board may treat them as constituting one employer for the purposes of this Act and grant any relief, by way of declaration or otherwise, that the board considers appropriate.*
>
> *(2) Subsection (1) applies only to businesses, undertakings or other activities that become associated or related after the coming into force of this section.*

Counsel for SGC argued against the Board exercising its discretion to designate SGC the "employer"

under s. 2(g)(iii). He argued that Marwest does not operate in a manner that falls within the pattern of cases in which the Board has exercised its discretion to name the principal as the "employer." In particular, counsel noted that Marwest does not operate as a labour broker supplying employees to SGC on a cost-plus basis. Further, he noted that Marwest is not being used in the circumstances to circumvent a certification Order or to insulate SGC from union organizing drives. He urged the Board not to give the Union an insurance policy against future events, namely the possibility of the termination of Marwest's lease agreement.

Counsel for Marwest argued that the designation of SGC as the Employer would place her client in the impossible position of permitting SGC to decide Marwest's collective bargaining obligations and costs.

Counsel for the Public Service Alliance of Canada ("PSAC") addressed the issue of a possible conflict between the Order requested in the present application and an Order requested by his client on LRB File No. 068-96 wherein PSAC requests a bargaining unit comprised of all employees of SGC employed at Casino Regina with certain exceptions. Mr. Engel pointed out to the Board that should SGC be designated the employer of the food and beverage workers, the unit description should be carefully worded to avoid overlap with the unit applied for by his client. There was no suggestion by PSAC that it considered the Marwest employees to be covered by its application.

During the course of the hearing, the Board requested a copy of the lease agreement between SGC and Marwest. With the Board's consent, all parties agreed that the lease agreement would be provided on a confidential basis for viewing only by the Board, counsel for the Union and the persons instructing him, including members of the Union's committee in the proposed bargaining unit. The Board concluded that there was no labour relations purpose in requiring SGC and Marwest to make public the terms of their lease agreement and that such disclosure may otherwise be harmful to the business interests of SGC and Marwest. The Board notes that similar reasoning has been adopted by the Canada Labour Relations Board in *Canada Post Corporation v. Canadian Union of Postal Workers and J.K. Driver Services Inc.* (1991), 15 C.L.R.B.R. (2d) 314 at 319, where the Board ordered the non-disclosure of documents filed in the proceedings.

The essential structure of the lease agreement is not uncommon in this industry. The tenant rents space in return for the payment of rent calculated on the basis of a fixed rental sum and on the basis of a percentage of gross sales. The economic risk of the business of providing food and beverage services

in the Casino clearly rests on Marwest. Marwest performs virtually all the employer functions, including payment of wages and other employment benefits or costs, hiring (which is subject to some control by SGC relating to security and minority hiring goals), firing, disciplining of staff and setting of work rules (subject again to some requirements set by SGC relating to the public image of the Casino and security).

The Board has designated one corporation the "employer" of employees of more than one corporate entity in a number of cases. In some cases, the Board relied on s. 2(g)(iii) for its authority and, in other cases, the Board relied on its ability to "pierce the corporate veil" to determine which of two or more corporate bodies is the employer.

In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Canadian Pioneer Management Group (Canadian Pioneer Management Ltd., Pioneer Life Assurance Company Ltd. & Pioneer Trust Company) and Canadian Pioneer Employees' Union*, [1978] May Sask. Labour Rep. 37, LRB File No. 661-77, the Union applied to be certified for three closely related corporations. The Board noted that there were at that time no provisions in *The Trade Union Act* explicitly permitting it to certify the employees of more than one employer in one bargaining unit. However, the Board held that it was permitted to pierce the corporate veil and hold that the employees of the two wholly owned subsidiary corporations were employees of the parent, Canadian Pioneer Management Ltd. The decision of the Board was unsuccessfully challenged on constitutional grounds ([1980] S.C.R. 433).

In *International Woodworkers of America, Local 1-184 and Shelter Industries Inc.*, [1979] Feb. Sask. Labour Rep. 38, LRB File No. 199-78, the Board applied the successorship provisions of *The Trade Union Act* to a corporation which had purchased a mobile home manufacturing business from a trustee in bankruptcy. The trustee sold the business to Shelter Industries Inc. which in turn, contracted for labour services through C & M Management Services Ltd. The contract required C & M Management Services Ltd. to supply all labour services required for the assembly of mobile homes in return for which the contractor was paid a flat rate for each mobile unit produced. In making its determination under s. 2(g)(iii) of the Act, the Board stated at 43:

> *The Board finds that the Respondent, Shelter Industries Inc., is an employer within the meaning of Section 2(g)(iii) of The Trade Union Act and that persons employed in the plant owned by it at Estevan are employees within the meaning of Section 2(f)(iii) of The Trade Union Act. To do otherwise would be to permit an employer evade the consequences of a Certification Order by contracting his work out to an*

> *independent contractor. In arriving at the Board's determination in this particular case, the Board took into account that Shelter Industries Inc. and C & M Management Services Ltd. are not dealing at arm's length in that Carl D. Johnson is an officer of both corporations and appears, on the evidence, to have a relatively free hand in running the entire operation. When matters are negotiated between the union and Shelter Industries Inc., Mr. Johnson will be in a position to see that the interests of C & M Management Services Ltd. are protected or Shelter can delegate bargaining to C & M Management. Shelter is the owner of the business and is the entity bound by the certification order.*

In *Canadian Union of Public Employees and Sollars et al.*, [1982] Dec. Sask. Labour Rep. 38, LRB File Nos. 128-82 to 163-82, (application for judicial review dismissed (1984), 9 D.L.R. (4th) 145 (Sask. C.A.); rev'ing (1983), 24 Sask. R. 225 (Q.B.); leave to appeal to the S.C.C. ref'd 36 Sask. R. 79), the Board applied the successorship provisions of the *Act* to the medical practices that continued after the dissolution of a large medical partnership. In its decision the Board concluded at 41:

> *With respect to those Respondents who hired former employees of the partnership through corporations, the Board finds the Respondents personally to be employers under the provisions of section 2(g)(iii) of the Act. The Board will not permit a Certification Order to be evaded by use of a corporation.*

In *United Brotherhood of Carpenters and Joiners of America, Locals 1805 and 1990 v. Cana Construction Co. Ltd. et al.*, [1985] Feb. Sask. Labour Rep. 29, LRB File Nos. 199-84, 201-84, 202-84 and 204-84, the Board applied the provisions of s. 2(g)(iii) to a contractor who sub-contracted labour services on a "fixed cost" basis for the stated purpose of avoiding union certification. In these circumstances, the Board held at 47-48:

> *Under the circumstances the Board finds that Pan-Western has committed an unfair labour practice under Section 11(1)(a) of The Trade Union Act by subcontracting carpentry work to Buchner Construction Inc., and pursuant to Section 2(g)(iii) of the Act the Board determines Pan-Western to be the employer of all carpenters employed by Buchner Construction Inc. whose services are supplied to Pan-Western under the subcontract dated March 1, 1984. Pan-Western is therefore under an obligation to bargain collectively with the union with respect to those carpenters, and its failure to do so is an unfair labour practice within the meaning of Section 11(1)(c) of The Trade Union Act.*
>
> *In coming to this conclusion the Board recognizes that it is imposing a responsibility on Pan-Western to bargain collectively with the union regarding wages payable to carpenters on the Y.M.C.A. project in Saskatoon when (according to the terms of the subcontract at least) the responsibility for paying those labour costs rests with Buchner Construction Inc. under a fixed price contract. Separating the responsibility for bargaining collectively with respect to wages from the responsibility for paying them is the necessary result of any determination under Section 2(g)(iii) of The Trade Union Act, a consequence that must have been anticipated and accepted by the legislature.*

> *At the same time, the Board is mindful of the past relationship between Mr. Buchner as a carpenter superintendent and Cana as an employer of carpenters, of the arrangements that have existed in practice and substance rather than in form between Buchner Construction Inc. and Pan-Western, and of the absence of any performance bond or personal guarantees given to Pan-Western by the newly incorporated Buchner Construction Inc. or any of its shareholders or directors. Given those circumstances there is reason to believe that finding Pan-Western responsible for negotiating wage rates for carpenters on the Y.M.C.A. project will not as a practical matter remove whatever control Buchner Construction Inc. may have over its own financial affairs.*

Similarly, in *United Steelworkers of America, Local 8294 v. Fairford Industries Ltd. et al.*, [1986] June Sask. Labour Rep. 54, LRB File No. 216-85, the Board held that in circumstances where a successor employer contracted out its labour services for the purposes of circumventing a certification Order, the successor employer would be designated the "employer" under s. 2(g)(iii).

In the later case of *Sheet Metal Workers' International Association, Local 296 v. Modern Roofing (1978) Ltd. et al.*, [1986] June Sask. Labour Rep. 64, LRB File No. 297-85, the Board summarized the effect of the definition of "employer" contained in s. 2(g)(iii) as follows at 67-68:

> *There is no provision in The Trade Union Act enabling the Board to treat two associated employers as one for the purposes of The Trade Union Act. However, at times it has exercised its discretion under Section 2(f)(iii) and 2(g)(iii) ofThe Trade Union Act to determine that individuals ostensibly employed by one corporation are in fact employees of another (see, for example, Board of Parkland School Unit No. 63 et al., [1978] 2 CLRBR 489; Shelter Industries Inc.,[[1979] Feb. Sask. Labour Rep. 38, LRB File No. 199-78]; Fairford Industries Ltd.,[[1986] June Sask. Labour Rep. 54, LRB File No. 216-85]; and Cana Construction Ltd. et al.(1985), 9 CLRBR (N.S.) 175). At other times it has simply "pierced the corporate veil" to accomplish the same thing (see, for example, Canadian Pioneer Management Group, [1978] 2 C.L.R.B.R. 269 in which one certification order was found to apply to a management company and its two wholly owned subsidiaries).*
>
> *The Board cannot categorize the arrangement between H & S and Custom as a legitimate contracting out for labour. Custom is not only wholly owned by H & S - it is apparent that Custom is also completely directed, controlled, and dominated by H & S. The employees may have been ostensibly hired by Custom, but H & S has fundamental control over them on a day to day basis. In the Board's view Custom is such an integral part of H & S's ability to carry on business, and the business affairs and industrial relations of both companies are so interconnected, that they are inseparable.*
>
> *This is therefore an appropriate case for the Board to pierce the corporate veil and to find as a matter of fact that employees of Custom are employees of H & S.*

In *International Union of Electrical Workers, Local 2038 v. Flint Electrical Management Ltd.*, [1989] Fall Sask. Labour Rep. 49, LRB File No. 040-89, the Board distinguished between a determination that an entity is an "employer" within the ordinary meaning of the term and the determination made pursuant to s. 2(g)(iii) to designate a principal the "employer" of the employees of a contractor. In the *Flint Electrical Management* case, the Board held that the principal who subcontracted labour services from a contractor on a cost plus basis to a non-related corporate entity was not, unless so designated by the Board under s. 2(g)(iii), the employer of the employees in question. The Board stated at 49:

> *The Board invited the Union to amend its application to add Ramtec as an interested party, indicating that it would adjourn the hearing so that Ramtec could be notified. The union declined the invitation. It did not ask the Board to exercise its discretion under Section 2(g)(iii) of The Trade Union Act to designate Flint Electrical as the employer of Ramtec's employees (see, for example, Fairford Industries Ltd. [supra], LRB File No. 216-85; Shelter Industries Ltd., [supra], LRB File No. 199-78; and The Board of the Parkland School Unit No. 63 [[1978] 2 CLRBR 489] in which the Board invoked Section 2(g)(iii) to prevent employers from circumventing existing certification orders or collective agreements).*

In *Saskatchewan Government Employees' Union v. Government of Saskatchewan and Tourism Industry Association of Saskatchewan Inc.*, [1989] Winter Sask. Labour Rep. 63, LRB File Nos. 119-87 and 217-87, the Board held that a contracting out of the services that had previously been performed by Government to an entity that was not closely related to Government did not give rise to the circumstances which would convince the Board to exercise its discretion to designate the Government of Saskatchewan the employer pursuant to s. 2(g)(iii). The circumstances in that case were similar to the circumstances in this case in the sense that Government is subcontracting work that otherwise was or might be performed by employees of Government to a private enterprise. The Board stated at 67:

> *In summary, what occurred was a contracting out for services to an entity neither owned nor controlled by Government. The function contracted out was not a core activity of the principal and the business affairs and industrial relations of the two organizations were neither interconnected or inseparable. In the circumstances, the Board will not designate the Government as the employer of TISASK employees pursuant to Section 2(g)(iii) of The Trade Union Act.*

These cases were all decided before s. 37.3, the "related employers" provision, was added to *The Trade Union Act*. Similar cases may now fall to be considered under s. 37.3. For instance, in *Canadian Pioneer Management Group, supra*; *Shelter Industries, supra*; *Sollars, supra*; *Modern Roofing, supra*; and *Fairford Industries, supra*, the factors triggering the exercise of the Board's discretion to

designate a principal the "employer" under s. 2(g)(iii) or to "pierce the corporate veil" were the corporate ties between the principal and contractor and the corresponding lack of arm's length dealings between them. In the *Modern Roofing* decision, the Board acknowledged the use of s. 2(g)(iii) in lieu of associated employer provisions that existed at that time in other labour jurisdictions. However, the Board has not restricted the application of s. 2(g)(iii) to those cases in which the principal and contractor are related employers in the sense of sharing common ownership and control. For instance, in *Cana Construction*, *supra*, the principal and contractor were separate corporate entities with different shareholders and managerial structures.

In determining the criteria that should apply to a determination under s. 2(g)(iii), we must be mindful that in designating a principal as the "employer", the Board is "separating the responsibility for bargaining collectively with respect to wages from the responsibility for paying them" (*Cana Construction*, *supra*, at 48). Before doing so, the Board must be convinced that the separation of responsibility is based on a sound labour relations footing. In past decisions, the Board has been influenced by factors indicating that the principal dominates the financial affairs of the contractor to such an extent that the setting of wage rates and other working conditions does not affect the financial health of the contractor. For instance, in the *Cana Construction* case, *supra*, the Board held that "finding Pan-Western responsible for negotiating wage rates for carpenters on the Y.M.C.A. project will not as a practical matter remove whatever control Buchner Construction Inc. may have over its own financial affairs." It seems to this Board that the designation of a principal as "employer" under s. 2(g)(iii) can be made where it will enhance the collective bargaining process by requiring the party effectively controlling the purse strings to sit at the bargaining table. In these circumstances, the ability of the union and the contractor to negotiate and conclude a collective agreement may be frustrated by the formal absence of the principal from the bargaining table. If the principal plays an invisible role at the table, in the sense that the contractor cannot conclude an agreement without consulting with and obtaining tacit approval of the agreement from the principal, then the collective bargaining process is well served by requiring the principal to actually engage in formal collective bargaining with the union. There are different types of relationships that may fall within the scope of this provision, including contractors who provide labour services on a cost plus basis. In many cases the principal will effectively determine the terms and conditions of work for employees, such as their hours of work, work assignments, and the like, as well as determining wages and the other costs. The provision, however, is not limited to the labour broker relationships. Each case requires an examination of a number of factors to ensure that an assessment is made of the labour relations gains to be achieved by

separating the responsibility for negotiating a collective agreement from the responsibility for paying wages.

In the present case, the Board concludes that SGC should not be designated the employer under s. 2(g)(iii). Marwest does not operate on a "cost plus" basis with SGC. The risk of the labour costs and collective bargaining costs are within its control. It is not financially dependent on SGC to such an extent that it would make more sense to require SGC to bargain with the Union for the wages and working conditions of Marwest employees. Marwest is in a better position overall to determine its collective bargaining obligations. In no sense is SGC an invisible hand at the bargaining table.

The Board understands the frustrations experienced by unions operating in the service sector, particularly in food and cafeteria services. Given the nature of the industry, changes in the employer-contractors frequently occur. Leases in the industry tend to be relatively short-term compared to the cycle of collective bargaining. In the past, the right of unions to continue to represent employees has been challenged on changes of contractors. The Legislature responded to these concerns, in part, through the addition of s. 37.1 of the *Act* which is intended to ensure the continuation of union representation when cafeteria or food service contractors or janitorial or cleaning service contractors working in public institutions change. The Union has some anxiety that this provision will not adequately cover a change or the removal of the contractor in the present case. While we are sympathetic to the Union's long term concerns for seamless representation despite changes in contractors, the Board does not consider this factor sufficient to override its main concern that SGC does not exercise the type of financial dominance over Marwest that would justify ordering it to bargain collectively with the Union for the employees of Marwest.

The Union having filed majority support among the members of the bargaining unit will be issued a certification Order naming Marwest Food Systems Ltd. as employer.

UNITED STEELWORKERS OF AMERICA, Applicant and WHEAT CITY STEEL, A DIVISION OF SAMETCO AUTO INC., Respondent

LRB File No. 102-96; July 3, 1996
Chairperson: Beth Bilson; Members: Donna Ottenson and Don Bell

For the Applicant: Joe Nistor
For the Respondent: Brian Scherman

Bargaining unit - Appropriateness - Whether unit composed of all employees with exception of sales staff is appropriate - Board deciding unit is appropriate.

Bargaining unit - Geographic scope - Whether unit should be described in terms of twenty-mile radius of city - Board deciding scope should be limited to municipal boundaries, but worded to include present site.

Bargaining unit - Exclusions - Confidential exclusion - Whether position of credit manager should be excluded - Board deciding position should be in scope.

***The Trade Union Act*, s. 5(a).**

REASONS FOR DECISION

Beth Bilson, Chairperson: The United Steelworkers of America have made an application seeking to be certified as the bargaining agent for a unit of employees of Wheat City Steel. The Union proposed that the bargaining unit should be described to include yard staff, drivers and two clerical employees. The unit described in this way would exclude several managerial positions, the sales staff, and a position bearing the title of credit manager.

The Employer is engaged in the business of supplying reinforcing and dimensional metals from a facility at the north end of Regina. A related corporation, which processes scrap metal, operates out of an adjacent facility; this application does not involve any part of that business.

The facility consists of a relatively open yard area, a warehouse, offices, and a trailer in which yard staff change their clothes and spend their breaks. The sales staff obtain orders for the products supplied by the company. These orders are processed by the clerical staff, and then conveyed to the yard staff, who assemble the material for loading and delivery by the drivers. The total number of persons employed at this location, excluding management staff, is fourteen.

There are six yard staff, who work under the direction of a foreman, who the parties agree would be excluded from the bargaining unit. There are two highway drivers, who deliver materials throughout the province and into Alberta, and one city driver, whose route is limited to local deliveries. The office staff consists of a receptionist, a clerk and the credit manager. The two sales staff have offices adjoining the general office.

Counsel for the Employer argued that the unit proposed by the Union is not appropriate. He suggested that the appropriate bargaining unit would either include all of the employees, or be limited to the yard staff.

The delineation of appropriate bargaining units has long been acknowledged to be a critical task for this Board, and, in this context, we have considered a wide range of factors which may be relevant to the construction of a unit which will provide a foundation for a sound collective bargaining relationship. In *Health Sciences Association of Saskatchewan v. St. Paul's Hospital, Saskatoon*, [1994] 1st Quarter Sask. Labour Rep. 269, LRB File No. 292-91, the Board made this comment, at 270:

> *This Board has, from its earliest days, been mindful both of the importance of its responsibility to define appropriate bargaining units, and of the complexity of this question. A range of more or less common factors may be considered in cases where the bargaining unit is to be determined, but these factors may have a different resonance or weight in different circumstances. The primary obligation of the Board is not to devise a set of principles or a formula to which it will adhere in a dogmatic way, but to make a pragmatic assessment of each case which is brought before it, and to determine what definition will best serve the overall objectives of promoting collective bargaining and allowing employees access to such bargaining.*
>
> *The Board has long held the belief that collective bargaining is most effective if the participants are defined on the basis of the most inclusive possible bargaining unit, and has favoured larger bargaining units as the model which represents the appropriate bargaining unit. As we have often pointed out, however, the Board does not adhere to this preference with such obstinacy as to blind us to the fact that we should be ready to allow employees the benefits of collective bargaining if it can be conducted in a bargaining unit which is viable, and therefore appropriate, even if it is not comprehensive enough to match an ideal.*

In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Limited*, [1992] 4th Quarter Sask. Labour Rep. 75, LRB File No. 182-92, the Board commented, at 77:

> *There is a range of factors which may enter into the consideration of these policy*

> *objectives, and which may affect the weight which is given to any of them. An impressive volume of cases has emerged in which these factors are enumerated. They include such things as whether there is sufficient community of interest among the employees concerned, whether recognition of a unit will result in undue fragmentation of the total complement of employees, whether there is a history of successful collective bargaining between an employer and a union or unions, and whether other groups of employees may be disadvantaged in some way by the description of a unit. It must be kept in mind, however, that the articulation of these factors is not meant to provide an exhaustive list of necessary conditions for a finding that a unit is appropriate. The list of items results rather from attempts by labour relations boards, after examining specific employment situations, to identify the aspects of those relationships which suggest that certain definitions of bargaining units will better satisfy the policy objectives which are being pursued.*

In a decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, [1994] 3rd Quarter Sask. Labour Rep. 87, LRB File No. 088-94, the Board commented as follows on the general policy which underlies the consideration of various factors, at 89:

> *Though, as these extracts make clear, the Board has been guided by a wide range of factors in assessing the appropriateness of proposed bargaining units, our general approach has been to attempt to balance a policy interest in stable and coherent bargaining units as a basis for healthy collective bargaining, with the right of employees stated in Section 3 of The Trade Union Act to have access to collective bargaining as a means of dealing with their employers. Not every configuration of employees suggested can provide a foundation for strong collective bargaining. On the other hand, the Board has pointed out on numerous occasions that a proposed unit need not be the most appropriate bargaining unit which can be imagined; it is sufficient for it to be an appropriate unit.*

As counsel for the Employer pointed out in this case, the Board has often expressed the view that the soundest basis for viable collective bargaining is formed by the creation of the most comprehensive possible units, preferably units which consist of all of the employees of a single employer. In general, such units combine the optimum degree of influence for the trade union with minimal administrative disruption for the employer, and hold out the best hope for a stable and constructive bargaining relationship.

For various reasons, the creation of such units is not always possible, or even desirable, and the Board has been sufficiently optimistic about the flexibility of collective bargaining to recognize that various configurations constitute a satisfactory foundation for a bargaining relationship.

In weighing the arguments which are advanced when a proposal is made for a bargaining unit which is less inclusive than a unit composed of all employees, the Board has been careful not to attach undue

importance to such factors as the range of union organizing, or administrative convenience from the point of view of the employer. In the *Regina Exhibition Association* decision, *supra*, the Board made this comment, at 77:

> *If the only argument of the employer in this case were that the unit applied for is less appropriate than a unit which would include the banking staff, that argument in itself is not sufficient to defeat the application made by the union. On the other hand, the fact that the union has identified a group of employees it wishes to represent, and in which the majority of employees apparently want such representation, does not in itself determine the issue either.*

Counsel for the Employer argued that what the Union is essentially proposing in the application is the inclusion in the bargaining unit of three out of four very diverse groups of employees. He argued that these groups do not have a strong community of interest, and that it would be very difficult for the Employer to bargain with the Union about the differing terms and conditions for these employees. He said that the exclusion of the sales staff would be a further barrier to sound collective bargaining, because of the significant amount of interaction they have with the clerical staff.

It is true that the Board has in the past expressed some reluctance to recognize a bargaining unit which contains several highly divergent groups picked out of a larger group of employees. A bargaining unit of this type is sometimes proposed because it represents the current limits of the organizing capacity of the trade union, or because of other considerations which do not provide a satisfactory rationale, objectively speaking, for the construction of a bargaining unit in that form. On occasion, we have said that this does not seem to represent a promising start to a collective bargaining relationship. In part this is because of the difficulties for the trade union of providing strong and cohesive representation for a unit of employees whose interests are diverse.

We have also expressed the view, however, that the most inclusive bargaining unit possible provides the soundest basis for collective bargaining, as a general rule. The value of comprehensiveness to some extent counteracts the difficulties posed by the inclusion of diverse groups of employees. In this case, a bargaining unit composed of the office staff, the drivers and the yard staff would include nearly all of the employees of this Employer. The fact that there are differences in the duties and conditions of the three groups does not seem in itself sufficient reason to reject this configuration as a basis for collective bargaining.

The exception of the sales staff from the bargaining unit does not seem to us to render it an

inappropriate one. It is true that they have a significant amount of interaction with other employees in the course of their duties. On the other hand, they are remunerated in part through a bonus or incentive system, and this makes it possible for the Employer to treat their terms and conditions of employment in a different way than other employees.

We are not suggesting that sales personnel should routinely be excluded from bargaining units composed of other kinds of employees. There is little doubt that, in most cases, these persons are "employees" within the meaning of *The Trade Union Act*, R.S.S. 1978, c. T-17, and there is no reason to exclude them categorically from access to collective bargaining as a means of determining their terms and conditions of employment.

This is a different issue, however, from the question of whether an employer should be able to put forward administrative considerations to defeat a proposal for a bargaining unit which does not include the sales staff. It must be remembered that the focus of our inquiry here is whether the Union has proposed *an* appropriate unit, not whether some other unit would be a better one. In our view, there is no reason to suppose that a unit composed of yard staff, drivers and office staff would not form a viable basis for collective bargaining.

It is our opinion, in this connection, that the employee whose title is credit manager should *not* be excluded from the bargaining unit. In the application, the Union referred to this person as an "accountant," but it was agreed at the hearing that this position is the same one which is entitled credit manager by the Employer. Mr. Geoff Perry, the General Manager for the Employer, testified that, in addition to performing credit checks, the incumbent in this position carries out duties of an ordinary clerical nature. He said that the term "credit manager" was devised largely for public relations purposes, and that the incumbent performs no managerial functions.

The representative of the Union suggested that this person performs duties of a confidential nature, which would justify her exclusion from the bargaining unit. There is no suggestion, however, that the person in this position carries out any duties which are confidential in relation to the labour relations of the Employer, and the exclusion on confidential grounds which is contained in s. 2(f)(i) of *The Trade Union Act* does not therefore apply. We have concluded that this position should be included in the bargaining unit.

The geographic scope which the Union proposed for the unit was described in the following terms, "located at 3090 Industrial Drive N., Regina, Saskatchewan or at any other premises in, or within a twenty (20) mile radius of Regina, Saskatchewan to which any part of the existing operation may be moved..."

In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Brown Industries (1976) Ltd.*, [1995] 2nd Quarter Sask. Labour Rep. 71, LRB File Nos. 010-95 and 012-95, the Board summarized the rationale underlying our policy on the issue of geographic scope as follows, at 78:

> *The Board has sought to draw a balance between encouraging collective bargaining on the widest possible basis for the employees who are employed at the time certification occurs, and recognizing the right of a trade union to represent employees whose employment is purely hypothetical, and who may be disenfranchised as a result. In special circumstances, such as those which are obtained in the construction industry, the Board has sometimes concluded that the only way to ensure that the rights of employees to engage in collective bargaining are not defeated is to recognize a bargaining unit whose scope is defined to include the entire geographic area of the province. In general, however, the Board has not thought it advisable to approve such bargaining units, and we see no compelling reason to depart from that policy in this case.*

Our general policy, outside the construction industry, has been to describe bargaining units in terms of municipal boundaries. This has seemed to us to protect the bargaining rights of trade unions when an employer moves within municipal boundaries, without extending those bargaining rights in a way which preempts the consideration of a situation which has changed substantially.

It is, of course, open to a trade union to apply for an amendment to a certification Order in appropriate circumstances. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Raider Industries Inc.*, [1996] Sask. L.R.B.R. 27, LRB Nos. 274-95 & 275-95 this Board allowed an application for an amendment to a certification Order where an employer moved a significant portion of a manufacturing operation to an additional location in a different municipality.

One of the sources of concern for the Union in this case may be that the current location of the Employer is not, strictly speaking, within the municipal boundaries of Regina, although it is popularly referred to as being in Regina. To clarify this, we will issue an Order describing the geographic scope as follows, "at Regina, Saskatchewan, including the current premises at 3090 Industrial Drive North."

We have reviewed the evidence of support filed by the Union, and as the application for certification is supported by the majority of employees in the bargaining unit as we have now defined it, we will grant an Order for certification.

SASKATCHEWAN GOVERNMENT EMPLOYEES' UNION AND GOVERNMENT OF SASKATCHEWAN, Applicants and THE CANADIAN ASSOCIATION OF FIRE BOMBER PILOTS AND JAMES STOCKDALE, Respondents

LRB File No. 302-95; July 10, 1996
Chairperson: Beth Bilson; Members: Gerry Caudle and Kathie Jeffrey

For the Applicants: Rick Engel
For the Respondents: Kevin Wilson and Jeff Lee

Bargaining unit - Scope - Whether union succeeded in showing that fire bomber pilots had ever been within scope of bargaining unit - Board deciding Union had not demonstrated they had ever been included.

Practice and procedure - Evidence - Evidence of support - Whether evidence of support is required - Board deciding evidence of support would be required for inclusion in bargaining unit, given conclusion that pilots are being added to bargaining unit.

Reconsideration - Criteria - Whether Board should reconsider tentative conclusion reached in earlier hearing which was largely focused on constitutional question - Board deciding no need to reconsider original decision.

***The Trade Union Act*, s. 24.**

REASONS FOR DECISION

Beth Bilson, Chairperson: The Saskatchewan Government Employees' Union ("S.G.E.U.") represents a unit of employees of the Government of Saskatchewan which has been described in successive certification Orders issued by this Board since 1945.

As a result of a series of events which will be summarized in due course, the S.G.E.U. has taken the position over the past several years that the fire bomber pilots and flight watch coordinators involved in forest fire suppression in northern Saskatchewan fall within the scope of the bargaining unit as defined in the current certification Order. For ease of reference, we will refer to this group as "the pilots" or the "fire bomber pilots" in these Reasons, although the application also deals with approximately five flight watch coordinators. In an earlier proceeding, the Canadian Association of Fire Bomber Pilots ("C.A.F.B.P.") brought an application asking for a finding that this Board did not have constitutional

jurisdiction over their industrial relations, and that they could not therefore be included in a certification Order issued by the Board.

In the decision in *Canadian Association of Fire Bomber Pilots and James Stockdale v. Saskatchewan Government Employees' Union and Government of Saskatchewan*, [1993] 1st Quarter Sask. Labour Rep. 202, LRB File No. 164-92, the Board concluded that the industrial relations of the pilots fall within provincial jurisdiction, notwithstanding the aeronautical aspect of their activities. On an application for judicial review cited at (1993), 119 Sask. R. 116, the decision of the Board was upheld by the Court of Queen's Bench for Saskatchewan. The decision was further upheld by the Saskatchewan Court of Appeal (22 April 1994), C.A. No. 1748 and leave to appeal was refused by the Supreme Court of Canada (2 February 1995).

In the decision in the application designated as LRB File No. 164-92, the Board stated that the finding on the constitutional issue should not be regarded as determining the question of whether the pilots were included within the scope of the bargaining unit. The Board made the following statement, at 219:

> *In our view, this set of circumstances requires some further discussion of the rights of these employees before they are included in the bargaining unit, as counsel for the Union requests. The previous decisions of the Board appear to suggest that evidence of majority support among these employees may be required. It is possible, however, that there may be other means by which the wishes of these employees may be taken into account, and the Board does not wish to rule these out without considering what alternatives there may be.*
>
> *The issue was not raised by either party at the hearing of this matter; it is our view, however, that the Board should not include these employees in the S.G.E.U. bargaining unit by default, on the assumption that the resolution of the question of constitutional jurisdiction settles this issue as well. The Board will, of course, entertain a timely application to add these employees to the bargaining unit.*

In support of this proposition, the Board reviewed some of the principles governing the addition of employees to the scope of a bargaining unit, summarizing them as follows, at 217:

> *In the decision of this Board in Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre, [1995] 1st Quarter Sask. Labour Rep. 167, LRB File No. 236-92, we observed that there are several different means by which individual employees or groups of employees can be added to an existing bargaining unit.*
>
> *One of these means is through the union security provision of a collective agreement, under which employees who are hired by an employer into a position which lies*

> *within the bargaining unit are required to become members of the trade union as a condition of employment.*
>
> *The second is through bargaining between the parties over the scope of the bargaining relationship; this is often the means by which decisions are made as to whether newly-created positions are to be included within or excluded from the bargaining unit.*
>
> *The third method involves a redefinition of the bargaining unit itself. In the Wascana Rehabilitation Centre case, we summarized Board policy in this respect. In that case, the Union was seeking to add to the bargaining unit a group of physical therapists who had for some time been specifically excluded from the scope of the bargaining unit, and had bargained with their employer through a professional association.*

Though the Board observed that the issue had not been exhaustively dealt with at the hearing concerning the constitutional matter, the Board tentatively suggested that the circumstances of the pilots appeared to fall into the third of these categories.

The S.G.E.U. subsequently filed this application, seeking to have the Board reconsider this tentative conclusion. The application was filed jointly with the Employer, pursuant to s. 24 of *The Trade Union Act*, R.S.S. 1978, c.T-17, as a Reference of Dispute. The Employer, the Government of Saskatchewan, did not take any active part in the proceedings, and the actual parties to the application must be regarded as the S.G.E.U. and the C.A.F.B.P. These two parties filed an Agreed Statement of Facts. In addition, they filed a considerable amount of archival documentation which was presented to shed light on the complex developments which have resulted in this dispute. Some of these documents were filed by agreement, and others were filed by the parties separately.

The pilots who are the subject of this application perform duties related to aerial forest fire suppression in northern Saskatchewan, in a branch of Saskatchewan Environment and Resource Management ("S.E.R.M.") known as Northern Air Operations. A number of other pilots work for S.E.R.M. as conservation officers. As well, there are pilots employed in the Air Transportation Branch of the Saskatchewan Property Management Corporation ("S.P.M.C.") in connection with the Executive Air Service and the Air Ambulance Service.

The connection between the fire bomber pilots, or at least their predecessors, and the Government of Saskatchewan began in the late 1940s. The early history of this connection is described as follows in the Agreed Statement of Facts filed by the S.G.E.U. and the C.A.F.B.P.:

6. On July 23, 1947, the Government of Saskatchewan established a crown corporation known as "Saskatchewan Government Airways" ("SGA") for the purpose of operating on behalf of the Province of Saskatchewan the business of an air transport, express and freight system and the business of servicing and repairing aircraft. SGA owned aircraft and employed pilots, aircraft maintenance engineers and other personnel. The Saskatchewan Labour Relations Board issued an order on December 10, 1947 certifying the Canadian Airline Employees' Union, Local No. 1 as the bargaining agent to represent the employees of SGA. By the terms of an Order of the Board dated September 30, 1953, the Board amended its earlier order and certified the Canadian Brotherhood of Railway Employees and Other Transport Workers, First Airways Division No. 305 ("the Brotherhood") as the bargaining agent to represent the employees of SGA. It continued as the certified bargaining agent of these employees until the winding-up of the corporation in 1968.

7. SGA became actively involved in providing aerial forest fire suppression services and water bombing aircraft and personnel to the Department of Natural Resources of The Government of Saskatchewan. SGA changed its name to SaskAir in 1963. SGA was wound up by the Government of Saskatchewan in 1968 and its assets were sold to an air transportation company based in Prince Albert and known as "Norcanair".

8. From 1968 until approximately 1976, the Government of Saskatchewan obtained aerial forest fire suppression services by contracting with commercial air transportation companies (including Norcanair) to supply aircraft, personnel and services for use in aerial forest fire suppression.

9. The Government of Saskatchewan began to re-acquire ownership of aircraft for use in aerial forest fire suppression in approximately 1976. In that year, the Government of Saskatchewan acquired six Grumman Tracker Mark III aircraft (which had been converted to water bombers) and two "Bird-dog" (or guide) aircraft. These government-owned aircraft were initially operated by the Government of Saskatchewan in conjunction with other aircraft supplied by various commercial air transportation companies.

Between 1977, when the Government of Saskatchewan began a renewed period of direct involvement in aerial fire suppression, and the present time, the fire bomber pilots and succeeding agencies representing the Government of Saskatchewan have entered into contracts each year to secure the services of the pilots for the summer fire season. These contracts have generally covered the period from April until October, and have been signed by the individual pilots and flight watch coordinators.

Northern Air Operations, which has at some times also been known as Northern Air Services, was housed successively between 1977 and 1987 in the Department of Government Services, the Department of Northern Saskatchewan, the Department of Supply and Services, and Saskatchewan Supply and Services.

In 1987, S.P.M.C. was created as a Crown corporation, and this entity assumed the administrative responsibility for Northern Air Operations. In 1992, this responsibility was passed back to Saskatchewan Parks and Renewable Resources, a department of the Government of Saskatchewan, and in 1993, in turn, S.E.R.M. became responsible for Northern Air Operations.

When a number of services previously provided by the Government of Saskatchewan were transferred to S.P.M.C. in 1987, S.G.E.U. contacted the Public Service Commission for Saskatchewan to initiate discussion of the implications of this change for in-scope employees represented by that Union. In a letter dated March 3, 1987, the Acting Chief Executive Officer of S.P.M.C., Mr. Otto Cutts, informed the Union of the intention to offer employment within the corporation to employees who had been engaged in providing the same services, and also advised the Union that the corporation intended to negotiate a separate collective agreement to cover those employees. In a subsequent letter, dated March 6, 1987, Mr. Len Posyniak, an official of the Public Service Commission wrote to the Union in the following terms:

> *As you are aware, Saskatchewan Property Management Corporation accepts the jurisdiction of the S.G.E.U. for collective bargaining purposes for former in-scope Supply and Services employees as per Section 37 of The Trade Union Act and this in itself provides that employees' working conditions and benefits will not be affected, subject to whatever changes the parties wish to agree to in their contract negotiations.*
>
> *In addition, on February 10, 1987, the Public Service Commission and the Saskatchewan Property Management Corporation proposed a letter of understanding dealing with the transfer of employees to the new employer that would have provided employees with access to the public service-wide re-employment list for a two year period beginning March 1, 1987. To date, we have not received a formal response to this proposal from you.*
>
> *You have requested that we amend the PSC/SGEU Collective Agreement to provide coverage of the Saskatchewan Property Management Corporation. We are not in agreement with your proposal and in any event, such a proposal would be unenforceable since the Saskatchewan Property Management Corporation is legally a separate employer and could not be bound by such an agreement.*

When control of Northern Air Operations was returned to the executive government of the Province of Saskatchewan in 1992, S.G.E.U. concluded a Letter of Understanding with S.P.M.C. and Saskatchewan Parks and Renewable Resources (then called Saskatchewan Natural Resources), which set out the terms and conditions which would govern the employees who were being transferred back to employment with the government.

