**LES SMITH, Applicant and UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Certified Union and REMAI INVESTMENT CORPORATION, OPERATING AS THE IMPERIAL 400 MOTEL, Respondent**

LRB File No. 342-96; January 7, 1997
Chairperson: Beth Bilson; Members: Hugh Wagner and Bob Cunningham

For the Applicant: Kevin Wilson
For the Certified Union: Drew Plaxton
For the Respondent: Larry Seiferling, Q.C.

**Decertification - Interference - Vote is ordered, where Board finds link between employees use of staff controlled fund to pay legal fees on application and employer too tenuous to support inference of employer interference.**

***The Trade Union Act*, ss. 5(k) and 9.**

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** The United Food and Commercial Workers, Local 1400, was designated in an Order of this Board dated December 15, 1994, as the bargaining agent for a unit of employees of Remai Investment Corporation at the Imperial 400 Motel in Prince Albert. Mr. Les Smith has filed this application on behalf of a number of employees who seek rescission of the certification Order.

The Union opposed the application on the basis 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.*

Mr. Smith gave evidence in which he enumerated the reasons which, in his view, underlay the decision to file the application for rescission with the Board. He said that the employees he represents were frustrated with the failure of the Union to conclude a collective agreement with the Employer. He said that they are unhappy with the representation given to them by the Union; as an example, he talked about the infrequency of visits by Union staff representatives to the motel. He stated a personal concern

about the prospect of paying dues to the Union once an agreement is concluded. He further stated his opinion that the rescission of the certification Order would go some distance to reducing tension among employees at the motel.

The final straw, as far as Mr. Smith was concerned, appears to have been a meeting which was organized by a group of employees so that they could obtain information about the progress of negotiations. The meeting was not held on the premises of the motel. He testified that the employee representatives on the bargaining committee were invited, but did not attend the meeting. He said that there was no actual discussion of the possibility of decertification at that meeting, but that employees expressed considerable dissatisfaction with the information they were receiving about the negotiation process.

Mr. Smith began working for the Employer in the pool area of the motel in February of 1994, several months before the Union began organizing employee support for the certification application. He said that he had not worked in a unionized workplace prior to that time. His reservations about the representation given to the employees by the Union grew over time. He lent his support to a petition which was circulated among employees in April of 1996 which asked this Board to grant a vote among employees on the representation issue.

At some point in the fall of 1996, he was approached by Ms. Laura Olson, who asked him if he would be willing to undertake gathering evidence of support from bargaining unit employees for the rescission application which we are considering here. The earlier activities of Ms. Olson, who works at the front desk of the motel, were the subject of comment by this Board in a decision in *United Food and Commercial Workers v. Remai Investment Corp. and Laura Olson*, [1995] 1st Quarter Sask. Labour Rep. 289, LRB File Nos. 171-94 and 177-94.

In that decision, the Board considered allegations that the letters of revocation of support which were submitted by Ms. Olson on behalf of certain employees at the end of the Union organizing campaign were tainted by Employer interference. The Board concluded that the participation of members of management in the drafting and circulation of the letters of revocation rendered them suspect, and that the letters should not be considered in assessing the level of support for the certification application. In the decision, the Board made the following comment, at 298:

> *Furthermore, the Board does not believe that Ms. Pelican and Ms. Ford were acting on instructions from head office or senior management or even that these two managers intended to act improperly. Neither of these managers testified but the overall impression created by all the evidence was of two managers without previous experience in labour relations who were drawn into the events surrounding the application for certification by their friend Ms. Olson. Their violations were relatively mild and seemed to be based more on unawareness than malice. Nevertheless, it is impossible to accept as prima facie evidence the five letters of revocation that were given in these circumstances.*

In his evidence, Mr. Smith said that Ms. Olson told him she was asking him to undertake the task of mustering employee support because she thought it would not "look good" for her to be involved, given the outcome of this earlier proceeding.

Mr. Smith said that he agreed to gather support for a rescission application, and Ms. Olson advised him that he should obtain the advice of a solicitor about how to do this. He said that he did not think at the time to inquire how the fees of the lawyer would be paid, but he asked her some time later.

Ms. Olson told him that employees had used money from the "staff fund" to pay the expenses of an application the previous year. Mr. Smith said he was aware that the Board had dismissed that application, *Donna Wells v. Remai Investment Corp. and United Food and Commercial Workers*, [1996] Sask. L.R.B.R. 194, LRB File No. 305-95, on the grounds that Employer discretion in the uses of the staff fund ran afoul of s. 9 of the *Act*.

He said that he knew, however, that the staff fund was now under the control of the employees, and was supervised by Mr. Milan Kolosa, a bargaining unit employee. He knew this because he had earlier been asked if he would be one of the signing authorities for the staff fund account. He declined because his duties sometimes made it difficult to track him down, but he had found out something about the nature of the fund.

The money in the staff fund comes from two major sources, according to Mr. Smith. The first source is the collection of the deposit on beer bottles abandoned by guests in the motel; the other source is the proceeds of "garage sales" which are held periodically to get rid of surplus furniture, linens and other goods from the motel.

Mr. Don Logan, a staff representative of the Union, confirmed that there had been some discussion of the staff fund at the bargaining table. He said this arose when the representatives of the parties were talking about the possibility of inserting a clause in the agreement which would preserve existing "rights and benefits" for employees. He said Ms. Rebecca Ford, a management representative, informed them that "Milan controls the fund."

Mr. Smith testified that he was the only employee who was involved in approaching other employees and gathering evidence of support. He said that he telephoned them and arranged to meet them at some location away from the motel, when they were not working. He said he looked up most of the telephone numbers in the telephone directory, although he obtained several numbers from Ms. Olson and Ms. Wells at the front desk.

Counsel for the Union conceded that there was no evidence which would directly link the Employer to this application. He urged the Board, however, to draw the inference that the evidence demonstrated that there was subtle or indirect influence emanating from the Employer. He argued that the application was actually masterminded by Ms. Olson, who had earlier been the subject of findings by the Board in relation to Employer influence, and that Mr. Smith was really just a front man. He argued that, if the control of the staff fund is now in the hands of the employees, the Board should conclude that this change was made by the Employer so that employees would see it as an invitation to pursue a further application for rescission. He intimated that, as Ms. Olson and Ms. Wells both work at the front desk, in close proximity to the administrative offices of the motel, they were possibly acting in concert with management when they supplied Mr. Smith with telephone numbers he could not find.

Counsel for Mr. Smith, and counsel for the Employer, on the other hand, both argued that the involvement of employees like Ms. Olson and Ms. Wells, and the concern over the control of the staff fund, were both red herrings. Indeed, both of them described the latter concern, which was the basis of the dismissal by the Board of the application filed by Ms. Wells a year ago, as either a "technicality" or a "red herring" in the context of the earlier application as well.

In a decision in *Betty Wilson v. Remai Investment Corp. and United Food and Commercial Workers*, [1990] Fall Sask. Labour Rep. 97, LRB File No. 088-90, the Board spoke of the significance of s. 9 of the *Act* in the following terms at 99:

> *Whenever the representation issue is before the Board, the Board must look through the bitter divisions between management and union and between employee and employee and keep the fundamental object of the Act in view. That object is the right given to all employees by s. 3 of the Act to decide for themselves whether or not they wish to be represented by a union for the purpose of bargaining collectively with their employer. Section 9 of the Act is a necessary adjunct to that right.*

In another decision, in *Kim Leavitt v. Confederation Flag Inn (1989) Limited and United Food and Commercial Workers*, [1990] Winter Sask. Labour Rep. 64, LRB File No. 225-89, the Board also commented on the place of s. 9 of the *Act*, at 66:

> *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 Corp. and Saskatchewan Joint Board Retail, Wholesale and Department Store Union*, [1987] Dec. Sask. Labour Rep. 35, LRB File No. 162-87, the Board commented in the following terms, at 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 s. 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.*

As these passages suggest, the concern of the Board in applying s. 9 of the *Act* is to ensure that employees are able to make an independent choice as to whether they wish to be represented by a trade union or not. An employer does not have a legitimate role in connection with this choice by employees, and the Board has recognized that any indication by an employer of preferences or viewpoints in this regard may have a disproportionately significant effect on the outcome. In *Lorraine Gobeil v. Remai Investment Corp. and United Food and Commercial Workers*, [1996] Sask. L.R.B.R. 201, LRB File No. 314-95, the Board made the following comment, at 205:

> *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.*

In that decision, the Board went on to make the following observation, also at 205:

> *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.*

In the instance of the previous application for rescission brought by Ms. Donna Wells, the basis for the dismissal of the application by this Board was the fact that the Employer enjoyed the discretion to approve or disapprove the use of the staff fund for particular purposes. Our review of that decision leads us to the conclusion that the case was not decided by the Board on merely technical, nit-picking or fantastical grounds. Though the representatives of the Employer may, in practical terms, have left it up to the employees to decide on uses for the staff fund - most of which were social or benevolent in nature - the ability of the Employer to permit or deny use of the fund for such purposes as the payment of legal fees related to a rescission application provided the Employer with a means to convey to employees how the Employer viewed such an application. In this respect, the staff fund could be a vehicle for influencing the decision of employees as to what their position should be on the representation question.