It is important for our purposes to note two specific details of the Letter of Understanding. The first is that among the job classifications listed in the Letter of Understanding were Pilots at several levels. The salary rates attached to these classifications were drawn from the rates paid to comparable classifications in other air services within the government service.

The second point which should be noted is that a list of the employees affected by the Letter of Understanding was appended to the document. This list contained the name of only one person identified as a "Pilot 2." According to the evidence presented on behalf of the C.A.F.B.P., this pilot, Mr. Ted Viden, had originally been the pilot of a light plane engaged in natural resources work. When this work came to an end, he was transferred to the Air Ambulance Service, but failed to meet the proficiency standards to take on a job there. Since he was three years away from retirement, he was taken into Northern Air Operations as a "bird dog" pilot in the fire suppression service; he continued to be a member of S.G.E.U., and was, in this respect, different than the other fire bomber pilots.

The contracts which were signed by the pilots for the seasons of 1977 and 1978 make no specific reference to their employment status. One of the documents which was filed by the S.G.E.U. with the Board was a copy of a memorandum, dated March 7, 1974, from the Government Comptroller informing all Permanent Heads in the Government of the expectation on the part of the Government of Canada that deductions would be made from the amounts paid to contract employees for Canada Pension Plan and unemployment insurance contributions.

Whether it was related to this advice or not, the contracts which were signed for the seasons after 1979 contained the following clauses:

> 4. *Independent Contractor*
>
> 4.1 *The Pilot shall be an independent contractor and not the employee of the Province in the performance of his/her services and no provision of this Agreement that gives the Province a measure of control over the services shall be construed as authorizing the Province to direct the manner in which the services are to be carried out, but shall rather be construed as authorizing the Province to give direction as to the services to be performed and the results desired to be obtained.*
>
> 4.2 *Notwithstanding paragraph 4.1 it is agreed that the Province shall undertake on behalf of the Pilot to make deductions from amounts due to the Pilot for remittance to the Receiver General of Canada with respect to Income Tax, U.I.C. and CPP contributions.*

The parties were in agreement that, for the purposes of this application, the pilots are employees of the Employer, though it was argued on behalf of the pilots that the existence and the contents of the contracts have other implications which are of importance in connection with this application.

On August 18, 1989, the pilots made a request to meet as a group with the President of S.P.M.C., as well as with the administrators of Northern Air Operations. In this letter, the purpose of such a meeting was described as follows:

> *Issues which are on the agenda are:*
>
> 1. *Taxation methods used for contract pilots*
> 2. *Wages*
> 3. *Operation of S.P.M.C. - N.A.O. aircraft from Flin Flon, Manitoba.*
>
> *Long-term members, as well as newcomers to our organization, feel the above issues reflect problems that have remained unsolved. The contract personnel, as a group, have never had the opportunity to meet with you personally; we feel that your presence would represent support for our concern in resolving these matters.*

Though it is not clear that the President himself attended the meeting, there are indications that some representatives of S.P.M.C. were present, and the issues raised at the meeting were later followed up in discussions with Mr. Norm Loehr, the Director of Human Resources for the corporation. In a letter dated January 22, 1990, Mr. Jim Stockdale, writing on behalf of the pilots, referred to one of these meetings, held in December of 1989, and raised the following issues for continued discussion:

> *1. A form letter addressed to Revenue Canada would be drafted and sent to each pilot. The purpose of this letter is to allow pilots to apply for special taxation considerations under the "undue hardship" clause as outlined in Revenue Canada's guidelines.*
>
> *2. A payroll deduction system could be used to deduct RRSP contributions directly from contract employees paychecks. This practice would help in reducing the amount of income tax deducted from our checks. We understand this will be done on a voluntary basis.*
>
> *3. I would like to outline your position on the 1990 and future wage proposals.*
>
> > *(i) That pay equity between Saskatchewan and Manitoba or Ontario would not be considered.*
> >
> > *(ii) That you are committed to closing the gap, although perhaps never completely, between Saskatchewan and ConAir.*
>
> *4. You also discussed drafting a policy regarding employment opportunities for contract pilots working for Northern Air operations. The purpose of this policy would be to permit NAO contract pilots the opportunity of working for Air Ambulance or Executive Air Services.*

> *5. The final point I would like to outline regards benefits. You offered to examine the possibility of including NAO pilots in the government's benefit package. This is the benefit package for out-of-scope employees. Mr. Loehr mentioned that now would be a good time to try and have contract pilots included because the existing benefit package is being changed.*

In a letter dated February 28, 1990, one of the managers at S.P.M.C. responded to this letter as follows:

> *Thank you for your letter outlining your understanding of the points discussed at our Saskatoon meeting of December 20, 1989. So that future expectations remain consistent with what was discussed, the following points need to be clarified:*
>
> *1. With respect to salaries, we are committed to being competitive with like kinds of operations, currently Alberta and B.C. We will work towards a gradual closing of the gap between our scales and those of the two private carriers who contract their services to those two provinces.*
>
> *2. In view of the in-scope staffing process forming part of our collective agreement with the S.G.E.U., we are unable to formulate a policy regarding employment opportunities in the Executive/Air Ambulance Units. However, you will receive notification of any Pilot competitions established for either of those Units and are invited to make application.*
>
> *3. With regard to inclusion of the contract pilots in the Government's out-of-scope benefits package, we did agree to examine the possibility. Mention was made that the existing package is being reviewed, but I don't want to leave the expectation that it will be altered to facilitate inclusion of contract personnel. Much of the out-of-scope benefit package is covered by legislation which would need amending before changes could result. Even if eligibility changes occur, the Corporation is only committed to considering inclusion of contract personnel.*
>
> *A form letter relating to individual applications for exclusion from the normal application of Revenue Canada income tax collection rules has been distributed to all contract personnel. A payroll deduction system which would allow source deductions and subsequent individual contributions to a RRSP, has now been negotiated with the Department of Finance. Basically, individuals are allowed to contribute up to 20% of earned income to a maximum of $7,500 annually. This could represent a significant income tax deferral mechanism. A letter explaining the process as well as the benefits in more detail will be made available prior to or at the time the contract commences.*

At the 1990 annual meeting of the pilots, which seems to have been held sometime in the spring, the pilots voted to form an association, in order to pursue some of the issues which had been raised in the discussions with S.P.M.C.

Over the period following the meetings with representatives of S.P.M.C. in 1989, the pilots undertook a review of wages and benefits paid to their counterparts in other jurisdictions. This information formed the basis of further discussions which took place with S.P.M.C. managers in the summer of 1990. The document which summarized the findings of the pilots concerning wages and benefits ended with the following summary of issues to be raised with their employer:

> *As employees we are generally satisfied with our jobs. We enjoy working in the province, the superior maintenance of the aircraft, the people with N.A.O. and forestry, and most of all we enjoy the type of flying we do. This is indicated by the numerous pilots who continue to return year after year.*
>
> *But times are changing and we are falling behind our contemporaries in other provinces. We note a handful of experienced pilots who have left over the past few years due to this situation. We feel we should be compensated equally as others in the same field.*
>
> *Question:* *Could you enlighten us on our status with S.P.M.C.? Are we contractors or employees?*
>
> *Question:* *Do you or S.P.M.C. have a problem with the pilot association we have formed and if so what?*
>
> *Question:* *As you know we fly heavy chemical and water bombers. Currently, government employed Cheyenne/Air Ambulance pilots who fly light twins, earn approximately $64,000.00 per year and enjoy a full benefit package. Their wages are based on an eight hour day plus overtime. It should be noted that these pilots' annual days of work is comparable to ours yet their levels of operating risk are considerably lower. Would you explain the difference between the two groups.*

The meeting between representatives of the pilots and representatives of S.P.M.C. took place on July 23, 1990. A copy of the document which was prepared by the pilots to summarize these discussions was filed with the Board. Though it is not necessary to reproduce it here in full, one or two examples may serve to convey the flavour of the meeting. The following are two of the questions raised and answered:

> *1. Will the Insurance agent for the government cover us assuming we make it through the red tape and SPMC are willing to include us in the out-of-scope package?*
>
> *Mr. Loehr replied that there are people on contract covered on some or part of the benefit package; however, these people are politically appointed by Order-in-Council. He felt we would not qualify as political appointments. He also stated he would contact the Public Employees Benefit Agency (PEBA) and find out how or if we would qualify. He stated that he had a contact in the Insurance Agency of Reed Stenhouse and would also speak to him.*

> *2. Is there a process which could include us in the out-of-scope benefit package and could Order- in-Council get us into the package:*
>
> *"There is no process which could include us in the out-of-scope benefit package but that doesn't mean it can't be done."*
>
> *The Public Employees Benefit Act is presently being changed (the amended act has received 2nd reading in the legislature) and these changes will expand the groups and types of people eligible to be included in PEBA's agency. Presently the act is too specific as to who can and cannot be included in PEBA.*

There was also discussion of a pension plan, the nature of Order-in-Council appointments, group insurance, long-term disability coverage, and the possibility of multi-year contracts for the pilots. Towards the end of the discussion, the following exchange was recorded:

> *11. Mr. Loehr was asked the question: "In view of the fact that we are pilots and not professional negotiators, and that we prefer flying to bargaining, would he prefer to discuss our concerns with some kind of mediator?"*
>
> *Mr. Loehr responded (paraphrased) that he had no problems talking with us and that talking directly to the group and not through a third party was a better way to go. He stated that he had no problem talking with a mediator either, he does all the time, but for us he felt it would be an unnecessary expense, that it would extend talks and that bias is unavoidable. He concluded by saying that he is not telling us not to get a mediator, that would be our own decision.*
>
> *We informed Mr. Loehr that we had not contacted any mediators but were just wondering what he preferred and thanked him for his comments.*

In addition to the pilots, the employees of Northern Air Operations include a number of mechanics and other flight support personnel. These are the employees who were listed by name in the Letter of Understanding which was concluded in 1992. It is not altogether clear what triggered an approach on the part of one of the S.G.E.U. shop steward for this group of employees, Mr. Dave Smallwood, to the pilots in the summer of 1991, though it may have had something to do with the preparations which were taking place for the transfer of Northern Air Operations from S.P.M.C. to Saskatchewan Parks and Renewable Resources. According to Mr. Peter Byl, who gave evidence on behalf of the C.A.F.B.P., Mr. Smallwood asked the pilots to sign union cards, and suggested they would have to do that in order to retain their jobs.

Mr. Smallwood provided Mr. Byl with written responses to a number of questions which the latter asked about the implications of the inclusion of the pilots in the S.G.E.U. In response to a question concerning "job protection," for example, Mr. Smallwood made the following comment:

> *Answer #1: (a) In regards to the present situation, no presently employed pilot or flight watch coordinator will lose their job over the impending unionization of this group. This would be a contravention of The Trade Union Act and an unfair labour practice would be filed against the Corporation. (b) If the matter of unionization has not been settled while this group is here (La Ronge and Prince Albert) the Corporation and the Union have agreed to consider this group as employees for the sake of continuity and job protection. i.e., if you held your present position before unionization you would hold your position after unionization regardless if you were here or not when this matter is settled. (c) If you become a member of S.G.E.U., (that is assuming the Union succeeds with this action) you will have full job protection as is outlined in the Collective Agreement.*

To another question concerning job classification, Mr. Smallwood gave the following answer:

> *Answer #3: As of July 11th no decisions have been made concerning class level of pilots and flight watch coordinators. The reason for this is the delay of documentation from Ontario and Manitoba Governments. As stated earlier in Answer #2 the documents have been received in Regina. A comparison will be made between the two Governments and the pilot and flight watch coordinator levels currently held on the S.G.E.U. Collective Agreement. The Union would greatly appreciate the cooperation of the pilots and flight watch coordinators in examining the documentation, comparing it with their present positions, and arriving at their own class levels with the reasons why.*

A further question concerned advancement, to which Mr. Smallwood replied as follows:

> *Answer #8: Advancement rights, positions applied for on the basis of seniority etc. will be in accordance to the S.G.E.U. Collective Agreement. To disallow seniority rights to S.G.E.U. members is an infringement of their rights as a union member under the Collective Agreement. As an option to this situation the Union will look at class levels which prevents pilots from other areas (i.e. Air Ambulance, Exec Air Services) from having the necessary qualifications to apply. In discussions with Regina, I was informed that Air Ambulance and Exec Air Services are worried that N.A.O. pilots may bump them.*

The pilots were apparently not reassured by the answers provided by Mr. Smallwood, as the C.A.F.B.P. proceeded to file on their behalf an application for certification with the Canada Labour Relations Board.

When the transfer of Northern Air Operations from S.P.M.C. was in progress in early 1992, Mr. Barrie Hilsen, an official of the corporation, made the following comments to the S.G.E.U. in a letter dated February 27, 1992:

> *Based on our discussion of February 26, 1992, regarding the fire bomber pilots status with respect to SGEU and per your request, please find the following action to be taken by the Saskatchewan Property Management Corporation with respect to*

this issue.

(1) SGEU be advised of the Saskatchewan Property Management's need to put commitments in place with the Fire Suppression Group for the 1992 fire season.

(2) SGEU be advised that should the application for certification made by the Canadian Association of Fire Bomber Pilots (CAFBP) be declined by the Canada Labour Relations Board, that the Saskatchewan Property Management Corporation will bring on the 33 individuals as employees of the Corporation. Further, that the individuals will be brought on as temporary appointments and that the conditions enjoyed by the individuals while under contract be extended to their temporary appointments via a Letter of Understanding between SPMC and SGEU. The temporary appointment start and end dates would coincide with those that would have been associated with the personal services contracts, the fire season.

(3) Due to CAFBP application before the Canada Labour Relations Board, that the Saskatchewan Property Management Corporation obtain the required approval from the CAFBP to issue personal services contracts to the individuals of the Fire Suppression Group for the 1992 fire season pending resolution of their CLRB application.

(4) That the CAFBP be advised of the legal requirement for SGEU recognition by the Corporation should the CAFBP application before the CLRB be unsuccessful. This legal requirement being clearly and specifically indicated by the Saskatchewan Department of Justice.

In a further letter, dated April 16, 1992, another representative of the corporation wrote to the S.G.E.U. as follows:

As you are aware, the transfer of Northern Air Operations from Saskatchewan Property Management Corporation to Saskatchewan Parks and Renewable Resources will involve a number of in-scope employees, as well as contract pilots.

The pilots, represented by the Canadian Association of Fire Bomber Pilots (CAFBP), has filed an application for certification with the Canadian Labour Relations Board. It is my understanding the hearing will take place May 21, 22, and 23.

As you can appreciate, it is important that our department have firm commitments in place with the Pilots for the 1992 fire season. It would be our preference that the contracts put in place for this season remain so to the end of the fire season.

Should the CAFBP application before the Canadian Labour Relations Board be unsuccessful, it would be our clear intent to acknowledge the legal requirement for S.G.E.U. recognition and begin discussions prior to the 1993 fire season.

I would appreciate an indication of the S.G.E.U.'s position on this issue as it is currently an area of concern in our contract discussions with the CAFBP.

The S.G.E.U. sought to intervene in the application which had been filed by C.A.F.B.P. with the Canada Labour Relations Board. In a letter dated January 13, 1992, counsel for S.G.E.U. stated their arguments for intervenor status in the following terms:

> *S.G.E.U. has a current collective bargaining agreement with all other in-scope employees of S.P.M.C. This agreement includes executive air pilots and there have been extensive efforts since 1989 to persuade the firebombers to join the collective agreement.*
>
> *More specifically, S.G.E.U.'s organizational campaign has consisted of an informational meeting in April, 1991, ongoing one-to-one discussions between S.G.E.U. service staff and various pilots, and numerous meetings between the S.P.M.C. shop steward and the bargaining committee chairman for the S.P.M.C. unit, and the firebomber pilots. For the most part, these have been individual meetings where the pilots have been encouraged to voluntarily join S.G.E.U.'s collective bargaining process. We reserve the right to present further submissions and evidence on the nature of our campaign should this be required.*
>
> *S.G.E.U. also takes the position that the firebombers have a sufficient community of interest to make them part of the current S.P.M.C. bargaining unit. In S.G.E.U.'s view, they should be part of the existing agreement.*
>
> *Finally, S.G.E.U. respectfully submits that the firebombers employed by S.P.M.C. either as a separate group or as part of the larger S.P.M.C. unit, fall within the jurisdiction of the Saskatchewan Labour Relations Board and not the jurisdiction of the Canada Labour Relations Board.*

It should be noted in relation to this letter, that at the hearing before the Board, counsel for the C.A.F.B.P. disputed the assertion that S.G.E.U. had conducted extensive organizing efforts among the pilots.

The parties ultimately agreed that the question of constitutional jurisdiction should be referred to this Board, and the C.A.F.B.P. made an application asking the Board to resolve that issue, which resulted in the decision alluded to at the outset of these Reasons. Notwithstanding the comment made by the Board, S.G.E.U. apparently took the position that the decision on the constitutional question was determinative of the issue of whether the pilots should be included in the public service bargaining unit represented by the S.G.E.U. They gave notice to the Employer that they wished to enter into negotiations concerning the terms and conditions of employment which should apply to the pilots.

In a reply dated June 29, 1993, the Chair of the Public Service Commission, Ms. Sheila Bailey, cited a number of passages from the Reasons for Decision issued by this Board, and made the following comment:

> *The Board concluded that it would not include the fire bombers and flight coordinators in the S.G.E.U. bargaining unit by default, on the assumption that the resolution of the question of constitutional jurisdiction settles this issue of employee preference.*
>
> *It appears that the Labour Relations Board is saying that S.G.E.U. must make application to it for the inclusion of the Fire Bomber Pilots, and the Labour Relations Board would determine how the employee support must be ascertained We do not see the matter of inclusion of the Fire Bomber Pilots as a matter of negotiations between the employer and the Union, given this ruling.*
>
> *In your letter of June 8, 1993, you request to negotiate the inclusion of the fire bomber pilots and flight coordinators under the provisions of Article 8.2. We do not concur with the position that new classes have been created for these employees. The fire bomber pilots and flight coordinators are employed on a contract basis. As such, they do not come within the provisions of The Public Service Act, and therefore are not a "class of positions" within the classification plan within the meaning of Section 11 of The Act, or Article 8.2 of the Collective Bargaining Agreement.*

The Employer subsequently agreed with S.G.E.U. to file a Reference of Dispute application with the Board in order to have the issue resolved.

It will be clear from the account which has been given up to this point that a number of threads must be followed through the sequence of events which brought about this application. These include: the successive administrative arrangements which covered the air service ultimately referred to as Northern Air Operations; the employment arrangements which were made for the pilots; the gradual evolution of C.A.F.B.P. as a vehicle for discussion of the terms and conditions of employment of the pilots; the claims made by S.G.E.U. for inclusion of the pilots in the bargaining unit; and the history of the applications made to the Canada Labour Relations Board and to this Board.

There is another theme which warrants some comment, and that is the development of the bargaining relationship between S.G.E.U. and the Employer during the period since the use of contract pilots for aerial fire suppression began in the 1940s.

The last certification Order issued by this Board which explicitly refers to the air service which is now in place as Northern Air Operations is an amendment Order issued on September 30, 1953. In this Order, the Canadian Brotherhood of Railway Employees and other Transport Employees was identified as the bargaining agent to replace the Canadian Airline Employees' Union for the employees of Saskatchewan Government Airways. This bargaining relationship does not appear to have survived the

winding down of Saskatchewan Government Airways as a Crown corporation.

S.G.E.U. filed a succession of certification Orders which show that Union and its predecessors to have been granted bargaining rights for employees of the Government of Saskatchewan. It goes without saying that, from the beginning, the formulation of these bargaining rights was a somewhat complicated matter. In the original certification Order granted on March 19, 1945, the bargaining unit was described as follows:

> *1.(a) Subject to paragraph (b) of this section, the employees on the staffs of all departments, boards, commissions and other agencies which were under the control of or were owned and operated by the Government of Saskatchewan on the twelfth day of February, 1945, constitute an appropriate unit of employees for the purpose of bargaining collectively.*
>
> *(b) The following employees are not included in the appropriate unit of employees referred to in paragraph (a) of this section:*
>
> > *(i) heads of department as defined by paragraph 3 and section 8 of The Public Service Act, being chapter 8 of the Revised Statutes of Saskatchewan, 1940; private secretaries to the said heads of departments; permanent heads of departments as defined by paragraph 4 of section 2 of The Public Service Act; heads of divisions or branches within departments;*
> >
> > *(ii) all employees employed in the Department of Telephones of the Government of Saskatchewan;*
> >
> > *(iii) all employees employed in the mental hospitals at Weyburn and North Battleford.*

Subsequent amendments were largely focused on defining the excluded individuals and categories more precisely. For example, a large number of managerial and confidential positions were excluded by specific reference to their titles. Certain professional groups, such as engineers, land surveyors and physicians were excluded. Also excluded were a number of pockets of employees who were members of bargaining units represented by the Canadian Union of Public Employees.

In the last version of the amended certification Order, which was issued on October 21, 1987, the bargaining unit was described as follows:

> *(i) all employees of the Executive Branch of the Government of Saskatchewan;*
>
> *(ii) all employees of all Corporations, Boards, Commissions and agencies of the Government of Saskatchewan whose employees are subject to The Public Service Act; or*
>
> *(iii) employees of those agencies set forth in the attached schedule,*

> *are an appropriate unit of employees for the purpose of bargaining collectively, excluding the following:*
>
> > *all employees in the bargaining unit of the Saskatchewan Cancer Foundation; permanent heads; members of boards and commissions; incumbents of positions excluded from the operation of the Public Service Act, 1947, as amended from time to time pursuant to the provisions thereof; Order-in-Council appointments; members of the Association of Professional Engineers of Saskatchewan; Engineers-in-training registered with the Association of Professional Engineers of Saskatchewan; members of the Veterinary Association of Saskatchewan; members of the Saskatchewan Land Surveyors Association; medical staff; all employees in the bargaining unit employed by the Government of Saskatchewan at the Saskatchewan Hospital at North Battleford, the Valley View Centre at Moose Jaw, the North Park Centre at Prince Albert, the Souris Valley Extended Care Hospital at Weyburn and the Riverside Special Care Home at Battleford, and at the Mental Retardation Division of CORE Services Administration, represented by the Canadian Union of Public Employees Local Union 600, and in the Vocational Training Centre operated in the City of Prince Albert by the Government of the Province of Saskatchewan through its CORE Services Administration, represented by the Canadian Union of Public Employees Local 600; all employees employed by the Government of Saskatchewan represented by any other bargaining agent; all employees excepted and excluded from such bargaining units; incumbents of positions within a class as may from time to time be excluded by agreement between the parties; and incumbents of the following classes of positions. . .*

In successive collective agreements, the provision concerning scope differed slightly from the terms of the certification Order. In the agreement which was concluded in March of 1948, for example, the parties agreed to the following scope provision:

> *The terms of this agreement shall apply as herein stated to persons in the classified service on the staffs of all departments, boards, commissions and other agencies within the bargaining unit of the Association, appointed in virtue of and under The Public Service Act, 1947, excluding however, the incumbents in the following positions:*
>
> *Permanent heads, members of boards and commissions; positions excluded from the operation of The Public Service Act, 1947, pursuant to the provisions thereof; departmental personnel officers, and. . .*

Agreements prior to 1980 continued to use the term "classified service" in defining the scope of the agreement. This term was used to refer to that part of the public service where employees were assigned to a "class" or job classification which was part of the classification scheme set by the Public

Service Commission and acknowledged by S.G.E.U. as the basis for bargaining about terms and conditions of employment.

The distinction between the "classified" and "unclassified" portions of the public service is articulated in ss. 9 and 10 of *The Public Service Act*, R.S.S. 1978, c. P-42, which read as follows:

> *9 The unclassified division of the public service shall comprise the positions of:*
>
> *(a) permanent heads;*
> *(b) members of boards or commissions;*
> *(c) the Secretary of the Executive Council, the Clerk of the Executive Council and secretarial or clerical assistants or staff for committees to the Executive Council or for members of the Executive Council;*
> *(d) technical or administrative advisers or assistants to the Executive Council or members of the Executive Council;*
> *(e) provincial magistrates, officers of elections and election employees;*
> *(f) Repealed. 1984-86, c.103, s.4.*
> *(g) persons employed in a professional or scientific capacity to make or conduct a temporary and special inquiry, investigation or examination on authority of the Lieutenant Governor in Council;*
> *(h) special examiners and other part-time examination assistants appointed under the authority of the commission for the conduct of examinations under the provisions of this Act;*
> *(i) persons whose positions are designated by the chairman as part of the labour service;*
> *(j) part-time employees. R.S.S. 1965, c.9, S.9, 1972, c.95, s.9, 1984-86, c.103, s.4*
>
> *10. The classified division of the public service shall comprise all other positions now existing or hereafter created in the public service, together with such positions in the unclassified service as the Lieutenant Governor in Council may direct. R.S.S. 1965, c.9, s.10.*

In more recent times, the scope clause of the collective agreement has been more closely parallel to the terms of the certification Order, and begins in the following way:

> *This agreement shall apply as set out in its respective parts to all employees on the staff of departments, boards and commissions and other agencies within the bargaining unit of the Union, appointed in virtue of and under The Public Service Act, with the following exceptions:*

The list of exclusions which follows includes, "positions excluded from the operation of The Public Service Act pursuant to the provisions thereof."

The notion of the classification of positions in the public service in Saskatchewan had its origins, as it

did elsewhere, in the aspirations of provincial governments in the 1930s and 1940s to develop a public service which was professional in nature and insulated from patronage. The creation of an independent Public Service Commission which would define positions on a rational basis, and make staffing decisions on the basis of objective criteria, was an important aspect of this plan.

The set of objectives which was served by this model of personnel decision-making for the public service coincided with the interest of S.G.E.U. and its predecessors in the establishment of a system of recruitment and employment which would be fair and even-handed, and which would dovetail with collective bargaining goals.

From the beginning, it is clear that one of the aims of S.G.E.U. was to represent, as much as possible, all of the employees who were covered by the classification system, and furthermore, to extend the reach of the classification system as much as possible. In the early days, the classification scheme referred to employees in the public service proper. This must be distinguished from the "labour service," which consisted of seasonal and part-time employees who performed such duties as building and maintenance in connection with highways, parks and other public works. The exclusion of the "labour service" from the scope of the classification system is still mentioned in the list contained in s. 9 of *The Public Service Act*.

In the mid-1970s, S.G.E.U. and the Employer were involved in a number of dealings designed to clarify the status of certain categories of employees. As a result of these efforts, the terms and conditions of the labour service and the public service were consolidated under one agreement.

Another related issue which was confronted at that time was that of the use of contractors to perform services for government departments and agencies. In a memorandum dated April 1, 1975, which was addressed to all Permanent Heads, the Public Service Commission outlined the policy which was to be followed for contracting for services to the Employer. The premises on which the policy was based were summarized in the introductory paragraphs as follows:

> *Cabinet recently approved a recommendation by Treasury Board to establish a service-wide policy on the engagement of persons on contract. A copy of the policy statement is attached.*
>
> *There were a number of reasons for considering it necessary to adopt this policy, but the most important were:*

1. *the increased use of contracts suggests that in some instances it may be at variance with efforts to control manpower utilization;*

2. *in the absence of a service-wide policy, there is a marked inconsistency of practice among departments in the use of contracts and in their provisions;*

3. *use of contracts for individual services may be severely limited in any case in the event that S.G.E.A. [the predecessor of S.G.E.U.] refers to the Labour Relations Board the issue of whether a person engaged on contract is an "employee" for the purposes of The Trade Union Act. Should the Board's finding be affirmative, it is unlikely that there could legally be any form of contract covering a person's conditions of employment other than the collective agreement; i.e., instead of using individual contracts, departments would have to engage these personnel as labour service designates, temporaries, etc. The exception would of course be where the function is clearly out-of-scope, but as this is also negotiable with the union, the use of contracts could become exceedingly complicated.*

In a further memorandum, dated April 16, 1975, the Public Service Commission made the following comments:

> *It is becoming increasingly evident that contracts are not an appropriate method of obtaining services except in a limited range of circumstances. A contract that does not provide at least the level of benefits specified in The Labour Standards Act could probably be challenged successfully if it can be shown that an employer-employee relationship exists. At the same time, where such a relationship exists The Trade Union Act precludes any form of contract covering conditions of employment except the collective agreement (unless of course the function is determined to be out-of-scope either by agreement with the union or by a ruling of the Labour Relations Board).*
>
> *The question of whether an employer-employee relationship does or does not exist is not the subject of written guidelines. For their separate purposes, the Labour Standards Branch and the Labour Relations Board determines this on the basis of circumstances in each individual case. It seems however, that an employer-employee relationship would <u>not</u> likely be present where*
>
> - *the contract covers a specific result or output within a given time, eg., completion of study, a project, etc.*
> - *the fee is in consideration of that completion, even where interim payments are provided for (eg., monthly).*
> - *the contract does not require regular attendance during normal working hours or at a particular place of work.*
> - *the person is not subject to supervision and direction as to the manner of completing the task.*

In the course of the implementation of this policy, a considerable number of positions which had been

regarded as governed by contract were incorporated as bargaining unit positions, or were put specifically on the footing of Order-in-Council or temporary appointments.

When the Employer made the decision, which was implemented in 1977, to assume responsibility for aerial fire suppression services, the evidence suggests that the intention was to use the services of the pilots on a contract basis. In the document which was the basis for the Cabinet decision to create a fire suppression service within government, a distinction was drawn between personnel such as flight engineers, and the pilots, who were noted as "contract" personnel. When the service was instituted in 1977, approval was given for the advertising and recruitment of pilots on a contract basis.

From the point of view of S.G.E.U., the objection of the pilots to inclusion in the bargaining unit which is represented by that Union constitutes an attempt to "carve out" a group of employees who are within the scope of the bargaining rights granted to the Union in the certification Order. Counsel for S.G.E.U. argued that there is no question that the pilots are employees, and that they are therefore covered by the language of the certification Order. Mr. Tim Davies, who gave evidence on behalf of S.G.E.U., said that one of the most important objectives of the Union in recent years has been to reinforce the "wall to wall" nature of the bargaining unit described in the certification Order.

The argument which was advanced on behalf of C.A.F.B.P., on the other hand, is that the pilots have not been included in the bargaining unit in the past, and that their inclusion in the unit should depend on a demonstration that the majority of them wish to be added.

These two characterizations of the situation, each of which is supported to some extent in the voluminous documentation which was filed with the Board, rest on different premises, and they have differing implications in terms of policy and practical effect.

The Board has on numerous occasions stated a preference for larger and more inclusive bargaining units as the basis for collective bargaining relationships. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. O.K. Economy Stores Ltd.*, [1990] Fall Sask. Labour Rep. 64, LRB File No. 264-89, the Board made this comment, at 66:

> *In Saskatchewan, the Board has frequently expressed a preference for larger and fewer bargaining units as a matter of general policy because they tend to promote administrative efficiency and convenience in bargaining, enhance lateral mobility among employees, facilitate common terms and conditions of employment, eliminate*

> *jurisdictional disputes between bargaining units and promote industrial stability by reducing the incidence of work stoppages at any place of work (see [Industrial Welding (1975) Limited, [1986] Feb. Sask. Labour Rep. 45, LRB File No. 274-85]).*

In applying this principle, the Board has also indicated a reluctance to allow the departure from established bargaining units of groups of employees who are of the view that their interests are not best served by inclusion in a larger bargaining unit. In *Health Sciences Association of Saskatchewan v. Wascana Rehabilitation Centre and Saskatchewan Government Employees' Union*, [1994] 4th Quarter Sask. Labour Rep. 100, LRB File No. 265-93, the Board made this comment at 109:

> *Though, as we have seen, the decisions in which this Board has acceded to an application to construct a paramedical professional or technical bargaining unit have not assigned a specific weight to the various factors considered to be of relevance, there is no doubt that community of interest has been of considerable significance in these cases. On the other hand, the Board has often stated, notably in the [Hanna v. Government of Saskatchewan, [1985] Aug. Sask. Labour Rep. 31, LRB File No. 338-84] case, and the related decisions in [Griffin v. Government of Saskatchewan and Saskatchewan Government Employees' Association, [1981] Feb. Sask. Labour Rep. 61, LRB File No. 168-80], and [Donald v. Government of Saskatchewan and Saskatchewan Government Employees' Union, [1983] Apr. Sask. Labour Rep. 67, LRB File No. 435-82], that employees cannot simply choose to opt out of bargaining units because they feel their own interests would be better served.*

In *Health Sciences Association v. South Saskatchewan Hospital Centre (Plains Health Centre)*, [1987] April Sask. Labour Rep. 48, LRB File Nos. 421-85 and 422-85, the Board outlined the rationale for this position, at 55:

> *The second is that the Board will be most reluctant to permit any special group of employees forming an appropriate bargaining unit to move in and out of a larger bargaining unit or attempt to enlarge itself at the expense of another unit. Either attempt could lead to the very type of industrial instability the Board is committed to avoiding.*

In commenting on the outcome of the *Plains Hospital* case, which is not relevant here, the Board made the following comment in the *Wascana Rehabilitation Centre* decision, *supra*, at 110:

> *In that case, of course, the Board did place heavy weight on the community of interest relied on by the applicant in granting the application. In retrospect, it is our view that the Board, in that and other cases, failed to make what seems to us a valid distinction between the significance of community of interest when a certification Order is being sought for a bargaining unit which is smaller than an all-employee unit in the first instance, and the significance of this factor when what is being considered in the dismantling of an existing bargaining unit.*

The Board went on, at 111, to make the following statement:

> *We do not interpret earlier decisions of this Board as signifying that employees may point to a strong community of interest as a basis for defining any bargaining unit they wish, or for departing from a bargaining unit which has been defined on a more inclusive basis. Though community of interest may have considerable weight in an assessment by the Board of whether a bargaining unit can be a viable basis for coherent collective bargaining, it is a factor which must be considered in relation to a wide range of other factors, especially, as the [Island Medical Laboratories v. Health Sciences Association of British Columbia (1993), 19 C.L.R.B.R. (20) 161] decision intimates, when what is at issue is breaking down an existing large unit into smaller ones.*

It is, in our view, unnecessary here to provide further examples to demonstrate that the Board has generally defended the integrity of inclusive bargaining units against the claims of smaller or more specialized groups of employees who are disenchanted with inclusion in a unit more comprehensively defined. The stance the Board has adopted in this respect has been of considerable importance to S.G.E.U. in protecting the boundaries of the public service/government employment bargaining unit, which is without doubt the largest and most diverse bargaining unit in the province. If the resistance of the pilots in this case can be characterized as an attempt to "carve out" a specialized group from the general bargaining unit, it is fairly clear from the jurisprudence of this Board what the answer to such an attempt would be.

Counsel for C.A.F.B.P., however, argued that the position of the pilots cannot be characterized in this way, and that their position is based on an interpretation of decisions of the Board related to another issue, that of the requirements concerning groups of employees who are being added to existing bargaining units.

The Board has reviewed the jurisprudence related to this issue in a number of decisions, including our original decision in this case, on the application designated as LRB File No. 164-92. In these cases, the Board has been concerned with a somewhat different issue than that raised by the "carve out" cases. In the case of the latter, the Board has considered whether the perceived interests of defined groups outweighs the accepted policy of the Board of supporting larger bargaining units as a basis for stable and sound collective bargaining. In the cases where the Board has dealt with the addition of groups of employees to a bargaining unit, the concern of the Board has been to balance the legitimate interest of the Union in the security of bargaining rights against the interest of employees in being able to exercise their right to choose a bargaining agent.

In the decision in *Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre and Physical Therapists Association*, [1993] 1st Quarter Sask. Labour Rep. 167, LRB File No. 236-92, the Board commented on this point, at 173:

> *In our opinion, this approach, which allows the Union to rely on a valid and subsisting certification order as proof that it enjoys majority support in an existing unit, but requires that the wishes of a new group of employees be canvassed before the unit can be reshaped to include them, seems to provide an appropriate balance between the secure and stable status for a trade union, and the entitlement of employees to express their wishes when there is to be an alteration in the existing method by which their terms and conditions of employment are determined, whether that be through representation by some organization other than a union, or by some other means.*

In *Retail, Wholesale and Department Store Union v. Sunnyland Poultry Products Ltd.*, [1993] 2nd Quarter Sask. Labour Rep. 213, the Board made the following observations, at 227-228:

> *There are compelling practical reasons for being concerned with the sweeping in of employees by these applications. A history of collective bargaining by one group of employees of which the other group has not been a part, may create divergent interests. To cite one example, the employees in the existing unit may have accumulated seniority, but employees in the accretion have not. This could be a matter of genuine concern to the numerically smaller group of employees in the accretion if they are thrown into a larger bargaining unit with zero seniority. Whether this concern is well-founded or not is difficult to say, but it is a risk which the employees in the accretion should be permitted to weigh for themselves along with whatever other practical objections or concerns they might have. If their support is essential on these applications, it is something which the Union would have to explain to these employees when campaigning for their support, but these safeguards would be totally removed if the process proposed by the Union on this application were endorsed.*
>
> *When all is said and done the question that cannot be avoided is why, when the Board has a choice between two methods, one which permits the affected employees to decide the representation issue and one that permits a union to acquire representation rights in a way which deprives the affected employees of the most fundamental right conferred on them by the Act, the Board should choose the method that disenfranchises the affected employees. No reason whatsoever was advanced by the Union except that it coincides with an interest that the larger certified group of employees have developed in the work performed by the employees in the accretion. The Union cannot point to any vital interest of its own or the certified group which requires it to proceed in this fashion and is really unable to throw anything on to the scales to balance the Section 3 right of the employees in the accretion.*

A recent decision of the Canada Labour Relations Board, in *General Teamsters v. Brinks Canada Limited* (27 February 1996), C.L.R.B. Decision No. 1153, that Board made a similar

point in these terms:

> *This policy strikes a delicate balance between the institutional interests of trade unions and the interests of the employees they wish to represent. Where a union seeks to add employees outside the intended scope of the original certification, it must demonstrate majority support. A union should not be allowed to use its existing membership strength in such a situation to increase the size of its bargaining unit without first having canvassed the wishes of the employees to be added. The policy thus respects the principles of freedom of association which underpin the Code by ensuring that employees are not "swept in" without having had the opportunity to express their wishes and without the union having garnered majority support among them. These principles are expressed by the Board in New Brunswick Broadcasting Co. Limited (1988), 75 di 101 (CLRB no. 711), upheld by the Federal Court of Appeal ([N.A.B.E.T. v. New Brunswick Broadcasting Co. Limited, (Nov. 2, 1989), Doc. A-1138-88 (Fed. C.A.)]):*
>
> > *"...First and foremost, is the fundamental freedom given to employees in section 110 of the Code"*
> >
> > *'110.(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.'*
> >
> > *This is the cornerstone of Part V of the Code upon which the certification processes in the Code are based. It is fundamental that a trade union becomes the bargaining agent for employees only through an expression of a wish on behalf of a majority of employees within the bounds of appropriate bargaining units...*
> >
> > ...
> >
> > *...As such, these employees have a legitimate right under the Code to select a bargaining agent of their choice. In these circumstances, it is our respectful opinion that it would run counter to the fundamental principles of the Code to sweep the MITV Halifax employees into NABET's existing bargaining unit in New Brunswick on the strength of the working of the 1982 certification order..."*

It will be gathered from the passages which have been quoted here that the Board has been consistent in requiring that, where the boundaries of the bargaining unit are being changed to include new groups of employees, a trade union must demonstrate that the employees have been permitted to express their wishes concerning this change, and that a majority of the group to be added on support the change.

In our original decision concerning the pilot group, our conclusion was that the situation of C.A.F.B.P. fell into this category. The Board stated this in the following terms, at 219:

> *In our view, the situation in the case before us can be distinguished from all of these examples. In this case, the pilots and flight-watch co-ordinators were previously part of a unit, latterly known as Northern Air Operations, in which they had a*

> *continuing relationship with the Government of Saskatchewan. This relationship took various forms, of which the latest is a relationship of direct employment by the Government. The change in their relationship with the Government which took place approximately two years ago was analogous to the acquisition of a business by the Government which already had a cohesive group of employees who were used to having their terms and conditions of employment determined in a different way. This "Acquisition" places these employees in a different position than employees who are hired into a bargaining unit in which they clearly belong. When the most recent description of the bargaining unit was made, neither the Employer nor the Union had in mind this particular group of employees - or, to put it more accurately, the parties considered them excluded as outside contractors.*

It is essentially this conclusion which S.G.E.U. has asked the Board to reconsider in this Reference of Dispute.

It is not an easy matter to disentangle the threads in the sequence of events which we have attempted to summarize earlier in these Reasons. We have gained considerable insight into the historical record by examining the archival documents filed by both parties to assist the Board, but there are, inevitably, parts of the sequence which are hazier than others. As we have suggested, there is some support for the characterization given to the situation by each of the parties. We might frame our assessment in a slightly different way than we did in our original decision, having had the opportunity to learn considerably more about the details of the relationship between the pilots and the Government of Saskatchewan. We have concluded, nonetheless, that the evidence supports our original conclusion considerably more strongly than it supports the alternative presented on behalf of S.G.E.U.

The general conclusion which must be drawn from the evidence, in our view, is that the pilots have never been included in the bargaining unit, and must therefore be regarded as an accretion.

Counsel for S.G.E.U. argued strongly that the terms of the certification Order, last amended in 1987, confer on the Union bargaining rights for a "wall to wall" bargaining unit of all employees in the public service. It can certainly be conceded that the attainment of such a unit is a central objective of the Union, and that the Employer has made efforts to accommodate this ambition.

It does not seem to us literally accurate, however, to describe the bargaining unit represented by S.G.E.U. as a truly universal one, either historically or currently. This is not surprising given the diffuse nature of government activity, and the complexity of the structures in which government

employees are to be found. The repeated refinement and amendment of the bargaining unit description in the certification Order and in the collective agreement is an indicator that the definition of status and relationship within the public service is an ongoing process.

In part, this process relates to the exclusion of specific positions based on the extent to which the incumbents perform managerial or confidential duties. In addition, the parties to the collective bargaining relationship continue to contemplate and to negotiate about the status of individuals and groups who may be regarded by the Employer as outside the scope of the bargaining unit, whether because they are independent contractors, because they are among the exceptions listed in s. 9 of *The Public Service Act*, or for some other reason. It may be that, in the course of this process of definition and redefinition, certain persons are acknowledged as being within the scope of the bargaining unit, and who these persons are may previously have escaped the notice of the Union. The managers of community pastures, who were the subject of judicial proceedings in *Saskatchewan Government Employees' Union and Paul Lefebre v. Government of Saskatchewan* (25 September 1991), Q.B. No. 2408 (Sask. Q.B.); aff'd (12 June 1992), C.A. No. 1026 (Sask. C.A.), may have fallen into this category.

There is equally no question, however, that there are certain persons or groups in the public service who are not included in the bargaining unit. In spite of the promulgation in 1975 of a policy concerning the use of contract services, for example, it cannot be said that there are not still contractors who are performing services for the Government of Saskatchewan. In the case of part-time or temporary employees, there is also some variation in their status.

In this case, the evidence shows that the pilots were, through all of the events which have occurred, treated as a distinct group. In 1977, when the Government of Saskatchewan assumed responsibility for the operation of an aerial fire suppression service, the pilots were not treated as bargaining unit employees, but were hired on the basis of seasonal contracts, and the documentation relating to the plans for this service suggests that this was a conscious decision.

In 1987, when the control of Northern Air Operations passed to S.P.M.C., and in 1992, when it passed back to the Government of Saskatchewan, there is no question that a successorship occurred with respect to the bargaining unit employees. There is no sign, however, that the terms and conditions of the pilots were viewed as being affected by this successorship. Indeed, after S.P.M.C. took over

Northern Air Operations, the pilots began to discuss the terms of their contracts as a group with representatives of the corporation. The notes of those discussions make it clear that the corporation did not regard the pilots as being in-scope employees; there was discussion, for example, of whether the pilots could be given access to benefit plans for out-of-scope employees of the Government of Saskatchewan, or whether separate arrangements would have to be made for them.

In 1992, it is even clearer that the pilots were not regarded as included in the transfer of collective bargaining obligations back to the Government. In the Letter of Understanding, which listed by name the in-scope employees of Northern Air Operations, the names of the pilots were not listed.

In the subsequent discussions which occurred, the Employer referred to "bringing [the pilots] on as employees," which suggests that they regarded this as constituting a change to their status. Even in the correspondence sent to Mr. Byl by Mr. Smallwood, the Union shop steward, there was reference to the "impending unionization" of the pilots. The summary given by Mr. Smallwood of the terms which would apply to the pilots suggests that they were coming into the bargaining unit, not that they were being treated as though they should have been there for some time; there is reference, for example, to the use of comparators of various kinds to settle their wage levels as well as the suggestion that the pilots had not accrued any seniority.

Counsel for S.G.E.U. argued that the fact that the Union had never provided any practical representation to the pilots is not relevant to the issue of whether they are covered by the terms of the existing certification Order, because the Union cannot know everything which is happening in the public service in all parts of the province. He argued that it is largely the responsibility of the Employer to raise issues concerning the status of employees for discussion with the Union.

It would be unreasonable, of course, to visit negative consequences on the Union in every one of the numerous situations where the Employer makes alterations to the complement of employees or the structure of departments and agencies. The Union cannot be expected to be aware of all of these events, or of their significance, and there is a general onus on the Employer to bring changes to the attention of the Union.

In this case, however, the idea that the Union should be excused for having been corporately oblivious to the presence of the pilots is not a tenable one. Counsel for the Union suggested that the obligation of

the Employer to negotiate with S.G.E.U. concerning the pilots went back to 1977, to the moment when the Government took over responsibility for maintaining an aerial fire suppression service. During the period after that, when Northern Air Operations was run by the Government, by S.P.M.C. and then by the Government again, the pilots worked in close proximity to a group of employees represented by the Union, and whose terms and conditions of employment the Union was responsible for negotiating. There was a shop steward among those employees, and it cannot have escaped his notice that the pilots were present on a regular basis, or that their terms and conditions were set in a different way than those of the bargaining unit employees. It was not until the eve of the transfer back to the Government that S.G.E.U. gave any indication that they felt any responsibility for the pilots, and at that time, their claim was put in terms of bringing the pilots into the bargaining unit.

In our view, this situation can be distinguished from that described in our decision in *Canadian Union of Public Employees, Local 88 v. St. Elizabeth's Hospital*, [1995] 4th Quarter Sask. Labour Rep. 85, LRB File Nos. 260-94 and 032-95. In that instance, the trade union had been certified to represent "all employees" of an employer, with certain named exclusions. In responding to a Union request for the deduction of dues from a group of employees, the Employer attempted to rely on what was claimed to be an agreement with the trade union for the exclusion of the named employees. The Union denied that any such agreement had been made. The Board made the following comment at 97:

> *In our view, the often-quoted statement that a certification order is "spent" once a collective agreement has been concluded does not mean that the certification order automatically disappears into the void after a round of collective bargaining. At the very least, there must be some indication that the bargaining unit description set out in that order has been replaced by something else which is the product of an agreement between the parties. Indeed, we think the view advanced by Mr. Welden that the Union is entitled to rely on the scope of the bargaining unit contained in the certification Order unless the scope has been explicitly altered at some later stage is correct.*

The case which is now before us is, in our view, the reverse of the situation outlined in the *St. Elizabeth's Hospital* case. In that case the conclusion of the Board was that the persons in question fell within the description of the bargaining unit given in the original certification Order, and the Employer did not succeed in showing that they had ever been excluded, either by explicit agreement with the Union, or by a formal amendment to the certification Order.

In this case, our conclusion is the opposite one - that the Union has not demonstrated that the group of pilots were ever included in the bargaining unit.

Counsel for S.G.E.U. argued that if the Board were to accept the position of the pilots that they are not covered by the certification Order, it would constitute a wholesale attack on the integrity of the public service/government employment bargaining unit. We do not view our decision here as having implications of that kind. The Board has defended the inclusiveness of this bargaining unit on many occasions, against many different kinds of onslaughts, and we have not changed our position on the desirability of maintaining it in as comprehensive a form as possible.

This case raises, as we have said, a different issue, and raises it in very specialized circumstances. For a variety of reasons, the pilot group which has formed C.A.F.B.P. has never been treated, either by the Employer or by the Union, as part of the bargaining unit. In our view, the evidence does not provide any basis on which the Union can found a claim that the terms of the existing certification Order should be held to cover them, or to have covered them in the past. Whatever this saga leaves to be desired in the way of historical tidiness, we can see no reason why these employees should not now be given an opportunity to signify their wishes with respect to trade union representation. If the Union cannot provide evidence that a majority of this group support inclusion in the bargaining unit, we do not think the Union can simply sweep them in.

For these reasons, we must dismiss the request made by S.G.E.U. to reconsider the conclusions we drew in our original decision involving these employees.

KEN CHRUNIK, SHELDON THOMAS AND CHRIS STRETTEN, Applicants and NATIONAL ELECTRIC LTD. AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2038, Respondents

LRB File No. 060-96; July 11, 1996
Chairperson: Beth Bilson; Members: Don Bell and Bruce McDonald

For the Applicants: Noel Sandomirsky, Q.C.
For the Respondents: Neil McLeod

Decertification - Employer influence - Whether union succeeded in demonstrating that rescission application was influenced by employer - Board deciding was no sign of employer influence.

***The Trade Union Act*, ss. 5(k) and 9.**

REASONS FOR DECISION

Beth Bilson, Chairperson: The International Brotherhood of Electrical Workers, Local 2038, was certified by this Board in a certification Order dated November 6, 1991, as the bargaining agent for a unit of employees of National Electric Ltd.

Three employees, Mr. Ken Chrunik, Mr. Sheldon Thomas and Mr. Chris Stretten, have filed three separate applications seeking rescission of the certification Order granted to the Union. It was agreed at the hearing that the three applications should be treated as a single application for rescission.

The three employees have made two earlier efforts to obtain rescission of the certification Order. In 1994, when they sought to file an application, they were informed by the Secretary of this Board that they were out of time, and they withdrew their application.

In *Chrunik, Thomas and Stretten v. National Electric Ltd. and International Brotherhood of Electrical Workers*, [1995] 4th Quarter Sask. Labour Rep. 109, LRB File No. 251-95, the Board considered a further application filed by these employees, and concluded that the application was also out of time because it had not been filed with regard to the open period established by the conclusion of a collective agreement under *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c.29.11.

The position taken by the Union at the hearing was that the application should be dismissed pursuant to s. 9 of *The Trade Union Act*, R.S.S. 1978, c. T-17, because of employer influence on the bringing of the application. Section 9 reads as follows:

> *9 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.*

Two of the applicants, Mr. Chrunik and Mr. Thomas, were present at the hearing. Mr. Stretten had apparently taken employment elsewhere. Counsel for the Union was permitted to cross-examine the two applicants, though they were not examined in chief.

Mr. Chrunik had worked for the Employer as a journeyman electrician since approximately November of 1991. He said that he was not aware of any organizing campaign by the Union, and had never been approached to sign a Union card. He said that he had not worked on the project at SaskFerco Products Inc. in which the Employer was involved around the time of the certification application.

Mr. Chrunik said that he had first caught wind of the fact that the Union might be involved with his Employer sometime in 1993. At that time, he was talking to a unionized plumber who was working on the same construction project, who told him that the name of National Electric Ltd. was on a "list" at the office of the plumbers' union. Mr. Chrunik understood this list to refer to employers for whom certification applications were outstanding. He said that he asked Mr. Pat Stretten, the owner of the company, whether the company was being certified; according to Mr. Chrunik, Mr. Stretten did not seem to know anything about it.

Mr. Chrunik said that he did not want to have anything to do with a trade union. He said that this was, in part, because he understood that union dues were high, and also because he gathered from talking to other tradespersons that unionized employees stood a good chance of being laid off for long periods of time.

Mr. Thomas began working for the Employer as an apprentice in August of 1991. Although he was working on the SaskFerco project, he said that he had never been approached to sign a Union card during the organizing campaign, or at any other time. He said that, although he was vaguely aware that something was going on, he did not understand the significance of a certification application, and

did not know that the certification Order had been granted.

Like Mr. Chrunik, Mr. Thomas said that, in 1993, he had talked to a plumber who said that the name of the Employer was on a list at the office of the plumbers' union. He understood that the list contained the names of unionized contractors, and he said he was surprised to find this out. He said that he also wanted to avoid having anything to do with a trade union, for the same reasons given by Mr. Chrunik. Mr. Thomas said that he was particularly influenced by the fact that he could not afford to be laid off.

After discussion among the three employees, Mr. Chrunik undertook to contact this Board to find out how to "get out of the Union." Though the efforts made in 1994 and 1995 proved unsuccessful, Mr. Chrunik understood from the comments of the Board in relation to the 1995 application that it would be necessary to file the application in March of 1996. He obtained three copies of the application form from the Board, and the employees assumed that they should each fill one out. Several days prior to the hearing, the employees asked a lawyer to represent them, but they had no previous advice concerning how they should fill out the form.

Mr. Chrunik said they asked the secretary in the administrative office of the Employer if she knew someone who could witness and swear the applications; she said that she was a Commissioner for Oaths, and volunteered to swear the documents.

Both Mr. Chrunik and Mr. Thomas said that they had not talked to Mr. Pat Stretten about any of the applications, and that he had given them no advice or encouragement. Neither of them could say whether Mr. Chris Stretten, who is the son of Mr. Pat Stretten, had talked to his father about the application.

The Union called evidence from Mr. Garth Ivey, who is a staff representative with the Union. He testified that he had known Mr. Pat Stretten when he was a member and elected official of the Union. Counsel for the Union argued that this evidence was relevant because it demonstrated that Mr. Stretten was more knowledgeable about the implications of certification than he apparently let on to Mr. Chrunik.

Counsel for the Union conceded that there is no direct evidence in this case that the Employer engaged in any conduct which directly supported or encouraged this application for rescission. He argued that

the Board should, nonetheless, draw an inference that the Employer did play an improper role in the bringing of the application, and that the application should be dismissed on this basis.

In this connection, he referred to the decision of the Board in *Poberznek v. United Masonry Construction Ltd. and International Union of Bricklayers and Allied Craftsmen*, [1984] Oct. Sask. Labour Rep. 35, LRB File No. 245-84. In that decision, the Board dismissed a rescission application, citing the following grounds at 36:

> *In the Board's opinion, the applicant gave no plausible explanation for wishing to have the Certification Order rescinded. He testified that he was applying because "everyone else is", although according to him he had spoken to no one else about the matter except a friend who works in Alberta.*
>
> *According to the applicant, he had made no inquiries about the state of negotiations between the employer and the union, he had no information about his future job prospects, and he had experienced no shortage of work except during the normal winter slow down in January. He denied discussing the application with his brother, with anyone in management, with any representative of the union or with any other tradesmen in Saskatchewan. Although he had no reason to believe that he would be laid off, he expressed concern that there would be a shortage of work because existing wage rates were too high.*
>
> *According to the applicant, it was simply coincidence and good luck that he first consulted a lawyer during the 30 - 60 "open period" for applying for rescission. The Board notes, however, that Oistein Kristiansen considers himself to be knowledgeable about matters pertaining to industrial relations in the construction industry because he has been a member of the employer negotiating committee in the Bricklayers Trade Division of the Saskatchewan Construction Labour Relations Council.*
>
> *Any one of the above circumstances would not necessarily cause the Board to conclude that this application was made as a result of influence, interference or intimidation by the employer. However, when taken together and viewed along with the evidence on LRB File No. 115-84, the Board is drawn to that conclusion. It cannot accept the proposition that the applicant acting spontaneously, alone, and at his own expense, with no idea how the application might affect him personally, took it upon himself to retain a lawyer to apply for rescission at a time that happened to coincide with the available open period.*

In that case, the Board also made the following cautionary comment, at 36:

> *Employer influence is rarely overt. Under the circumstances the only inference the Board can draw is that this application was made in whole or in part on the advice of or as a result of influence by the employer. The application is therefore dismissed.*

Another example of circumstances in which the Board drew an inference of employer interference from

indirect evidence may be found in *Pfefferle v. Ace Masonry Contractors Ltd. and Bricklayers and Masons International Union*, [1984] Aug. Sask. Labour Rep. 45, LRB File No. 225-84, at 46:

> *Although the applicant denies having discussed this application with the co-owners and the members of their family, the Board finds it difficult to accept that denial at face value since all of the employees work fairly closely with one another. Furthermore, the Board is not satisfied that the applicant has an honest belief, well founded or otherwise, that the union has failed to adequately carry out its responsibilities as his bargaining agent. He attempted but failed to advance any credible rationale for applying for rescission, and that, coupled with all of the other circumstances, leads the majority of the Board to conclude that the application has been made in whole or in part as a result of influence of the employer.*

In a decision in *Leavitt v. Confederation Flag Inn (1989) Limited and United Food and Commercial Workers*, [1990] Summer Sask. Labour Rep. 61, LRB File No. 225-89, the Board commented on the link between employer conduct and the rights of employees in connection with an application for rescission. The Board commented, at 63:

> *The Board has frequently commented upon the relationship between s. 3, which enshrines the employees' right to determine whether or not they wish to be represented by a union, and s. 9 of the Act. These sections are not inconsistent but complimentary. s. 3 declares the employees' right and s. 9 attempts to guard that right against applications that in reality reflect the will of the employer instead of the employees.*

The Board went on to make the following statement, at 64:

> *Generally, where the employer's conduct leads to a decertification application being made or, although not responsible for the filing of the application, compromises the ability of the employees to decide whether or not they wish to be represented by a union to the extent that the Board is of the opinion that the employees' wishes can no longer be determined, the Board will temporarily remove the employees' right to determine the representation question by dismissing the application.*

In *Wells v. Remai Investment Corporation, operating as the Imperial 400 Motel, Prince Albert, and United Food and Commercial Workers*, [1996] Sask. L.R.B.R. 194, LRB File No. 305-95, the Board made the following comment at 198:

> *This statement makes clear that s. 9 is directed at a circumstance in which an employer departs from a posture of detachment and neutrality in connection with the issue of trade union representation. There have been cases where an employer has taken a direct role in initiating or assisting an application for rescission of a certification Order, and in these cases, it is fairly easy for the Board to identify the conduct on the part of the employer which constitutes improper interference. On the other hand, as the Board pointed out in [Poberznek v. United Masonry Construction Ltd. and International Union of Bricklayers and Allied Craftsmen, [1984] Oct. Sask.*

> *Labour Rep. 35, LRB File No 245-84], employer interference is rarely of an overt nature, and the Board must be prepared to consider the possibility that subtle or indirect forms of influence may improperly inject the interests or views of the employer in the decision concerning trade union representation.*

It is clear from the passages which have been quoted here that the Board has always been alert to the possibility that the inherently authoritative position of an employer has been used, in either direct or subtle ways, to interfere in the right guaranteed to employees under s. 3 of *The Trade Union Act* to a democratic choice in the matter of whether they wish to be represented by a trade union or not. In making this assessment, the Board has been prepared to draw inferences from aspects of the evidence which suggest that the decision of employees to seek rescission did not have its origins in their own deliberations, or that their views have not been spontaneously and autonomously expressed.

On the other hand, the Board has also stated that the right to determine the representation question should only be removed from the employees if the Board is persuaded that their ability to make that decision has been impaired by the influence, direct or indirect, of their employer.

Counsel for the Union argued that it is impossible to believe that the Employer did not have conversations with the applicants here, or that the Employer did not make some effort to engineer a rescission application in order to avoid the consequences of involvement in bargaining under *The Construction Industry Labour Relations Act, 1992.*

We have concluded that the evidence does not support the argument advanced on behalf of the Union. Although the Board has on occasion been prepared to draw inferences of indirect employer influence, there must be something in the evidence which holds a clue to this, other than an assertion that it is natural for an employer to favour decertification.

In this case, it is clear that Mr. Chrunik and Mr. Thomas determined some time ago that they did not wish to be represented by a trade union. They showed considerable tenacity in seeking the rescission of the certification Order, returning to the Board on several occasions when they discovered that their earlier applications were out of time. The progress of their successive applications, and the nature of the applications which they most recently filed, does not suggest that they had any assistance or advice as to how to go about applying for rescission.

Counsel for the Union cross-examined them closely about their reasons for wishing to bring about the rescission of the certification Order. He intimated that the grounds on which they sought rescission were unreasonable because, by their own testimony, they have had no contact with the Union, and the Union has not insisted on collecting union dues.

As counsel for the Union acknowledged, it is not necessary for the reasons given by applicants for rescission to be sound ones, though they must make enough sense to suggest that they have genuinely motivated the application. We are persuaded that Mr. Chrunik and Mr. Thomas have independently come to the decision that representation by a trade union does not meet their needs.

It must also be said that, if the Union viewed the reasons given by Mr. Chrunik and Mr. Thomas as based on misinformation or misunderstanding, they had a lengthy opportunity to persuade them otherwise. It is possible that the Union was not aware that Mr. Chrunik was an employee of this Employer if the certification application was based on work being done at the SaskFerco plant, though it is hard to understand why Mr. Thomas did not come to their notice in this context. The applicants filed at least one previous application which would have come to the notice of the Union, and there was apparently no contact with the applicants either before or after that application.

For the reasons we have given, we have concluded that the application should not be dismissed pursuant to s. 9, and that it should be granted. As Mr. Chrunik and Mr. Thomas are currently the only employees, the Union did not ask that a vote be held in the event their argument under s. 9 was rejected.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and MOOSE JAW EXHIBITION COMPANY LIMITED, Respondent

LRB File Nos. 131-96, 132-96 & 133-96; July 11, 1996
Chairperson: Beth Bilson; Members: Don Bell and Donna Ottenson

For the Applicant: Larry Kowalchuk
For the Respondent: Merv Nidesh

Unfair labour practice - Discharge - Whether employer succeeded in showing that decision to dismiss was not improperly motivated - Board deciding employer had not met onus of proof.

***The Trade Union Act*, s. 11(1)(e).**

REASONS FOR DECISION

Beth Bilson, Chairperson: The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union was designated in a certification Order issued by this Board dated May 24, 1996, as the bargaining agent for a unit of employees working in the Casino at the Moose Jaw Exhibition Company Limited.

The Union has filed an application alleging that the decision to terminate the employment of Ms. Gloria Ponto constituted an unfair labour practice and a violation of s. 11(1)(e) of *The Trade Union Act*, R.S.S. 1978, c. T-17, which reads 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:*
>
> > *(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 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.*

Ms. Ponto was first employed as a dealer in the Casino in 1982. In 1993, she assumed the responsibilities of a pit boss, and in 1995, she became a supervisor. Prior to her dismissal, Ms. Ponto performed the duties associated with all three positions, as she was assigned.

All employees associated with the gaming aspects of the Casino are required to take training and perform their duties in a manner prescribed by the Saskatchewan Gaming Commission. Dealers are expected to be familiar with a variety of gaming activities, to deal cards, to provide customers with chips in exchange for their money, and to keep track of the number of chips they have distributed.

A pit boss is responsible for overseeing a number of tables. The pit boss monitors the activity of the dealers to ensure that they are conducting the gaming activities properly, and identifies any problems which should be reported to the supervisor. The supervisor is generally responsible for the gaming activity which is going on in a particular area of the Casino. In addition, the supervisor completes some records, oversees the closing out procedures for the area, and decides on the replacement of dealers who are consistently losing games.

At the time when Ms. Ponto commenced her employment at the Casino in 1982, the primary activity offered at the Casino was blackjack. More recently, the Casino has offered a wider variety of gaming activities, including off-track betting, video lottery terminals and roulette. In December of 1995, a specific area of the Casino was set aside for poker.

The established Casino policy was that tips which were provided by customers should be pooled and distributed to all employees who had worked during the day they were collected. At the blackjack and roulette tables, a procedure had been developed to ensure that the tips were gathered and distributed to

employees. Each of the tables had a drop box under it for the collection of cash which customers presented to be exchanged for chips. The box was connected to a plunger in a slot in the table top, which was used to press the money into the box. When a customer gave a tip to a dealer, which would usually be in the form of a chip, the dealer would acknowledge the tip and tap it on the plunger to draw the attention of the supervisor to the fact that a tip had been received. The dealer would then place the tip on the right hand side of the table, close to the plunger. When the tips had accumulated to $5.00, the supervisor would remove them from the table and put them in a box marked "Tips." This box stood on the pit stand, a small cabinet which was used for storing and handling papers and supplied connected with the tables.

A similar system was instituted when the poker room was opened. Shortly after the room was opened, it was decided, in response to customer requests, to use some of the money put in by players to create a jackpot, so that the game would be more exciting. The general practice was that 50 cents was collected from each pot, shortly after the beginning of play. The dealer would place this money at his or her left hand, on the opposite side from the tips. A box was set aside for that money as well.

In February of 1996, the jackpot box and the box for tips, which were identical in appearance, were painted the same colour, and were placed in slots on a pit stand situated against the wall of the poker room. The boxes were not marked to show that one was for tips and one was for jackpot money. The explanation given for this was that management did not wish to draw attention to the fact that boxes containing money were present in the room.

There was some difference in the evidence concerning the extent to which uncertainty was created for the employees by the fact that the boxes were indistinguishable from each other. It seems clear, however, that at least some employees raised the question. Ms. Lesley Flynn, the Assistant Manager of the Casino, said that, as far as she was concerned, it was self-evident that the tips would go in the box which was at the right hand of the supervisor when facing the pit stand unit, and that the jackpot chips would go in the box on the left. This would correspond with the placement of the chips on the table when the dealer collected them.

Ms. Flynn said that on March 1, 1996, she gave verbal instructions to supervisors who were present and who would be depositing chips, along with any cash tips given by patrons, in the boxes. She also made a notation in the book on the pit stand in the poker room which contained items for the

information of staff. This notation read as follows:

> *Two tables for the majority of the night. It was decided to use the closest (to the tables) drop box on the pit stand for tips, the other for jackpot. This would keep it the same as chips collected on the tables. Good night by all. Bonus Hands. Norm - 4 -tens.*

The events which were cited as the reason for the termination of the employment of Ms. Ponto took place on May 18, 1996. On that day, the Casino held its first poker tournament, which, according to Ms. Flynn, was quite successful. The tables in the poker room were rearranged so that four tables, rather than three, could be accommodated. In the event, three of the tables were used for the poker tournament, and the fourth was used to accommodate regular play. The pit stand was also moved to a different place, although it also stood against the wall in that location.

The tournament began at 1:00 p.m. Although Ms. Ponto went to work at the Casino at 3:00 p.m., she did not work in the poker room during the tournament, which ended at around 5:45 p.m. On that day, she was functioning as a relief supervisor, and her duties ultimately took her into the poker room for several periods after 6:00 p.m. At one point, she relieved the Manager of the Casino, Mr. Murray Patterson, during his dinner break, for about 45 minutes.

The events which occurred at the end of the evening were described as follows by Ms. Flynn in a report she made to Mr. Patterson the following day, May 19:

> *On Saturday, May 19, 1996, I was the supervisor in the poker room and because of a shortage of staff I was giving the poker dealer, Randy Miller, breaks as well. Gloria Ponto was the relief supervisor.*
>
> *At 11:30 pm, Ponto entered the poker room to provide myself the last break before closing. Under normal circumstances this would be a ten minute break and then Ponto would return to pit one to help with the closing of tables. I asked Ponto if she had her break and had she relieved the floor staff in pit one for this hour. She replied that she had. I then asked Ponto if she would stay in the poker room to close Randy's table. She agreed. I then asked Randy if he wanted a ten minute break. He said no, he was okay to finish the night. While I was at the poker table I removed a $5.00 tip to place in the tip box, (which is a normal supervisor procedure). While doing so Ponto commented that she had previously spoken to Susan Townend regarding the location of the tip and jackpot boxes on the pit stand in the poker room. Townend had told Ponto they were in the same location as before, just like the placement of tips and jackpot chips on the poker table. I agreed with Townend's remarks. Ponto was standing directly in front of the boxes at the pit stand and asked me if the right box was then the tip box. I confirmed that it was, and regardless that the pit stand had been moved for the poker tournament, the location of the tip and jackpot boxes had not altered. Ponto then reported, "But then I have been putting*

the tips into the jackpot box instead of the tip box and there has been more tips than jackpot." I replied, "Well there is nothing I can do about that," and left the pit.

I went directly to the count room to get organized for closing. Approximately 3-5 minutes later I looked out the cashier window and saw Ponto standing at the poker room entrance. I said to the bank staff, "I'll be right back, it looks like Gloria needs another signature." When arriving at the poker room, Randy was indeed waiting for a signature to close the poker table. Ponto then asked me if I was going to write the poker room daily report. I agreed that I would. I then asked Ponto if there were any bonus hands to record and she provided same. I proceeded to gather the table fill/credit record sheet, my notes from the poker tournament and went to get the tip and jackpot boxes. There was only one box left, sitting on top of the pit stand. Ponto then stated that Crystal Hiscock had already picked up the tip box. I then returned to the count room with what I understood to be the jackpot box. (Both boxes are identical in appearance and are not usually removed from their respective positions on the pit stand until taken to the bank area.) I opened the jackpot box to sort the chips and there was a folded fifty dollar bill inside. I immediately realized that this was not the jackpot box but the tip box.

After the conclusion of the poker tournament the winner, Ken Schick, gave me a fifty dollar bill to buy pizza or something for the poker tournament staff. I had folded the fifty dollar bill and placed it in the tip box.

Without sorting or counting the chips, I immediately closed and locked the jackpot box and went out to the poker room. I then stated to Ponto, "You gave me the wrong box!" Ponto smirked and shrugged her shoulders, making no comment. I then left the poker room, stopped by the roulette table and asked Mark Mann to please pass me the grey tip box from the blackjack/roulette pit stand, in which he did. I then proceeded to the count room and opened the tip box and there was not a fifty dollar bill inside same. Tim Baba and Crystal Hiscock were present at this time.

Therefore, it was confirmed that Ponto had exchanged the poker room tip and jackpot boxes. If I had not personally placed the fifty dollar bill in the tip box, there would have been no way of knowing the boxes had been exchanged.

Ms. Ponto gave a slightly different version of this incident. She said that she had not been present to receive any verbal instructions from Ms. Flynn on March 1, and she had some difficulty interpreting the instructions in the notebook in the poker room. She testified that she had asked another employee, who had made it clear to her that the jackpot box was the one nearest the wall - to the left hand of a person facing the pit stand, in other words, which would put the tip box on the right.

Ms. Ponto said the changed placement of the tables in the poker room on May 18 made it more confusing to her. She said that she was not sure how to decide which box was "nearest to the tables," in the terms of the notebook instructions, when the tables were laid out this way. She said she remembered being advised by another employee to "think of being a dealer at poker table 1," and that

this would help her decide which box to use.

Her evidence was that she was still aware that she might be confused about which box was which. She decided to counter this by depositing equal amounts in the boxes, collecting the chips when both tips and jackpot chips amounted to $5.00. At one point, however, she said that the tips amounted to $10.00, so she had to choose which box was the tip box and which the jackpot box.

She testified that, on one occasion, she saw Ms. Flynn collect some tip chips from a dealer and put them in the box on the right hand of the pit stand as seen by a person facing the stand. At that point, she said, she understood which one was the tip box. She said that she did raise with Ms. Flynn the question of which box was the tip box, and told her she thought she had put some of the tip money into the jackpot box. She agreed that Ms. Flynn said something to the effect that there was nothing which could be done. She also said that when she asked Ms. Flynn how she should remember which box was which, Ms. Flynn replied "Think about it! Think about it!."

Ms. Ponto said that after 11:30 p.m., she was assisting the dealer in the poker room at closing out his table. She said another employee, Ms. Crystal Hiscock, who was a representative from the employee tip committee, came into the room to collect the tip box so it could be taken to the cash room and counted. According to Ms. Ponto, Ms. Hiscock asked which one was the tip box. Ms. Ponto said that she was counting cards and thinking of other things at that moment, and did not give the matter her full attention. She said that, again, she did not think of how the boxes would look if she were facing the pit stand, and she pointed out the second box - the jackpot box - to Ms. Hiscock. At this time, Ms. Hiscock took the box to the blackjack area, where she put it next to the box marked "Tips" so that both of them could be taken to the cash office.

Meanwhile, Ms. Ponto said that she had a feeling that she had mixed up the boxes again. She said she thought it could be straightened out, however, and was not too worried about it. She said that, as she usually did, she took the "jackpot" box out of the slot on the pit stand, and put it on top of the stand next to the papers and other items which she planned to take to the cash office as part of the closing procedure. The dealer in the poker room needed a second signature on his closing sheet, and Ms. Flynn arrived to provide this. At that time, Ms. Flynn said she would take the jackpot box to the cash office, and picked up the remaining box on the pit stand.

When the box was opened, as Ms. Flynn recounted, the presence of a $50.00 bill which had been given as a tip revealed that the box she had just taken was not the jackpot box, but the tip box. She went back to the poker room, where Ms. Ponto was still going through the closing procedures, and informed her that she had given Ms. Flynn the wrong box. Ms. Ponto said she did not "smirk," but that she thought it was not a serious matter. She thought the contents of the boxes could simply be recorded according to their proper purposes.

Ms. Flynn proceeded to the blackjack area, where she collected the other box - the real jackpot box - and took it to the cash area. At that time, the contents of the tip boxes from the blackjack area and the poker room were pooled for distribution to the employees. The contents of the jackpot box were counted so that the accumulated jackpot could be calculated.

Ms. Ponto said that when the winner of the poker tournament gave Ms. Flynn a $50.00 bill as a tip, it became a subject of discussion in the staff room, and she was aware of the tip. Both she and Ms. Flynn said that the amount of the tip, although large, was not unheard of. Ms. Ponto said that she did not mention to Ms. Flynn that she was aware of this tip.

The following day, May 19, 1996, Ms. Flynn wrote the "Incident Report" which was quoted earlier, and discussed the matter with Mr. Patterson. Ms. Flynn was of the opinion that Ms. Ponto had intentionally switched the two boxes, and that this justified the termination of her employment. Mr. Patterson suggested that Ms. Ponto should be suspended pending further investigation and consideration of her conduct.

Ms. Ponto was summoned to meet with Ms. Flynn and Mr. Patterson shortly after her shift commenced on May 19. Her recollection was that after raising the matter of the switched boxes with her, Mr. Patterson offered her the opportunity to resign. Mr. Patterson and Ms. Flynn asked her if she had any explanation for her conduct the previous evening. Ms. Ponto said that she was so shocked by having the alternatives of resignation or suspension put before her that she was not sure she gave a coherent explanation, although she attempted to describe the event from her point of view. She also said that Ms. Flynn was so angry that she was not sure she was receptive to what Ms. Ponto was saying.

Mr. Glen Duck, the General Manager of the Employer, testified that the matter was brought to his attention by Mr. Patterson on May 21. At that time, Mr. Patterson advised him that the

recommendation of Mr. Patterson and Ms. Flynn was that the employment of Ms. Ponto should be terminated.

Ms. Ponto contacted Mr. Duck and asked to meet with him. After the cancellation of a meeting set for May 28, Mr. Duck did meet with her, in the presence of another employee. Mr. Duck also met with Mr. Mark Hollyoak, a staff representative of the Union, and advised Mr. Hollyoak that the matter would be raised with the executive committee of the Board of Directors of the Employer, which also functioned as a personnel committee.

The meeting with the executive committee occurred on June 4. Mr. Duck indicated to the executive that the management of the Casino felt the issue was a serious one, and that termination was justified. The executive approved the recommendation. Mr. Duck said that he talked to Mr. Patterson and Ms. Flynn on June 5, and again on June 6, to confirm that they were still in favour of termination. On June 6, Ms. Ponto received a letter stating that her employment would be terminated immediately.