Counsel for the Applicant suggested that the Board might have rectified this problem in the case of the last application for rescission by prohibiting the use of the staff fund for paying the fees of the solicitor retained by Ms. Wells on behalf of the employees seeking rescission. In our view, this would not have addressed that aspect of this transaction which was of concern to the Board, which was the capacity of the Employer to use the control over the fund to communicate to employees where the Employer stood - and, by implication, where it would be safe for the employees to stand - on the issue of rescission.

In the case of the application before us on this occasion, however, we do not think the Union succeeded in demonstrating that the Employer exercised real or apparent influence over the application which could have the effect of preventing employees from making an autonomous decision as to whether they wish to continue to be represented by the Union.

Counsel for the Union argued that the Board should take the "whole picture" into account, and should include in that picture some unfair labour practice findings against the Employer at some time in the past, the involvement of Ms. Olson and Ms. Wells, and the change of control in the staff fund, which counsel speculated "must have" included an intimation that the staff fund should be used for future rescission applications.

There are in this picture, to be sure, actors - notably Ms. Olson and Ms. Wells - who have expressed vigorous hostility to the Union in the past, and their earlier efforts were found by the Board to be tainted by Employer influence. The Union has failed to show, however, that Mr. Smith and his application are linked to the Employer, either in the sense that the Employer lent any real support or assistance to the application, or in the sense that employees might perceive Mr. Smith as a delegate of the Employer or even of the previous organizers of activity against the Union. The links which the Union has urged the Board to identify are of a far too tenuous kind to justify denying the employees an opportunity to express their wishes with respect to further representation by the Union.

For the reasons we have given, we will issue an Order directing that a vote be taken among the employees in the bargaining unit to determine whether the application for rescission enjoys the support of the majority of employees.

**CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3287, Applicant and GABRIEL DUMONT INSTITUTE OF NATIVE STUDIES AND APPLIED RESEARCH, INC., Respondent**

LRB File No. 192-96; January 10, 1997
Chairperson: Beth Bilson; Members: Bruce McDonald and Terry Verbeke

For the Applicant: Jim Holmes
For the Respondent: Noel S. Sandomirsky, Q.C.

**Successorship - Transfer of business - Transfer of part of business - University did not transfer part of business to Respondent when it entered into affiliation agreement with Respondent to permit Respondent to offer academic courses connected with bachelor's degree program - Institutions are separate entities.**

**Unfair labour practice - Duty to bargain in good faith - Successorship - Board finds Respondent is not successor employer and is not under duty to bargain with Union or to abide by Union's collective agreement.**

***The Trade Union Act*, ss. 11(1)(c) and 37.**

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** The Canadian Union of Public Employees, Local 3287, has been designated in a certification Order of this Board, last amended on July 26, 1995, as the bargaining agent for a unit of employees employed as sessional lecturers by the University of Saskatchewan.

The Union has filed an application alleging that the Gabriel Dumont Institute of Native Studies and Applied Research, Inc. has committed an unfair labour practice and a violation of s. 11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c. T-17, by failing to respond to a request from the Union to discuss the status of certain sessional lecturers instructing courses administered by this Employer. The Union acknowledges that the success of their unfair labour practice application is dependent on a finding by this Board that the Employer is a successor employer to the University of Saskatchewan within the meaning of s. 37(1) of the *Act*. Sections 11(1)(c) and 37(1) 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:*

> *(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;*
>
> *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.*

The Gabriel Dumont Institute was established in 1979. In the collective agreement between this Employer and the Saskatchewan Government Employees' Union, the institution was described in the following terms:

> *The parties acknowledge and agree that the Gabriel Dumont Institute is a Metis-controlled education and cultural institution; its mission is "to promote the renewal and development of Metis culture and to design and deliver educational and cultural programs for and about Metis people."*

Dr. Robert Devrome, the acting executive director for the Employer, gave evidence concerning the mandate and activities of the Gabriel Dumont Institute. He said that the aims of the institution are to devise, foster and encourage educational and training programs for students of Metis heritage in Saskatchewan. These programs are designed to reinforce and nurture Metis cultural traditions, and to counteract economic, educational and social barriers which have limited the extent to which persons of Metis ancestry have been able to advance their education.

Some of the programs are of a commercial or vocational nature. In addition, the Employer has made agreements with both the University of Saskatchewan and the University of Regina to permit the participation of the Gabriel Dumont Institute in offering post-secondary courses and programs in a number of academic fields.

In the case of the University of Saskatchewan, the focus of the collaborative activity between the University and the Gabriel Dumont Institute was on the introduction of a training program for teachers.

This program, called the Saskatchewan Urban Native Teacher Education Program (SUNTEP), was inaugurated in 1980, and was the subject of a succession of agreements between the University, the provincial government and the Employer, the last of which was concluded in 1990.

According to the evidence of Dr. Devrome, the agreement formally expired in 1995, but the terms of the agreement have continued to govern the relationship between the signatory parties.

For our purposes, it is not necessary to review the entire agreement, but some of its terms are of some significance in relation to this application. At the outset, the agreement alludes to the significance of the statutory status of the University:

> *1.1 WHEREAS the Minister may make provision for the training of teachers, including those required for new or special programs of services to pupils, in accordance with ss. 10(1)(l) and 8.1 of The Education Act and s. 17 of The Government Organization Act may enter into agreements for such purposes;*
>
> *1.2 AND WHEREAS the University under the provisions of s. 3(1) of The University of Saskatchewan Act, except for the University of Regina and for theology degrees, has the sole power to grant degrees in the Province of Saskatchewan; and, whereas under the provisions of the Department of Education and the University of Saskatchewan Agreement re: Teacher Training (1964) and as outlined in ss. 267 and 269 of The Education Act, the University has been entrusted with the responsibility for teacher preparation in the Province.*

These clauses of the agreement make it clear that the University has the responsibility for training teachers and maintaining appropriate standards in courses which would be given credit towards post-secondary qualifications. It is also evident from the terms of the agreement and from the testimony of Dr. Devrome that the University enjoys considerable scope to carry out this responsibility in various ways.

The instructional resources devoted to the SUNTEP program over time have been of several kinds. There are a number of faculty employed on a full-time or part-time basis by the Employer, and a number of them have taught courses in the SUNTEP program as part of their teaching duties. Along with administrative and support staff, these persons fall within the scope of a certification Order issued by this Board on June 22, 1990 designating the Saskatchewan Government Employees' Union as the bargaining agent for a unit of employees described as follows:

> *all employees of Gabriel Dumont Institute of Native Studies and Applied Research in the Province of Saskatchewan, except the Executive Director; Directors (Finance & Administration, University & Technical Programs, Research & Development, SUNTEP, SIAST/Native Services Division); Administrative Co-ordinators (Finance & Administration, Native Services Division, SUNTEP); Confidential Secretary; Co-ordinators (SUNTEP [3], Native Services Division [3], University & Technical Programs [7], Library [1]),*

We will address ourselves to the implications of this bargaining unit description at a later point in these reasons.