Ms. Ponto testified that she and other employees had discussed the possibility of obtaining union representation from time to time. In the spring of 1996, she and two other employees began to consider the matter seriously. They raised the suggestion with other employees, and, when they felt there was a sufficiently strong indication of interest, they approached the Union and asked them to conduct an organizing campaign.

The Union filed an Application for Certification on April 11, 1996. The Employer initially raised objections concerning the appropriateness of the bargaining unit, and the inclusion within the scope of the bargaining unit of certain persons, including the Casino supervisors. The parties appeared before the Board on May 23, 1996, by which time all matters in dispute between the parties had been resolved, and a certification Order was granted on May 24, 1996.

Several days prior to June 6, a meeting of the Union membership was held, and Ms. Ponto was elected as a member of the Union bargaining and grievance committee.

In the Reply filed by the Employer, they denied having any knowledge of the role played by Ms. Ponto in the Union organizing campaign, or of her election to a position on the bargaining committee.

The Board has always attached critical importance to any allegation that the suspension or dismissal of an employee may have been affected by considerations relating to the exercise by that employee or other employees of rights under *The Trade Union Act*. In a decision in *Saskatchewan Government Employees' Union v. Regina Native Youth and Community Services Inc.*, [1995] 1st Quarter Sask. Labour Rep. 118, LRB File Nos. 144-94, 159-94 and 160-94, the Board commented on this matter as follows, at 123:

> *It is clear from the terms of s. 11(1)(e) of The Trade Union Act that any decision to dismiss or suspend an employee which is influenced by the presence of trade union activity must be regarded as a very serious matter. If an employer is inclined to discourage activity in support of a trade union, there are few signals which can be sent to employees more powerful than those which suggest that their employment may be in jeopardy. The seriousness with which the legislature regards conduct of this kind is indicated by the fact that the onus rests on the employer to show that trade union activity played no part in the decision to discharge or suspend an employee.*

The Board made further comment on the significance of the reverse onus under s. 11(1)(e) in *The Newspaper Guild v. The Leader-Post*, [1994] 1st Quarter Sask. Labour Rep. 242, LRB File Nos. 251-93, 252-93 and 253-93, at 244:

> *The rationale for the shifting to an employer of the burden of proof under s. 11(1)(e) to show that a decision to terminate or suspend an employee was completely unaffected by any hint of anti-union animus has, in our view, two aspects. The first is that the knowledge of how the decision was made, and any particular information regarding the employment relationship involving that employee, is often a matter available exclusively to that employer. The trade union knows of the termination or suspension, knows of the union activity, and asserts that there is a link between them of anti-union animus. A decision that this link does in fact exist can often only be established on the basis of information provided by the employer. Whether this is described as a legal onus of proof, which is the basis of the challenge made by the Employer to the courts, or whether it is seen as an evidentiary burden, an employer must generally be able to provide some explanation of the coincidence of trade union activity and the suspension or termination in question.*
>
> *The second aspect of the rationale, which is particularly important in a case, such as this one, where union activity with an employer is in its infancy, addresses the relative power of an employer and a trade union. An employer enjoys certain natural advantages over a trade union in terms of the influence it enjoys with employees, and the power it can wield over them, particularly where the power to terminate or discipline is not subject to the constraints of a collective agreement or to scrutiny through the grievance procedure. In these circumstances, the vulnerability of employees, and their anxieties, even if exaggerated, about the position in which they may be put by communicating what they know of the circumstances surrounding the dismissal to trade union representatives, and*

> *possibly to this Board, makes it difficult for the trade union to compile a comprehensive evidentiary base from which they may put their application in its fairest light.*

As the Board has pointed out, it is not sufficient to meet the onus of proof under s. 11(1)(e) for an employer to demonstrate the existence of a defensible business reason for the decision to suspend or terminate an employee. In *United Steelworkers of America v. Eisbrenner Pontiac Asüna Buick Cadillac GMC Ltd.*, [1992] 3rd Quarter Sask. Labour Rep. 135, LRB File Nos. 161-92, 162-92 and 163-92, the Board made the following observation in this connection, at 139-140:

> *When it is alleged that what purports to be a lay-off or dismissal of an employee is tainted by anti-union sentiment on the part of an employer, this Board has consistently held, as have tribunals in other jurisdictions, that it is not sufficient for that employer to show that there is a plausible reason for the decision. Even if the employer is able to establish a coherent and credible reason for dismissing or laying off the employee - and we are not persuaded that the reasons put forward by Eisbrenner are entirely convincing - those reasons will only be acceptable as a defence to an unfair labour practice charge under s. 11(1)(e) if it can be shown that they are not accompanied by anything which indicates that anti-union feeling was a factor in the decision.*

An important element of the task of this Board in assessing a decision which is the subject of an allegation made pursuant to s. 11(1)(e) is the evaluation of the explanation which is offered by an employer in defence of the decision to dismiss. In this respect, the Board has emphasized that our objective is somewhat different than that of an arbitrator determining whether there is "just cause" for dismissal. In *The Leader-Post* decision, *supra*, the Board made this comment, at 248-249:

> *For our purposes, however, the motivation of the Employer is the central issue, and in this connection the credibility and coherence of the explanation for the dismissal put forward by the Employer is, of course, a relevant consideration. We are not required, as an arbitrator is, to decide whether a particular cause for dismissal has been established. Nor, like a court, are we asked to assess the sufficiency of a cause or of a notice period in the context of common law principles. Our task is to consider whether the explanation given by an employer holds up when the dismissal of an employee and some steps taken in exercise of rights under The Trade Union Act coincide. The strength or weakness of the case an employer offers in defence of the termination is one indicator of whether union activity may also have entered the mind of the Employer.*

As the Board has pointed out on a number of occasions, the fact that trade union activity is taking place does not mean that an employer is prevented altogether from taking serious disciplinary steps against an employee. The onus imposed on an employer by s. 11(1)(e) is not impossible to satisfy. There is no question, however, that it is difficult to meet. In order to satisfy ourselves that the grounds

stated for a decision to dismiss an employee do not disguise sentiments on the part of an employer which run counter to the purposes of *The Trade Union Act*, it is necessary for us to evaluate the strength or weakness of the explanation which is given for a dismissal, in the light of other factors, including the kind of trade union activity which is going on, the stage and nature of the collective bargaining relationship, and the possible impact a particular disciplinary action may have on the disciplined employee and other employees.

In *The Leader-Post* case, *supra*, the Board made the following comment, at 249-250, which provides an illustration of the sensitivity of the Board to the possibility that the grounds which have been cited as the basis of a decision to terminate the employment of an employee do not hold up to scrutiny when the dismissal coincides with organizational activity in support of a trade union:

> *All three witnesses painted a picture of a department in which competition and entrepreneurial activity were encouraged. In such circumstances, it is difficult to be sure whether the conduct described by Mr. Tantardini and Mr. Ambrose went beyond the bounds of what employees could assume to be tolerated, and became an attempt to second guess and to undermine the authority of Mr. Tantardini and Mr. Ambrose.*
>
> *"I don't trust you," like "I don't agree with you" or "I don't like you", are of little value as part of a scheme of workplace discipline unless they are put in the context of specific goals and instructions which an employee can be expected to understand and adhere to. We accept that for Mr. Ambrose to sandbag Mr. Liberet in the way he did might not expose him to adverse consequences in legal proceedings at common law. In the context of our deliberations concerning these applications, however, the absence of any specific indications to Mr. Liberet that his conduct was unacceptable, and any particular instructions to him, must cast doubt on the reasons offered for the choice of this timing for the termination of Mr. Liberet, and makes it difficult to understand why his dismissal became a matter of such urgency that Mr. Liberet was ushered from the building without even being allowed to return for his personal possessions.*

In this case, the parties provided extensive evidence concerning the conduct on the part of Ms. Ponto which was regarded by the Employer as sufficient grounds for her dismissal. The evidence included photographs and floor plans of the Casino, and in particular the poker room, which augmented our understanding of the allegations which were made against Ms. Ponto.

Counsel for the Employer argued that employees in the Casino are in a position of trust. In a heavily-regulated industry of this kind, the continued reputation and even existence of the Casino depends on the absolute trustworthiness and honesty of the employees.

It is difficult to disagree with this as a general proposition, and it is reasonable for the management of the Employer to take seriously any conduct on the part of employees which is dishonest or corrupt.

Having reviewed the evidence, however, it is easy to see how Ms. Ponto might have become confused about the relative placement of the tip box and the jackpot box, particularly in circumstances in which the room had been rearranged to accommodate the poker tournament. The Employer must bear considerable responsibility, in our view, for creating the possibility of confusion. The written instructions which were given by Ms. Flynn in the notebook in the poker room were, at best, ambiguous, and Ms. Flynn betrayed considerable impatience when asked for more explicit instructions by Ms. Ponto.

Ms. Flynn evidently felt that the relative placement of the boxes was self-evident, and we have no doubt that she was sincere in her conclusion that Ms. Ponto must have intentionally switched the boxes. We do not, however, think that this was a reasonable conclusion to reach, objectively speaking. For one thing, the fact that another employee, Ms. Hiscock, asked Ms. Ponto which was the tip box suggests that Ms. Ponto was not the only person for whom the placement of the boxes was not obvious. For another, it is difficult to believe that, if Ms. Ponto had some devious purpose in mind - and it is somewhat difficult to appreciate what that would be - she would have drawn attention to the fact that she had mixed up the boxes by raising it with Ms. Flynn.

On the whole, we are not persuaded that the Employer has met the onus of showing that they had a coherent and plausible reason for deciding to terminate the employment of Ms. Ponto.

Given this conclusion, it is not really necessary to consider the impact on the decision of the organizational activity in which Ms. Ponto evidently played such a visible role. We would like to comment briefly on this point, however. All three witnesses who testified on behalf of the Employer, though they continued to deny that they knew anything about the specific role played by Ms. Ponto, admitted that they were aware that an organizing campaign was taking place. All three of them were consulted by employees who wished to discuss the possible implications of union certification. In the case of Ms. Flynn, she said that a friend of hers, an employee, attended Union meetings, and admitted that she knew Ms. Ponto was present at those meetings. She also said that she heard a "rumour" that Ms. Ponto had been elected to the bargaining committee.

Serious disciplinary action against an employee is, it goes without saying, an important event for that employee at any time. The significance of such steps from the point of view of *The Trade Union Act* and this Board is related to the signal which is sent, not only to the employee most directly affected, but to all employees, concerning the risks which they may be taking by engaging in activities which they are legally entitled to undertake. When such action is taken against an employee who is playing a significant role in a union organizing campaign and in the activities which lay the foundation for the collective bargaining relationship, the Board has always been highly alert to the possibility that a decision to discipline such an employee at this particular time may be something other than a coincidence. In this case, we would have to say that, had we been persuaded that the explanation given by the Employer held water, we would still have been very concerned by the timing of the decision to suspend and then dismiss Ms. Ponto, and this factor would probably, in itself, have led us to the conclusion that the Employer could not meet the onus of proof under s. 11(1)(e).

For the reasons we have given, we must allow the application, and we will issue an Order that Ms. Ponto be reinstated to her employment. We will give the parties an opportunity to reach agreement on the amount of monetary loss payable to Ms. Ponto. The Board will remain seized in the event the parties are unable to reach such agreement.

We would like to make a brief comment on an issue of procedure which emerged during the hearing, because it touches a significant question concerning the role of this Board. During the phase of the hearing devoted to argument, counsel for the Employer raised an objection that counsel for the Union was making remarks of an abusive nature directly to the witnesses who had given evidence on behalf of the Employer, and that the Board should direct him to conduct himself with a higher degree of decorum.

The Chairperson of the Board requested counsel to direct his argument to the Board, and to moderate his tone with respect to the individuals present at the hearing.

Counsel for the Union responded that counsel could raise any issues of decorum through a complaint to the Law Society, but that he regarded proceedings before the Board as designed for the benefit of the parties and not for the Board. In this light, he apparently felt that there was nothing untoward about vigorous personal attacks on representatives of the Employer present at the hearing.

The Board did not reply formally to this argument, in the interests of proceeding with the hearing, but we would not like to think that our silence on this issue would create a misapprehension about what we regard our role to be.

It is true that the major function of the Board is to promote sound and vigorous collective bargaining relationships. We are under no illusions that these relationships may be marked by tension, ill feeling, and a certain amount of noise. We are also aware that some of this tension is bound to spill over into proceedings before the Board, and that we must be prepared to accommodate the strong expression of feelings in the form of vigorous cross-examination and passionate argument. We do not think that, in general, we have been overly restrictive in this respect.

In the course of a collective bargaining relationship, events occur in a number of settings. In some of these, personal attacks, abusive or belittling remarks and passionate outbursts may be tolerated as a normal manifestation of the relationship. A party which chooses to initiate a proceeding before this Board, however, must recognize that participation in such a proceeding will impose certain limits on the degree to which such free-form expression can take place. Though the proceedings of the Board constitute one of the instruments for the achievement of the objectives of *The Trade Union Act*, the role of the Board is adjudicative in nature. We must maintain sufficient control over our proceedings to ensure that evidence and argument are presented and heard in an orderly fashion, so that we are able to perform our adjudicative role. In this sense, hearings are conducted for the benefit of the Board, because it is the Board which has been asked to make the determination of the issue in dispute for the assistance of the parties.

This should not be confused with an assertion that our proceedings are or should be legalistic in nature or difficult to understand or participate in. We do expect, however, that participants will conduct themselves with a degree of decorum and civility which will permit the Board to comprehend and focus on the issues in dispute.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant and SALVATION ARMY (SASKATOON RECYCLING CENTRE), Respondent

LRB File No. 030-96; July 15, 1996
Chairperson: Beth Bilson; Members: Bob Cunningham and Gerry Caudle

For the Applicant: Drew Plaxton
For the Respondent: Kevin Wilson

Bargaining unit - Appropriate bargaining unit - Managerial exclusions - Whether employer should be limited to certain number of store manager positions - Board deciding number not relevant if incumbents are performing managerial functions.

Employer - Description - Whether employer should be identified as "Governing Council" of unincorporated association or association itself - Board deciding association itself should be named as employer.

Employer - Description - Whether employer should be designated as local or national association - Board deciding identification of employer should reflect both local and national organization.

***The Trade Union Act*, ss. 5(a), 5(b), 5(c), 2(f)(i) and 2(g)(i).**

REASONS FOR DECISION

Beth Bilson, Chairperson: The United Food and Commercial Workers, Local 1400, has filed an application asking that they be certified as the bargaining agent for a unit of employees who work at the Saskatoon Recycling Centre operated by the Salvation Army.

The Saskatoon Recycling Centre consists of five "Thrift Stores" in Saskatoon, one in Rosetown and one in Outlook, for the sale of used clothing, furniture and other goods, which have been donated by residents of the Saskatoon area. Until recently, the Centre also had a warehouse facility in Saskatoon. After that building was destroyed by fire, a decision was made to move the storage and processing aspects of the business to Winnipeg. A separate application has been filed alleging that certain aspects of that decision constituted unfair labour practices and violations of *The Trade Union Act*, R.S.S. 1978, c. T-17.

The proposed bargaining unit described in the application for certification includes all of the employees

in the Saskatoon stores. The parties were able to reach agreement on a number of issues related to exclusions from the bargaining unit, and presented two issues for resolution by the Board.

The first of these related to the terms in which the Employer should be designated in the certification Order. The Union proposed that the Employer should be named as the "Governing Council of the Salvation Army in Canada, operating as the Salvation Army Recycling Centre and Thrift Stores in the City of Saskatoon." For reasons which will be discussed later in these Reasons, counsel for the Employer argued that it was inappropriate to name the Governing Council of the Salvation Army as the Employer, and that the correct name for the Employer would be "Salvation Army Saskatoon Recycling Centre."

The other issue on which the parties had been unable to reach agreement concerned the terms in which the exclusion of the position of store manager should be worded. The Union accepted that this position should be excluded, but argued that a numerical limit should be placed on the number of store managers the Employer should be permitted to designate.

The argument of the Union for the designation of the Governing Council of the Salvation Army in Canada as the Employer was based on the ground that the Salvation Army itself is an unincorporated association. The Union asserted that, as such, it has no legal existence to which the obligations imposed on an employer by a certification Order issued under *The Trade Union Act* might attach, or at least no legal standing which would allow the enforcement of those obligations. Counsel for the Union argued that, on the other hand, the Governing Council has been granted corporate status on the basis of a series of statutes passed by Parliament.

Counsel for the Employer did not deny that the Governing Council is part of the structure of the Salvation Army, but he argued that this body exists to manage the real property and other assets of the Salvation Army, and that it does not have the power to make decisions related to industrial relations. He further argued that the Saskatoon Recycling Centre is an autonomous entity, and should properly be designated as the Employer.

The Salvation Army is a well-known religious and philanthropic organization which pursues its religious objectives in part through social programs aimed at the disadvantaged in Canadian communities.

The Salvation Army originated in Britain in or around 1865 at which time it was called "The Christian Mission." In 1878, the Salvation Army name was adopted. Under the leadership of its founder, General William Booth, the Salvation Army undertook an ambitious program of evangelism and social service in many countries, including Canada.

From the founding deeds, which were appended as a schedule to a statute passed by the Parliament of Canada in 1909, it is clear that the early decision-making power in the organization was centralized in the hands of General Booth. The origins of the organization were described in the following terms in the deeds:

> *Whereas in the year 1865 the said William Booth commenced preaching the Gospel in a Tent erected in the Friends Burial Ground Thomas Street in the parish of Whitechapel in the county of Middlesex and in other places in the same neighbourhood.*
>
> *And whereas a number of People were formed into a Community or Society by the said William Booth for the purpose of enjoying Religious fellowship and in order to continue and multiply such efforts as had been made in the Tent to bring under the Gospel those who were not in the habit of attending any place of worship by Preaching in the open air in Tents Theatres Music Halls and other places and by holding other Religious Services or Meetings.*
>
> *And whereas at the first the said Society was known by the name of the East London Revival Society and afterwards as the East London Christian Mission.*
>
> *And whereas other Societies were afterwards added in different parts of London and a Society was also formed at Croydon.*
>
> *And whereas the names of these united Societies was then altered to that of "The Christian Mission."*

The deeds go on to describe the decisions which were made to develop a formal doctrinal position, and to permit General Booth to acquire, manage and dispose of property on behalf of the loose "society" ultimately known as the Salvation Army.

The deeds include a document setting out a detailed procedure for replacing General Booth, because of his incapacity or death. The body which was created to carry out this responsibility was referred to in the deeds as the "High Council," whose membership was defined as follows:

> *The High Council shall consist of and Summonses shall accordingly be despatched to the persons holding at the qualifying date the following Offices that is to say:*
>
> *The Chief of the Staff*
>
> *The Secretary for Foreign Affairs*

> *All the Commissioners of the Army not being Commissioners on the Retired List*
>
> *All the Officers holding territorial Commands in the Army in any part of the World whatever their rank in the Army*
>
> *Provided always that in case under the foregoing qualifications of Commissioners and Territorial Commanders two persons being Husband and Wife and holding Commissions or commands in respect of the same Country or district are entitled to be members of the High Council they shall only have one vote which shall be given by the husband as he may think fit if he alone is present or both are present and shall be given by the wife as she may think fit only if she alone is present.*

In Canada, the Salvation Army also operated as an unincorporated "society" or association. In 1909, the Parliament of Canada responded to a petition presented by a number of officials of the organization, who were listed as follows:

> *Thomas Bales Coombs, commissioner in Canada; Nellie Coombs, wife of the said Thomas Bales Coombs, officer in charge of the women's social work; Henry William Mapp, colonel, chief secretary; Albert Gaskin, lieutenant colonel, field secretary; Joseph Pugmire, lieutenant-colonel, men's social secretary; Thomas Howell, lieutenant-colonel, immigration secretary; John Sharp, lieutenant-colonel, provincial officer; William Barnard Turner, lieutenant-colonel, provincial officer; William Scott Potter, brigadier, financial secretary and trade secretary; John Bond, brigadier, editor; Annie Stewart, brigadier, assistant for the women's social work; Charles Taylor, brigadier, principal of the training school; John Southall, brigadier, advanced training secretary; William Morehen, brigadier, divisional officer; Robert Hargrave, brigadier, provincial officer; George Burditt, brigadier, provincial officer; John Rawlings, major, property secretary; Frank Morris, major, provincial officer; William Green, major, divisional officer ...*

Section 2 of the statute reads as follows:

> *If any of the said offices is altered or abolished in accordance with the constitution of the Salvation Army, any other office constituted in accordance with the said constitution may be substituted for the office so altered or abolished, and the person holding the office so substituted shall by virtue thereof become a member of the Corporation.*

The statute which was passed in answer to this petition incorporated a body known as the Governing Council, which consisted of five of these officials. The purposes of the corporation were described as "administering in Canada the property, business and other temporal affairs of the Salvation Army."

The corporation was given extensive powers to manage the property and financial affairs of the Salvation Army, including the power to make bylaws which were not inconsistent with the foundation

deeds of the Salvation Army.

Two subsequent statutes were passed in 1916 to create separate Governing Councils for eastern and western Canada; in 1990, a further statute was passed to recombine them into a single Governing Council. There were also a series of amendments to these statutes; an amendment in 1957, for example, removed the limit on the value of assets which could be held by the Salvation Army.

It should also be noted that a Saskatchewan statute was passed in 1909 for the following purpose: "to vest in the said Governing Council of the Salvation Army in Canada all the property in Saskatchewan now held by or vested in trust in any person or persons for the Salvation Army."

This statute also provided, among other things, that the Governing Council should appear on all land titles as the owner of real property, and that the real property used for religious and charitable purposes should be exempt from taxation.

Captain James Hagglund, the Executive Director of the Saskatoon Recycling Centre, gave evidence on behalf of the Employer. Captain Hagglund has served as an officer of the Salvation Army for approximately seven years, and his parents were both officers as well. Captain Hagglund referred the Board to the following statement of policy which had been issued by the Territorial Headquarters of the Salvation Army in June of 1994:

> *When contracts are negotiated between a Salvation Army centre and a union, care is to be taken that the name of the relevant Salvation Army centre be used as the respondent employer.*
>
> *Although union contracts are to be signed by the Governing Council of The Salvation Army on behalf of Salvation Army centres, the name of the Governing Council is not to be stated as a part to contracts.*

Captain Hagglund did not claim to be an expert on the national administrative structure of the Salvation Army. He said, however, that it is his understanding that the Governing Council functions exclusively as a trustee and financial manager for the Salvation Army. Decisions concerning policy, programs and administration are made by a Cabinet, which is composed of senior officials of the Salvation Army, including senior representatives of the regions. He stated that he thought there was overlap in the composition of the two bodies, but said they do not perform the same functions.

He cautioned, however, against thinking of the Salvation Army in Canada as a centralized or hierarchical organization. He said that much of the decision-making and implementation of programs is done at the local level, and many of the decisions made at the national headquarters take into account the input of adherents of the Salvation Army in the communities where those decisions will be carried out. Much of the programming is done on the basis of community initiatives, and planned and instituted by local Salvation Army groups.

Captain Hagglund had been assigned to become the Executive Director of the Saskatoon Recycling Centre approximately 18 months prior to the hearing. His wife, Captain Gwendolyn Hagglund, became the Assistant to the Executive Director at the same time. The Saskatoon Recycling Centre is one of a network of similar operations across the country. The objectives of the Centre, in common with the other recycling operations, were described as follows in a mission statement:

1. *To collect every available article of recyclable clothing, textiles and other marketable goods in Canada.*
2. *To monetize these donations to provide a major source of funding for Salvation Army community programs and services.*
3. *To supply low cost, quality clothing, furniture, and other household goods to people who function on a limited budget.*
4. *To intercept recyclable and reusable materials currently destined for Canada's land fill sites.*

The recycling centres across the country are grouped collectively as the Salvation Army National Recycling Operations. Through this structure, the recycling centres share information and co-operate in the operation of the local facilities. Captain Hagglund was reluctant to characterize this as a formal administrative structure, though he did concede that he and his Assistant report to the administrative head of the Salvation Army National Recycling Operations in the prairie and northwestern Ontario region.

Captain Hagglund said that the decisions about the operation of the Saskatoon Recycling Centre are made by a management team made up of himself, the Assistant to the Executive Director and the Warehouse/Transportation Co-ordinator. The Saskatoon Recycling Centre pays a proportion of its revenues to the Saskatchewan Division, and a proportion to the national or "Territorial" headquarters. The main purpose of the recycling enterprise in Saskatoon, however, is to raise funds for local Salvation Army programs and initiatives. The material which is collected from donors is recycled in Saskatoon, though it is now sorted and processed in Winnipeg.

Counsel for the Union argued that the identification of the Governing Council of the Salvation Army in Canada as the Employer is the only way to ensure that the Union would not face unreasonable barriers in the event of any attempt to enforce Orders of this Board against the Employer. He argued that the Salvation Army, as such, "does not exist," and that the Governing Council is the only entity with any legal status.

Counsel for the Employer, on the other hand, argued that the Governing Council has no meaningful role in relation to the persons employed in various Salvation Army facilities and programs, and that the designation of the Governing Council in the role of employer would not correspond to the realities of the actual administration of the Salvation Army. He acknowledged that there have been a number of certification Orders, including several issued by this Board, which have named the Governing Council as the Employer, but this, according to his argument, had been done in error, an error which the Salvation Army was trying to correct by issuing the policy statement quoted earlier.

Counsel referred the Board to a number of previous decisions in which the Board has considered the status of other kinds of employers than the corporations or administrative entities which are ordinarily parties to collective bargaining relationships.

In *International Brotherhood of Electrical Workers v. Sun Electric Ltd. and Baker Electric Joint Venture*, [1985] July Sask. Labour Rep. 34, LRB File No. 052-85, the Board found that the joint venture, rather than the individual firms who were participants in the joint venture, was the actual employer of electricians on a construction project. In *Canadian Union of Public Employees v. R.J. Sollars et al.*, [1982] Dec. Sask. Labour Rep. 38, LRB File Nos. 128-82 to 163-82, the Board considered the effects of the dissolution of a partnership of physicians, which had been certified as the employer of a unit of employees. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Canadian Pioneer Management Group*, [1978] May Sask. Labour Rep. 37, LRB File No. 661-77, the Board designated three corporate entities as a single employer. In other examples, the Board has named non-profit corporations (see, for example, *Canadian Union of Public Employees v. Saskatoon Society for the Prevention of Cruelty to Animals* (28 August 1990), LRB File No. 100-90) and societies (for example, *Saskatchewan Government Employees' Union v. Regina Native Women's Association*, [1986] Mar. Sask. Labour Rep. 19, LRB File No. 307-85).

It is not surprising that the legal status of unincorporated associations has been the subject of judicial

comment in a number of decisions; counsel for the Union referred the Board to a number of examples. In their most elemental form, unincorporated associations are merely collections of individuals who have gathered to pursue some goal, which may be of an entirely ephemeral or temporary nature. It stands to reason that, in these cases, the civil law would view the individuals who make up the association as more clearly capable of exercising the functions of legal persons, and more amenable to the imposition of legal obligations, than the association itself.

At the other end of the spectrum of unincorporated associations lie organizations, such as the Salvation Army, which have constructed fairly complicated organizational structures, and imposed on themselves limitations in the form of rules and procedures, which are respected and observed by conscientious members of the organization. Even in these instances, of course, absent statutory arrangements to the contrary, these sophisticated administrative and procedural arrangements must be seen as largely voluntary; they cannot be subject to legal "enforcement" except in the limited terms of judicial review.

In *Lamont v. Dunsmuir, Vancouver and District Labour Council et al.* (1965), 53 W.W.R. 169, the British Columbia Supreme Court held that the Vancouver and District Labour Council, the British Columbia Federation of Labour and the Vancouver Allied Printing Trades Council were all unincorporated associations, and, as such, could not be sued by name.

The Alberta Supreme Court, Appellate Division, also addressed this issue in *Blackfoot Stock Association v. Thor*, [1925] 3 W.W.R. 544. The court said that the appellant was an unincorporated association, and could only bring legal proceedings in the name of all members of the association, or obtain a representation order under the Rules of Court.

In *Comeau v. Fundy Group Publications Ltd. et al.* (1981), 24 C.P.C. 251, the Nova Scotia Supreme Court (Trial Division) made the following comment, at 254:

> *At common law, in order to sue or be sued, the entity involved must either be an individual or a corporation, or must have that capacity by virtue of legislation. Taff Vale Ry. Co. v. Amalg. Soc. of Ry. Servants, [1901] A.C. 429 (H.L.).*
>
> *It is now clear in this province, under the provisions of the Trade Union Act, 1972 (Nova Scotia), c. 19, that a trade union may sue and be sued. O'Laughlin v. Halifax Longshoremen's Assn. (1972), 3 N.S.R. (2d) 766, 28 D.L.R. (3d) 315 (C.A.).*

The court went on to find that the Nova Scotia Federation of Labour did not fall into any of these

categories, and granted the application by the federation to be struck from the proceedings.

It should be noted that, in a number of the cases which deal with unincorporated associations, the point is made that whatever legal disability such an entity may be under as a named party in a civil proceeding, it may have a legal persona for the purposes of a particular statute. In *Vancouver Machinery Depot Ltd. v. United Steelworkers of America*, [1948] 4 D.L.R. 518 (B.C.C.A.), Sidney Smith J.A. made the following observation, at 521:

> *I therefore hold that the international union is created a persona juridica by the Industrial Conciliation and Arbitration Act, 1947, for the purpose of implementing that Act and for causes of action that may possibly be founded directly upon its provisions or a breach thereof, as I have already mentioned. It follows, in consequence, that the order made dismissing it from the action was premature at this inchoate stage of the proceedings below."*

In *Vancouver Machinery Depot Ltd. v. United Steelworkers of America*, *supra*, the British Columbia Court of Appeal made the following comment, at 521 :

> *The status of an unregistered union, such as this, has already been before us in [Re Patterson and Nanaimo Dry Cleaning & Laundry Workers Union Local No. 1, [1947] 2 WWR 510, at 502], and an appeal to the Supreme Court of Canada was quashed on the point of jurisdiction [[1948] 4 D.L.R. 522 (B.C.C.A.)]. In that case the majority held that the union, as a bargaining agent, was created by the Industrial Conciliation and Arbitration Act, 1947, a legal entity, for the purposes of that Act and proceedings thereunder, and no further.*

In part, these comments relate to the explicit statutory status conferred on unincorporated associations for the purpose of participation in legal proceedings. Section 29 of *The Trade Union Act* provides an example of this:

> *29 For the purposes of this Act, every trade union is deemed to be a person, and may sue or be sued and prosecute or be prosecuted under its own name.*

In addition, however, it cannot be doubted that an unincorporated association which is the subject of statutory provisions must have a legal personality at least to the extent which is necessary to permit the implementation of the specific legislative goals embodied in the statute. In the periods when *The Trade Union Act* has not contained an equivalent of s. 29, there can be little doubt that those unincorporated associations known as trade unions had legal status for the purposes of the interpretation and application of the provisions of the *Act*.

In administering the *Act*, the primary focus of this Board cannot be on how the parties to collective

bargaining might be characterized in relation to the proceedings of the civil courts, but on how they should be viewed in relation to the purposes and objects which are served by the institution of collective bargaining. It is important, from this point of view, for the Board to identify the parties in a certification Order in a way which will support the development of a sound collective bargaining relationship.

In a decision in *International Brotherhood of Electrical Workers, Local 2038 v. Flint Electrical Management Ltd.*, [1989] Fall Sask. Labour Rep. 49, LRB File No. 040-89, the Board summarized the criteria which are relevant to the proper identification of an employer at 50:

> *The Board has recently set out the principles and factors it takes into account when called upon to identify the employer of an employee. In Lakeland Regional Library Board, [1987] April Sask. Labour Rep. 59, it decided that the employer is the entity with fundamental control over industrial relations matters affecting the employees or with effective control over the essential aspects of the employment relationship. To aid in determining who had that control, the Board identified the person who exercised the authority to hire, supervise, evaluate, approve leave and holidays and who bore the responsibility for remuneration.*
>
> *In University of Regina, [1987] May Sask. Labour Rep. 43, the Board identified the responsibility for payment of wages, the power to determine other terms and conditions of employment, the responsibility for day to day direction, and the responsibility for deducting Income Tax, Canada Pension Plan and UIC contributions, as hallmarks of an employer. It identified who the employee would look to for payment if wages or benefits were withheld and from whom the employee would seek redress if he was wrongfully dismissed.*
>
> *In University Hospital, [1988] Mar. Sask. Labour Rep. 41, the Board identified an employer as the one with the power to hire, fire, discipline, evaluate and supervise and the one with the obligation to pay wages.*

In that decision at 50, the Board quoted the following list of criteria suggested by the Ontario Labour Relations Board in *York Condominium Corporation No. 46*, [1977] O.L.R.B. Rep. Oct. 645, at 648:

1. *The party exercising direction and control over the employees performing the work.*
2. *The party bearing the burden of remuneration.*
3. *The party imposing the discipline.*
4. *The party hiring the employees.*
5. *The party with the authority to dismiss the employees.*
6. *The party which is perceived to be the employer by the employees.*
7. *The existence of an intention to create the relationship of employer and employees.*

In another decision, in *Hotel and Club Employers' Union, Local 299 Toronto of the Hotel and*

Restaurant Employers' and Bartenders' International Union (A.F.L. - C.I.D. - C.L.C.) v. Sutton Place Hotel and Dennis Management Company, an Operating Division of Affiliated Realty Corporation Limited, [1980] O.L.R.B. Rep. Oct. 1538, the Ontario Board made the following comment at 1552-1553:

> *A particularly important question answerable through an evaluation of all of the factors set out in York Condominium [supra]is who exercises fundamental control over the employees. In some cases control over hiring may reflect fundamental control. In other situations, reminiscent of a hiring hall, it may not. In some cases, day to day supervision may suggest fundamental control, in others it may not. Similarly, with the payment of wages: in the factual mix of some cases the payment of wages may, along with other factors, suggest who holds the fundamental control while in other cases it may be of minor significance. No single factor in York Condominium [supra] inevitably points to the possession of fundamental control. The Board's ultimate evaluation of who holds fundamental control in any particular fact situation, however, is generally the single most determinative question in identifying the employer. In a word, to find the seat of fundamental control is generally to find the employer for the purposes of The Labour Relations Act.*

Given that our mandate is to oversee and promote progress towards the objectives contained in *The Trade Union Act*, it is criteria such as these which must be of more significance to this Board than the question of what would occur in the case of civil proceedings between these parties. This does not mean, of course, that the potential difficulties suggested by counsel for the Union in connection with such legal proceedings are irrelevant to the question of how to formulate a certification Order which will be most efficacious in bringing about a solid collective bargaining relationship.

Having taken this factor into account, however, we are of the view that the difficulties of taking enforcement measures in the event of a violation of the obligations imposed under a certification Order, even taking the estimate of those difficulties by the Union at face value, do not outweigh the importance of identifying the actual employer for the purposes of formulating an Order.

It is our opinion that it goes too far to suggest, as counsel for the Union did, that the Salvation Army "does not exist." It is clear that the Salvation Army possesses a complex national structure, a clear system of internal accountability, a clearly-defined set of objectives and a doctrinal base which unites those who adhere to its tenets. In this context, we are satisfied that the Governing Council does not, as such, function in a way which indicates that it should be named as the Employer. The Governing Council is part of the Salvation Army, but the Army is broader than that.

This should, in fact, come as reassuring news to the Union. The Governing Council does not make decisions about the recruitment, deployment, direction or terms and conditions of the workforce. It does, nonetheless, enjoy an indisputable legal personality, and exists primarily to permit transactions involving money and property to be conducted in the name of, and in accordance with the goals of the Salvation Army. In the event that the Salvation Army incurs some liability pursuant to an Order of this Board, there is nothing which would prevent the Union from making the Salvation Army answerable through the Governing Council as the conduit for the resources of the association, a conduit which has a clear legal persona.

Counsel for the Employer argued that the Saskatoon Recycling Centre is an independent entity, and that, given the decentralized nature of the Salvation Army as an organization, the centre should be regarded as an autonomous employer.

We are not persuaded that this represents the situation accurately. We are satisfied that Captain Hagglund and the other members of the management team make many of the major decisions related to the recruitment, discipline and direction of the employees, and that they make these decisions in the light of local interests and conditions. On the other hand, it is clear the Captain Hagglund is answerable to others in a wider national structure, specifically the Salvation Army National Recycling Operations, and that many of the policy decisions are made at other levels.

In spite of significant initiatives undertaken by Captain Hagglund in an effort to make the Saskatoon Recycling Centre operate more effectively, the Centre has continued to lose money. Arrangements to underwrite the financial losses of the Centre have been made at the national level. In addition, Captain Hagglund conceded that there is a possibility that a decision might be made to abolish the position of Executive Director in Saskatoon, and to put the Centre under the direction of someone located elsewhere.

Though we accept that critical personnel decisions are made at the local level by Captain Hagglund and the other members of his management team, we think the Employer should be identified in the certification Order in a way which makes it clear that the Saskatoon Recycling Centre is part of a broader national structure, and that the existence of the collective bargaining relationship does not stand or fall by reason of decisions about the management structure in the Saskatoon location.

Counsel for the Employer provided the Board with copies of a number of certification Orders and other documents indicating how the Salvation Army has been identified as an employer in other jurisdictions. In some cases, the locution which has been used parallels that suggested by the Employer here - Salvation Army Saskatoon Recycling Centre.

Our preference would be for another form which appears in some certification Orders, which would be Salvation Army (Saskatoon Recycling Centre). The use of this form would leave no doubt about the particular facility and program which is being identified as the basis for the bargaining relationship, but would also indicate the relationship between the local facility and the Salvation Army in both its local and national sense.

The other issue which was raised by the parties for determination by the Board was that of whether restrictions should be placed in the certification Order on the ability of the Employer to add to the number of store manager positions.

Captain Hagglund testified that, when he assumed responsibility for the Recycling Centre, there was someone designated as "manager" at each of the Thrift Store locations. He expressed his view that not all of these persons possessed the qualities or performed the functions which are properly associated with management status. For this reason, he established a "lead hand" classification, and allocated a number of the existing managers to that classification. It has been agreed that the lead hand position would be within the scope of the bargaining unit.

Prior to the hearing, Captain Hagglund formulated a job description for the position of store manager, which he felt defined the position in terms of true managerial responsibilities. These managerial duties include the hiring, firing and discipline of employees, attendance at management meetings, and budget formulation and control. As of the date of the application, he said there were two store managers carrying out these duties, one at the Thrift Store in Confederation Park, and the other at the store on 51st Street.

A reorganization of the Thrift Store operation on Avenue A was undertaken some time ago. This reorganization consists of the expansion of the floor space of the store and the addition of a full range of Thrift Store merchandise. A person had been appointed to the position of store manager at that location some time prior to the hearing, although the store had not yet reopened for business when the

hearing took place.

The other two stores, which are smaller, are currently operating without store managers, pending the outcome of a reassessment of the operations at those stores.

Captain Hagglund said that it was his intention to place a store manager in each Thrift Store in Saskatoon, whether the number of stores remains the same or is altered in the future.

Counsel for the Union argued that the certification Order should indicate that the number of persons in store manager positions is limited to two. He said that a general exclusion of the position would permit the Employer to multiply the number of store managers without restriction.

Counsel referred us to the decision of the Board in *Saskatchewan Union of Nurses v. Kindersley Senior Care Inc.*, [1989] Winter Sask. Labour Rep. 47, LRB File No. 219-88. In that case, the Board considered a position entitled "Nursing Unit Manager" which had been created as an out-of-scope position by the employer. In the course of the decision, the Board made this comment, at 49:

> *An employer is free to manage as he sees fit and it is not the Board's role to second guess his managerial decisions. It is for the employer to recognize its managerial requirements and to take whatever steps are necessary to fulfil them. On the other hand, an employer cannot interfere with the right of employees to bargain collectively through a trade union of their own choosing under the guise of creating managerial positions to carry out bargaining unit work. The Ontario Labour Relations Board commented on the case-by-case consideration of newly created positions in Ottawa General Hospital [1984] OLRBR, Sept. 1199 at p. 1203:*
>
> > *An employer is entitled to structure his organization as he sees fit, but there is a limit on the extent to which he can unilaterally multiply the number of excluded persons by purportedly creating additional "foremen", or by installing a process of management by committee. On the other hand, there will obviously be situations where individuals make serious recommendations which regularly and significantly impact upon the employment situation or security of fellow employees. If these recommendations, on the evidence, are routinely acted upon to the detriment of those employees, then it can be said that the person making the recommendation is, if not the actual decision-maker, then one decisively influencing that decision and thereby exercising a significant influence over the livelihood or economic destiny of his co-workers. Such influence carries with it the potential for conflict to which section 1(3)(b) is directed. It remains a question of evidence whether an individual's own authority extends this far.*

The decision of the Board in the *Kindersley Senior Care* case does not seem to us to stand for the proposition that an employer is not entitled to place additional persons in genuinely managerial positions. Rather, the Board was cautioning employers against thinking that they could simply designate persons as out-of-scope "managers" when their duties did not meet the criteria set out in s. 2(f)(i) of *The Trade Union Act*. As the Board pointed out, at 50:

> *The definition of employee makes it clear that only persons whose primary responsibility is to exercise authority and perform functions that are of a managerial character, persons who are an integral part of the employer's management, and persons who regularly act in a confidential capacity in respect of the employer's industrial relations are denied the right to bargain collectively because of their managerial duties and responsibilities.*
>
> *It is true that the employer has called each of the employees whose status is in dispute "Nursing Unit Managers" but it is perhaps trite to say that it is not what they are called but what they actually do that determines whether they are employees within the meaning of the Act.*

In this case, the Union has accepted that the store manager position as outlined in the job description supplied to the Board should be excluded from the bargaining unit. Although we have some sympathy for the concern expressed on behalf of the Union that an exclusion of "all store managers" leaves it open to the Employer to place additional persons in these positions, we think this option is limited, in practical terms, by the requirement that the persons so designated must have as their primary responsibility the performance of managerial functions. To the extent the duties of the position became diluted, because, for example, of the size of a particular store, it would be open to the Union to ask the Board for a ruling on whether a particular individual is acting primarily in a managerial capacity, or whether consideration should be given to a reallocation of the individual.

SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 333, Applicant and BATTLEFORDS AMBULANCE CARE LTD., DUTCHAK HOLDINGS LIMITED OPERATING AS WPD AMBULANCE CARE, BRUCE CHUBB AND WALTER P. DUTCHAK, Respondents

LRB File No. 202-95; July 16, 1996
Vice-Chairperson: Gwen Gray; Members: Bruce McDonald and Terry Verbeke

For the Applicant: Ted Koskie
For the Respondents, WPD Ambulance Care and Walter P. Dutchak: Larry Seiferling, Q.C.
For the Respondents, Battlefords Ambulance Care Ltd. and Bruce Chubb: Bill Humeny

Arbitration - Deferral to arbitration - Board declining to defer to arbitration where grievance involves interpretation of s. 37 of *The Trade Union Act*.

Technological change - Definition - Whether introduction of new level of ambulance service triggered technological change provisions - Board holding that introduction of new service did not affect terms, conditions or tenure of employment of significant number of employees - No notice of technological change is required.

Unfair labour practice - Duty to bargain in good faith - Refusal to negotiate - Board held that successor employer failed to bargain in good faith when it treated employees of predecessor employer as job applicants, subjected them to pre-employment screening, refused to continue to employ six of thirteen employees, and refused to acknowledge that collective agreement applied to employees prior to being selected for continued employment.

***The Trade Union Act*, ss.11(1)(c), 37 and 43.**

REASONS FOR DECISION

Gwen Gray, Vice-Chairperson: The Union brought an unfair labour practice application against Battlefords Ambulance Care Ltd. ("B.A.C."), Battlefords District Health Board, WPD Ambulance Care ("WPD"), Bruce Chubb and Walter P. Dutchak alleging that they failed to bargain collectively with the Union contrary to s. 11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c. T-17, and that they failed to comply with the technological change provisions contained in s. 43(2) of the Act. Prior to the hearing, the Union withdrew its allegations against the Battlefords District Health Board. In evidence it was established that WPD is operated by Dutchak Holdings Limited and the application is amended to reflect the proper name of this Respondent.

On November 29, 1982, the Union was certified to represent all employees of Robertson's Ambulance Service Ltd., in the City of North Battleford, except the Manager/Owner. Subsequently, Robertson sold its business to B.A.C., who assumed Robertson's obligations under the collective agreement and

the certification Order. The latest agreement between Union and B.A.C. runs from July 1, 1993 to June 30, 1996. Bruce Chubb is the managing owner of B.A.C.

On August 1, 1995, B.A.C. sold its ambulance business to WPD, which is owned by Dutchak Holdings Limited, operating as WPD Ambulance Care. Walter Dutchak is president of Dutchak Holdings Limited and manages the day to day operations of WPD. It is agreed between all parties that WPD is the successor employer to B.A.C. pursuant to s. 37(1) of *The Trade Union Act*.

B.A.C. also transferred its operating agreement with the Battlefords District Health Board to WPD, which resulted in the Health Board and WPD entering into an amended agreement effective August 1, 1995. In the amended agreement, WPD agreed to upgrade the existing level of ambulance service from a basic life support service to an advance life support service. The upgrade in service required the addition of persons trained as paramedics to the ambulance service. We will discuss the significance of this change in the level of service later in this decision.

In dispute between the parties is the actual effect of the successor provisions that are contained in s. 37(1) of the *Act* on the employees of B.A.C. All of the employees of B.A.C. were provided with notice of termination from B.A.C. dated June 19, 1995 which stated:

> *This letter is to advise you that effective July 31, 1995 at 12:00 midnight, your services with this company will no longer be required. The Ambulance Service has been sold to Dutchak Holdings of Rosthern Saskatchewan. It is my understanding that the purchasers will be in to interview all current staff members.*

On June 22nd, WPD posted a notice on the staff bulletin board at the ambulance service inviting B.A.C. employees to apply for driver/attendant positions with WPD. The posting indicated that candidates must be prepared to attend screenings for a written and practical exam, a medical exam and panel interviews. The screenings were held in mid-July.

Mr. Arnold Balysky, who had worked for eleven years with B.A.C., testified that he successfully completed the screening tests and was subsequently offered employment with WPD. Mr. Garry Boyer, another employee, had worked as an emergency medical technician with B.A.C. and Robertson's for a total of thirteen years. He attended the screening tests after working all night at B.A.C. and, as a result, had a difficult time performing the examinations. He subsequently was advised by his Union representative that he had failed the tests. Mr. Boyer was not offered employment with WPD. Mr. Murray Gaertner, the local Union president and an emergency medical technician with B.A.C. for nine years, testified that he "blew" the examine as he felt the whole situation was a set up designed to get rid of the B.A.C. employees. Mr. Gaertner was not offered employment with WPD.

In the final result, WPD hired seven B.A.C. employees to fill four full-time and three part-time positions but did not offer to continue the employment of six B.A.C. employees. According to the evidence of Mr. Dutchak, the selection of employees was made on the basis of the employees' test results. Mr. Dutchak indicated that WPD used the screening procedures to select the WPD staff in order to be confident of the skill levels of the staff for insurance and liability purposes and, secondly, in order to ensure quality patient care. He indicated that WPD uses similar pre-employment testing in all its ambulance services. Mr. Dutchak remarked that WPD would have hired all of the former B.A.C. employees had they passed the examinations. As it was, the company operated short-handed from August 1 until mid-August.

Mr. Dutchak was clearly of the view that employees of B.A.C. did not become employees of WPD until they had gone through a hiring process and were selected for employment by WPD. He did not connect the implementation of the pre-employment screening of driver/attendants to any increase in skill levels made necessary as a result of the upgrade in the ambulance service from basic life support to advance life support. Mr. Dutchak's testimony left the Board with the clear impression that he viewed the testing as part of the normal pre-employment screening of new applicants for driver/attendant positions. The testing was aimed in his words at ensuring the driver/attendants possessed the "minimum" emergency medical technician skills.

Although there was considerable testimony and discussion about the fairness of the tests that were administered by WPD to the B.A.C. employees, more relevant for our purposes is the evidence of Mr. George Wall, International Representative of the Union, as to the discussions that occurred between the Union and employers during the time of the change in ownership. Mr. Wall testified that he was informed of the pending sale by Mr. Gaertner, the local Union president. Mr. Wall also became aware of the posting of driver/attendant positions with WPD from Mr. Gaertner. Neither B.A.C. or WPD contacted Mr. Wall directly to discuss the sale or the transfer of employees. On May 1, 1995, counsel for the Union wrote to B.A.C. and sent a copy of the letter to Dutchak Holdings Limited expressing the Union's concern with the process of transferring ownership of the ambulance service. In the letter, counsel for the Union made the following remarks:

> *As a result of the foregoing, the law requires that you deal directly with the exclusive bargaining agent and not with the employees. The failure to do so in our view constitutes an Unfair Labour Practice. As a result, we hereby demand that any and all future discussions take place with our client. If such lines of communication are circumvented by either you or your purchaser, we shall advise our client to bring applications to the Labour Relations Board for appropriate interim and final relief.*
>
> *It is a further purpose of this letter to formally demand that both you and your purchaser ensure that all provisions of the collective bargaining agreement are complied with both in terms of discharging and hiring of employees. A failure to do*

> *so may well cause us to advise our client to not only lodge grievances, but also bring applications to the Labour Relations Board charging an Unfair Labour Practice for failure to bargain in good faith.*

In response to the May 1, 1995 letter and a telephone conversation with Mr. Wall, counsel for WPD, Mr. Seiferling, wrote Mr. Wall as follows on June 27, 1995:

> *This will confirm that one of the conditions of the sale was an upgraded service in that community. The upgraded service involves new jobs at higher skill levels and our client's assurance that the EMT's have a skill level required to perform the work.*
>
> *Our client has now posted jobs to determine who is interested in working for them and will post jobs for the higher qualification jobs.*
>
> *Our client is also prepared to negotiate with the Union as required on any Section 37 case on the following areas:*
>
> *a) the rate of pay for the higher qualification job;*
>
> *b) the question of exclusions from the bargaining unit;*
>
> *c) the manner of selection of those who are qualified for the jobs open in the new service. [Emphasis added]*

As noted above, the ambulance service provided by WPD to the Health Board was upgraded from a basic life support service to an advance life support service. Advance life support service is provided by employees who are trained as paramedics. As a result of their advanced training, paramedics are permitted to administer more medications and to perform more tests and procedures than are employees who are trained as emergency medical technicians. In addition, the provision of advance life service requires the addition of new equipment such as cardiac monitors, defibrillation equipment, intervenous equipment, advance airway kits, nitrous oxide and other similar equipment.

Mr. Wall indicated that he was not aware prior to the June 27th letter that WPD planned to introduce paramedics to the service in order to upgrade the ambulance service from a basic life support service to an advance life support service. Following this exchange of letters, Mr. Wall and Mr. Koskie met with Mr. Seiferling on June 29th to discuss the Union's objections to the posting of the driver/attendant positions, the screening process and timing of the screening which was then scheduled to take place on the July long weekend. The Union challenged the right of WPD to subject B.A.C. employees to the screening process and it urged the Employer to continue to employ B.A.C. employees in accordance with the terms of the collective agreement. The meeting resulted only in an agreement on the part of WPD to postpone the testing and to provide the Union with copies of the test results.

A further meeting was held on July 11, 1995 where the parties discussed the creation of a paramedic classification, the paramedic rate of pay, managerial exclusions and the continued employment of Darcy Chubb, one of the former owners of B.A.C. On the same day, the Union wrote B.A.C. and

WPD a letter objecting to the testing of employees as follows:

> *Our member employees advise that they have been told to submit to certain examinations. The position of the union is that such testing should not take place. We hereby object to same. We ask that the employer refrain from conducting any such tests. If the employer insists upon doing so, however, we shall advise our members to submit to the testing. We do so without prejudice to our right to challenge the testing and the use of any results from same.*

On July 11, 1995, the Union also wrote B.A.C. and WPD to invoke the technological change provisions in *The Trade Union Act*. The letter stated as follows:

> *The purpose of this letter is to provide notice, in writing, to commence collective bargaining for the purpose of developing a work place adjustment plan. This notice is given pursuant to the provisions of Section 43 of The Trade Union Act of Saskatchewan. It is our position that the sale and disposition of the business carried on by Battlefords Ambulance Care Ltd. to WPD Ambulance Care and the new services to be delivered and new equipment to be used in conjunction with the said business constitute a technological change.*

On July 12, 1995, the Union wrote to WPD indicating that it was prepared to recommend settlement of the various matters discussed on July 11th provided that agreement was reached on the continued employment or the severance of the employees of B.A.C. and that WPD acknowledge that the Union took the position that WPD and B.A.C. had not satisfied the requirement to bargain the introduction of the technological change. Mr. Wall testified that the Employer did not reply to this letter.

In response to the letters of termination issued by B.A.C. on June 19, 1995, the Union filed grievances with B.A.C. on June 23, 1995 claiming that the employees were discharged without just cause and requesting their reinstatement. Mr. Dutchak for WPD responded to the grievance as follows:

> *WPD Ambulance Care replies as follows:*
>
> *a) As a preliminary matter, the employer says that the grievor is not and has never been an employee of the Company and therefore has no right to file a grievance, no right to reinstatement or recall.*
>
> *b) In the event that the grievor has a right to grieve, the employer states the employee does not have the qualifications and abilities required to perform work for the employer and therefore can make no claim to any job.*

The grievances remain outstanding and are set to go to arbitration.

On cross-examination, Mr. Wall acknowledged that WPD did recognize the Union as the representative of the employees of WPD, although WPD did not agree with the Union that the collective agreement

applied to the six members whose employment was not continued by WPD. Mr. Wall acknowledged that this was the primary issue in dispute between the parties.

The Union's case against B.A.C. and WPD has two branches. First, it argues that the introduction of the advance life support service and the attendant addition of new equipment and work methods constituted a technological change within the meaning of s. 43 of *The Trade Union Act* and that WPD and B.A.C. failed to comply with the terms of s. 43 in introducing the change. The second branch of the Union's case alleges that the two employers failed or refused to bargain collectively with the Union as required under s. 11(1)(c) of *The Trade Union Act*.

Without undertaking an extensive review of the technological change provisions in the Act and the case law interpreting the provisions, the Board finds that the Union's argument on this under s. 43 must fail for the reasons which follow.

Subsections 43(1) to (3) provide:

> *43(1) In this section "technological change" means:*
>
> *(a) the introduction by an employer into employer's 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 or relocation outside of the appropriate unit by an employer of any part of employer's work, undertaking or business.*
>
> *(1.1) Nothing in this section limits the application of clause 2(f) and sections 37, 37.1, 37.2 and 37.3 or the scope of the obligations imposed by those provisions.*
>
> *(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.*

It is possible to argue that the new equipment added to the ambulance service, which included cardiac monitoring equipment, defibrillation, intervenous equipment, and other equipment that paramedics are authorized to operate, constitutes a "technological change" within the meaning of s. 43(1)(a). Subsection 43(2) then imposes an obligation on the employer to provide 90 days advance notice of the introduction of the change to the Union if "[it] is likely to affect the terms, conditions or tenure of employment of a significant number of such employees". The "significant number of such employees" in the present case calculated in accordance with Sask. Reg. 171/72, s. 3 is three employees.

In order to find that the introduction of the advance life systems triggers the requirement for advance notice under s. 43(3), there must be some logical connection between the introduction of new equipment and changes in the "terms, conditions or tenure of employment" of the employees. The Union argued that the introduction of the advance life support service was connected to the refusal of WPD to continue the employment of the six B.A.C. employees. There is some support for this view of the situation in the letter dated June 27, 1995 from Mr. Seiferling to the Union, which is quoted above, when it states:

> *This will confirm that one of the conditions of the sale was an upgraded service in that community. The upgraded service involves new jobs at higher skill levels and our client's assurance that the EMT's have a skill level required to perform the work.*

The evidence of Mr. Dutchak, however, did not support such a conclusion. Mr. Dutchak was responsible for implementing the testing process and provided, in our opinion, the best evidence of why the tests were implemented. Overall, it appears to the Board that the introduction of the advance life support service had little connection to the decision of WPD to not offer employment to the six former B.A.C. employees. Mr. Dutchak indicated that he implemented the testing for the purpose of ensuring that the employees had the minimum emergency medical technician training. He wanted to establish the competency of the driver/attendants for liability and patient care reasons. He testified that he would have offered employment to all of the B.A.C. employees if they had all passed the screening tests. Mr. Dutchak clearly took the approach that he had a free hand to select employees who would be offered employment with WPD and that he was entitled to treat the former employees of B.A.C. as job applicants. In addition, there was no reduction in the number of driver/attendant positions caused by

the introduction of the paramedic services, and other than the addition of two paramedics, there was no real change in the work performed by the employees of WPD.

As a result of this evidence, the Board concludes that the introduction of the advance life support service, which saw the addition of two paramedics to the ambulance service, was unrelated to WPD's refusal to continue the employment of six of the thirteen former B.A.C. employees so as to bring the change in the type of service within the provisions of s. 43 and it dismisses this aspect of the application against WPD. The allegation of technological change against B.A.C. must fail for similar reasons.

The second branch of the Union's case is its argument that both B.A.C. and WPD failed or refused to bargain collectively with the representatives of the Union contrary to s. 11(1)(c) of the *Act*. "Bargaining collectively" is defined in s. 2(b) of the *Act* as follows:

> *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;*

Section 3 of the *Act* is also significant to this discussion. It 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.*

We must also refer to s. 37(1) of the *Act* which all parties agree does apply to continue the status of the Union as the bargaining representative of the employees of WPD. Subsection 37(1) states:

> *37(1) 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.*

This case raises squarely the issue of whether employees of a predecessor employer retain their employment status with the successor employer. In addition, it raises the question of whether a refusal by a successor employer to continue the employment of the predecessor's employees can result in an unfair labour practice under s. 11(1)(c). An additional issue arises as to whether such conduct also constitutes a breach of the collective agreement that should be resolved through the grievance and arbitration provisions in the collective agreement, as opposed to being heard and dealt with by this Board.

In the present case, WPD acknowledges that the Union's certification Order and collective agreement apply to it as a result of the successorship provisions contained in s. 37 of the *Act*. However, it also takes the position that the employees of B.A.C. who were not selected for employment by WPD have no status as employees under the collective agreement in question. This position was boldly asserted in the reply to the grievance documents as follows:

> *As a preliminary matter, the employer says that the grievor is not and has never been an employee of the Company and therefore has no right to file a grievance, no right to reinstatement or recall.*

In *Emrick Plastics Inc. v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 195*, [1982] 3 C.L.R.B.R. 163, the Ontario Labour Relations Board considered an argument similar to the one put forward by WPD and, applying a purposive interpretation of the Ontario counterpart to our s. 37, concluded as follows at 171:

> *Nowhere in the Kelly Douglas decision [[1974] 1 C.L.R.B.R. 77] did the B.C. Board suggest that a successor employer was free to select its employment complement free from the provisions of the governing collective agreement. On the contrary, that Board in M.M. Pruden,[[1976] 1 C.L.R.B.R. 138; quashed 69 D.L.R. (3d) 713 (B.C.S.C.)] stated, at page 143:*
>
> > *... On the other hand, it is implicit in s. 53, and in the reasoning of Chairman Weiler in Kelly Douglas, that any discontinuance of employment must be for a legitimate business reason. That is, it must be for "just cause". A successor employer must continue to employ those employees whose jobs survive a succession under the Code, notwithstanding its opinion as to their suitability for continued employment. In other words, the Code should not be interpreted so as to give successor employers a licence to weed out "undesirable employees".*
>
> ...

> *The interpretation given to its successorship legislation by the British Columbia Labour Relations Board makes eminent good sense to this Board as well. Collective bargaining legislation is designed primarily for the benefit of employees, not trade unions. Can it really be said that the Legislature in enacting section 63 of our own Act intended that the rights of the bargaining agent selected by the employees would "run with the business" (cf., for example, Marvel Jewellry, [1975] OLRB Rep. Sept. 733), that the collective agreement bargained for and ratified by those employees would run with the business, but that the very employees who had made these choices would not? The Board would need unmistakable language in its statute to come to that conclusion...*
>
> *We conclude, similar to the British Columbia Labour Relations Board, that section 63(2) of our own Act continues the effect of a collective agreement over a sale transaction without hiatus, and that the purchaser stands literally in the shoes of its predecessor with respect to any rights or obligations under that agreement. The purchaser, in other words is given no opportunity to "weed out undesirable employees" contrary to the provisions of the collective agreement, nor to decline to recognize any of the seniority or other rights accrued by employees under the collective agreement during their tenure with the predecessor employer.*

The Ontario Labour Relations Board reaffirmed its decision in *Emrick Plastics Inc., supra*, in *Daynes Health Care Limited, Earl Daynes v. Service Employees International Union, Local 183 and Group of Employees* (1984), 8 C.L.R.B.R. (N.S.) 1 where it stated at 23:

> *38. Where the sale of a business occurred, the Balmoral employees [predecessor's employees] did not revert to the status of "laid off employees" or employees who had been properly terminated. They were actively employed by Balmoral until its business had been completely transferred to Daynes, and, upon the acquisition of Balmoral's business, they became employees of Daynes with full seniority rights and a claim to any work opportunities then available. Their status as employees in the bargaining unit did not change, and Daynes had no more right to change it than its predecessor had. . . . The Balmoral employees could not be discharged without just cause, and if Daynes suddenly found itself with too many employees for the available work, it was required to reduce its work force in accordance with the lay-off provisions in the collective agreement, taking into account the seniority rights of all of its employees.*

Counsel for WPD referred the Board to a decision of the British Columbia Court of Appeal in *British Columbia Government Employees' Union v. Industrial Relations Council and Government of British Columbia* (1988), 33 B.C.L.R. (2d) 1 which came to a different conclusion than the Ontario decisions above. The dispute in the *Government of British Columbia* case arose after the Government of British Columbia refused to permit an employee, whose position was transferred to an employer in the private sector, to remain an employee in the public sector. The employee grieved the decision arguing that the transfer of the laundry service in which he worked to the private sector resulted in his layoff from the Government position. As a result of viewing the change of employers as effecting a layoff of his

employment, the employee argued further that he was entitled to exercise various job security options that were contained in the collective agreement between the Government and the Union. The arbitrator dismissed the grievance holding that the employee was not laid off from the Government when his work transferred to a successor employer. The arbitration award was appealed to the Labour Relations Board [reported at (1987), 16 C.L.R.B.R. (N.S.) 93] and its decision was subject to a reconsideration application before the Industrial Relations Council [reported at (1987), 19 C.L.R.B.R. (N.S.) 1]. Finally, the matter was subject to an application for judicial review in the British Columbia Court of Appeal, which set aside the decision of the arbitrator and held as follows at (1988), 33 B.C.L.R. (2d) 1 at 22:

> *When Verrin became an employee of the government both he and the government became bound by the provisions of the collective agreement in accordance with s. 64. When the business was sold the purchaser became subject to the terms of the collective agreement in accordance with s. 53. The employees of the purchaser also became bound in their relations with the purchaser by the terms of the collective agreement. Verrin never became an employer of the purchaser and hence he never had any contractual relationship with the purchaser. His only contractual relationship was with the government. In order to make Verrin an employee of the purchaser one must, as Shaw J. said, read words into the statute which are not there. The statute may, in a sense, have provided for the assignment of the collective agreement from the government to the purchaser. It did not provide for the assignment of the employees from the government to the purchaser.*

The *Government of British Columbia* case can be distinguished from the present application because it dealt with the peculiar situation that arises when an employer sells or transfers a part of its business and continues to operate the remainder of its business as before. The Union in that case argued that the employee had a choice to either become an employee of the successor employer or to remain an employee of the government. While it is unnecessary for this Board to decide this issue in the present case, in our opinion, the Union's analysis in the *Government of British Columbia* case is logical. Where an employer disposes of only part of its business, it clearly continues to be bound by the certification Order and collective agreement, including all provisions dealing with layoff, recall, seniority and other similar provisions, which provide job security to employees within the bargaining unit. At the same time, the successor employer is bound to the same collective agreement and certification Order unless the Board orders otherwise under s. 37. It would seem clear that in the case of the sale of part of a business, the Legislature contemplated that one collective bargaining agreement could apply simultaneously to two employers. In such circumstances, there is nothing either in the *Act* or in most collective agreements that would prevent those employees, whose work is affected by the sale, from claiming rights under either collective agreement. We therefore agree with the decision of the British Columbia Court of Appeal to the extent that the Court held that the Employer cannot unilaterally transfer or assign its employees to a successor employer in a situation where only part of

the business is sold or transferred. This aspect of the judgment is consistent with our analysis that there are two sets of contractual rights that may be apply to the employees affected by the transfer of part of the business.

However, to the extent that the *Government of British Columbia* decision, *supra*, suggests, if in fact it does, that employees of the predecessor have no contractual rights arising on the transfer of the business or part of it to a successor employer, we would respectfully disagree with the judgment and prefer instead the reasoning of the Ontario Labour Relations Board in *Emrick Plastics*, *supra*, and *Daynes Health Care*, *supra*. Clearly, as recognized by the Ontario Board, the successorship provisions would provide a hollow remedy for unionized employees if the provisions are interpreted to effect a transfer of the Union's bargaining rights and the collective agreement to the successor employer, without requiring the successor employer to continue the employment of the people who actually performed the work.

Our analysis does not require the successor employer to continue the business in the same manner that it was performed in the past. Not all of the former jobs may survive the transfer of a business, in which case the successor employer may be required to lay staff off in accordance with the provisions contained in the collective agreement. The new employer steps into the shoes of the predecessor in terms of exercising the rights granted to it under the collective agreement. In many cases, this will permit the employer to decide how many employees it requires to conduct its business.

Counsel for WPD argued that the Employer, in this instance, was exercising its management rights under the terms of the collective agreement by unilaterally imposing new rules requiring employees to possess certain levels of competence. This may or may not be allowed under the management rights clause in this particular agreement and is not a matter over which the Board need decide. However, on our understanding of the evidence, this is not what WPD purported to do. It did not indicate to the employees or to the Union that it was implementing new rules requiring existing employees to establish their competency in order to maintain their employment with the ambulance service. It purported instead to offer employment only to those former employees of B.A.C. who satisfactorily passed pre-employment tests.

In our opinion, the difference is not insignificant. In the case of the unilateral implementation of new rules under a management rights provision, the Employer recognizes the employment status of the predecessor's employees, albeit subjecting them to new rules that might result in their discharge. Such discharge is governed by the terms of the collective agreement itself. In the present case, WPD did not acknowledge step 1 of the process - that is, it did not recognize the continued employment status of the

predecessor's employees. Instead it took the position that the collective agreement does not apply to the former employees of B.A.C. until and unless they are offered work by W.P.D. This approach fundamentally misconstrued the collective bargaining obligations imposed on the successor employer by s. 37 of the *Act* which is meant to place the successor in the shoes of the predecessor by binding it to the certification Order and the collective agreement as though the former had been made against it and the latter signed by it.

The Board has held in past decisions that the failure of a successor employer to recognize the representative status of the certified trade union or its refusal to acknowledge the applicability of a collective agreement to its business constitutes a violation of the successor employer's duty to bargain in good faith. In *International Woodworkers of America, A.F.L.-C.I.O., Region Number 1, Local Union Number 184 v. Shelter Industries Inc.*, [1979] Feb. Sask. Labour Rep. 38, LRB File No. 199-78, the Board held at 43:

> *The employer's refusal to discuss with the union the matter of recalling employees in order of seniority as called for under the agreement is an unfair labour practice and the Board so finds and requires the employer to cease and desist therefrom.*

Similarly, in *Saskatchewan Government Employees' Union v. Saskatchewan Institute of Applied Science and Technology*, [1989] Summer Sask. Labour Rep. 51, LRB File No. 131-88, the Board held at 69:

> *The first and most primitive aspect of the duty to bargain is the employer's obligation to recognize the certified trade union's right to represent all employees in the appropriate unit, and to accept the existence of the collective bargaining agreement by which it is bound. An employer who refuses to recognize a collective bargaining agreement by which it is bound commits an unfair labour practice within the meaning of section 11(1)(c) of The Trade Union Act. The respondent SIAST was bound by various collective bargaining agreements in force between SGEU and SIAST's predecessor Institutes, Centres and Community Colleges by virtue of Section 37 of The Trade Union Act. It refused to recognize that it was bound by those agreements, and therefore committed the aforesaid unfair labour practice.*

In a companion decision, the Board held in *Saskatchewan Government Employees Union and Saskatchewan Institute of Applied Science and Technology*, [1989] Summer Sask. Labour Rep. 70, LRB File No. 281-88, at 76 as follows:

> *As exclusive bargaining representative SGEU acquired, by definition in Section 2(b) of the Act, the right to represent employees for the purpose of "negotiating from time to time for the settlement of disputes and grievances of employees" in the bargaining unit. A refusal to accept the union's status as bargaining representative, or the refusal to accept the existence and application of a collective bargaining agreement containing a grievance procedure for the settlement of disputes, constitutes a violation of Section 11(1)(c) of The Trade Union Act.*

Applying the cases quoted above to the present case, the Board finds that WPD failed to bargain in good faith when it treated employees of B.A.C. as job applicants; when it subjected them to pre-employment screening tests to determine if they were suitable to be hired; when it refused to continue to employ six of the thirteen former B.A.C. employees; and when it refused to acknowledge that the collective agreement applied to all former employees of B.A.C. This failure to bargain in good faith is not cured by WPD's willingness to accept the Union as the exclusive representative of the employees which it selected for continued employment, nor its willingness to discuss the issue with the Union or its willingness to participate in the grievance and arbitration procedures. The position taken by WPD places the Union in the position of having to prove the existence of its collective bargaining rights with the successor employer, as opposed to having such rights automatically recognized by the successor employer as is required by s. 37 of the *Act*. As stated in the *Emrick Plastics* case, *supra*, the *Act* should not be interpreted "so as to give successor employers a licence to weed out 'undesirable employees'." A successor employer must accept that it becomes a party to the collective agreement of its predecessor, without modification. This requires the successor employer to continue to employ its predecessor's employees unless their employment is terminated by the successor employer in accordance with the provisions of the collective agreement. The successor employer fails in its duty to bargain collectively if it maintains the position that it has a free hand to select the employees who will work in its newly acquired business without reference to the rights of the employees of the predecessor employer under the terms of the collective agreement.

As indicated above, a secondary issue arises as to whether the Board should exercise its jurisdiction under s.11(1)(c), s. 5(d) and (e) and s. 42 of the *Act* when the subject matter of the dispute has already been referred by the Union to arbitration pursuant to the terms of the collective agreement. In *United Food and Commercial Workers, Local 1400 v. Western Grocers, a division of Westfair Foods Ltd.*, [1993] 1st Quarter Sask. Labour Rep. 195, LRB File No. 010-93, at 197, the Board alluded to situations of concurrent jurisdiction between the Board and an arbitrator where the Board would not exercise its discretion to defer to the arbitration process:

> *It is not, of course, to be expected that in all disputes which appear to raise this question of concurrent jurisdiction, there will be sufficient congruence between the allegations concerning the breach of the collective agreement, and those involving a violation of the statute, that deference to the arbitration procedure is justified. The Board acknowledged this, and therefore made it clear that deference to arbitration under a collective agreement should be neither absolute nor unconditional. There might be circumstances under which the Board would not defer to arbitration; though these situations could not be exhaustively catalogued, they would include the following:*
>
> > *a) if the resolution of the grievance would not resolve the issues raised on the application before the Board; or,*

> *b) if the conduct of the employer or trade union represents a total repudiation of the collective bargaining process, including a refusal to recognize the existence of the collective agreement or the grievance/arbitration procedure.*

In *Canadian Union of Public Employees, Local 3736 v. North Saskatchewan Laundry and Support Services Ltd.*, [1996] Sask. L.R.B.R. 54, LRB File Nos. 289-95 and 290-95, the Board also remarked at 59 as follows:

> *The second point is that this Board is the source of authoritative interpretations of The Trade Union Act as such. Though it is open to an arbitrator to construe and apply the provisions of the Act, to the extent that it is necessary to assist in an understanding of the meaning of the collective agreement, such interpretation must be subject to comment or correction by the Board.*

In the present case, the Board hesitates to defer its jurisdiction to an arbitrator as the subject matter of the arbitration, by necessity, involves an interpretation of the effect of the successorship provisions contained in s. 37 of the *Act*, a matter over which the Board is the source of "authoritative interpretation." Secondly, the subject matter of the arbitration goes to the very heart of the collective bargaining relationship, that is, whether the employees are covered by the terms of an agreement. Although an arbitrator may have jurisdiction to address these issues in the context of the grievances filed by the employees, the issues are of fundamental importance to healthy labour relations not only between these parties, but to all collective bargaining relationships that fall under the successorship provisions contained in s. 37 of the *Act*. A definitive answer from the Board to the interpretative issues raised by the Employer as to the effect of s. 37 on the employees of the predecessor employer is preferable in these circumstances to a decision of an arbitrator.

In its application, the Union requests the Board to make orders under s. 5(d) and (e), s. 42 and s. 43 of the *Act* requiring the Respondents to (a) bargain collectively with S.E.I.U., and (b) refrain from proceeding with the said changes for such period of time as is deemed appropriate. As noted above, the Board dismisses the s. 43 application against all Respondents. We are therefore left with the task of fashioning an appropriate remedy to address the failure of WPD to bargain collectively with the Union. In order to remedy the breach of s. 11(1)(c), the Board seeks to place the Union and the employees in the position they would have been in but for the conduct of the Employer that has been found to violate the provisions of the *Act*. Sections 5(d) and (e) of the *Act* provide 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 do any of the following:*
>
> *(i) refrain from violations of this Act or from engaging in any unfair labour practice;*
> *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*

Section 5.1 of the *Act* states:

> *5.1 In making an order pursuant to subclause 5(e)(ii), the board may consider a plan, submitted by a person found to have violated the Act, the regulations or a decision of the board, for rectifying the violation.*

There are many possible Orders that could issue to rectify this violation of the *Act*. However, the remedial possibilities were not fully explored before the Board in its original hearing and the Board is reluctant to impose a specific method of rectifying the violation without hearing further arguments from the parties. The Board is aware that the arbitration of the dismissal grievances is proceeding and may well, in combination with this decision, resolve all of the outstanding issues. At this time, the Board will therefore issue a standard cease and desist Order under ss.5(d) and (e)(i). The Board will remain seized of its jurisdiction to issue a rectification Order under s.5(e)(ii) of the *Act* if the same is requested by either party. In order to achieve some finality to the issue, the Board imposes a time limit of 10 days from the date of receiving this Order for either party to request that the Board reconvene to address the need for and contents of a rectification Order under s.5(e)(ii).

The Board does not find Battlefords Ambulance Care Ltd. or Darcy Chubb in violation of any provisions of the *Act*. As stated by the Board in *Canadian Union of Public Employees v. Town of Maple Creek*, [1993] 2nd Quarter Sask. Labour Rep. 71, LRB File No. 269-92, s. 37 of the *Act* does not impose an obligation on the predecessor employer to ensure that its successor is complying with the requirements of the *Act*.

WILLIAM CAMPBELL, Applicant and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2067 AND SASKATCHEWAN POWER CORPORATION, Respondents

LRB File No. 080-96; July 17, 1996
Chairperson: Beth Bilson; Members: Terry Verbeke and Gloria Cymbalisty

For the Applicant: Patrick Alberts
For the Respondent, I.B.E.W., Local 2067: Rick Engel
For the Respondent, Saskatchewan Power Corporation: No Appearance

Duty of fair representation - Arbitrary conduct - Whether union acted in arbitrary way in handling grievance -Board deciding union had not been arbitrary in handling grievance.

Duty of fair representation - Apprehension of bias - Whether reasonable apprehension of bias existed because of ties between Union officers and some employees - Board deciding reasonable apprehension of bias was not relevant and not demonstrated, in any event.

***The Trade Union Act*, s. 25.1.**

REASONS FOR DECISION

Beth Bilson, Chairperson: The International Brotherhood of Electrical Workers, Local 2067, has been designated by this Board as the bargaining agent for a unit of employees of SaskPower. Mr. William Campbell has brought an application alleging that this Union was in breach of the duty to represent him fairly because of their failure to pursue a grievance filed on his behalf.