The agreement with the provincial government and the University provides for submission of the credentials of faculty members employed by the Employer to the University so that they can be accredited to instruct in courses for which academic credit will be given.

Some of the courses offered in the SUNTEP program have been taught by full-time faculty employed by the University of Saskatchewan, who are within the scope of a bargaining unit represented by the University of Saskatchewan Faculty Association. The agreement put before the Board provides a mechanism for charging the instructional costs associated with the services of these faculty members to the Gabriel Dumont Institute.

Other courses in the SUNTEP program have been taught by sessional lecturers, who are remunerated with a stipend per class.

The sessional lecturers employed to teach courses for credit by the University of Saskatchewan are included in a bargaining unit represented by the Union which is separate from bargaining units for other employee groups. A first collective agreement was concluded between these parties in May of 1991, to cover the period from March 28, 1989, to June 30, 1992. In the scope clause of that agreement, the sessional lecturers associated with SUNTEP were explicitly excluded from the scope of the bargaining unit.

After the first agreement had been signed, the status of the sessional lecturers then associated with the SUNTEP program was given further consideration. The Union entered into discussions with the University about the possibility of including the SUNTEP sessional lecturers within the bargaining unit.

The Union also filed an application seeking certification as bargaining agent for these employees in the event that their real employer was the Gabriel Dumont Institute.

After a period of discussion, the University acknowledged that this group of sessional lecturers were their employees. The Union had also conducted a membership campaign among the sessional lecturers connected with SUNTEP and obtained support from the majority of them for inclusion within the scope of the bargaining unit. In the subsequent collective agreement, which was concluded in December of 1994, the exclusion of this group of sessional lecturers was removed. Meanwhile, the application for certification was adjourned sine die.

According to the evidence of Dr. Devrome, SUNTEP was the only program of courses offered through the University of Saskatchewan for academic credit throughout this period. He testified, however, that the Employer continued to look for ways to expand the services offered to Metis students, and aspired to become more mature and self-sufficient as an academic institution.

In trying to achieve this goal, the Employer took steps to create a new entity operating under the auspices of the Gabriel Dumont Institute, which was to be called the Gabriel Dumont College. An affiliation agreement with the University of Saskatchewan signed in 1993 authorizes the College to offer academic courses connected with the first two years of study towards the bachelor's degree program of the College of Arts and Science. The agreement also envisioned that these courses might eventually be augmented by courses at the introductory level in other colleges as well.

The first four courses intended to be part of the offerings of the Gabriel Dumont College were included in the University of Saskatchewan calendar for the 1996-97 academic year. Though these particular courses had also been included on the curriculum for SUNTEP, Dr. Devrome said that it was anticipated that students other than those registered in SUNTEP would enrol in them.

At least two of the instructors assigned to teach these courses are sessional lecturers who have previously taught courses in SUNTEP as employees of the University of Saskatchewan, and have therefore been included within the scope of the bargaining unit represented by the Union. The parties seem to be in agreement that the Gabriel Dumont Institute is their Employer with respect to these specific courses. It is this group of sessional lecturers who are the subject of this application.

In July of 1996, Mr. Jim Holmes, the staff representative of the Union responsible for the affairs of this bargaining unit, wrote to Dr. Devrome making the following claim:

> *Sessional lecturers teaching SUNTEP courses are covered by the collective agreement between the University of Saskatchewan and CUPE Local 3287. Although an agreement between the University and Gabriel Dumont Institute may change the employer, it is the position of CUPE Local 3287 that the sessional lecturers will continue to be covered by the terms of the collective agreement.*
>
> *Therefore we request that Gabriel Dumont Institute follow the terms of the Collective Agreement with respect to the posting and filling of vacancies.*

Dr. Devrome admitted that he had made no response to this letter. He said that he did not understand what it could be referring to, as he thought the only collective bargaining relationship established with the Employer was in relation to the certification Order held by the Saskatchewan Government Employees' Union.

A second letter was sent to Dr. Devrome in August, and, when he did not respond to that letter, the Union took steps to file this application, alleging that the failure of the Employer to reply to the request of the Union constituted a failure to bargain collectively within the meaning of s. 11(1)(c) of *The Trade Union Act*.

The Union has urged the Board to characterize the situation as one in which the University of Saskatchewan devolved or transferred the responsibility for part of the program previously offered by that institution to the Employer. On this basis the Union asked to have the Board make a finding that the Employer is a successor to the University of Saskatchewan insofar as that segment of program responsibilities is concerned. This in turn would be the basis for a finding that the Employer is in breach of an obligation to bargain collectively with the Union concerning the terms and conditions of employment of the sessional lecturers now teaching courses under the auspices of Gabriel Dumont College.

Counsel for the Employer, on the other hand, argued that there has been no transfer of "all or part of a business" which could be the subject of a finding that the Employer is a successor to the University of Saskatchewan within the meaning of s. 37(2) of the *Act*. He took the position that the Employer has no

anterior legal duty to bargain with the Union which could found the application presently before the Board.

The Board has considered numerous cases involving a claim that collective bargaining obligations have been transferred to a successor employer. The representatives of both parties in this case referred us to earlier decisions in which the Board has enumerated the factors which are relevant to an assessment of the successorship question. In *Canadian Union of Public Employees v. Versa Services Ltd.*, [1993] 1st Quarter Sask. Labour Rep. 174, the Board outlined an overall conclusion as follows, at 178:

> *What comes through clearly from the attempts by labour relations boards to arrive at a uniform definition of successorship is that there is no factor or single set of criteria which is a sine qua non for the transfer of collective bargaining obligations to occur. It may be obscured by a dizzying variety of technical legal or commercial forms, it may display puzzling or conflicting features, it may have quite a different character than the entity which was previously in existence, but a successor may still be identified because of the transmission of some imponderable and organic essential quality from the previous employer. This transmission is not tied to specific work, individual employees, or, naturally, the employment relationship which was already in existence.*

In *Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Canadian Western Agribition*, [1995] 1st Quarter Sask. Labour Rep. 160, the Board made a similar observation, at 168:

> *As the cases referred to earlier suggest, no single factor is generally regarded as conclusive of whether a disposition has taken place of a kind which binds the successor employer to obligations entered into by the predecessor. Rather the Board tries to discern the fundamental nature of the transaction which has taken place and of the relationship between the two entities, in an attempt to decide whether the rationale for protecting the bargaining rights of employees when a transfer takes place has any relevance under the particular circumstances. Factors like those we have just listed may hold vital clues concerning the essential nature of the relationship between the parties, but the Board must keep in mind that the fundamental question overall is whether the putative successor has acquired anything which might be characterized as a business or a part of a business.*

In that case, the Board went on to make the following finding, also at 168:

> *In this case, we have concluded that Canadian Western Agribition has not acquired anything from the Regina Exhibition Association Limited which might be so characterized. These two organizations have, of necessity, a close relationship with each other. Because they use the same facilities, they must perforce finds ways of dovetailing their operations in a way which minimizes the logistical difficulties and maximizes the mutual benefit. They are separate organizations with long histories, who are independent of each other and have independent claims to the use of facilities which are owned by neither of them. Though Canadian Western Agribition has found it useful and politic to make use of equipment, services and employees who are*

> *generally connected with the Regina Exhibition Association Limited, through contracts, direct hiring and more informal arrangements, they are not dependent on any of these for their continuing life or success. Whatever difficulties it might create for them, there is no doubt that Canadian Western Agribition could find alternative sources for all of the resources necessary to carry on their operation. They have acquired nothing which could be called a business or even part of a business from the Regina Exhibition Association Limited.*

Counsel for the Employer argued that the situation before the Board in this case is more closely analogous to that in the *Canadian Western Agribition* case, *supra*, than to that in the *Versa Services Ltd.* case, *supra*, where the Board found that a transfer of obligations had taken place. He argued that, although their responsibilities have been interrelated in some respects, the University of Saskatchewan and the Employer have been independent entities all along, and that there has been no change in their relationship with each other which would lead to the conclusion that the University has transferred some of its "business" to the Employer.