The events which led to the discipline which was the subject of the grievance occurred on May 3, 1995. At that time, Mr. Campbell was the foreman of a crew engaged in maintenance of an electrical installation at Battrum, near Swift Current. In addition to Mr. Campbell, the members of the crew were Mr. Scott Street, Mr. Jim Kolebaba, Mr. Rick Keating, Mr. Bruce Abbott and Mr. Lawrence Bill.

On May 3, the crew were completing their maintenance duties at the Battrum site in preparation to moving elsewhere. Shortly before noon, Mr. Kolebaba and Mr. Street were dispatched to the location where the crew would next be working. At about 2:45 in the afternoon, Mr. Abbott asked Mr. Campbell for assistance with testing some of the equipment; he said that Mr. Bill had asked him to perform this testing. According to the evidence of Mr. Campbell, he thought this was odd, as Mr. Bill had more experience with testing than Mr. Abbott had.

Mr. Campbell then instructed Mr. Keating to perform the testing. In his evidence, he said that Mr. Keating had recently completed a testing course, and he thought it would be a good training opportunity for him. Mr. Campbell said that he heard Mr. Keating ask Mr. Bill for some assistance, which Mr. Bill refused, saying that he should ask Mr. Campbell to help him. Mr. Keating told Mr. Campbell he still did not understand how to do the testing, and Mr. Campbell directed Mr. Bill to assist Mr. Keating. Mr. Bill resisted, saying he did not know how to use the test which Mr. Campbell had suggested. Mr. Campbell suggested two other tests he might use, but Mr. Bill still refused.

The evidence of Mr. Campbell was that Mr. Bill then instructed the other two members of the crew to stop work for the day, and walked over to one of the vehicles himself. Mr. Campbell told them that they should "think twice" before they followed this suggestion, as he was the foreman and he expected them to continue working. Mr. Bill returned to where Mr. Campbell was standing. According to Mr. Campbell, he then instructed Mr. Bill to go home for the day. The statements of the two other crew members said that Mr. Campbell asked Mr. Bill why he had not gone home. In any case, Mr. Bill said that it was too early to stop work, and proceeded to the shed where the telephone was.

He reappeared several minutes later, saying that he had phoned Mr. Grant Shellhorn, the manager of Transmission for the Employer, and that Mr. Shellhorn wished to speak to Mr. Campbell. Mr. Campbell went into the shed, and asked Mr. Bill to leave so that he could talk to Mr. Shellhorn in confidence. Mr. Bill said he wanted to hear what Mr. Campbell was saying. Mr. Campbell told Mr. Shellhorn he would call him back from his vehicle, and proceeded towards the Suburban van which contained his cellular telephone.

There are variations in the descriptions of the events which followed. It is only necessary at this point to outline the version given by Mr. Campbell. When he reached the Suburban, he said that Mr. Bill followed him, although he was asked several times to leave Mr. Campbell alone. He said that, when he reached the passenger side of the van, he found the front door locked. He said that he reached in to open the back door, and Mr. Bill, from behind him, made two attempts to get into the rear seat of the van. Mr. Campbell said that he told Mr. Bill he would not let him into the vehicle. In the course of this exchange, Mr. Bill grabbed Mr. Campbell by the arm. Mr. Campbell turned around, caught Mr. Bill by the lapels of his coveralls, and asked him "what his problem was."

At this point, it appears that Mr. Keating came over to where Mr. Bill and Mr. Campbell were standing, and asked what was going on. He then went into the shed to call Mr. Shellhorn.

Mr. Campbell said that he then got into the Suburban and drove away to a spot where he could stop the vehicle and call Mr. Shellhorn. He said that he expressed concern to Mr. Shellhorn about getting the

transformer tested. Mr. Shellhorn checked with the testing department, and told Mr. Campbell that other arrangements would be made to do the testing. Mr. Campbell testified that Mr. Shellhorn said that he was not sure when they would be able to discuss the problems which had just arisen with Mr. Bill, as he understood Mr. Campbell would be on holidays the following week. Mr. Campbell said that he told Mr. Shellhorn he would be cancelling his holidays, and that he might be forced to take a leave because of stress which he had experienced on the job.

Mr. Campbell said he returned to the site, turned over to the crew the keys to the half-ton truck which was their transportation, and told them that work was over for the day. Mr. Campbell said that, at the time, Mr. Bill was in the shed making another call to Mr. Shellhorn. Mr. Campbell took some photographs which he had been asked to make of the equipment; he said that Mr. Bill emerged from the shed and said that taking pictures was all Mr. Campbell did.

Mr. Campbell said that his supervisor, Mr. Perry Hill, asked him to provide a written statement concerning these events. He understood that Mr. Hill had been asked to obtain this by Mr. Dale Tilling, the employee relations manager for the Employer. Mr. Campbell said that he provided this statement on May 4, 1995. Mr. Campbell gave evidence that his original statement was in handwritten form, and he provided a copy of the handwritten statement to the Union on May 10. Counsel for the Union at one point seemed to be suggesting that the statement had been changed when it was put into typed form after an interval of several weeks; we are satisfied, however, that the typed statement which was filed with us did not differ in any substantive way from the handwritten statement given to Mr. Hill and to the Union.

Mr. Campbell said that, on May 4, he also talked to Mr. Al Schindel, the shop steward for the Union, and described the events of the previous day to him.

Friday, May 5, was a day off for Mr. Campbell. When he returned to work on Monday, May 8, he said that the members of the crew refused to work with him.

He was asked to attend a meeting with representatives of the Union on May 10. This meeting was attended by Mr. Schindel, as well as Mr. Neil Collins, who was then the Union business manager, and Mr. Pat Therrien and Mr. Gord Laverdiere, who were assistant business managers with the Union. At this meeting, Mr. Campbell was informed that the Employer wished to attempt to resolve the situation by using a trained independent mediator. Mr. Campbell said that he wished to have Mr. Schindel with him at any meeting with a third party, but he was informed the mediator preferred to talk to the participants in the situation alone. Mr. Campbell said that he expressed concern that the three crew members might lie about what had happened, but Mr. Collins said he was confident this would not

happen.

The mediator, Mr. Stephen Wernikowski, met with Mr. Campbell on May 11. He also met with Mr. Abbott, Mr. Bill and Mr. Keating on May 12. The statements of the three crew members were reviewed with them on June 5. In the case of Mr. Bill and Mr. Keating, the statements were signed on June 9; Mr. Abbott signed his on June 12. These written statements were ultimately provided to the Union, though the report of the mediator himself was not disclosed.

As of May 10, Mr. Campbell was reassigned to responsibilities connected with investigation and training, and another foreman was put in charge of the maintenance crew.

On June 1, Mr. Schindel, Mr. Laverdiere, Mr. Therrien and Mr. Campbell met with Mr. Kevin Mahoney, the Vice-President Human Resources, and Mr. Richard Patrick, Vice-President Production and Transmission. At this meeting, Mr. Mahoney stated the view of the Employer that the May 3 incident at Battrum, along with several earlier instances of misconduct, would give the Employer sufficient grounds to dismiss Mr. Campbell for cause. Mr. Mahoney went on to say that, instead of dismissing Mr. Campbell, the Employer would impose other disciplinary measures, which he outlined.

At a second meeting with Mr. Mahoney on June 1, which was attended only by Mr. Campbell and Mr. Schindel, Mr. Mahoney specified what earlier misconduct he was referring to. Mr. Schindel said that Mr. Campbell did not deny that these incidents had occurred, and Mr. Campbell himself said that he did not feel he was in a position to deny them at the meeting.

The disciplinary measures mentioned by Mr. Mahoney on June 1 were listed in a letter, dated June 5, which Mr. Mahoney sent to Mr. Campbell:

> ***Subject: Assault of Lawrence Bill Battrum***
>
> *This is to confirm our conversation of June 1, 1995 in the offices of Mr. R. Patrick with respect to disciplinary measures being taken against you as a result of the above noted incident.*
>
> 1. *You are reverted to the position of Apparatus Technician effective June 1, 1995 and are assigned to Jim Blevins crew, Transmission Maintenance South.*
> 2. *You are prohibited for the remainder of your employment with SaskPower from holding any position which would place you in charge of any other employee.*
> 3. *You are on probation for the remainder of your employment with SaskPower and as such will have your employment terminated should there be any future misconduct on your part.*

> *This letter will remain on your file for the duration of your employment with SaskPower due to the length of the prohibitions resulting from your actions.*

Following the meeting with representatives of the Employer on June 1, the Union filed a grievance in the following terms:

> ***Details***
>
> *An unfair disciplinary action was issued against Mr. W.P. Campbell.*
>
> *To resolve this issue the Union is asking that Mr. Campbell be placed in one of the Vacant Electrical Inspector positions in Regina, thus removing him from the area of concern and that he have his wage red circled at the foreman rate he presently holds.*
>
> *The Union is also asking that if Mr. W.P. Campbell maintains a clean record for the next 18 months, his conditional employment probationary period would end and he be able to once again bid and hold a supervisory position.*

The wording of the grievance was reviewed with Mr. Campbell. At the hearing, Mr. Campbell said that he felt the grievance was based on the assumption that he had assaulted Mr. Bill, and he was upset about this. Mr. Schindel testified, however, that Mr. Campbell had made no such complaint at the time, and that he would have done further work on the wording of the grievance if Mr. Campbell had protested.

The Union requested that the grievance proceed to a hearing at Step 2 of the grievance procedure, which required a hearing of the grievance by Mr. Patrick. This meeting took place on June 15, and was attended by Mr. Campbell. Mr. Patrick provided his response in a letter dated June 22:

> ***Re: Union Grievance Regarding W.P. Campbell Incident***
>
> *Background:*
>
> *SaskPower took disciplinary action against Mr. W.P. Campbell, foreman of the Transmission Maintenance South, Distribution Apparatus Crew, resulting from an incident on May 3, 1995, at the Battrum substation.*
>
> *On that date, Mr. Campbell is reported to have physically assaulted Mr. L. Bill, a member of the crew. Written and signed statements have been received from three members of the crew detailing the events of that day including the assault.*
>
> *The grievance consists of several parts:*
>
> 1. *Mr. Campbell should be assigned to an Electrical inspectors position in Regina so as to create separation between himself and his old crew.*
> 2. *Mr. Campbell should be red-circled at the rate of pay of the foreman position he held at the time of the Battrum incident.*
> 3. *The indefinite probation imposed on Mr. Campbell should be reduced to 18*

months after which he would be allowed to bid on supervisory positions which, as part of the disciplinary action taken against him, he is currently prohibited in doing.

4. *The disciplinary action taken by the Company is unfair in its severity.*

Decisions:

1. *Assignment to Electrical Inspector Position:*

There is no doubt that it would be more comfortable to create as much physical separation between Mr. Campbell and his old crew as possible.

Mr. Campbell has been reverted to the position of Apparatus Technician and assigned to the Transmission Maintenance South Apparatus Crew where he is expected to work in harmony with his fellow employees.

It is the Company's position that arbitrary assignment to an Inspector's position is inappropriate as these positions are highly sought after and that this would, in fact, reward Mr. Campbell's behavior.

Mr. Campbell has bidding rights for non-supervisory positions and is free to bid on Inspector positions whenever any become available.

The Union's request to post Mr. Campbell to an Electrical Inspector's position in Regina is denied.

2. *Red-Circle Rate:*

The Union contends that Mr. Campbell should retain his foreman's rate of pay.

The Company has disciplined this employee for his inappropriate behavior as a foreman. Mr. Campbell is reverted to the position of Apparatus Technician and should be paid as such. The Union position is denied.

3. *Indefinite Probation:*

The Union contends that an indefinite probation period is excessive, but would agree to 18 months after which time Mr. Campbell should be allowed to bid and hold supervisory positions.

The Company's position is that the probation period should be 2 years.

It is the Company's hope that Mr. Campbell will learn from this experience and will return to the work force as a productive employee.

By his behavior, Mr. Campbell has brought upon himself the situation where his actions will always be closely observed by his fellow employees. In fairness, however, he should have an opportunity to demonstrate a behavior adjustment and having done so resume the rights of any other SaskPower employee. For these reasons, the Union's position is upheld.

4. *Unfair Disciplinary Action:*

> *The Union contends that the assault did not occur as stated by the members of the crew, but that there was an "incident" and that it is now impossible for Mr. Campbell and the crew to continue to work together. Further, the Union contends that the discipline imposed is too severe given Mr. Campbell's previous record.*
>
> *Any supervisory position, including that of foreman, carries with it the responsibility to demonstrate the positive characteristics of leadership.*
>
> *The use of physical force by a foreman against his crew members is not acceptable behavior. There is precedent in industry that termination could have been an appropriate Company response. SaskPower, however, prefers to work with people to return them to a productive role.*
>
> *Insofar as the Company will limit the period of probation to 2 years, the Union's position regarding the severity of the discipline is partially upheld.*

It will be noted that Mr. Patrick indicated a willingness to accept a probationary period two years in length, which was closer to the Union position on this issue. At the hearing before this Board, Mr. Campbell said that he would have been able to "live with" the conditions outlined in the June 22 letter from Mr. Patrick. Mr. Schindel and Mr. Laverdiere said that they were convinced the return of Mr. Campbell to the same work crew did not form a workable basis for resolving the grievance, and that Mr. Campbell expressed this concern as well. Mr. Laverdiere testified that he did not recall Mr. Campbell saying that he could "live with" the resolution suggested in the June 22 letter; in any case, he said, the Union could not live with it.

The Union informed the Employer on June 23, 1995, that the settlement proposed in the June 22 letter was not acceptable, and asked that a third step meeting be set up. The Employer responded with a meeting date early in July. The Employer subsequently notified the Union, however, that, as Mr. Mahoney was the representative who would normally hear the grievance at the third step, and he had already been involved in dealing with the grievance, they wished to designate someone else to hear the grievance. The Union agreed to this, and Ms. Carole Bryant, Vice-President Corporate and Business Services, was ultimately named to hear the grievance.

In the meantime, Mr. Laverdiere had some discussion with a representative of the Human Resources office, Mr. James Harris, to attempt to reach a settlement for the grievance. This process came to be referred to as "Step 2½," as it was outside the normal steps of the grievance procedure. Eventually Mr. Harris presented Mr. Garth Ormiston, who had become business manager of the Union, with a draft agreement for signature. Though the draft settlement contemplated the removal of Mr. Campbell from contact with his former crew, the Union thought it was unacceptable for other reasons; one of these was that it did not address the concern of the Union to maintain the existing wage rate for Mr. Campbell, and, furthermore, the concept of "lifetime" probation was reintroduced.

The Step 3 hearing of the grievance took place on August 15, 1995. Ms. Bryant provided her decision to the Union in a letter dated August 22, 1995:

> *RE: W.P. Campbell Grievance - Discipline*
>
> *I have carefully reviewed all of the facts presented to me on the subject grievance and am denying the grievance for the following reasons:*
>
> *It is my considered opinion that the assault did, in fact, take place as verified by the signed statements of two eye witnesses and the victim. An assault on a fellow employee is in itself a serious offense and is compounded by the fact that Mr. Campbell was in a supervisory position. Generally, the accepted discipline for this type of offense would be dismissal.*
>
> *The Corporation will not tolerate an assault on a fellow employee under any circumstances. Mr. Campbell has been given ample opportunity to accept responsibility for his actions. To date, he has shown no remorse nor admitted responsibility. If there was friction between Mr. Campbell and his crew, there were several alternative avenues that could have been pursued without resorting to violence.*
>
> *My decision is to reinstate Mr. Campbell subject to the following conditions:*
>
> 1. *Until a vacancy is available in the Regina area, Mr. Campbell will be temporarily placed, supernumerary, in an Electrical Technician or a Region Metering Technician position, at the applicable rate of pay, in the Regina area. The effective date of this placement is August 24, 1995.*
> 2. *When a position for which he is qualified, in the Regina area, with the exception of Transmission Maintenance South and any supervisory positions become vacant, he will be placed in it at the application rate of pay.*
> 3. *He is prohibited, for the duration of his employment with SaskPower, from holding any position where he would supervise any other employee.*
> 4. *He will be on probation for the remainder of his employment with SaskPower and as such will have his employment terminated should there be any future misconduct on his part.*
> 5. *This letter will remain on his file for the term of his employment with SaskPower.*
>
> *This arrangement is non-precedent setting and any future similar situations may be dealt with differently, depending on the circumstances of the situation.*

Following this response, the Grievance Committee of the Union considered whether to pursue the grievance any further. This Committee consisted of Mr. Laverdiere, Mr. Therrien and Mr. Ormiston. The Committee sought the advice of their legal counsel, who advised them that it was his opinion the grievance would not stand a good chance of success at arbitration. After discussing this opinion, as well as other aspects of the case, the Grievance Committee decided to recommend to the Executive Committee of the Union that the grievance be withdrawn, a recommendation which was approved by

the Executive Committee. This news was conveyed to Mr. Campbell in a letter dated August 24, 1995.

Mr. Campbell sought legal advice as well, and his solicitor, Mr. Patrick Alberts, wrote a letter, bearing the date of August 28, 1995, to the Employer. This letter read, in part:

> *Please be advised that we have been retained by Mr. William Campbell to represent him at arbitration. Mr. Campbell was dissatisfied with Ms. Bryant's decision of August 22, 1995 and wishes to proceed further. According to article 8.01 of the collective agreement the next step is written notice of arbitration to the company. This correspondence is submitted to you as the Notice of Arbitration in this case. Please advise us within 10 days hereof who you will be appointing as your arbitrator.*

Mr. Albert also wrote to the Union, asking them to serve a notice of intention to proceed to arbitration on the Employer. In a letter dated August 29, 1995, Mr. Therrien wrote to Mr. Alberts in the following terms:

> *SUBJECT:* *REQUEST TO SASKPOWER FOR ARBITRATION*
>
> *I am in receipt of your letter to the Superintendent of Labour Relations at SaskPower, dated August 28, 1995, in which you are submitting notice of arbitration. I find this very disturbing in the fact that you have not been given any authority from the International Brotherhood of Electrical Workers, Local 2067, for such action.*
>
> *Article 1.03 of the Collective Agreement between the International Brotherhood of Electrical Workers, Local 2067, and SaskPower, clearly states that the Union is the sole bargaining agent for those employees of the company to whom this agreement applies. Your request therefore, in which you cite article 8.01 of this Collective Bargaining Agreement gives no basis whatsoever for you to pursue this matter in such a fashion.*
>
> *In closing I'd like to reiterate the fact that we have dealt with this case fairly, without discrimination and in good faith, all the while with our Members best interests at stake.*

In January of 1996, Mr. Campbell was able to obtain copies of telephone records for May 3, 1995, relating to the telephone at the Battrum site, through the offices of a counselor he had consulted. According to Mr. Campbell, these records indicated that the time interval between the end of his conversation with Mr. Shellhorn in the shed, and the beginning of the call made by Mr. Keating to Mr. Shellhorn, was no more than 54 seconds. He felt that this supported his version of the story insofar as it differed from the versions given by other members of the crew.

Mr. Campbell brought the telephone records to the attention of the Union, and contacted representatives of the Union on a number of occasions to discuss their significance. On March 1, 1996, Mr. Therrien communicated to Mr. Campbell the following outcome of these discussions:

> *Further to your memo dated February 21, 1996, which I received February 27, 1996. There are a couple of issues I would like to confirm and clarify:*
>
> *Yes, on February 1, 1996, you did contact myself and did inform me of some new evidence in regards to documented telephone times in regards to the Battrum incident on May 31, 1995.*
>
> *After lengthy deliberation with the Grievance Committee and the Executive of Local 2067, it was felt that the original resolve to the Grievance which was filed on your behalf was still acceptable by the Union. On this note, I contacted yourself on February 14, 1996, to reiterate our position.*
>
> *Further to this, after contacting SaskPower Labour Relations, I was informed that the time limits for proceeding further for this grievance has since lapsed.*
>
> *Trusting this is satisfactory please feel free to contact myself or any other Member of Grievance Committee, should you require any further clarification.*

Several weeks after this letter was sent, Mr. Campbell filed this application with the Board, alleging that the Union had failed to represent him fairly in dealing with his grievance.

In a number of previous decisions, the Board has linked the idea of a duty of fair representation to the exclusive legal status of trade unions as the representative of bargaining unit employees. In *Radke v. Canadian Paperworkers Union*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, the Board made this point in these terms, at 61:

> *The notion that a union owes a duty to those it represents to represent them fairly arose relatively early in the history of the interpretation of collective bargaining legislation in North America. As the legislation conferred the exclusive right to represent all employees in a group delineated as an appropriate bargaining unit, once a majority of those employees had selected a trade union, it was considered logical to impose on that trade union an obligation to be even-handed in its representation of all employees in the bargaining unit, including those who had opposed the selection of that union, had not become members of the union, or who were, for some reason, in a minority within the bargaining unit. The union acquired exclusive status as a legal representative of all employees in a bargaining unit; in recognition of the degree of influence this gave the union over interests important to all employees, labour relations boards and courts imposed on it a duty to represent all employees fairly and without discrimination.*

In *Canadian Merchant Services Guild v. Gagnon*, [1984] 1 S.C.R. 509, the Supreme Court of Canada outlined the principles which should govern the understanding of the nature of the duty of fair representation at 527:

> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *1. The exclusive power conferred on a union to act as a spokesman for the*

> *employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employees.*

The way in which these principles have been commonly summarized is to say that a trade union must represent bargaining unit employees in a manner which is not arbitrary, discriminatory or in bad faith. This language is used in s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17, which reads as follows:

> *25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*

The significance of these terms was summarized by this Board in a decision in *Ward v. Saskatchewan Union of Nurses and South Saskatchewan Hospital Centre*, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at 47:

> *Section 25.1 of The Trade Union Act obligates the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favouritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do. So long as it does so, it will not violate Section 25.1 by making an honest mistake or an error in judgment.*

In a decision in *Prinesdomu v. Canadian Union of Public Employees*, [1975] 2 Can. L.R.B.R. 310, the Ontario Labour Relations Board drew a distinction between the notions of bad faith and discriminatory conduct, and that of arbitrariness. In that case, the Ontario Board commented, at 315:

> *...bad faith and discrimination describe conduct in a subjective sense - that an employee ought not to be the victim of ill will or hostility of trade union officials or of a majority of the members of the trade union....Bad faith and discrimination constitute the outer limits of majoritarianism and official action, preventing a trade union from singling out certain individuals for unfair treatment. This aspect of the duty is particularly important in discouraging discrimination on the basis of race, creed, color, sex, etc., preventing internal trade union politics from erupting into forms of invidious conduct; and in prohibiting extreme forms of interpersonal breakdowns within a trade union.*

Commenting that it is difficult to articulate and apply the concept of arbitrariness in this context, the Ontario Board went on at 315-316 to describe it in these terms:

> *It could be said that this description of the duty requires the exclusive bargaining agent to 'put its mind' to the merits of a grievance and attempt to engage in a process of rational decision making that cannot be branded as implausible or capricious.*
>
> *This approach gives the word arbitrary some independent meaning beyond subjective ill will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgments, mistakes, negligence and unbecoming laxness.*

The Board has attempted on a number of occasions to describe how we understand our own task in assessing the conduct of a trade union in the light of a complaint that an employee has not been fairly represented. In the *Radke* decision, *supra*, the Board made this comment, at 64-65:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*

As the Board has often pointed out, it is not our task to assess whether a grievance filed on behalf of an employee who complains of a breach of the duty of fair representation would stand or fall on its merits. In *Kowal v. Communications, Energy and Paperworkers Union*, [1995] 2nd Quarter Sask. Labour

Rep. 115, LRB File No. 001-95, the Board made this statement, at 126:

> *In determining whether a trade union has met the obligation to provide an employee with fair representation, the task of this Board is not to act as a substitute for a board of arbitration. The issue before us is not whether a particular grievance would have succeeded at arbitration on its merits, and the basis of our conclusions is not the evidence which would be used in adjudicating the grievance. Our role is rather to examine whether the trade union handled the grievance in a manner which was not arbitrary, discriminatory or in bad faith. This determination must be made in light of a number of considerations, including the information which was available to the trade union at the time, legitimate concerns about allocation of union resources, the significance of a particular issue in the context of other issues and interests competing for the attention of the union, and the relationship between the employee and the trade union. In this context, the strength or weakness of the merits of the grievance may suggest that the case has or has not been treated fairly, but the particulars of the grievance are not the only factors which are considered by the Board.*

In *Barabe v. Communications, Energy and Paperworkers Union*, [1994] 3rd Quarter Sask. Labour Rep. 162, LRB File No. 116-94, the Board said this, at 171:

> *As the Board pointed out in the [John Robert Chrispen v. International Association of Fire Fighters, [1992] 4th Quarter Sask Labour Rep. 133, LRB File No. 003-92] decision, supra, the responsibility of a labour relations tribunal charged with assessing the conduct of a trade union in relation to the duty of fair representation is not to pronounce on the merits of the decision the union has made, nor to confine decision-making by trade unions within the boundaries of rigid or unrealistic criteria, but to evaluate the quality of the representation which a trade union has given to one of its members in particular circumstances. The factors which enter into a trade union decision may be variable; the same may be true of the factors the Board considers relevant to assessing the conduct of the trade union. The point is not to second guess the union, to trip it up with technical or procedural requirements or to require standards which could not reasonably be met, but to examine whether the union has conscientiously and reasonably represented the interests of a member who has no alternate recourse for the protection of those interests.*

Mr. Campbell complained of a number of aspects of the way the Union handled his grievance, leading up to their decision to withdraw it, and their refusal to pick it up again when he provided the telephone records early in 1996. His major criticism was that the Union accepted that the Employer was correct in assuming that Mr. Campbell had assaulted Mr. Bill on May 3, and that they failed to get to the bottom of the discrepancies in the factual descriptions given by Mr. Campbell and the other employees of the events at the Battrum site. Counsel also argued on his behalf that the Union had not supplied Mr. Campbell with all of the information relevant to the pursuit of his grievance, including the notes taken by Mr. Schindel. Counsel further argued that it was improper for Mr. Ormiston to be involved in

the processing of the grievance as a member of the Union Grievance Committee, because of his admitted friendship with Mr. Bill; counsel intimated that Mr. Schindel may, as well, have been favourably disposed towards Mr. Bill.

In our view, these complaints rest on a misunderstanding of the nature of the grievance procedure. Though the grievance procedure culminates, in many cases, in an adjudicative proceeding before an arbitrator, it is not in itself a process of "hearing" or adjudication. In the *Kowal* decision, *supra*, the Board commented on this point, at 129-130:

> *Counsel for Ms. Kowal suggested that the Union should have pushed harder to obtain the written document, and should not have proceeded in its absence. It must be remembered, however, that the various steps of the grievance process are not "hearings" in themselves. They represent an attempt by the parties to test the firmness of their respective positions, and to identify the issues which are of significance between them. We accept the evidence of the Union officers that there was nothing in the collective agreement or in the practice adopted by the parties to entitle them to insist on receiving particular documents generated by the Employer. It would indeed be uncommon for a trade union to have access to all of the documentation or evidence possessed by an employer prior to an arbitration hearing. The process is more like the process in which a party decides whether to commence a legal action, and this decision depends largely on the information possessed by that party.*

In another decision, in *Basaraba v. Saskatchewan Government Employees' Union and Saskatchewan Liquor Board*, [1994] 3rd Quarter Sask. Labour Rep. 216, LRB File No. 086-94, the Board made this observation, at 232-233:

> *Counsel for Mr. Basaraba further argued that the Union acted arbitrarily because its approach to the question was inconsistent, that they could not, as he put it, "approbate and reprobate at the same time." It is true that the representatives of the Union articulated a number of arguments and took a number of positions, not all of them compatible with each other, in the course of their efforts to arrive at a satisfactory disposition of the case. Without wishing to be too facetious, "approbating and reprobating at the same time" seems to be a fairly accurate description of the normal (and legitimate) grievance procedure prior to arbitration. The grievance procedure is an organic and unpredictable process, in the course of which both parties may test the waters by making suggestions which are more or less serious, may reach tentative agreements and then abandon them, may adopt provisional positions and then resile from them, all in the interests of fostering candid exchange and in the spirit of commitment to reaching satisfactory solutions. It is not a measured adjudicative process, but an open-textured process of negotiation and accommodation.*

The documentary evidence filed with the Board included a typewritten version of the statement provided to the Employer and the Union by Mr. Campbell, which he said he wrote out on the evening

of May 3. It also included the signed statements which were made by Mr. Abbott, Mr. Bill and Mr. Keating to Mr. Wernikowski on May 12.

It is true that there is considerable variation in the details of the events as described by the four employees. Mr. Campbell denied slamming the door of the Suburban van on Mr. Bill as he was trying to get into the vehicle. Mr. Bill himself said, "[He] starts to slam the door on my arm." In the version given by Mr. Keating, Mr. Campbell slammed the door on the arm and leg of Mr. Bill a number of times. Mr. Abbott did not mention in his discussion with the representatives of the Union on May 10 that he saw Mr. Campbell slam the door; in his statement of May 12, however, he said that Mr. Campbell slammed the door "really hard." Mr. Schindel said that he pointed out this particular discrepancy to other Union representatives. All three of the crew members said that Mr. Campbell had pushed Mr. Bill against the vehicle when he grabbed him by the lapels; Mr. Campbell denied this.

The representatives of the Union who gave evidence did not deny that there were differences in the descriptions of the events which were given by the employees. Mr. Schindel conceded that he had no idea which was the most accurate version, but said that he thought the statement made by Mr. Campbell was as likely to be right as any of the others. Mr. Schindel, Mr. Laverdiere and Mr. Therrien said that, in all of the discussions which took place in the course of the grievance procedure, the Union consistently made their arguments based on the truth of the statement of Mr. Campbell.

The representatives of the Union conceded that the original grievance was framed on the basis that Mr. Campbell had done something worthy of censure on May 3. Mr. Campbell did not deny that some physical confrontation between him and Mr. Bill took place that afternoon, and even if his version of events were accepted at face value, the judgment of the Union was that Mr. Campbell had done something which they felt an objective observer would find to warrant disciplinary action. Though there may have been a difference between the suggestion by Mr. Keating that the door had been slammed on the arm or leg of Mr. Bill numerous times, and the grabbing of Mr. Bill by the lapels which Mr. Campbell admitted to, it was clear that there was a confrontation of a physical nature which occurred while Mr. Campbell was acting in his role as a foreman.

Mr. Schindel took extensive notes of his conversations with Mr. Campbell, Mr. Bill, Mr. Abbott and Mr. Keating. He also interviewed Mr. Kolebaba, who had been at the work site earlier on May 3, although he had not witnessed the actual incident which gave rise to the disciplinary action. These notes confirm the testimony of Mr. Schindel that he had asked a number of questions about the relationship between the other employees and Mr. Campbell in the period leading up to the "scuffle" with Mr. Bill. All of the employees reported that there was tension between them and Mr. Bill, including Mr. Kolebaba, who, according to the notes, said the employees were "scared of Campbell."

Mr. Campbell denied that there was any tension between him and the members of the crew, but his record of the events which occurred prior to his confrontation with Mr. Bill suggest that he was frustrated because of what he perceived as disrespectful or insubordinate conduct on the part of crew members, that there were several verbal exchanges of an acrimonious nature, and that there was escalating tension on the site for at least several hours before the scuffle with Mr. Bill.

In his description of his initial telephone conversation with Mr. Campbell on May 4, Mr. Schindel said that he told Mr. Campbell he had heard an "assault" had occurred, and asked if Mr. Campbell had hurt anyone. Mr. Campbell said that he had not hurt anyone, but that if he wanted to, he could have, and if he had, he would have "gone to La Ronge." Mr. Schindel also testified that Mr. Campbell began to make similar comments at a grievance meeting, but Mr. Schindel had cut him off.

It was clear that the Employer was treating the conduct of Mr. Campbell as a very serious matter. From the beginning, very senior representatives of the Employer were involved in all of the discussions which took place, and Mr. Mahoney made it clear from the outset that the termination of the employment of Mr. Campbell had been seriously considered as an option, based on this and earlier incidents.

The representatives of the Union themselves had taken the position that the Employer should place a high priority on the prevention of violent or coercive conduct on the part of out-of-scope supervisors. Mr. Laverdiere testified that the representatives of the Union did not feel they could appear to be taking it less seriously when an in-scope supervisor had allegedly conducted himself in an intimidating way.

It was also clear to the Union that the Employer was becoming more, not less, obdurate in their responses to the grievance at successive stages of the grievance process. The most obvious example of this is that, while the response of the Employer at Step 2 accepted that the probationary period should be less than the entire period of employment, the idea of lifetime probation was subsequently reinstated.

In the final analysis, the officers of the Union concluded that the grievance should be withdrawn. In making this decision, they took into account a wide variety of factors, not all of which may have been consistent with what Mr. Campbell regarded as his interests. They considered factors related to the likelihood of obtaining a positive outcome at arbitration, including the nature of the conduct to which Mr. Campbell admitted, the context in which the incident occurred, the demeanour of Mr. Campbell and the determination of the Employer. They considered the position which the Union had taken concerning coercive behaviour on the part of supervisors.

They also assessed the penalties which had been imposed on Mr. Campbell, and, inevitably, compared

these with the dismissal which the Employer had suggested as the alternative. No one would suggest that these penalties were not serious ones. Mr. Campbell was demoted, he was denied future access to positions of a supervisory nature, and his pay fell by approximately two dollars per hour. On the other hand, the Union considered that a separation of Mr. Campbell from the crew he had been working with was critical in order to prevent further trouble which might, as the Employer hinted, lead to his dismissal.

The Union also considered the relevance of a provision of the collective agreement which read as follows:

> *9.04 (ii) It is understood and agreed that by means of written request from an employee to the Labour Relations Division, arrangements will be made for the employee to view the Corporate personnel file maintained under the employee's name, and the employee may request the removal of any detrimental document that has been on file for over 2 a.*

The officers of the Union who testified conceded that they did not think this provision had ever been applied in the case of someone who had been put on "lifetime" probation, and they could not, of course, guarantee that they would be successful in having this status lifted at some time in the future. They were hopeful, however, that it might provide the basis for future rehabilitation of Mr. Campbell, and felt that it offered the only basis on which his status might be altered.

When Mr. Campbell provided the representatives of the Union with the telephone records in early 1996, we accept that the Union gave full consideration to their implications. They clearly did not think they would have the dramatic impact Mr. Campbell thought they would, and this, in our opinion, was an assessment they were entitled to make. As the letter from Mr. Therrien indicates, they also concluded that they were prevented from resuscitating the grievance on the basis of the telephone records by the fact that the time limits for processing the grievance had long since passed.

In our view, the Union considered all of the factors which might be relevant to the question of whether to pursue the grievance to arbitration. These factors included, but were not limited to, the preferences and immediate interests of Mr. Campbell, for they were entitled to take other interests into account. They did not make their assessment in a cursory or offhand way. Indeed, they explored a number of avenues in an effort to arrive at a solution which would be more satisfactory from the point of view of Mr. Campbell. Though Mr. Laverdiere and Mr. Therrien had not been long in their positions as assistant business manager, Mr. Schindel was a very experienced shop steward, and approached the gathering and assessment of relevant information in a conscientious and thorough manner. The representatives of the Union tried to take full advantage of the fact that senior representatives of the

Employer were involved in discussions from the beginning, although, as it turned out, the presence of company vice-presidents signified mainly that the Employer took an exceedingly dim view of the conduct of Mr. Campbell.

Though it was not couched specifically in the language of discrimination or bad faith, counsel for Mr. Campbell did suggest that his client had reason to suspect that the officers of the Union, notably Mr. Ormiston, would be biased against him in arriving at their decision. It is difficult, in our view, to apply the notion of "reasonable apprehension of bias" to the activities of a trade union when it is taking a grievance through the grievance procedure and trying to decide whether the grievance should be pursued to arbitration. As we stated earlier, this process cannot be characterized as an adjudicative one. It is, in fact, a component of the bargaining process and an element of the ongoing relationship between the trade union and the employer.

The trade union is expected, of course, to take the interests of individual members seriously, to avoid favouritism, and to ensure that decisions are not actuated by personal spite or hostility. A union official is not a judge, however. Union officers act in a representative capacity; they are chosen from among the employees they represent, and it is not surprising that there are often ties of acquaintanceship, loyalty and affection with union members, as well as traces of old rivalries.

Mr. Collins apparently felt that his previous ties with some of the actors in this situation made it difficult for him to be fair, and he removed himself from any dealings with the Campbell grievance. Ormiston conceded that he had once had a close friendship with Mr. Bill, although this had waned in recent years. Though he was involved in some of the discussions which took place, there is no sign that he was in a position to influence the outcome of the grievance process unduly, or that he made any effort to do so. The major roles in processing the grievance were played by Mr. Laverdiere, who had no previous connection with any of the employees involved, Mr. Therrien, who had been hired from outside the Union and did not know any of the employees very well, and Mr. Schindel, who was described as the "only one Mr. Campbell trusted."

We are not persuaded that there is any reason to suppose that favouritism, personal spite, bias or malice played any role in the decision to withdraw the grievance.

We would like to comment briefly on one final argument made by counsel for Mr. Campbell. He argued that the Union acted improperly by not insisting that the grievance procedure laid out in the collective agreement be followed to the letter, and that in particular the omission of a Step 1 meeting between Mr. Schindel and Mr. Hill constituted a procedural flaw.

The grievance procedure contained in a collective agreement sets out the process by which the parties to a collective bargaining relationship have agreed to resolve the differences which arise between them over the interpretation or application of the agreement. Though it provides rules which the parties are entitled to rely on, it is common in a healthy collective bargaining relationship that the parties agree to modify the rules to accommodate particular situations. In this case, for example, the Union agreed that an alternative representative of the Employer should consider the grievance at Step 3, and this required a further agreement to extend the time limits for successive steps of the process. The parties also agreed to the informal discussions which took place at "Step 2½" because they thought such exchange might be fruitful in producing a resolution.

In our view, these examples do not suggest improper use of the grievance procedure, but an effort to maximize its effectiveness as a tool for resolving disputes between the parties. In this connection, the Union was entitled to conclude that, though the involvement of the vice-presidents at the initial stages of discussion of the grievance signalled an ominous seriousness about this particular case, it also offered an opportunity for negotiating about the situation with persons who were in a position to make decisions about it.

One has to have considerable sympathy for Mr. Campbell. He was described by representatives of the Employer at various points as a valued and skilled employee. The events which led up to, and succeeded, the confrontation which he had with Mr. Bill on May 3, 1995, have clearly been stressful for him. Some of the evidence suggests that the confrontation was not entirely of his making, and Mr. Bill was also subject to minor disciplinary action for his part in the incident.

Nonetheless, the Employer asserted that, because he was in a position of authority, the conduct of Mr. Campbell on this occasion was unacceptable, and the Union essentially concurred with that view for a variety of reasons. This did not, in our opinion, prevent the Union from doing their best to ameliorate the harshness of the penalties which were imposed on Mr. Campbell, or from providing him with representation which was fair, conscientious and competent.

For the reasons we have given, this application must be dismissed.

GRAIN SERVICES UNION, Applicant and AGPRO GRAIN INC., Respondent

LRB File No. 111-96; July 25, 1996
Chairperson: Beth Bilson; Members: Ken Hutchinson and George Wall

For the Applicant: Hugh Wagner
For the Respondent: Brian J. Scherman

Collective agreement - Grievance and arbitration procedure - Deferral to arbitration - Whether issues raised in application should be deferred to arbitrator - Board deciding all issues should be deferred, with exception of allegations regarding duty to bargain and status of contractor.

Employee - Independent contractor - Whether person retained to perform security and grounds maintenance is employee or independent contractor - Board deciding person is employee.

***The Trade Union Act*, ss. 2(f)(i.1) and 2(f)(iii).**

REASONS FOR DECISION

PRELIMINARY OBJECTION

Beth Bilson, Chairperson: The Grain Services Union (I.L.W.U. - Canadian Area) was certified by this Board in an Order dated February 21, 1995, as the bargaining agent for a unit of employees of AgPro Grain Inc. at their fish-farming operation on Diefenbaker Lake.

The Union has brought an application alleging that the Employer has committed unfair labour practices and violations of *The Trade Union Act*, R.S.S. 1978, c. T-17, in relation to a decision to contract out duties connected with security and grounds maintenance at the Diefenbaker Lake site. The Union alleges that certain aspects of the decision violate ss. 11(1)(a), (b), (c), (e), 32(1) and 33(1) of the *Act*. These provisions read 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:*
>
> > *(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten 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;*
>
> ...
>
> *(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 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 ...*
>
> *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.*
>
> *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.*

In response to the decision of the Employer to contract out the security and grounds maintenance work, the Union also filed a grievance under the collective agreement which had been concluded between the parties. At the outset of the hearing, counsel for the Employer raised a preliminary objection to the proceeding before the Board, arguing that, in this instance, the Board should defer to the grievance and arbitration procedure under the collective agreement.

In a number of cases, this Board has been faced with scenarios in which conduct which has been

impugned may constitute a violation of a provision of a collective agreement as well as a breach of *The Trade Union Act*. In many such situations, the Board has concluded that it is appropriate to regard the grievance and arbitration procedure under the collective agreement as the forum to which the parties should initially resort as the means of resolving their differences. In *United Food and Commercial Workers v. Western Grocers*, [1993] 1st Quarter Sask. Labour Rep. 195, LRB File No. 010-93, the Board made the following comment, at 196-197:

> *In Canadian Union of Public Employees v. City of Saskatoon, [[1990] Fall Sask. Labour Rep. 77], LRB File Nos. 155-89, 026-90, 043-90, 044-90 and 045-90, the Board laid out a number of principles which might help to determine whether deference to arbitration would be appropriate. The Board considered what would justify deference to a private decision-making tribunal by a labour relations board deriving its mandate from a statute. It found the answer in the nature and objectives of The Trade Union Act itself. Since the primary purpose of the statute is to foster and promote sound collective bargaining, the fruit of that bargaining - a collective agreement in which the parties have set out their respective rights and obligations - should be given a full and expansive role in relation to whatever disputes arise between an employer and a trade union. If the parties have decided in the course of collective bargaining to submit disputes concerning certain aspects of their relationship to a forum of their own creation, it is appropriate that a labour relations board allow that tribunal an opportunity to adjudicate the dispute. Support for this view was found by the Board in United Food and Commercial Workers v. Valdi Inc. [(1980), 80 CLLC Para. 16,046 (Ont. LRB)] and St. Anne Nackawic Pulp & Paper Ltd. v. Canadian Paperworkers Union, [[1986] 1 S.C.R. 704].*

In *Re United Food and Commercial Workers, Local 1400 v. Saskatchewan (Labour Relations Board) and Westfair Foods* (1992), 95 D.L.R. (4th) 541, the Saskatchewan Court of Appeal considered the approach which the Board had taken to the issue of deferral to arbitration, and suggested the following as preconditions for a decision to defer at 548:

> *(i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute;*
>
> *(ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance-arbitration procedure; and,*
>
> *(iii) the remedy under the collective agreement must be a suitable alternative to the remedy sought in the application to the Board.*

The question put before this Board in the *Westfair Foods* case was whether it was appropriate for the Board to defer to the grievance and arbitration procedure where the relevant provision of the collective agreement paralleled the prohibition against discrimination on the basis of union activity contained in s. 11(1)(e) of *The Trade Union Act*. The Court of Appeal drew a distinction between the power of the Board to address violations of the *Act* and the capacity of an arbitrator to offer a satisfactory remedy

under the collective agreement. In this respect, the Court found that the Board had improperly declined jurisdiction in that case.

In a subsequent decision in *United Food and Commercial Workers v. Labour Relations Board and Westfair Foods carrying on business as The Real Canadian Superstore* (1994), 117 Sask. R. 308, the Saskatchewan Court of Queen's Bench commented at 311-312 on the decision of the Court of Appeal in the *Westfair Foods* case. Baynton J. found the key to that decision in the dismissal of the application by the Board, which could be interpreted as a declining of jurisdiction. In the *Real Canadian Superstore* case, the Board had instead made it clear that the deferral to arbitration was conditional, and that any issues for which arbitration proved to be unable to provide a comprehensive answer could be brought back to the Board for determination. The approach described by Baynton J. has in fact been the one commonly followed by the Board.

The Board emphasized in a decision in *Canadian Union of Public Employees v. North Saskatchewan Laundry and Support Services*, [1996] Sask. L.R.B.R. 54, LRB File Nos. 289-95 and 290-95, that we reserve the power to offer an authoritative interpretation of *The Trade Union Act*, even under circumstances where a dispute also raises a question of interpretation of provisions of a collective agreement. The Board made the following comment, at 58-59:

> *This has two important implications, in our view. The first is that, though the arbitration procedure occupies a significant, and in many ways autonomous, position in the scheme of labour relations, that scheme itself is regulated by The Trade Union Act. Each of the collective bargaining relationships which is brought into being through the offices of this Board is of continuing interest to us insofar as its health and character are a measure of successful attainment of the objects of The Trade Union Act. Unlike the courts, whose interest in any aspect of these relationships is of a general nature connected with the advancement of the law in an overall sense, the responsibility of this Board, like that of an arbitrator, is of a focused and specialized kind.*
>
> *The second point is that this Board is the source of authoritative interpretation of The Trade Union Act as such. Though it is open to an arbitrator to construe and apply the provisions of the Act, to the extent that it is necessary to assist in an understanding of the meaning of the collective agreement, such interpretation must be subject to comment or correction by the Board.*

To determine which aspects of an application invoke the power of the Board under *The Trade Union Act*, as distinct from those which would be more appropriately submitted to an arbitrator, is, of course, often easier said than done. For this reason, the Board has on occasion heard the evidence which is related to all or part of an application, so that we may be able to decide whether the application filed with the Board gives rise to a set of questions which may or should be heard separately from the

arbitration proceeding, or whether it is more appropriate to remit the dispute for resolution at arbitration.

In this case, after hearing the representations of the parties on the preliminary objection, the Board reviewed the allegations made in the application. It was our view that one issue raised by the Union lies peculiarly within the jurisdiction of the Board, and that a determination of this issue might lead to the resolution of other matters in dispute. This is the question of whether the person who was retained to perform the duties connected with security and grounds maintenance was an independent contractor, or an "employee" within the meaning of s. 2(f) of *The Trade Union Act*. The Board requested that the parties present evidence on this point, without prejudice to any determination we might make about remitting this question, along with others, to the arbitration procedure.

Having had an opportunity to consider this question further, we are of the view that the question of whether this person was an employee is not a matter which is appropriately remitted to the arbitration process, and we propose to make a ruling on that question. With respect to the other issues which are raised in the application, we have concluded that, though some of them may cease to be in dispute as a result of our ruling, there may remain some areas of difference between the parties, and that these should be pursued through the grievance and arbitration procedure. In the event an arbitrator finds any of these issues inarbitrable or is unable to provide an adequate remedy under the collective agreement, the Union may bring any of these matters back to us for further consideration.

We would make one exception, and this concerns the allegation made by the Union that the Employer proceeded with contracting out the security and groundskeeping duties after assuring the Union at the bargaining table that this would not happen. This seems to us a direct allegation of a violation of s. 11(1)(c) of *The Trade Union Act* which is distinct from any reliance on the provisions of the collective agreement. If the Union wishes to pursue this aspect of the application further, it is our opinion that it should be done through further hearings before this Board.

Mr. John Bielka, the General Manager for the Employer, testified that, prior to December of 1995, the responsibility for security and groundskeeping had largely been carried out by other employees. There were some employees present on the premises through the year, and their presence was the main factor which discouraged trespassing or theft of fish from the pens in the lake. Grass-cutting and other grounds maintenance were carried out by employees as part of their ordinary duties in the summer.

In the late fall of 1995, however, the decision was made to lay off all employees, with the exception of one fish technician. The metabolism and decreased activity of the fish during the cold winter months meant that there was little work to be performed in relation to the fish, and it was decided that no

processing work would be done over the winter. The one fish technician would go to the site regularly to feed the fish, and the management personnel would be on site periodically for various reasons, but there would not be anyone on the site after hours.

Mr. Bielka said that he was concerned that the site might become a target for trespassers if there was no one there during the winter. In addition, he said that he thought the Employer could save money by having security and grounds maintenance work done on a contract basis in the summer, which would obviate the necessity of diverting other employees to this work during the season of high activity at the fish farm and processing plant.

In December of 1995, Mr. Bielka notified the Union that he was advertising in the Outlook newspaper for tenders for the security and grounds work, and forwarded to them a copy of the contract which would be signed between the contractor and the Employer. The responsibilities of the contractor were described as follows in the contract:

> *(1) During the term of this Agreement, the Contractor shall:*
>
> *(a) Perform site security duties including, as a minimum and without limitation, locking gates at night, patrolling the site 24 hours per day, for a minimum period of 5 nights and 5 days per week (to be specified by AgPro), and requesting managerial and/or police assistance in the event of trouble. The Contractor shall be solely responsible for determining what security measures above such minimum are reasonably necessary for the security of the farm;*
>
> *(b) Perform yard maintenance including, as a minimum and without limitation, keeping roadways free of snow, cutting grass and watering all plants. The Contractor shall be solely responsible for determining what is necessary to keep the site clean and plants maintained;*
>
> *(c) Perform building maintenance including, as a minimum and without limitation, keeping buildings clean and watering all plants. The Contractor shall be solely responsible for determining what is necessary to keep the buildings clean and the plants maintained. The processing facilities after processing are specifically excluded from such duties;*
>
> *(d) Hire, train, supervise and remunerate any staff required by the Contractor;*
>
> *(e) Remit all taxes (including without limitation G.S.T.) and paying all bills and fees as and when they become due;*
>
> *(f) Pay for all expenses including, without limitation, all transportation, meals, lodging, bonding and membership or licensing dues;*
>
> *(g) Maintain all dealings with AgPro and its customers in confidence and fulfill its duty to AgPro to act in a relationship of trust and good faith on the basis that it is acting in an ethical and businesslike manner.*

The responsibilities of the Employer under the contract were described as follows:

> *(1) During the term of this Agreement, AgPro shall:*
>
> *(a) Pay to the Contractor, as its sole compensation for the services rendered, the sum of $___ per month, such sum is to include all taxes (including G.S.T.) and benefits to which the contractor might be entitled. All expenses incurred by the Contractor including, without limitation, transportation, meals, lodging, licenses, membership dues and any other approved expenses (by AgPro) incurred by the Contractor.*
>
> *(b) Provide the Contractor with access to the fish farm.*
>
> *(c) Provide the Contractor with accommodation for one person.*
>
> *(2) Pay a bonus of $___ if no break-in or vandalism occurs while the contractor is providing the security service.*
>
> *(3) The Contractor acknowledges and agrees that AgPro may deduct from the amounts otherwise payable to the Contractor, all amounts owed to AgPro by the Contractor including, without limitation, any damages suffered by AgPro as a result of any breach of contract and/or duty of care by the Contractor in the performance of its duties.*

The contract also contained an indemnification provision in the following terms:

> *(1) The Contractor agrees to indemnify AgPro against any and all losses, costs and expenses which AgPro incurs as a result of any demand, claim or proceeding made, threatened or brought against AgPro:*
>
> *(a) for any actions or inactions of the Contractor;*
>
> *(b) for failure by the Contractor to remit any taxes or to pay any fees or charges;*
>
> *(c) for any losses arising out of the performance by the Contractor of its obligations under this Agreement.*
>
> *(2) For sake of clarity, the Contractor is not an employee of AgPro and AgPro is therefore not vicariously responsible for any of the Contractor's actions or inactions.*

Mr. Bielka testified that he obtained no response to the advertisement placed in the local paper. He said that he had not specifically sent out the notice concerning the tender to the employees who had been laid off. He had posted the notice at the fish farm, but acknowledged that the employees had already been laid off when this occurred, and that it might have been preferable to contact them more directly.

When he received no tenders for the work, Mr. Bielka said that he prevailed on his brother-in-law, Mr. Marcel Jobin, to undertake the contract. Mr. Jobin had been working as a bargaining unit employee prior to this, and had been laid off with the other employees. He was reluctant to take on the contract, but agreed to do it for four months. He indicated to Mr. Bielka that his long-term interest was in pursuing a career in veterinary medicine.

For the four-month period, Mr. Jobin stayed in a cabin on the site, which was provided rent-free by the Employer. Though he was expected to be present on the site most of the time, he was allowed to leave the site when others, such as Mr. Bielka, were present. It was anticipated that he would make periodic inspections of the site, but Mr. Bielka said that it was the presence of Mr. Jobin which was largely relied on to discourage improper entry to the site. Mr. Jobin was also expected to carry out some snow removal, using equipment provided by the Employer, and to clean the offices on the site.

The representative of the Union argued that the contractual format of the relationship between the Employer and Mr. Jobin was a "fiction," and that Mr. Jobin, and whoever succeeds him, should be categorized as employees within the bargaining unit.

Counsel for the Employer, on the other hand, argued that the Board should accept that Mr. Jobin was an independent contractor. The only grounds on which the Board could make any other decision, he argued, would be if the explanation offered by the Employer for structuring the work in this way was so feeble or incoherent as to suggest that the explanation was devised to disguise anti-union sentiment.

We do not accept that the presence or absence of anti-union animus in the heart of an employer is relevant to the determination of whether a person is an independent contractor or an employee, although it may have significance where allegations are made of unfair labour practices. What is required of the Board in connection with this issue is an assessment of whether, objectively speaking, the disputed relationship has the character of that between a principal and a contractor, or that between an employer and an employee.

Section 2(f) of *The Trade Union Act* reads as follows:

> *2 In this Act:*
>
> *(f) "employee" means:*
>
> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or*
> *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer.*
>
> *(i.1) a 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 labour-management 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.*

In *United Food and Commercial Workers v. Beatrice Foods Ltd.*, [1994] 3rd Quarter Sask. Labour Rep. 302, LRB File No. 264-93, the Board made the following comment at 303:

> *This Board has commented a number of times on the significance of whether a person falls within the definition of "employee" contained in Section 2(f) of The Trade Union Act. The Board has indicated that the goal of ensuring that persons who are really employees have access to the rights and protections offered to them by the Act is of sufficient importance that the relationship between someone who is claimed by an employer not to be an employee will be closely examined to determine that the substantive as well as the formal relationship is truly not one of employment.*

In a recent decision in *Retail Wholesale Canada, a Division of the United Steelworkers of America v. United Cabs Ltd. and William Johnston and Michael Winowich*, [1996] Sask. L.R.B.R. 337, LRB File No. 115-95, this Board had occasion to review the jurisprudence of this Board concerning the status of independent contractors. In that case, the Board described our essential task in this respect as follows, at 345:

> *In deciding whether a person is an employee for a purpose which relates to the advancement of the policy objectives embodied in The Trade Union Act, the Board must attempt to distinguish between persons who are genuinely operating in an entrepreneurial fashion independent of an "employer," and those who, whatever the form their relationship with that putative employer takes, are really employees whose access to the option of bargaining collectively should be protected.*

This sentiment was an echo of a comment of the Board in an earlier decision in *Retail, Wholesale and Department Store Union v. Dairy Producers' Co-operative Limited*, [1983] Dec. Sask. Labour Rep.

30, LRB File No. 029-83, at 32:

> *The contractual relationship between Messrs. Parr and Isaak and the Respondent must be examined against the purpose of The Trade Union Act. That purpose is to protect the right of employees to organize in and to bargain collectively through a trade union of their own choosing. Once acquired, collective bargaining rights should be protected from erosion by contractual arrangements that differ in form but not in substance from the employment relationship. If the substance of the relationship between an individual and the person to whom he provides work or services is closer to that of an independent contractor than it is to an employer/employee relationship then the individual is not an employee within the meaning of Section 2 (f) (i) of the Act and the Board will not designate that person as an employee for the purposes of Section 2 (f) (iii)*

In *International Brotherhood of Electrical Workers v. Tesco Electric*, [1990] Summer Sask. Labour Rep. 57, LRB File No. 267-89, the Board commented as follows, at 59-60:

> *With respect to the final consideration: ... the statutory purpose of The Trade Union Act is to protect the rights of employees to organize in trade unions of their own choosing for the purpose of bargaining collectively with their employers. Accordingly, individuals should not be excluded from collective bargaining because the form of their relationship does not coincide with what is generally regarded as "employer-employee", when in substance, they might be just as controlled and dependent on the party using their services as an employee is in relation to his employer. If the substance of the relationship between the individual and company is essentially similar to that occupied by an employee in relation to his employer, then the individual is in fact an "employee" within the meaning of Section 2(f) of the Act and will be so designated by the Board, notwithstanding the form of nomenclature attached to that relationship.*

More recently, in *Canadian Union of Public Employees v. City of North Battleford*, [1993] 1st Quarter Sask. Labour Rep. 296, LRB File No. 090-93, the Board summarized the criteria which might be used in determining whether a genuinely independent contractual relationship exists, at 298-299:

> *Two principles may be drawn from these cases. One is that the definition in Section 2(f) (iii) frees the Board from the necessity of relying exclusively on tests, such as the "four-fold" test from the [Montreal v. Montreal Locomotive Works Ltd., [1947] 1 D.L.R. 161 (P.C.)] case, which draw upon - and are more appropriate to - the jurisprudence of contract at common law. The other criteria which have been suggested, such as the statutory purpose test, and the "crucial question" of whether a person is acting for himself or a superior, are intended to underline that the role of a labour relations board in this context is not to determine whether a person can be sued in contract, or whether she is vicariously liable for the negligent conduct of her employees, but is rather to determine whether the true character of a relationship is such that collective bargaining is an appropriate mechanism for the interactions between the parties.*
>
> *The other important principle which is articulated in the cases referred to above, as well as many others, is that the character of any such relationship can only be*

> *determined in relation to a wide range of factual elements, which may combine to present a different pattern from one case to another.*

In the *United Cabs* decision, *supra*, the Board made the following observation at 351:

> *The Board is presented by Section 2 (f) (iii) with a choice. On the one hand, the Board can conclude that the persons in question are true independent contractors, whose activities are genuinely entrepreneurial and risk-taking. In this context, an inequality of bargaining power cannot in itself justify the removal of someone from the classification of independent contractor; many business relationships which have none of the features of employment involve parties who do not carry on business on an equal footing.*
>
> *On the other hand, the Board may conclude that, when the relationship is taken as a whole, there is a degree of dependence by the contractor on the principal which indicates that the relationship is most accurately viewed, not as a relationship between entrepreneurs capable of deciding their economic future, but as a relationship which sufficiently resembles an ordinary employment relationship that the "employees" should be given an opportunity to deal with the "employer" on the basis of collective bargaining.*

A similar point was made by the Ontario Labour Relations Board in a decision in *Di Sabatino v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America and Abdo Construction*, [1977] O.L.R.B. Rep. Apr. 197, at 200:

> *18. The Labour Relations Act, however, was never intended to insulate entrepreneurs from economic competition by allowing that class of person to act in combination. Such combinations not only fall outside the purview of collective bargaining legislation, but they are also expressly restricted by the federal Combines Investigation Act. Collective bargaining policy, thus, expressly encourages combinations, while competition policy operates in the opposite direction. Given these two quite different policies, it then becomes important to identify the outer limits of our own statute, the Labour Relations Act.*
>
> *19. The task of distinguishing between the individual worker and the true entrepreneur has never been easy. There exists an economic spectrum - coloured at one end by the true entrepreneur and at the other end by the individual worker. These two points of the spectrum can be identified clearly. The businessman who sells goods, and employs others to produce these goods, is clearly not entitled to use the Labour Relations Act for the purpose of forming a combination with other businessmen. On the other hand, it is clear that the worker who supplies only his own labour to an employer is entitled to organize with other workers under the Act. At the shaded area toward the middle of the economic spectrum, however, it becomes difficult to draw a distinction.*

As the quoted passages make clear, the Board has been at pains in previous decisions to make it clear that it is important to identify the true nature of the relationship between the putative contractor and principal, and to decide whether the relationship really possesses the entrepreneurial characteristics

which would place it at the end of the spectrum occupied by genuinely independent contractors. In this respect, we have been careful not to be distracted by the formal aspects of the relationship from a determination based on its substantive nature. The mere existence of a contract has never been held, in itself, to establish conclusively that the relationship is not one of employment.

We have concluded in this case that Mr. Jobin was not an independent contractor, notwithstanding the contractual form given to his relationship with the Employer. Though Mr. Jobin was paid a set amount, this did not differ significantly from the wages calculated at an hourly rate for other employees. Though he had a certain amount of discretion in carrying out his responsibilities, his duties were outlined in detail, and he continued to be subject to the direction of Mr. Bielka. Mr. Jobin did not provide his own equipment, and, though he was expected to pay any expenses incurred out of the contract sum, Mr. Bielka said that it was intended that he be able to claim reimbursement for any unexpected or unusual expenses.

In these circumstances, it is impossible to characterize Mr. Jobin as an independent entrepreneur. Unlike the contractor in *Beatrice Foods*, *supra*, Mr. Jobin did not have a significant degree of control over the financial outcome of the contract, nor was he exposed to any risk of the kind that an entrepreneur might be expected to shoulder. Overall, he was economically dependent on the Employer to a degree which suggests that he continued to be an employee, and was never an independent contractor.

Mr. Bielka explained the decision to enter into a contract for the work related to security and maintenance of the site by saying that the Employer hoped to save money, and that these were not regarded as "core duties" which warranted the attention of employees. They are nonetheless duties which the Employer wished to have performed, and, in our view, the Employer employed Mr. Jobin to carry them out.

In the evidence which was given at the hearing, a number of examples were mentioned of other arrangements which were made by the Employer for the performance of some duties like those performed by Mr. Jobin. These were apparently brought forward by the parties to suggest elements of comparison with the situation of Mr. Jobin. We make no comment about the status of the persons involved in these situations, or about whether those arrangements were properly entered into. We would only observe that none of the examples mentioned persuaded us that Mr. Jobin was not an employee.

We have some hope that this finding concerning the status of Mr. Jobin (and anyone employed under a similar contract) may have a beneficial effect in resolving some elements of the dispute between these

parties. In the event that there are issues which remain to be determined, this ruling is not intended to prevent them being pursued, in the first instance at arbitration, or, if necessary, in further proceedings before this Board. In the case of the allegation of a violation of the duty to bargain in good faith, we leave it open to the Union to decide whether they wish to schedule a hearing before us on that issue.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and MOOSE JAW PACKERS (1974) LTD., Respondent

LRB File No. 067-96; August 1, 1996
Vice-Chairperson: Gwen Gray; Members: Don Bell and Donna Ottenson

For the Applicant: Larry Kowalchuk
For the Respondent: Noel Sandomirsky

Bargaining unit - Amendment - Add-on group - Whether Board should exclude employees who are added to existing bargaining unit from coverage under collective agreement until parties bargain their terms and conditions - Board deciding that collective agreement applies to employees who are added on to bargaining unit and both parties required to bargain collectively with respect to issues arising from integration of new group of employees.

Bargaining unit - Appropriate bargaining unit - Fragmentation - Whether certification order should be amended to include office workers in production unit - Board deciding that "all employee" unit is most appropriate - Amendment allowed.

***The Trade Union Act*, s. 5(k).**

REASONS FOR DECISION

Gwen Gray, Vice-Chairperson: The Union applied to be certified for a bargaining unit consisting of "all employees employed by Moose Jaw Packers (1974) Ltd. in or in connection with its place of business in the City of Moose Jaw" with certain exceptions. The Union was certified on July 8, 1971 for a similar unit. However, in the course of collective bargaining office staff were excluded from the bargaining unit. In this application, the Union seeks to include the four office workers in the bargaining unit and, in support of its application, it filed evidence of support from a majority of the office staff.

The Employer opposed the application and requested that the Board certify the office workers as a separate bargaining unit. The source of the Employer's concern arises from a decision of the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Kindersley Co-operative Association Limited*, [1995] 2nd Quarter Sask. Labour Rep. 278, LRB File No. 034-95. In this case, the Board held that employees who are added to a bargaining unit through an amendment to a certification Order are covered by the terms of the collective agreement then in force between the union and the employer. The Board stated at 280:

> *The provisions of the collective agreement must apply to the employees who have been added to the unit. This would certainly be the case if a group of new employees*

> *were added at the Kindersley location, and we can see no reason why the geographic separation of these employees should lead to a different conclusion.*

The Board also noted at 280:

> *It is unlikely that all of the provisions of the collective agreement can be applied directly to the employees who have been added. It is possible, for example, that there may be employees in job classification which are not included in the collective agreement. As Mr. Burkart stated, however, the parties can negotiate in relation to whatever transitional difficulties there may be.*

These principles were confirmed by the Board in its reconsideration decision, which is reported at [1996] Sask. L.R.B.R. 140.

The Employer is particularly concerned about applying the hours of work provisions contained in the current collective agreement to the office staff. Article 1.02 of Appendix "A" of the Agreement in force from May 1, 1992 to April 30, 1995 provides for a guarantee of hours for full-time staff as in the following terms:

> *1.02 The Company agrees to guarantee to every full-time employee a minimum of thirty-six (36) hours of work per week or pay in lieu of work. An employee who is absent from work for personal reasons on any day shall have his guarantee for the week concerned reduced by the number of hours missed by such absences.*

Evidence was led which indicated that the application of this provision to the office staff would result in the layoff of one clerical employee. Counsel for the Employer urged the Board to either certify the office staff as a separate unit or narrow the impact of the *Kindersley Co-operative Association* case, *supra*, by ordering that the collective agreement does not apply to the office workers and by requiring the Union and the Employer to bargain their terms and conditions taking their existing employment conditions as the starting point. The Employer urged the Board not to give the Union the leg up by applying the terms contained in the production agreement to the office workers.

The Employer also argued strongly that there was no community of interest between production and clerical workers. In evidence, the Employer pointed to the different nature of their work, the differences in their hours of work, the lack of interchangeability of workers between the two units on a casual or other basis, the differences in their pay, the differences in the conditions of work, and the absence of women workers in the production area.

The Union argued that the Board should apply its policy of certifying the largest possible bargaining unit, avoiding any unnecessary fragmentation of bargaining units. The Union noted that the right to

join a trade union of their own choosing was a right granted by s. 3 of *The Trade Union Act*, R.S.S. 1978, c. T-17, to employees, not to the employer. The desire of the office employees to join the production workers' bargaining unit should be respected unless there are sound policy reasons for finding the proposed unit to be inappropriate for collective bargaining.

First, we will address the issue of whether the unit proposed by the Union is appropriate. It should be noted that the original Order did provide for an "all employee" unit, although we understand that at the time the Order was issued, there were no office employees in the bargaining unit.

The Board discussed the criteria used to determine the appropriateness of a bargaining unit in *Health Sciences Association of Saskatchewan v. Board of Governors of South Saskatchewan Hospital Centre (Plains Hospital)*, [1987] Apr. Sask. Labour Rep. 48, LRB File Nos. 421-85 and 422-85, at 50:

> *Whenever the Board is faced with a choice of two or more bargaining structures, both of which are appropriate for the purpose of bargaining collectively, it will choose the one most appropriate for the promotion of long-term industrial stability. Beyond that it has not established an exhaustive set of rules for determining an appropriate bargaining unit. Depending on the nature of the case, it may look at any number of factors, including the history of collective bargaining, the nature of the employer's operations, the size and viability of the proposed unit, the nature of the work performed by the employees and any particular community of interest they might have, the interchangeability of personnel, the expressed views of the employees, the union and the employer, any agreements between the parties, and so forth.*

In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, [1994] 3rd Quarter Sask. Labour Rep. 87, LRB File No. 088-94, the Board described its general approach to determining the appropriateness of bargaining units as follows at 89:

> *Though, as these extracts make clear, the Board has been guided by a wide range of factors in assessing the appropriateness of proposed bargaining units, our general approach has been to attempt to balance a policy interest in stable and coherent bargaining units as a basis for healthy collective bargaining, with the rights of employees stated in Section 3 of The Trade Union Act to have access to collective bargaining as a means of dealing with their employers. Not every configuration of employees suggested can provide a foundation for strong collective bargaining. On the other hand, the Board has pointed out on numerous occasions that a proposed unit need not be the most appropriate bargaining unit which can be imagined; it is sufficient for it to be an appropriate unit.*

This Board has issued certification Orders which have segregated production employees from office and other workers: see *Prairie Micro-Tech, supra*, and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Brown Industries (1976) Ltd. et al.*, [1995] 2nd Quarter Sask. Labour

Rep. 71, LRB File Nos. 010-95 and 012-95 where, in both cases, the Union applied to be certified to represent production workers only. Although, as the Board noted in these cases, units of production employees may not be the *most* appropriate bargaining units, they are nevertheless viable collective bargaining structures.

In the present case, the unit applied for by the Union has both the advantage of providing a sound basis for collective bargaining and the advantage of fulfilling the wishes of a majority of the office employees to join the production bargaining unit. In the Board's view, long term industrial stability in this work place is better served by including office workers in the unit already certified by the Union. The Board comes to this conclusion after considering the collective bargaining difficulties that could arise for the office workers if they were segregated into a small office bargaining unit. Another factor that makes two bargaining units unattractive to the Board is the potential disruption that collective bargaining in one unit could have on its sister unit. The work of office and production workers is interconnected to such an extent that it would be almost impossible to engage in industrial action in one unit without stopping production in the other. The risk of production shutdowns and the resulting layoff of staff, who are not directly involved in an industrial dispute, places heavy responsibilities on the members of the unit considering such action. In our view, it is better for all employees if they are members of one bargaining unit and are allowed to decide on collective bargaining strategies as one group.

The impact of such fragmentation on the Employer is also a significant factor in our decision. If the Board segregated office workers into a separate bargaining unit, the Employer would be required to engage in two rounds of collective bargaining. Such collective bargaining would result in two sets of open periods and two collective agreements. The Employer would risk the potential of industrial action in two units, either of which could result in the cessation of production. Aside from its concern with the effect of the *Kindersley Co-operative Association* decision, *supra*, the Employer is hard pressed to articulate why such fragmentation is desirable from a collective bargaining point of view.

In addition, the Board is concerned overall with the exclusion of office workers from bargaining units comprised of production workers. Typically, where fragmentation is permitted, it reinforces a gendered division of work with women confined to the lower paid office work and men in the higher paid production work. Movement between the two units is stymied by the separate seniority and job security provisions. While such a fragmentation of bargaining units may be consistent with the wishes of employees as determined during an organizing campaign (which, we suspect, is often the ca hen a Union applies to be certified for a production unit only), as a matter of Board po fragmentation should be avoided, if possible.

It is the Board's view that a unit comprised of production and office staff is an appropriate unit. We now need to address the Employer's request that the Board temper the effects of the *Kindersley Co-operative Association* case, *supra*, by ordering that the terms of the existing agreement between the Union and the Employer not apply to the office staff. As noted in the passages quoted above from *Kindersley Co-operative Association*, the Board requires the parties to negotiate with respect to any matters arising from the integration of the add-on unit into the existing bargaining unit. In the present instance, the collective agreement between the parties is open for negotiations and the parties are actively engaged in collective bargaining. The Employer has the opportunity to address the integration issues at the main bargaining table.

In these circumstances, the Board does not think it necessary to reconsider its decision in *Kindersley Co-operative Association* or to temper its application to the present case. Both parties are obligated to bargain collectively with respect to the issues arising on the inclusion of the office workers in the production bargaining unit. In the Board's view, the bargaining process is the most appropriate forum for resolving these issues.

Having considered all of the evidence and arguments, the Board finds that the proposed bargaining unit is an appropriate unit; that the Union has majority support among the employees in the add-on unit; and that the Union is entitled to rest on its certification Order as evidence of its support in the production unit. An amended Order will issue accordingly.

NORMA JEAN LOEWEN, Applicant and ROYAL UNIVERSITY HOSPITAL, Employer and SASKATCHEWAN UNION OF NURSES, LOCAL 75, Certified Union

LRB File No. 031-96; August 2, 1996
Vice-Chairperson: Gwen Gray; Members: Brenda Cuthbert and George Wall

For the Applicant: Con Barkman
For the Certified Union, S.U.N., Local 75: Fran Eldridge
For the Employer, Royal University Hospital: No Appearance

Religious exemption - Application - Member of Church of God in Christ (Mennonite) is excluded from bargaining unit on religious grounds.

***The Trade Union Act*, s. 5(l).**

REASONS FOR DECISION

Gwen Gray, Vice-Chairperson: The Applicant, Norma Jean Loewen, a member of the Church of God in Christ (Mennonite), applies to the Board to be excluded from the bargaining unit assigned to the Saskatchewan Union of Nurses ("S.U.N.") at the Royal University Hospital ("RUH") in Saskatoon. Ms. Loewen works as a registered nurse at the RUH. The application is made under s. 5(l) of *The Trade Union Act*, R.S.S. 1978, c.T-17 which states:

> *5 The board may make orders:*
>
> *(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;*

The evidence of Ms. Loewen and her pastor, Mr. Barkman, indicate that at a Special Delegate Conference held in Loewen Tree Church, Galva, Kansas on September 27, 1953, the delegates passed the following resolution:

> *B. **Concerning Joining Unions:** After reconsidering the joining of labor unions, this Conference unanimously believes that it is inconsistent with the Christian faith and therefore is opposed to joining them. As employees or agriculturalists we can have no part financially or otherwise in labor unions or any such subsidiary organizations, because they make use of such well-known methods as monopolistic closed shop, the boycott, the picket line, and the strike. (Refer to article 21, 1956 Conference)*

At the 1967 Conference of Delegates of the Church, the following resolution was recorded in the Conference Decision Book:

> ***18. Labor Unions***
>
> *After reviewing the Conference writings which we have on record concerning the stand of the Church against joining labor unions, as set forth in the Conference of 1953, article 1b, the following was adopted.*
>
> *Resolved:*
>
> *A. That all brethren make it a matter of conscience as to union membership. This Conference encourages brethren to seek employment where union problems do not exist.*
>
> *B. If, and where, the union will grant us an agreement whereby we need not become members, but are permitted to continue employment by paying dues equivalent to union dues to charitable causes, it is permissible to work in a union shop. These exceptions from union membership are to be negotiated by reliable brethren in the area where problems exist and where the union is favorable to such an agreement. Caution is suggested in the proper approach.*
>
> *C. That we feel it is not wise to vote in a labor dispute in a plant where a disturbance between labor and management has developed. On the surface it appears that we are favorable to the union, but in order to be at peace with all men and uphold our peace witness, we feel to recommend that we abstain from voting.*
>
> *However, our position should be made clear to both labor and management as to why we take a neutral stand in their dispute in advance of a forthcoming election. We also feel it is inconsistent to remain on the job where a strike is called, thereby avoiding a cause of possible violence by the pro-union group.*
>
> *D. Concerning associations and cooperatives, we feel to leave this to the discretion of each local church staff because of varying circumstances.*

Ms. Loewen indicated that she graduated from nursing training in August, 1995 and became employed at RUH in September, 1995. She objects to belonging to the Union because unions, in her view, are a form of resistance movement. The tactics used by such groups conflict with the teachings of the Church, particularly, its opposition to any form of adversarial processes such as strikes and lockouts. She is not unsympathetic to the goals of the Union, which include the promotion of health care and the achievement of better wages and working conditions for nurses. However, Ms. Loewen does oppose the methods that may be used to achieve these goals because they are not, in her understanding, peaceable ways of resolving disputes. Ms. Loewen indicated that her membership in the Church would not be revoked if she remained a member of the Union, but her membership in the Church may be questioned if she involved herself in the activities of the Union.

Ms. Eldridge, employment relations Officer for the Union, argued, with great respect for Ms. Loewen's religious beliefs, that the views of Ms. Loewen's Church did not conflict with membership in the trade union. The Union argued that Ms. Loewen's Church does not prohibit membership in a trade union; it discourages activity in support of the trade union. Ms. Loewen's interpretation of the Church doctrine is a personal belief, not one imposed on her by her membership in the Church of God in Christ.