The circumstances in which this application has arisen are somewhat complicated, and it is not surprising that there has been some confusion about the allocation of representational rights and the categorization of this particular group of employees. One of the complicating factors has to do with the nature of the sessional lecturer classification itself. Sessional lecturers are retained to teach individual courses, and are remunerated on the basis of each course they teach. Some teach more than one course. All of them must reapply for positions each academic year; in the case of those employed by the University of Saskatchewan, the collective agreement with the Union provides that they have a right of first refusal when they have taught a course a certain number of times. In the case of those sessional lecturers associated with SUNTEP, one aspect of the negotiations concerning their status included an effort to reconcile the principles of affirmative action with the idea of a right of first refusal.

There is nothing to prevent the sessional lecturers from working for another employer when they are not engaged in performing their teaching duties for the University of Saskatchewan. Indeed, one sessional lecturer who has been a member of the bargaining unit represented by the Union is Dr. Devrome himself. In our view, there is equally nothing which prevents these persons from having the status of sessional lecturer with more than one employer.

In the scope clause of the first collective agreement which was concluded between the Employer and the Saskatchewan Government Employees' Union in 1992, "sessional lecturers (teaching no more than one class at a time)" were specifically excluded from the bargaining unit. This would seem to mean that sessional lecturers teaching more than one class at a time were implicitly included in the bargaining unit, though it is not clear whether there were any persons falling within that category employed by the Employer.

More recent revisions to the scope clause, which have not yet come into effect, have limited this exclusion to "sessional lecturers teaching no more than one class per year." Again, this would seem to include those sessional lecturers teaching more than one class per year within the scope of the bargaining unit represented by the Saskatchewan Government Employees' Union. Mr. Holmes conceded in argument that, in the event the Board grants this application, a question of the respective jurisdiction of the Saskatchewan Government Employees' Union and his Union might arise; he suggested that it should be up to the two trade unions to resolve this jurisdictional issue.

We have concluded that this set of circumstances has more in common with that described in the *Canadian Western Agribition* case, *supra*, than with that in the *Versa Services* decision, *supra*. The operation of the academic programs offered under the auspices of the Gabriel Dumont Institute clearly requires a close interrelationship with the University of Saskatchewan. Though the status of the Gabriel Dumont Institute may evolve to the point where it has standing as an accredited post-secondary institution, the capacity to offer programs for which academic credit will be given currently depends on close co-operation and on the monitoring of academic standards by the University. As an example, we have alluded to the requirement that the academic credentials of faculty employed by the Gabriel Dumont Institute be approved by the University if they are to instruct courses for credit.

In spite of the collaboration between the two institutions which is necessary to permit the development of programs such as SUNTEP, and in spite of the complicated financial, academic and administrative arrangements which this relationship entails, the University of Saskatchewan and the Gabriel Dumont Institute have continued to operate as two separate entities, and more significantly for our purposes here, as two separate employers. Both Gabriel Dumont Institute employees and University of Saskatchewan employees have been involved in teaching the courses which have been the basis of SUNTEP. These employees have included full-time and part-time faculty who are represented by the

University of Saskatchewan Faculty Association, full-time and part-time faculty who are represented by the Saskatchewan Government Employees' Union, and sessional lecturers who are represented by the Union which has made this application.

Though it is not clear whether there have ever been sessional lecturers teaching more than one class at a time who have been represented by the Saskatchewan Government Employees' Union, along with other employees of this Employer, such an eventuality seems to have been contemplated by the wording of the scope clause in the collective agreement. The scope clause now seems to have been extended to make provision as well for sessional lecturers who teach more than one course per academic year.

We do not find that any "business or part of a business" was transferred by the University of Saskatchewan to the Gabriel Dumont Institute, and we must therefore conclude that there is no basis on which the latter can be found to have assumed any bargaining obligations in relation to the Union. As the evidence of Dr. Devrome indicated, the Employer has aspired to extend the range of programs which are available to the clientele of the Gabriel Dumont Institute. The inauguration of the Gabriel Dumont College is a step in this direction.

This development does not seem to us, however, to represent any entity which was transferred to the Gabriel Dumont Institute from the University of Saskatchewan. It is instead a new initiative which is part of a direction that institution has been taking.

The sessional lecturers who are now employed by the Employer to teach the four courses which form part of the program offered by the Gabriel Dumont College are not, in our opinion, part of any entity which has been passed to the Employer, though they are in some cases the same persons who previously taught the same courses as employees of the University of Saskatchewan - and who may concurrently or in the future teach the same or different courses as employees of the University of Saskatchewan, represented by the Union.

Though we have found that the application must be dismissed, we would like to comment briefly on one aspect of this situation. As we have noted, the scope clause of the collective agreement between the Employer and the Saskatchewan Government Employees' Union has excluded certain categories of

sessional lecturers - currently those who teach one class per year. We have not been made privy to the reasons for this exclusion.

The Saskatchewan Government Employees' Union did not participate in these proceedings, and we do not therefore think it appropriate to comment on whether this group of employees are or should be included in the bargaining unit represented by that union. This is a separate question.

For the reasons we have given, we have concluded that this application must be dismissed.

**GORDON W. JOHNSON, Applicant, AMALGAMATED TRANSIT UNION, LOCAL NO. 588, Respondent and CITY OF REGINA, Employer**

LRB File No. 091-96; January 14, 1997
Chairperson, Beth Bilson; Members: Bruce McDonald and Brenda Cuthbert

For the Applicant: Cam McCannell and Michael Walker
For the Respondent: Neil McLeod
For the Employer: Jim McLellan

**Duty of fair representation - Arbitrary conduct - Whether decision not to pursue grievance to arbitration made by secret ballot among bargaining unit employees, contrary to recommendation of executive, was arbitrary - Board deciding procedure for making decision was in breach of duty of fair representation.**

***The Trade Union Act*, s. 25.1.**

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** The Amalgamated Transit Union, Local 588, has been designated by this Board as the bargaining agent for a unit of employees who work in the public transit system of the City of Regina. Mr. Gordon Johnson has filed this application alleging that the Union committed a breach of s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17, by failing to represent him fairly when he was discharged from his employment.

Section 25.1 of the *Act* 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.*

At the time of his dismissal, Mr. Johnson had been working for the Employer for approximately 15 years. For a significant portion of that time, he had been classified as a utility man. In January of 1994, however, he was promoted to the position of tradesman, with responsibilities for routine maintenance of buses. Mr. Johnson gave evidence that his duties in the garage included keeping records, carrying out tests on tires and other equipment, changing oil, and doing routine maintenance. He said that he was expected to do maintenance on three buses per day.

According to the evidence of Mr. Johnson, it was brought to his attention on several occasions that buses which had been under his care were overfilled with oil. He said that he attributed this problem to faulty equipment, and had discussed it with his direct supervisor, Mr. Mike Alexander. He conceded that the overfilling problem had not been resolved when matters came to a head in early May of 1994.

One of the buses for which Mr. Johnson had some responsibility was a new bus, Bus 504, which required a special kind of oil. On May 3, 1994, this bus was returned to the garage when it was discovered that it had been overfilled with oil. The bus was turned over to another mechanic, and Mr. Johnson asked what the problem was.

On May 4, 1994, Mr. Johnson was summoned to a meeting with management representatives of the Employer. He asked Mr. Alexander whether the overfilling problem with Bus 504 was a serious matter, and Mr. Alexander said he thought that it was so viewed by management. Mr. Johnson contacted Mr. John McCormick, president of the local Union, to ask if he could accompany Mr. Johnson to this meeting.

Prior to the meeting, Mr. McCormick advised Mr. Johnson not to "lock horns" with management representatives at the meeting. He said that they should try to obtain as much information as possible.

The meeting was attended by Mr. Don Hnetka, director of transit, and Mr. Chuck Flavelle, maintenance supervisor, both of whom were management representatives; by Mr. Alexander, the in-scope supervisor of Mr. Johnson; and by Mr. Johnson, Mr. McCormick and Mr. Ray Poth, financial secretary of the Union. Mr. Poth took notes summarizing the points raised at the meeting; these notes were filed with the Board by counsel for Mr. Johnson.

At the outset of the meeting, Mr. Johnson was asked by Mr. Hnetka for an explanation for the general problem which was occurring with overfilled buses. Mr. Johnson responded that he had forgotten to check the dipstick, and that he had had difficulties because there were not adequate facilities for disposing of the used oil. Mr. Hnetka made specific reference to Bus 504.

Mr. McCormick attempted to broaden the discussion to problems drivers and other employees might be having with the buses. Mr. Hnetka referred to previous instances of disciplinary action taken against

Mr. Johnson. Mr. McCormick replied that Mr. Hnetka had more recently said that Mr. Johnson was doing a good job; Mr. Alexander also confirmed that he was doing a good job.

Mr. Hnetka, Mr. Flavelle and Mr. Alexander left the meeting for a period of approximately 50 minutes. Mr. McCormick said that it was his impression that they wanted to check on the statements Mr. Johnson had made that he was handicapped in performing his duties by faulty equipment. In any event, after they returned, Mr. Hnetka listed a number of shortcomings identified in the performance of Mr. Johnson, including the overfilling of buses, deficiencies in record-keeping, and failure to change the oil on some occasions. He concluded by saying that the employment of Mr. Johnson was being terminated immediately for cause.

Mr. Johnson was, naturally, upset by this development. Mr. McCormick and Mr. Alexander accompanied him to the garage to retrieve his tools and clean out his locker. Mr. McCormick gave Mr. Johnson a lift to his home, and assured him that the Union would be investigating the situation and filing a grievance on his behalf.

According to the evidence of Mr. McCormick, he began to carry out an investigation the following day. He had access to the extensive notes kept by Mr. Alexander, which indicated that he had spoken to Mr. Johnson about a number of issues since January of 1994, including inaccuracies in records and failure to carry out various maintenance tasks; in addition, they had had a number of exchanges concerning the overfilling of the buses.

Mr. McCormick also spoke to Mr. Alexander. One of the questions which Mr. McCormick raised concerned the statement Mr. Johnson had made at the meeting with management that the receptacle for used oil was not functioning properly. Mr. Alexander said that this tank had been repaired some time previously, and that there was no reason Mr. Johnson would not be aware of this.

Mr. McCormick also obtained a statement from Mr. Perry Gellner, a colleague of Mr. Johnson who was moved into the tradesman position. He asked Mr. Gellner to indicate whether the expectation on the part of the Employer that Mr. Johnson would perform maintenance on three buses per day was reasonable, and also whether the equipment was working properly. The response of Mr. Gellner was that the duties assigned to Mr. Johnson were quite heavy, because a number of things had not been done

for a long time; he said, however, that the person who preceded Mr. Johnson had also done three buses per day. Mr. Gellner also indicated that the equipment was working, although he said that it was "slow."

In his testimony, Mr. McCormick said that he was aware of the prior disciplinary steps taken against Mr. Johnson. The documentation had been brought to his attention as an official of the Union. In any case, he said, the discipline taken against Mr. Johnson was common knowledge among a number of employees.

Mr. McCormick said that he kept in close touch with Mr. Johnson in the days immediately following the termination, and discussed with him the issues which had been raised at the meeting.

Mr. McCormick testified that, as a result of his investigation, he concluded that Mr. Johnson had had a somewhat chequered career as an employee, and that this might create some problems for the Union in challenging the decision of the Employer to dismiss for cause. He said, however, that he never expressed this view when discussing the case with the Employer.

In considering how to respond to the dismissal, Mr. McCormick arrived at an alternative ground on which to base a grievance. He decided that it would be possible to challenge the dismissal on the basis that the Employer had violated Article 9(e) of the collective agreement, which reads as follows:

> *A qualified employee having accepted appointment to a position within or beyond the scope of this agreement shall be allowed six (6) months in which to prove the ability to fill the position concerned to the satisfaction of the Director of Transit. If such employee does not prove the ability of filling the position concerned, the employee shall revert to the employee's former position without loss of seniority in such former position. By mutual agreement between the Director of Transit and the Union, the six (6) months' probationary period may be extended or reduced.*

Mr. Johnson had, in fact, performed the duties associated with the tradesman position for a period of six years at an earlier time. When the position he was then filling - which was a different one than the one he occupied at the time of his dismissal - was eliminated, he exercised his right to bump a junior employee in a utility man position. Thus, when he was promoted to the position of tradesman in January of 1994, reasoned Mr. McCormick, he was technically entitled to a probationary period as contemplated by Article 9(e). The correct recourse for the Employer in that circumstance would be to allow him to return to a utility man position rather than terminating his employment.

On May 9, 1994, Mr. McCormick wrote to the Employer indicating that the Union intended to challenge the dismissal of Mr. Johnson. The letter was in the following terms:

> *RE: JOHNSON TERMINATION*
>
> *The Executive of A.T.U. LOCAL 588 would like to meet with you under Article 8 (B) of the collective agreement.*
>
> *On Wednesday May 4, 1994 Gordon Johnson was called into a meeting with Management to discuss the work he has done as a Tradesman in regards to filling the buses with oil. The concerns were levelled that he was over filling buses, although there was never any documentation that he was given notice of this being a problem in the past.*
>
> *The concern is that this has become a "witchhunt" by management to get who they want in the position. Secondly management did not follow the contract because Mr. Johnson was on probation, and under article 9(E) if he was having difficulty in doing the functions of the job, to the satisfaction of the Director of Transit, he would then revert back to his former position.*
>
> *Termination should never be taken lightly because it has drastic effects on the family, not only the employee. In this case the union believes management did not follow their own corrective discipline policy, the collective agreement, or common sense.*
>
> *The Union is requesting reinstatement and full redress.*

It will be noted that the letter alluded both to general disagreement with the dismissal, and also to the allegation that the Employer was in breach of the obligation created by Article 9(e) of the collective agreement.

At the time this letter was forwarded to the Employer, Mr. McCormick acknowledged that neither Mr. Johnson nor the Union had received any written notification of the termination. Mr. McCormick said that he sent the letter dated May 9, 1994 in order to make it clear to the Employer that the Union was contesting the dismissal. After he had sent the letter, he telephoned the Employer to inquire whether they proposed to outline their reasons for terminating the employment of Mr. Johnson. A letter was sent by the Employer to Mr. Johnson, dated May 11, 1994, which contained a statement of the grounds for his dismissal in the following terms:

> *At our meeting, the events of April 16, 1994, regarding bus #504 were discussed. The maintenance records indicated you had, in fact, performed the maintenance on bus #504. In fact, the oil level was extremely overfilled and required immediate servicing.*

> *As well, the oil filter required changing. As you are well aware, operating a bus under these conditions would ultimately cause severe damage. You provided no sound explanation for the improper maintenance of this vehicle. A review of this incident, along with the following issues, was presented to you for your explanation:*
>
> - *continuing to overfill engine crankcase oil after receiving directives from the Garage Foreman not to;*
> - *neglecting to check engine oil levels after draining and refilling engine crankcases;*
> - *entering incorrect maintenance data on various bus servicing records;*
> - *neglecting to replace restricted air filter cartridges, when visual indications revealed the need to;*
> - *extending engine oil drain intervals, knowing the possible implications to engine life.*
>
> *Further to the referenced incidents, you have acknowledged and understood the contents of Mr. Alexander's memo of December 29, 1993, regarding direction for the servicing of buses, which have been continually discussed with you. Knowingly you have chosen to do otherwise.*
>
> *You failed to provide any explanation for your behaviour in these cases. There is no other conclusion than that these acts were done purposefully. Having made this determination, and in light of your overall work record, your employment relationship with the City of Regina has been irreparably damaged. Therefore, your employment with the City of Regina Transit Department is terminated effective 16:00, Wednesday, May 4, 1994.*

After reviewing this letter, Mr. McCormick sent a further letter, dated May 12, 1994, to Mr. Hnetka. The first two paragraphs of the letter were identical to their counterparts in the letter dated May 9, 1994. The rest of the letter read as follows:

> *The Management of the Transit Department did not follow the collective agreement or their own corrective disciplinary policy. It also took Management until May 11, 1994 to issue a letter of termination which is not acceptable to this local.*
>
> *The Union believes Mr. Johnson was wrongfully terminated and is requesting reinstatement with full redress.*
>
> *The Union is requesting immediate action to resolve this issue.*

In the interval between the sending of the two letters, Mr. McCormick met with other members of the Union executive committee, which included himself and Mr. Poth, financial secretary, along with the vice-president, recording secretary, and an elected shop steward representing each of the four "branches" - office employees, maintenance employees, bus drivers and paratransit drivers. According

to Mr. McCormick, the executive committee engaged in considerable discussion of the dismissal of Mr. Johnson. Mr. McCormick outlined the results of his investigation, and described the two bases on which the grievance had been filed. The executive committee agreed to recommend that the grievance be pursued to arbitration.