In *Enns v. Kindersley Union Hospital and Saskatchewan Union of Nurses*, [1993] 3rd Quarter Sask. Labour Rep. 149, LRB File No. 135-93, this Board surveyed the case law across Canada on the principles to be applied to a request of an employee for a religious exemption. In that instance, the Board referred to a decision of the Canada Labour Relations Board in *Barker v. Teamsters' Union, Local 938* (1986), 86 C.L.L.C. ¶16,031, in which the Canada Board summarized the criteria for dealing with an application of this nature as follows, at 14,288:

> *(1) The applicant must object to all trade unions, not just to a particular trade union.*
>
> . . .
>
> *(2) The applicant does not have to rely on some specific tenets of a religious sect to base his objections.*
>
> *In the same manner as the British Columbia and Ontario boards, we believe it is not for us to disqualify some convictions because they are personal to the applicant. While it will be easier for the latter to convince the Board that his belief is "religious" when this belief forms part of the dogma of a sect, we believe we would misconstrue section 162(2) if we were to get involved with religious orthodoxy.*
>
> *(3) An objective inquiry must be made into the nature of the applicant's belief in the sense that they must relate to the Divine or man's perceived relationship with the Divine, as opposed to man-made institutions. . . .*

> *(4) Finally, the applicant must convince the Board that he is sincere and that he has not rationalized his objections to the union on religious grounds after he was made aware of the provisions of the Code.*

This Board finds that Ms. Loewen's objections to belonging to the Union meet all of the requirements listed above. She holds the belief that peaceable resolution of disputes is a basic tenet of Christianity. While we might disagree with this interpretation of Christianity and dispute the view that trade unions promote other than peaceable resolution of employment disputes, nevertheless, the belief is genuinely held, founded in an interpretation of Christian teachings and Church dogma, and it did not surface in an opportunistic fashion.

The Board therefore orders that Ms. Loewen be excluded from the collective bargaining unit assigned to S.U.N. at the RUH. The Order will require the Employer to forward the union dues and assessments that otherwise would be payable by Ms. Loewen to a charity mutually agreed to by SUN and Ms. Loewen. In the event the parties are unable to agree to a charity, the Board will remain seized to determine the issue.

George Wall dissents for the reasons attached.

DISSENT

Member, George Wall: I have had the opportunity to read the decision of the majority of the panel and must disagree with their result.

The applicant applies for an Order under s. 5(1) of *The Trade Union Act* to be excluded from the obligations of s. 36 of the *Act* claiming:

> *I believe that my total allegiance must be to God rather than an organization such as a trade union. I believe that it is wrong to fight for my rights and for other issues as unions do, such as strikes and demonstrations.*

The Board is required under s. 5(1) to find that an employee objects to joining or belonging to a trade union or to paying dues and assessments to a trade union as a matter of conscience based on religious training or belief.

Section 36 of the *Act*, among other things, places an obligation on an employee, where a trade union is certified to represent the employees in a bargaining unit, to become a union member and to maintain

membership in the union as a condition of employment. The provisions of s. 36 recognize that individual rights are not paramount. They must be balanced against the collective rights of employees to organize into trade unions and to create an atmosphere in which effective collective bargaining can take place. Without the union security provisions in the *Act*, collective bargaining as we know it would not exist. Employers would be tempted to only employ people who oppose unions. Unions would constantly be required to pay attention to recruiting members and to collecting dues within their existing bargaining units. This would take away the unions' ability to devote itself to the goals for which they are created. There would be little or no time to bargain collectively or to deal with grievances of their members. Section 36 therefore becomes key to ensuring the rights of employees under s. 3 of the *Act*.

Section 5(l) of the *Act* does allow for individual rights to take precedence over collective rights under very special circumstances. Given the significance of s. 36 to guarantee the presence of trade unions, it is my opinion that caution should be exercised in granting exclusions under s. 5(l) of the *Act*.

The applicant is a member of the Church of God in Christ Mennonite Church. She produced a document that sets out the policy of the church as it applies to trade unions and trade union activity. The document gives us the Church's stand in 1953 and how that stand was modified in 1967. The following is a quotation from the Special Delegate Conference convened at the Lone Tree Church, Galva, Kansas, on September 27, 1953.

> *B. Concerning Joining Unions: After considering the joining of labor unions, this Conference unanimously believes it is inconsistent with the Christian faith and therefore is opposed to joining them. As employees or agriculturalists we can have no part financially or otherwise in labor unions or any such subsidiary organizations, because they make use of such well-known methods as monopolistic closed shop, boycott, the picket line, and the strike. (Refer to article 21, 1956 Conference.)*

The policy as set out in 1953 appears to meet one of the tests set out in s. 5(l) of the *Act*. The following is a quotation from the General Conference held in 1967, which replaced the policy of 1953:

> *After reviewing the Conference writings which we had on record concerning the stand of the Church against joining labor unions, as set forth in the Conference of 1953, article 1b, the following was adopted.*
>
> *Resolved:*
>
> *A. That all brethren make it a matter of conscience as to trade union membership. This Conference encourages brethren to seek employment where union problems do not exist.*

> *B. If, and where, the union will grant us an agreement whereby we need not become members, but are permitted to continue employment by paying dues equivalent to union dues to charitable causes, it is permissible to work in a union shop. These exemptions from union membership are to be negotiated by reliable brethren in the area where problems exist and where the union is favorable to such an agreement. Caution is suggested in a proper approach.*
>
> *C. That we feel it wise not to vote in a labor dispute in a plant where a disturbance between labor and management has developed. On the surface it appears that we are in favour to the union, but in order to be at peace with all men and uphold our peace witness, we feel to recommend that we abstain from voting. However, our position should be made clear to both labor and management as to why we take a neutral stand in their dispute in advance of a forthcoming election. We also feel it is inconsistent to remain on the job where a strike is called, thereby avoiding a cause of possible violence by the pro-union group.*
>
> *D. Concerning associations and cooperatives, we feel to leave this to the discretion of each local church staff because of varying circumstances.*

The policy of the Church as set out in 1967 does not prohibit Church members from becoming union members, nor does it prohibit Church members from paying union dues. It does prohibit them from taking part in union activities. The policy of the Church with respect to strike would not bring the Church member to conflict with the union.

The applicant when questioned said that she could agree with some union objectives and some with which she could not agree. She applied for a job in a union shop and commenced work in September 1995. Under the terms of the collective agreement she would have been required to join the union and to pay union dues in October 1995. There is no evidence that she did not do both. Her evidence is that she learned of the ability of the Board to exempt her on religious grounds about a month ago and subsequently filed her application.

The majority of the panel finds that a personal interpretation of religious documents will suffice to establish a religious conviction. While I do not take issue with that proposition, I am of the view our assessment must go further. Such an interpretation must not only be genuine, but properly based upon

religious foundation and reasonably arrived at. I am of the view the applicant's view is based upon an incorrect, but rigid perception of religious foundation. Furthermore, I am of the opinion that the applicant harbours an unrealistic view of trade union activity overall. All of this convinces me that her interpretation, though thought to be genuine, is ill informed and bred by misunderstanding and cannot be relied upon for a basis for exclusion.

Based on the evidence and documents filed, it is my opinion that the Applicant has failed to meet the test required to be excluded under s. 5(l) and we should dismiss the application.

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant and UNIVERSITY OF SASKATCHEWAN, Respondent

LRB File No. 035-96; August 6, 1996
Vice-Chairperson: Gwen Gray; Members: Brenda Cuthbert and George Wall

For the Applicant: Jim Holmes
For the Respondent: Catherine Sloan

Unfair labour practice - Duty to bargain in good faith - Disclosure - Whether employer communication, which was not fully understood by union, constituted an insufficient disclosure - Board held that employer's disclosure was adequate and did not violate duty to bargain.

Unfair labour practice - Unilateral change - Amended certification order - Whether freeze provisions apply to bargaining of terms of employees added to existing bargaining unit - Board holds that collective agreement is in existence and freeze provisions do not apply.

***The Trade Union Act*, ss. 11(1)(c) and (m).**

REASONS FOR DECISION

Gwen Gray, Vice-Chairperson: In this application, the Union alleges that the Employer failed to bargain collectively with the Union with respect to the terms and conditions of employment of teaching associates in the College of Medicine, and that the Employer unilaterally altered the terms and conditions of employment of teaching associates when no collective agreement was in existence.

The Union has represented Sessional Lecturers at the University for some time. In July, 1995 the unit was expanded by Board Order to include teaching associates at the College of Medicine.

The teaching associates act as surrogate patients in a clinical program designed to teach pelvic examinations to medical students. Prior to 1996, teaching associates generally worked in pairs of two, with one associate acting as a surrogate patient, while the other associate provided instructions to medical students. They were assigned work during the academic year from September through April. In the years prior to 1996, they designated one of their members to be the contact person between the associates and the College of Medicine. The contact person was relayed information on work assignments and schedules to the other teaching associates.

In the summer of 1995, after the certification Order was amended to include teaching associates, the contact person made a number of attempts to obtain information on the upcoming academic schedule

from the College of Medicine. However, by mid-September, no response was forthcoming from the College. Although the Union was not too alarmed at the lack of response because it speculated that a strike of Internes during the summer months disrupted the teaching schedule, it did persist in contacting the University. Subsequently, the Local Union President, Dr. Heather Wagg, began discussions of the matter with Dr. Joan Llewellyn, Director of Academic Administration. As a result of these discussions, the Union learned that the College of Medicine had redesigned the clinical program to which teaching associates were attached. As part of the redesign of the program, the College proposed to delay the recall of teaching associates until January, 1996. In addition, in the new program, the role of the teaching associates was to be reduced. In previous years, as indicated above, teaching associates performed an instructional role and acted as surrogate patients. In the new program, the instructional role was to be taken over by doctors and residents on staff with the College leaving the teaching associates with the role of acting as surrogate patients. The proposed program planned to team one teaching associate with a physician or resident for each two-hour teaching session.

The Union responded to the changes by filing unfair labour practice applications with the Board in which it alleged that the teaching associates had been terminated contrary to the provisions contained in *The Trade Union Act*, R.S.S. 1978, c. T-17 and that the University had failed to negotiate the changes to the clinical program with the Union contrary to ss. 11(1)(a),(c),(e) and (m) of the *Act*.

In an attempt to resolve the unfair labour practice applications, the parties engaged in a series of meetings which eventually resulted in a settlement. The terms of the settlement were set out in a letter to Dr. Llewellyn from Mr. Holmes, National Representative of the Union, dated December 21, 1995 where he stated:

> 1. *The University may proceed with the reorganization of the Obstetrics and Gynaecology Training in the Pelvic Examination as outlined in the attachment to your fax to Doctor Wagg of September 22, 1995 and in Mr. C.T.S. White's memorandum of October 23, 1995.*
>
> 2. *The Teaching Associates will be recalled to work in accordance with the past practice as described by the Union at the meeting on December 19, 1995. Recall will be of those Teaching Associates who have indicated an interest in returning and recall will be in order of seniority. Seniority will be determined by the total number of hours worked in the program, including hours when a Teaching Associate was providing "back up" for an absent Associate. (After the meeting the University indicated these hours could be obtained from the Payroll Department.) The College of Medicine would undertake to contact the applicants in order of seniority to determine who still wished to return. . . .*

3. *The University agreed to pay an amount equal to 159 hours pay (which was the number of hours worked in the program between September and December, 1994). This payment would go to the six of the Teaching Associates who are recalled for the January to April term. It was agreed shortly after the meeting that the University would delay this payment until it was determined there was no outstanding dispute as to which employees were recalled.*

4. *The Union will withdraw the Unfair Labour Practice, Reinstatement, and Monetary Loss applications filed with the Saskatchewan Labour Relations Board.*

5. *The Union maintains its position that any changes to the program affecting the working conditions of the Teaching Associates must be negotiated with the Union. [Emphasis added]*

It should also be noted that during this time the University and the Union were engaged in collective bargaining to renew the terms of the agreement for Sessional Lecturers and to develop new terms for the teaching associates.

In January, 1996, after teaching associates had been recalled to work at the College, the Union learned that the settlement reached between it and the University on the restructuring of the clinical program resulted in what the Union perceived to be a change in the ratio of teaching associates to medical students. The Union understood that prior to January, 1996, each two-hour teaching session was structured with one teaching associate acting as surrogate patient for two medical students. At a Union meeting held in January, 1996, the Union was advised by the teaching associates that the College was now scheduling three medical students to attend each two-hour teaching session, thereby increasing the associate/medical student ratio to 1:3.

Mr. Holmes indicated that he was not aware that the redesigned program would result in this change. During the January Union meeting, the Union shared with the teaching associates the attachments to the fax to Doctor Wagg of September 22, 1995 and Mr. C.T.S. White's Memorandum of October 23, 1995. These documents described the features of the redesigned clinical program in some detail and they were referred to and accepted in Mr. Holmes' letter of December 21st. Although the change in associate/student ratio had not been apparent to Mr. Holmes or Dr. Wagg from their reading of the memoranda, it was immediately apparent to the associates who read the two documents that the College of Medicine had redesigned the program on the basis of an associate/student ratio of 1:3. Had the teaching associates read the memoranda prior to the settlement being reached, they would have concluded from these documents that the University was proposing to have three medical students attend each two-hour teaching session. Mr. Holmes and Dr. Wagg were less familiar with the scheduling arrangements and did not decipher this information from the memoranda.

Mr. Holmes pointed out the significance of change in associate/student ratio for the teaching associates. If the ratio is increased, teaching assistants are required to undergo more examinations in each two-hour teaching session. In addition, an increase in the number of students taught in each two-hour session reduces the overall working time for associates.

The University led evidence to demonstrate that the associate/student ratio was not changed when the clinical program was redesigned. Its evidence indicated that over the past four academic years the associate/student ratio has varied. In 1992, there were 16 occasions when the associate/student ratio was 1:3. The remainder of times, the ratio was 1:2. In 1993, in all but two occasions, the associate/student ratio was 1:2. In the two occasions where it differed, the ratio was 1:3. In 1994, the ratio appeared to predominantly be 1:2 while in 1995, the ratio varied more frequently. Ms. Hamm, a teaching associate, who testified on behalf of the Union, acknowledged in cross-examination that it was not unusual to have a ratio of one associate to three students.

Mr. Holmes for the Union argued that the associate/student ratio of 1:2 was a term or condition of employment and that the University, through the reorganization of the clinical program, unilaterally altered the term without negotiating with the Union contrary to s. 11(1)(m) of the *Act*.

Mr. Holmes acknowledged that the applicability of s. 11(1)(m) is somewhat confused in these circumstances as a result of the Board's decision in *Retail, Wholesale and Department Store Union v. Kindersley Co-operative Association Limited*, [1995] 2nd Quarter Sask. Labour Rep. 278; LRB File No. 034-95; reconsidered at [1996] Sask. L.R.B.R. 140. In the *Kindersley Co-operative Association* case, the Board held that an amended certification Order overrides the scope provisions in a collective agreement. As a result, the collective agreement that is in effect with respect to the original bargaining unit applies to the bargaining unit described in the amended certification Order. Employees who are added to an existing unit through the amendment process, such as the teaching associates in the present case, are automatically covered by the existing collective agreement. The Board in the *Kindersley Co-operative Association* case did recognize that the collective agreement may not fit the new employees perfectly and that there may be a need for the parties to negotiate with respect to the transitional issues.

The significance of the *Kindersley Co-operative Association* case for the Union's argument is that it may preclude an application under s. 11(1)(m) as the freeze of employment terms and conditions that is required under s. 11(1)(m) is premised on the absence of a collective agreement. Section 11(1)(m) provides 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:*

> *(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;*

Mr. Holmes argued that the type of work performed by the teaching associates was so vastly different from the work performed by sessional lecturers for whom the agreement was entered into that very few of the collective bargaining provisions could readily apply to the teaching associates. Mr. Holmes then submitted that the gap in collective agreement coverage which results from the poor marriage of the terms of the existing agreement to the work performed by the teaching associates is equivalent to a "no agreement" situation. Under this analysis, s. 11(1)(m) would prevent the Employer from unilaterally changing the terms or conditions of the employees who are added to the unit through an amendment application. In the case of the teaching associates he argued that the associate/student ratio was a term that could not be unilaterally altered.

The Union also argued that the Employer breached its duty to bargain in good faith in violation of s. 11(1)(c) of the Act, during the negotiations to settle the first unfair labour practice applications, because the Employer failed to make the Union aware that the redesigned clinical program would change the associate/student ratio.

Ms. Sloan, counsel for the University, argued that there has been no change in the terms or conditions of work. She noted that in past academic years the College had varied the associate/student ratio and pointed out Ms. Hamm's testimony that three students per associate was not unusual prior to the 1996 Winter Term.

Alternatively, Ms. Sloan argued that should the Board find that the associate/student ratio was changed, it should also find on the evidence that the Union agreed to the change. Ms. Sloan argued that the failure of the Union to understand or fully comprehend the University's proposal for redesigning the clinical program was not the fault of the University. The University argued that it had provided the Union with the information that it was required to disclose. Ms. Sloan noted Ms. Hamm's testimony to the effect that the associate/student ratio of 1:3 jumped off the page to her when she read the memoranda referred to in Mr. Holmes' December 21st letter. Counsel for the University took the position that the University cannot be faulted if the Union did not consult with the teaching associates with respect to the actual contents of the memoranda prior to concluding the settlement of the prior unfair labour practice applications.

We will first deal with the Union's argument under s. 11(1)(m). We agree with Mr. Holmes that the issue of the applicability of s. 11(1)(m) is unclear as a result of the decision of the Board in the *Kindersley Co-operative Association* case. Section 11(1)(m) is premised on the absence of a collective agreement. It requires an employer to maintain the pre-certification terms and conditions of work until new terms are negotiated with the union.

In a situation where a certification Order is amended to add a new group of employees to an existing bargaining unit, the Board's ruling in *Kindersley Co-operative Association* has the effect of applying the collective agreement to the new group of employees. As explained in that case, however, there may be issues that are not addressed in the existing collective agreement, for instance, the wage rates for a new classification. In these circumstances, the parties are required to negotiate new provisions to address all of the transitional issues that arise as a result of the inclusion of the new group of employees into the bargaining unit. The parties must, in essence, negotiate to fill in the gaps in coverage under the collective agreement that may exist.

Although there may be such gaps in coverage under the agreement, the Board does not view these gaps as being the same as having no collective agreement. The basic rights contained in the collective agreement, such as the grievance and arbitration provisions, apply to the new group of employees and provide the employees with access to remedies that are not otherwise available to newly certified employees. In the Board's opinion, s. 11(1)(m) is intended to operate as a freeze of the pre-certification terms and conditions of employment where employees have no access to such collective agreement protection. We would not extend the provision to situations like that of the teaching associates where the employees are imperfectly covered by a collective agreement. Although we would agree with Mr. Holmes' assessment that very few of the provisions in the current collective agreement have any relevance or applicability to the teaching associates, and that most of the terms of their employment require collective bargaining, the teaching associates are not in the vulnerable position of newly certified employees. They do have access to a grievance and arbitration procedure, just cause provisions and the like, all of which provide significant, albeit, incomplete, protection. For these reasons, the Board holds that s. 11(1)(m) does not apply to the teaching associates because they are covered by a collective agreement.

In any event, had the Board agreed with the Union that s.11(1)(m) applied to the facts, we have a serious doubt as to whether the Employer unilaterally changed a condition of employment of the teaching assistants. The obligation to freeze the pre-certification terms and conditions of employment under s. 11(1)(m) has been interpreted by this Board and other labour relations boards as requiring the Employer to operate on a "business as before" basis. In *Saskatchewan Joint Board, Retail, Wholesale*

and Department Store Union and WaterGroup Canada Ltd. v. Aquafine Water Ltd., [1993] 1st Quarter Sask. Labour Rep. 111, LRB File No. 197-92, (quashed (1993), 115 Sask. R. 64 (Q.B.)), the Board summarized the "business as before" standard as follows at 115:

> *Using the standard of "business as before" establishes a fairly clear baseline for measuring employer conduct during the negotiation of a first collective agreement It means that the employer is entitled to continue to make business decisions, but must not change terms and conditions of employment which were in existence at the time of the certification. The employer cannot alter terms and conditions in a way which may be seen as punishing employees for choosing to support the certification of a trade union; equally, this standard prevents an employer from selecting the post-certification period to demonstrate that employees may enjoy positive changes without having to obtain them through collective bargaining. Though this way of looking at the post-certification period should indicate to the prudent employer that it is necessary to be cautious about making changes which may be characterized as undermining collective bargaining, it does not hamstring the employer completely.*

Although it is often difficult to determine precisely what terms and conditions of work existed prior to the certification of the Union, in the present case, the past practice of the Employer in setting the ratio of associates to students does not support the Union's assertion that a ratio of one associate to two medical students was an established term or condition of work. The ratio of associates to students varied in each of the previous four academic years. This evidence indicates to the Board that the Employer, in the pre-certification period, had not guaranteed any particular ratio to the associates. Based on this analysis, in the post-certification period, any changes to that ratio would not be inconsistent with the "business as before" rule.

The second matter raised by the Union relates to the Employer's obligation to disclose information to the Union in the course of negotiating a collective agreement. The Board has discussed this obligation in a number of cases, commencing with *Saskatchewan Government Employees' Union v. Government of Saskatchewan*, [1989] Winter Sask. Labour Rep. 52, LRB File Nos. 245-87 and 246-87 where the Board stated at 58-59:

> *The decisions are difficult to reconcile and, for the purposes of this decision at least, add little to the comments in the [Westinghouse Canada Limited (1980), 80 CLLC Para. 16,053] decision. They could be perceived as enunciating different rules for different factual situations, but the Board prefers a much less complicated interpretation: that is, each decision simply illustrates a different facet of the basic duty to negotiate in good faith. That duty is imposed by Section 11(1)(c) of The Trade Union Act and its legislative counterpart in every other jurisdiction. It requires the union and the employer to make every reasonable effort to conclude a collective bargaining agreement, and to that end to engage in rational, informed discussion, to answer honestly, and to avoid misrepresentation. More specifically, it is generally accepted that when asked an employer is obligated:*

> *(a) to disclose information with respect to existing terms and conditions of employment, particularly during negotiations for a first collective bargaining agreement;*
>
> *(b) to disclose pertinent information needed by a union to adequately comprehend a proposal or employer response at the bargaining table;*
>
> *(c) to inform the union during negotiations of decisions already made which will be implemented during the term of a proposed agreement and which may have a significant impact on the bargaining unit; and*
>
> *(d) to answer honestly whether it will probably implement changes during the term of a proposed agreement that may significantly impact on the bargaining unit. This obligation is limited to plans likely to be implemented so that the employer maintains a degree of confidentiality in planning, and because premature disclosure of plans that may not materialize could have an adverse effect on the employer, the union and the employees.*

In *Canadian Union of Public Employees, Local 3477 v. Saskatoon Society for the Prevention of Cruelty to Animals*, [1994] 3rd Quarter Sask. Labour Rep. 100, LRB File Nos. 007-94 to 012-94, the Board described the purpose of the obligation to disclose information during bargaining as follows at 113:

> *In our view, the obligation of an employer to reveal to the trade union any significant changes which may have an impact on issues which are being bargained, which is alluded to in the [Interprovincial Concrete Ltd., [1991] Spring Sask. Labour Rep. 85, LRB File No. 077-89] case, is consistent with the democratic purposes of collective bargaining, so aptly described in the [United Steelworkers of America v. Inglis Ltd., [1977] O.L.R.B.R. Mar. 128] decision. The provision of information which will allow the parties to formulate sensible and responsive bargaining positions is clearly essential to a healthy collective bargaining process. In this connection, as this Board has pointed out on occasion, an employer is generally speaking at an advantage when it comes to familiarity with information regarding the enterprise, and should be prepared to share with the union that information which is necessary to permit rational collective bargaining. Collective bargaining is not, or should not be, a game of cat and mouse, in which the parties attempt to achieve gains at the bargaining table by creating false impressions or incomplete pictures of the true state of affairs.*

These decisions make it clear that the Employer, who was engaged in collective bargaining with the Union and who had finalized plans to redesign a program that affected the terms and conditions of work of members of the bargaining unit, was obligated to disclose to the Union the plan to redesign the clinical program. The changes to the clinical program were not insignificant to the bargaining process and disclosure was required in order to permit "rational collective bargaining" with respect to the terms and conditions of employment of the teaching associates.

The University fulfilled most of its obligation to disclose the plan to the Union after the Union filed its

first unfair labour practice applications. The particular issue which we must decide, however, is whether the University was sufficiently explicit in setting out the consequences of the restructuring plan in its discussions with the Union. The Union complains that the Employer did not make it crystal clear in its memoranda that the new program would result in an associate/student ratio of 1:3. In effect, the Union argues that the University pulled the wool over the Union's eyes by not being straightforward about the change in the associate/student ratio.

While the Board is sympathetic to the awkward position the Union found itself in, we do not view the Employer's conduct as a breach of its duty to bargain in good faith. The information that the Union needed in order to assess its bargaining position with respect to the settlement of the outstanding unfair labour practice applications was contained in the memoranda referred to in Mr. Holmes' letter of December 21st. Although it was not fully understood by Mr. Holmes or Dr. Wagg, the Union representatives also failed to share the contents of the documents with the teaching associates prior to agreeing to a settlement. The teaching associates were able to fully understand the implications of the plan.

We are not suggesting that Employers are entitled to use unclear language to deliberately conceal information that is central to the Union's understanding of an issue. However, in the present case, the most that can be said is that the Union misunderstood the implications of the memoranda for reasons which were not intended by the Employer. The Employer's communications to the Union, although they were not fully understood by the Union, do not constitute an insufficient disclosure of its restructuring plan and as a result, the Board finds that the Employer did not breach its duty to bargain in good faith with the Union.

Although the Board dismisses the Union's application, we note that this application and the ones previously filed could have been avoided had the Employer initiated discussions with the Union concerning the restructuring of the clinical program earlier in the course of collective bargaining. Coming as it did shortly after the certification of the teaching assistants, the Union and its members can hardly be blamed for being suspicious as to the motives of the Employer. This underlying suspicion all too often carries over into other dealings between the parties and does not contribute to the establishment of healthy labour relations. Fortunately, the Employer in this instance made sincere efforts through Dr. Llewellyn to correct its delay in communicating details of the plan to the Union and the Board is hopeful that this co-operative attitude will continue to prevail between the parties.

As indicated above, after considering all of the evidence and arguments, the Board orders that the Union's application be dismissed.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and COURTYARD INNS OPERATIONS LTD., OPERATING AS THE REGINA INN, Respondent

LRB File Nos. 154-96, 155-96 & 156-96; August 6, 1996
Chairperson: Beth Bilson; Members: Bob Cunningham and Bruce McDonald

For the Applicant: Larry Kowalchuk
For the Respondent: Eileen Libby

Remedy - Interim order - Whether employee terminated during union organizing campaign should be reinstated - Board deciding employee should be reinstated.

Unfair labour practice - Discharge - Whether employee terminated during union organizing campaign should be reinstated - Board issuing interim reinstatement order.

***The Trade Union Act*, ss. 5(d),(e),(f),(g), 5.3, 11(1)(e) and 42.**

REASONS FOR DECISION

INTERIM ORDER

Beth Bilson, Chairperson: The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union has filed with the Board applications relating to the termination of the employment of Mr. Peter St. Rose by his employer, Courtyard Inns Operations Ltd., at The Regina Inn. In these applications, the Union has alleged that the termination of the employment of Mr. St. Rose constituted an unfair labour practice and a violation of s. 11(1)(e) of *The Trade Union Act*, R.S.S. 1978, c. T-17, and seeks the reinstatement of Mr. St. Rose and payment of any monetary loss he has suffered. Section 11(1)(e) reads 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:*
>
> > *(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 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.*

The Union filed a further application seeking an interim Order reinstating Mr. St. Rose to his employment. On the basis of affidavits filed by the parties, and oral submissions by counsel, the Board has issued an Order, dated July 26, 1996, requiring the Employer to reinstate Mr. St. Rose pending the disposition of the substantive applications, to post copies of the Order, and to convene a meeting at which a representative of the Union, Mr. Gordon Schmidt, would be permitted to address the employees. These Reasons relate only to this Order.

In the Affidavit of Peter St. Rose which was filed by the Union, Mr. St. Rose stated that he had been actively involved in a union organizing campaign from some date around June 25, 1996, and that his employment had been terminated on July 5, 1996, while the organizing campaign was in progress.

In the Affidavits filed on behalf of the Employer, the deponents denied that any representatives of the Employer were aware that Mr. St. Rose was engaged in any union activity at the time of his dismissal. The reason they gave for the dismissal was that his work performance was unsatisfactory.

Any allegation that the dismissal of an employee is related to the pursuit of lawful union activity, by that employee or by other employees, has always been viewed with great seriousness by this Board. In *Saskatchewan Government Employees' Union v. Regina Native Youth and Community Services Inc.*, [1995] 1st Quarter Sask. Labour Rep. 118, LRB File Nos. 144-94, 159-94 and 160-94, the Board made this point in the following terms, at 123:

> *It is clear from the terms of Section 11(1)(e) of The Trade Union Act that any decision to dismiss or suspend an employee which is influenced by the presence of trade union activity must be regarded as a very serious matter. If an employer is inclined to discourage activity in support of a trade union, there are few signals which can be sent to employees more powerful than those which suggest that their employment may be in jeopardy. The seriousness with which the legislature regards conduct of this kind is indicated by the fact that the onus rests on the employer to show that trade union activity played no part in the decision to discharge or suspend an employee.*

A decision to dismiss or suspend an employee which is motivated, even in part, by considerations related to the exercise of the right to engage in union activity, which is protected by *The Trade Union Act*, can have the effect of discouraging employees from supporting a trade union or participating in union activity at any time. If the dismissal or suspension occurs at the very moment when the trade union is trying to win the support of employees who have not been previously represented by a union, the event can send a particularly strong message to employees whose views on the representation issue have not been decided, and can have a devastating impact on the capacity of the union to solicit support from employees.

The Board commented on the significance of the dismissal or suspension of an employee during this sensitive period in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Moose Jaw Exhibition Company Ltd.*, [1996] Sask. L.R.B.R. 575, LRB File Nos. 131-96, 132-96 and 133-96, at 587:

> *Serious disciplinary action against an employee is, it goes without saying, an important event for that employee at any time. The significance of such steps from the point of view of The Trade Union Act and this Board is related to the signal which is sent, not only to the employee most directly affected, but to all employees, concerning the risks which they may be taking by engaging in activities which they are legally entitled to undertake. When such action is taken against an employee who is playing a significant role in a union organizing campaign and in the activities which lay the foundation for the collective bargaining relationship, the Board has always been highly alert to the possibility that a decision to discipline such an employee at this particular time may be something other than a coincidence. In this case, we would have to say that, had we been persuaded that the explanation given by the Employer held water, we would still have been very concerned by the timing of the decision to suspend and then dismiss Ms. Ponto, and this factor would probably, in itself, have led us to the conclusion that the Employer could not meet the onus of proof under s. 11(1)(e).*

As this passage suggests, the Board has imposed a heavy onus on any employer whose decision to dismiss or suspend an employee coincides with manifestations of trade union activity. In the context of an application for interim relief, the rationale which the Board has enunciated in cases like the ones quoted above is of considerable relevance in weighing the arguments put forward on behalf of the parties.

On a number of occasions, the Board has summarized the criteria which are appropriate for the determination of an application for relief of an interlocutory nature. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Companies Inc.*, [1992] 1st Quarter Sask. Labour Rep. 68, LRB File No. 011-92, the Board listed these criteria as follows at 77-78:

> 1. *An interlocutory injunction will only be granted where the right to final relief is clear.*
>
> 2. *The applicant, in asserting its rights, must show as a threshold test, either:*
>
> *a) a strong prima facie case in support of the right which he asserts and a strong possibility that he will succeed at trial in disputes where the success or failure to obtain the injunction will virtually decide the application; or*
> *b) that there is a serious issue to be tried in circumstances where the success or failure to obtain the injunction will not decide the application.*
>
> 3. *After the appropriate threshold test has been met, the applicant must be able to show that an injunction until the hearing is necessary to protect it against irreparable damage and loss. If the applicant can be adequately compensated through the Board's remedial powers at the final hearing, no injunction will normally be granted.*
>
> . . .
>
> 4. *Where any doubt exists as to the available remedy, the violation of the applicant's right, the irreparable nature of the loss, or the effectiveness of an expedited hearing, the Board will determine the application on the balance of convenience to the parties. In ascertaining the balance of convenience, the Board will address the considerations referred to by the Court in [Potash Corporation v. Todd, [1987] 2W.W.R. 481].*

Since the decision of this Board in the *WaterGroup* case, the standards for the granting of interlocutory relief have continued to evolve, both insofar as applications before this Board are concerned, and with respect to their use in the courts. The Board commented on this issue in *International Brotherhood of Electrical Workers v. Saskatchewan Power Corporation*, [1996] Sask. L.R.B.R. 243, LRB File No. 069-96 at 256-257:

> *It will be noted that the principles formulated in the WaterGroup [supra] decision were drawn from the principles applied by the courts in assessing applications for injunctive relief. These principles have continued to evolve, and the Board has commented on the effect of these changes in the decision in Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc., [1994] 4th Quarter, Sask. Labour Report, 147, LRB File No. 238-94,observing that the major effect of these changes in the way the criteria are formulated has been to bring together what were listed as a first and second principle in the WaterGroup case as a composite criterion. In the decision of the Supreme Court of Canada in [RJR-MacDonald Inc. v. Canada (Attorney-General),[1994] 1 S.C.R. 311 at 314], the Court summarized their approach this way:*
>
> > *At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on*

> *the basis of common sense and an extremely limited review of the case on its merits... A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare.*

In the Prairie Micro-Tech decision, [at 150] the Board summarized the result of the evolution exemplified by the RJR-MacDonald case as follows:

> *Formulated in this way, the standard does not put the applicant to the test of showing that there is a probability of success in the final result, and it shifts the emphasis to the other two elements of the principles outlined by the Board in WaterGroup - the requirement of irreparable harm, and a consideration of the balance of convenience.*

One of the general effects of the alterations in the way these standards have been described has been to elide the first of the tests mentioned in *WaterGroup* - a clear right to relief - with the second - formulated either as "a strong *prima facie* case" or "a serious issue to be tried." The distinction generally drawn between these two versions of this criterion is one between circumstances in which the granting of an interim Order will bring the dispute to an end, and preclude further consideration of any substantive questions, and those situations where the interim Order simply represents a stage prior to the ultimate substantive determination.

Counsel for the Employer argued that the circumstances of this case, if they do not place it within the former category, are sufficiently similar that the Board would be justified in scrutinizing the application with extra care. She argued that this is somewhat similar to a picketing situation, in that the return of Mr. St. Rose to work would have an impact which would to some extent limit the effectiveness of further consideration of the substantive questions raised in the application.

We have not been persuaded that the circumstances of this case set it apart from others in which the standard of a "serious issue to be tried" has been applied. The interim reinstatement of Mr. St. Rose does not resolve the ultimate substantive question of whether the termination of his employment constituted a violation of s. 11(1)(e) of *The Trade Union Act*. The parties have, indeed, agreed on a date for the hearing of this question, and there is nothing in the interim Order which renders such a hearing pointless or which ties the hands of the Board in addressing that issue. We are of the opinion that the Union has succeeded in establishing that the application meets the appropriate standard, which is that there be a "serious issue to be tried."

As is often the case with respect to applications for interim relief, the requirement that the applicant be able to establish that "irreparable harm" will occur if the relief is not granted is a critical factor. In this case, counsel for the Union argued that the dismissal of an employee who was actively involved in the organizing campaign being conducted by the Union would have a crippling effect on the potential success of the campaign. In his affidavit, Mr. Gordon Schmidt attested that the dismissal had an immediate chilling effect on the willingness of employees to support the Union or converse with representatives of the Union.

It is not necessary, at this stage, to come to a final conclusion about whether the termination of the employment of Mr. St. Rose did, in fact, have such an impact on the organizing campaign. It is plausible, however, to apprehend that the dismissal would have such an effect. It is, furthermore, difficult to provide full redress for this consequence. Even where an interim Order is granted, the Union may not be able to recover the full attention of the employees, innocent of any influence which may be attributable to the occurrence of the dismissal. Though the Board makes efforts to dispose of applications in an expeditious fashion, we accept the argument advanced on behalf of the Union that an interim Order provides the best chance for the Union to be able to recoup some of the effects of an action on the part of the Employer which they allege to be in contravention of *The Trade Union Act*.

We earlier alluded to recent discussion in court and tribunal jurisprudence concerning the most accurate way of describing the current criteria for the determination of interlocutory applications. As we intimated, recent cases suggest that the requirement of "irreparable harm" is closely tied to the last of the standards listed in the *WaterGroup* decision, *supra*, that of the "balance of convenience."

The claim made in the affidavits filed in support of the position of the Employer was that the reinstatement of Mr. St. Rose would lead to disruption in the work of the kitchen. Such potential disruption was attributed partly to an anticipated decline in "morale" which would occur because of the possibility that other employees would have to make extra efforts to compensate for the poor work performance of Mr. St. Rose, and partly to the need to undo the staffing arrangements which have been made since his dismissal. As counsel for the Union pointed out, none of the affidavits filed on behalf of the Employer contained a claim that the overall business or corporate image of the Employer would be seriously impaired in the event of the reinstatement of Mr. St. Rose.

The rights of employees to join trade unions and to select collective bargaining as a means of having their terms and conditions of employment determined are assured to them by the statutory scheme set out in *The Trade Union Act*. These rights are of such significance in the eyes of the legislature, in this and other jurisdictions, that the dismissal or suspension of any employee which occurs in the context of

the pursuit of these entitlements, is presumed to have been prompted by an improper motive on the part of the employer, and that the employer is required to demonstrate that this presumption is not correct in the particular case.

Against this backdrop of significant statutory rights, such factors as the speculative concern about how other employees might react to the return of Mr. St. Rose, the possible need to reassign employees, and the tension which may exist between Mr. St. Rose and his immediate supervisors, cannot, in our opinion, weigh too heavily in the balance of convenience. In comparison to the serious blow which the dismissal of Mr. St. Rose may have inflicted to the Union organizing campaign, these considerations do not persuade us that the stated interest of the Employer should outweigh the claims made by the Union.

For the reasons we have given here, we have concluded that the application for interim relief should be granted.