Mr. McCormick described the practice followed by the local Union in processing grievances filed on behalf of employees. He acknowledged that the collective agreement provides that there are two stages of the grievance procedure prior to taking the matter to arbitration. These two steps involve discussions between Union officers and representatives of the Employer at two levels. He said that the discussions at this level sometimes lead to a settlement of the grievance. He expressed the opinion, however, that it would be unlikely for a settlement to occur in the case of a dismissal, and that the real choice for the Union in these circumstances is whether to pursue the grievance to arbitration or not.

He said that the executive committee of the Union considers whether to take a position on the issue; in this case, the opinion of the executive was that they should recommend pursuing the grievance to arbitration. According to the ordinary practice of the local, the executive committee would present their recommendation at a membership meeting; in fact, two membership meetings are held on the same date to accommodate the shift schedules of all members of the local. The form of the recommendation would generally be to ask those present to support the holding of a "referendum vote" to be taken among all of the members of the local. The results of this referendum vote would determine whether the grievance would actually be taken to arbitration.

The other feature of the practice of the local which should be noted is that the costs incurred by the Union in taking a grievance to arbitration are paid through a levy of dues made on an *ad hoc* basis for each case, rather than out of a general fund accumulated for the processing of grievances in general.

The two regular membership meetings for the month of May took place on May 18, 1994, one in the morning and one in the afternoon. Mr. Johnson said that after the termination of his employment he was uncertain as to his status as a member of the Union, and he was not sure that he was entitled to attend the meetings. His recollection was that he was not present. Mr. McCormick, however, recalled that Mr. Johnson was present at both meetings, and this seems to be confirmed by the sign-in sheet which was filed with the Board. Both Mr. Johnson and Mr. McCormick agreed that Mr. Johnson did

not address the membership, but left it up to Mr. McCormick and other officers of the Union to make the presentation about his case. According to Mr. McCormick, there was no reason that Mr. Johnson could not have participated in the discussion, but he did not speak at the meeting.

Mr. McCormick testified that he outlined the circumstances of the case to the membership. Mr. Alexander also made some comments, as did one or two other persons. Mr. McCormick said that it was made clear to the members that the executive committee were in favour of proceeding to arbitration on the grievance, and they invited a resolution in support of submitting the question for determination in a referendum vote, in accordance with their usual practice. Such a resolution was put, and passed by a majority of those present at the two meetings.

On the afternoon of May 18, 1994, during the interval between the two membership meetings, the first stage meeting on the grievance occurred between representatives of the Union and representatives of the Employer. Mr. Hnetka and Mr. Flavelle represented the Employer, and Mr. McCormick, Mr. Poth and Mr. Bratkoski, shop steward from the maintenance branch, were present on behalf of the Union. Mr. McCormick indicated that it is not the usual practice to involve a grievor in these discussions.

The representatives of the Union went over their reasons for contesting the termination, including the alleged violation of Article 9(e) of the collective agreement. They also continued to suggest that the Employer had not followed a reasonable pattern of progressive discipline in dealing with Mr. Johnson. Mr. Hnetka ultimately sent a letter to Mr. McCormick, dated May 27, 1994, stating that the discussion had not resulted in any change in the position of the Employer regarding the termination. The letter contained the following sentence: "In the absence of any explanation we can only assume that he purposefully chose to act as he did."

In cross-examining Mr. McCormick, counsel for Mr. Johnson intimated that the Union might have picked up on this as an indication that the Employer was alleging that Mr. Johnson had been guilty of some kind of deliberate action intended to cause harm to the buses. Mr. McCormick said that he had not understood it this way, but simply assumed that the Employer was suggesting Mr. Johnson knew what he was supposed to be doing, and failed to do it.

The next stage of the grievance procedure was to appeal to the city manager. A meeting was held on June 2, 1994, between representatives of the Union and of the Employer, including Mr. Doug Fisher, senior director of corporate finance and administration, who represented the city manager. Mr. Fisher sent a letter dated June 21, 1994, confirming that the Employer had not revised the position they had been taking. This letter included the following comment:

> *In reviewing the facts of this case, it is apparent that Mr. Johnson made decisions with complete knowledge of the impact his actions would have. This behaviour is totally unacceptable. As such, Mr. Johnson's dismissal was for cause.*

There was a further opportunity for discussion of the Johnson grievance at membership meetings on June 15, 1994. Mr. McCormick recalled that he had given an update on the grievance. There was not a quorum of members at either meeting, however, so no new decisions were taken concerning the grievance.

The referendum vote was scheduled for June 28, 1994. Mr. McCormick said that the notice of the vote was posted in the usual places. Although the Union had not retained a copy of the notice, he recalled that it had indicated the general purpose of the vote. Mr. McCormick said that he spent considerable time prior to the vote trying to visit all of the employees to tell them the executive was recommending a positive vote, and to answer any questions which members might have. Members of the executive were also present on the date of the ballot, which was conducted in three different locations at times which were meant to permit the maximum number of employees to vote. Although Mr. McCormick was on holidays, he also went to the polling place to intercept members on the day shift and "lobby" for their support.

When the votes were counted, it became clear that seventy-six members had voted against pursuing the matter to arbitration, and sixty-six had voted in favour of following the recommendation of the executive.

In his testimony, Mr. McCormick said that, at some time during the processing of the grievance, the Union obtained a legal opinion concerning the likelihood of success at arbitration. He was not certain when this opinion was obtained, and could not say whether it had been available prior to the referendum ballot. The opinion of the solicitor, which was conveyed to Mr. McCormick verbally, was that the grievance stood a reasonable chance of success.

Mr. McCormick also said that he spoke to the human resources manager of the Employer after the vote, and appealed to him to consider reversing the decision to dismiss Mr. Johnson. This request, which was not part of the grievance procedure as such, was denied.

In addition, Mr. McCormick telephoned the international vice-president of the Union in Vancouver to ask if it would be possible to conduct another vote in an effort to achieve a more satisfactory result. He was told that once the vote was held, a second ballot should not be held.

This Board has described in a number of decisions the rationale for the imposition on trade unions a duty to represent fairly the employees in respect of whom they enjoy bargaining rights. In a decision in *Gilbert Radke v. Canadian Paperworkers Union*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, the Board commented as follows, 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 Rayonier Canada (B.C.) Ltd. and International Woodworkers of America and Ross Anderson*, [1975] 2 C.L.R.B.R. 196, the British Columbia Labour Relations Board commented on the historical origins of the duty in these terms, at 201:

> *Some time after the enactment in this form of The Wagner Act - which was the model for all subsequent North American labour legislation - American courts drew the inference that the granting of this legal authority to the union bargaining agent must carry with it some regulation of the manner in which these powers were exercised in order to protect individual employees from abuse at the hands of the majority. This came to be known as the duty of fair representation. Beginning with the decision in Steele v. Louisville (1944) 323 U.S. 192, which struck down a negotiated seniority clause that placed all black employees at the bottom of the list, the duty has been extended to all forms of union decisions. An enormous body of judicial decisions and academic comment has been spawned. This culminated in the U.S. Supreme Court*

> *decision of Vaca v. Sipes (1967) 55 L.C. 11,731, which is the leading American precedent in this area of the law. This initiative by the United States judiciary was emulated by one Canadian judge, in the case of Fisher v. Pemberton (1969), 8 D.L.R. (3d) 521 (B.C.S.C.), where he concluded that the same duty must bind British Columbia unions certified under the old Labour Relations Act (at pp. 540-541). But Canadian legislatures have not waited for the evolution of a common law principle to run its course. Instead, they have uniformly moved to write the obligation explicitly into the statute and entrust its administration to the Labour Relations Board which is responsible for the remainder of the legislation. (For the Ontario history, see Gebbie v. U.A.W. and Ford Motor Co. (1973) OLRB 519.) The B.C. legislature followed suit when it enacted s. 7 in late 1973.*

In *Donald Gebbie and Michael Longmoore v. United Automobile, Aerospace and Agricultural Implement Workers of America*, [1973] O.L.R.B. Rep. October 519, the Ontario Labour Relations Board also described the origins of the duty of fair representation, at 525:

> *38. Section 60 of The Labour Relations Act is to ensure that individual rights are not abused by the majority of the bargaining unit; it is an attempt to achieve a balance between the individual interests and the majority interest by recognizing that the exclusive bargaining agent has a duty to consider all the separate interests in the performance of its obligations. The duty has been described as the duty of fair representation. The emphasis is on fairness - it is a duty to act fairly in the interests of all members of the bargaining unit, minority factions, as well as majority factions, individual employees, as well as the collective group, members as well as non-members, craft employees as well as industrial employees. It is not a duty which makes the union the guarantor or insurer for every situation in which an individual employee is aggrieved or adversely affected; rather, the statute attempts to have the union consider the position of all groups and to weigh the competing interests of minorities, individuals and other like groups in arriving at its decision. The difficulties that arise are in applying the concept of fairness and particularly where to draw the line between majority and minority interests.*

The evolution of the duty of fair representation in this jurisdiction was unique, in that the recognition of a duty by this Board was based on an interpretation of existing provisions in the Act, in the case of *Doris Simpson v. United Garment Workers of America*, [1980] July Sask. Labour Rep. 43, rather than on the addition of a statutory provision which explicitly imposed such an obligation. Section 25.1 was added to the *Act* as part of a series of amendments in 1983. Despite the unusual course which the development of the duty has followed in Saskatchewan, it seems fair to say that the principles which the Board has articulated in relation to the duty of fair representation are consistent with those followed in other Canadian jurisdictions.

This may in part be traced to the unifying influence of the succinct summary of appropriate principles provided by the Supreme Court of Canada in *Canadian Merchant Services Guild v. Gagnon*, [1984] 84 C.L.L.C. 14,043, at 12,188:

> *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 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 employee.*

As labour relations boards have considered the scope of the duty of fair representation, they have been at pains to emphasize that the nature of trade union representation and of collective bargaining precludes defining this obligation in terms which might be appropriate to a discussion of professional negligence. In the *Ford Motor Company* decision, *supra*, the Ontario Labour Relations Board made this comment, at 526:

> *In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community; [Fisher v. Pemberton et al. (1969), 8 D.L.R. (3d) 521 at 546].*

In *Walter Prinesdomu v. Canadian Union of Public Employees*, [1975] 2 C.L.R.B.R. 310, the Ontario Board made this observation, at 316:

> *There is thus a concern not to engage in what may well constitute uninformed second guessing about a process of decision-making that resides at the heart of the administration of the collective agreement or to impose unrealistic standards of conduct upon unpaid union officials who may lack the experience and time required to shoulder the burden. The parties to a collective agreement are the most familiar with the problems that must inevitably arise and decisions have to be made "in a context of considerable conflict with delicate balances of mutual acceptability in a vortex of power, reason and persuasion." (See Hanslowe, Individual Rights in Collective Labour Relations (1959), 45 Cornell L. Rev. 25, 46.) It is argued that a more stringent definition of the duty would discourage the union from settling grievances thereby clogging the lifeline of the collective agreement. Further, because, in appropriate circumstances, an employer can be directed to respond to an alleged violation of the collective agreement which it may consider settled or withdrawn (and possibly time barred) too stringent a standard might introduce an unhealthy uncertainty that would discourage or penalize reasonable reliance on a trade union's actions. In other words, it is felt that a more stringent standard would adversely affect the entire relationship between trade unions and employers to the detriment of all employees. Unfortunately, this limitation - one prevailing in the United States as well as in Ontario - necessarily leaves employees affected by mistakes and carelessness without a remedy under s. 60. And it is this result that caused at least one commentator to lament that until recovery for ordinary negligence is permitted "employees will always be second class citizens in their industrial world." (Flynn and Higgins, Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee (1974), 8 Suffolk University, Rev. 1096, 1143) And while we must say this latter observation lacks a perspective and concern for the overall health of collective bargaining referred to above, it is symptomatic of a feeling some employees may experience in particular circumstances.*

As the latter part of this passage intimates, early in the development of the jurisprudence relating to the duty of fair representation, there was considerable debate over whether individuals should have some entitlement to press issues of importance to them regardless of the conclusion of their trade union. The Canada Labour Relations Board initially accepted the notion that, in the case of what were termed "critical job interests," the obligation of a trade union to uphold the interest of the individual employee affected would be close to absolute. What might constitute such critical job interests was not entirely clear, but loss of employment through discharge was clearly among them.

The Board continued to hold the view that the seriousness of the interest of the employee is a relevant factor. In *Brenda Haley v. Canadian Airline Employees' Association*, [1981] 81 C.L.L.C. 16,096, the Canada Board made this comment, at 609:

> *This concept (i.e. critical job interests) is a useful instrument to distinguish circumstances where the balance between the individual and union or collective bargaining system interests will tilt in one direction or another. A higher degree of recognition of individual interests will prevail on matters of critical job interest, which may vary from industry to industry or employer to employer. Conversely on matters of minor job interest for the individual the union's conduct will not receive the same scrutiny and the Board's administrative processes will not respond with the same diligence or concern. Many of these matters may not warrant an expensive hearing. Examples of these minor job interests are the occasional use of supervisors to do bargaining unit work, or isolated pay dispute arising out of one or a few incidents and even a minor disciplinary action such as a verbal warning.*

They concluded in the *Brenda Haley* case, however, that this factor should be evaluated along with other aspects of the decisions taken by the trade union. The decision contains this comment, at 614:

> *As frustrating as duty of fair representation discharge cases may be and as traumatic as loss of employment by discharge may be, we are not persuaded mandatory discharge arbitration is the correct response. It is an easy response but its effect on the group and institutional interests is too harsh. With the same view of the integrity of union officials and the merits of the grievance procedure shared by Professor Weiler we say unions must continue to make the difficult decisions on discharge and we must continue to make the difficult decisions complaints about the unions' decisions often require.*

They went on to summarize the nature of the duty imposed on the trade union, also at 614:

> *It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.*

In a companion decision in *André Cloutier v. Cartage and Miscellaneous Employees' Union*, [1981] 81 C.L.L.C. 16,108, the Canada Board commented as follows, at 698:

> *The legislator's intent must be taken in the context of blending these rights into society which has agreed to give unions a very important place as regulatory bodies capable of establishing sound working conditions by negotiating and administering collective agreements. The employee who opts for the collective bargaining regime accepts inherently to sacrifice some personal interests for the sake of obtaining greater advantages and benefits for the majority of people. To accede to the wishes of the majority brings a multitude of advantages which an individual acting on his own, could never hope to gain, unless he were blessed with an extraordinary personality and material means beyond the norm. To give but one example, an employee who is a member of a bargaining unit has access to many services, depending on the quality of the union chosen as bargaining agent. These services available to him include consultants and advisers on pension plans, labour law, unemployment insurance, workman's compensation, political lobbying at the municipal, provincial and federal levels, etc.*
>
> *In the course of its daily activities a union may take a great number of decisions. In its attempt to maximize for everyone the benefits inherent to the collective bargaining regime, the rights of one or more individuals may be sacrificed.*
>
> *If what we have stated above is true and we believe it is then the complainant's statements as quoted at the outset of these reasons cannot be substantiated.*
>
> *The Board does not believe that the duty of fair representation obliges a bargaining agent to automatically defend to the limit a member's grievance just because the latter pays his union dues without taking into account the very merits of the complaint. It seems evident that such an obligation would seriously undermine the union's other duty, that of administering in a reasonable fashion the funds at its disposal, which are drawn from the dues paid by all members.*

In the *Ford Motor Company* case, *supra*, the Ontario Board made a similar observation, at 526:

> *One of the most difficult areas in applying the duty is in the settlement of grievances. We think it clear that the union's obligation to administer the collective agreement gives it the right to settle grievances. An employee does not have an absolute right to have his grievance arbitrated. One should consider that the negotiation of the collective agreement was a group affair and certain interests yielded to others, and there is no reason why the administration of the collective agreement, including the grievance-arbitration provisions should not be based on the same considerations. In determining fairness within the meaning of the Act one must consider the merits of the claim, the effect on others in the bargaining unit, the implications of settlement or arbitration on the future and whether there is any evidence of bad faith, discrimination or arbitrariness in the compromises effected. Motive may be significant in assessing prohibited conduct particularly when considering the admonition against bad faith.*

More recent decisions of the Ontario Board have expanded on this point. In *Mirza Alam et al v. Power Workers Union and Ontario Hydro*, [1994] O.L.R.B. Rep. June 627, that Board made this comment, at 638:

> *64. A "grievance" is an allegation of a breach of the collective agreement. It is relatively easy to file one. There is no cost involved, nor is there much formal paperwork. An employee need only allege that s/he has been dealt with contrary to the terms of the collective agreement, and the grievance procedure is triggered -whether or not there is a contractual foundation for the employee claim.*
>
> *65. Once a grievance is filed most collective agreements require several steps of discussion before a matter may be referred to arbitration. The purpose of that discussion is to allow the parties to consider their positions and resolve their differences - again, whether or not there is a contractual foundation for the employee claim. In the ordinary course, one would expect that most claims would be granted, settled or withdrawn. The discussion process should reveal the relative strength of the parties' positions, and thus, the desirability or utility of formal litigation. That is what the "grievance procedure" is for.*
>
> *66. A union would be remiss in its obligations to the membership if it proceeded to litigation with claims that were unlikely to be successful.*

The Ontario Board went on to refer to an earlier decision, *Catherine Syme v. Graphic Arts International Union*, [1983] O.L.R.B. Rep. May 775, in which the Board made the following statement, at 779:

> *20. Section 68 (now 69) requires a trade union to act fairly, inter alia, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official -especially an elected one - cannot be expected to exhibit the skills, ability, training and judgment of a lawyer.*

In the same passage, the Ontario Board continued:

> *22. These considerations are equally applicable to the settlement of disputes arising out of collective agreements. But there is an important difference. Unlike most parties in civil matters, the trade union and employer are bound together in a relationship which will subsist so long as the employees continue to support the union and the employer remains in existence. That relationship, despite its adversarial aspects and legal veneer, is neither wholly adversarial nor strictly legal. It is essentially an economic partnership in which both parties must be concerned about the ongoing relationship and the equitable resolution of disputes which occasionally arise. Like a successful marriage, a productive bargaining relationship depends upon the development of a spirit of cooperation and compromise. Regardless of the arguable importance of any particular grievance, it will inevitably be only one of many which the parties will be required to resolve during the currency of their relationship; and, if*

> *either party obstinately adheres to an unreasonable position, or continually presses trivial claims, the entire settlement process could be undermined, and their long-term relationship prejudiced. It can hardly further mutual trust and respect if union and management officials are required to spend needless hours discussing inconsequential or unfounded grievances. As a practical matter, a rigid insistence one one's "strict legal rights" or an insistence on proceeding to arbitration with doubtful claims is likely to provoke a response in kind, and yield only short term gains. As a matter of good judgment, and in the interest of sound industrial relations, a trade union should make reasonable efforts to settle grievances early in the process. I do not think there is any justification for processing obviously groundless claims simply because an individual employee demands his "day in court." Such position not only represents a waste of the employees' money in counsel and other fees associated with the arbitration process, but could also prejudice the ongoing and informal resolution of disputes, short of arbitration, where there might well be some contractual basis for the union's claim.*

In our own decisions, the Board has attempted to articulate the scope of the duty of fair representation in a way which will capture these principles. In the *Radke* decision, *supra*, the Board gave the following description, at 64:

> *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 *Rachelle Zora Kowal v. Communications, Energy and Paperworkers Union of Canada*, [1995] 2nd Quarter Sask. Labour Rep. 115, the Board described the general nature of the duty as follows, 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.*

It will be seen from the foregoing description of the evolution and articulation of the principles associated with the duty of fair representation that, in defining the duty of fair representation, labour relations boards, including our own, have taken into account a variety of factors which may mitigate the extent to which employees represented by a trade union can claim to have their own individual interests advanced or protected. These factors include the process of setting priorities and making accommodations which is inherent in collective bargaining, the competing interests of individual employees and groups of employees, the democratic and voluntaristic nature of trade unions as organizational entities, the volunteer nature of much trade union leadership, the resources available, and the stake of trade unions in maintaining their credibility as parties to a continuing collective bargaining relationship.

In a decision in *John Robert Chrispen v. International Association of Fire Fighters*, [1992] 4th Quarter Sask. Labour Rep. 133, LRB File No. 003-92, the Board pointed out that the duty of fair representation has been cast in essentially negative terms, at 150:

> *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 (in Saskatchewan see Doris Simpson, 1980 (July), Sask. Labour Report, Vol. 31, No. 7, p. 43), 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.*

It will be noted that this comment relates, in part, to the distinction which must be drawn in order to differentiate between conduct on the part of a trade union which is discriminatory, arbitrary or in bad faith. In a decision in *Glynna Ward v. Saskatchewan Government Employees' Union*, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, the Board suggested the following as the distinguishing features of the three kinds of conduct, at 47:

> *Section 25.1 of The Trade Union Act obligated 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.*

As the Board has often noted, it is more difficult to state with precision what kind of conduct might be described as "arbitrary" than it is to identify conduct which is discriminatory or in bad faith. In the *Rayonier* decision, *supra*, the British Columbia Labour Relations Board offered the following insight into what constitutes arbitrary conduct, at 201:

> *Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. 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 this case, Mr. Johnson did not allege that the Union approached his case with any subjective ill will or malice, or that he was treated in a discriminatory way. Indeed, he conceded that he had had a good relationship with Mr. McCormick and other officers of the Union, and with many of his fellow employees.

The argument made on behalf of Mr. Johnson was rather that the procedures followed by the Union in responding to the discharge of Mr. Johnson were flawed in ways which made it impossible for their decisions to be anything other than arbitrary.

Counsel for Mr. Johnson referred the Board to several provisions of the constitution and bylaws of the Union which he said had not been followed in dealing with the case of Mr. Johnson. For example, he cited the following clause from the bylaws of the local Union:

> *7.4 Negotiation and Grievance Committee*
>
> *This Committee shall consist of the President-Business Agent, the Vice-President, the Financial Secretary-Treasurer, the Recording Secretary and two (2) members from the non-operating, or operating schedule, so that all members of the Local are represented. It shall be the duty of this Committee to conduct all business of the Local in all affairs such as negotiations, grievances, conciliations and Arbitration boards, etc., as directed by the Executive Board and the Local. It shall report all its findings and recommendations to the Executive Board and the Local for decision. The Executive Board and the Local may add to the Committee any member or members it shall deem necessary to aid and assist this Committee in the performance of its duties.*

It must be acknowledged that this bylaw seems to contemplate that the "negotiation and grievance" committee will be a separate entity from the executive committee. In his evidence, Mr. McCormick indicated that the executive committee has in fact taken on the responsibilities outlined for the negotiation and grievance committee. The explanation he gave for this was that all members of the executive committee had received training in handling grievances and conducting negotiations, among other things, and that they were regarded as best equipped for these tasks.

Counsel for Mr. Johnson suggested that this merger of the functions of the two entities described in the bylaws was flawed because it meant that grievances were handled without having the input of the two "members-at-large" mentioned in bylaw 7.4. It must be remembered, however, that there are four elected shop stewards on the executive committee, and that these officers apparently supply the perspective which counsel alleged to be missing.

A further example of the kind of objection made on behalf of Mr. Johnson may be found in relation to the following portion of Article 13.6 of the constitution of the Union:

> *The L.U. bylaws shall provide for the handling of all grievances and complaints of the membership and for the taking up of disputes arising between the membership and the company. The bylaws may empower the president or any other officer to handle such*

> *matters, or may empower the executive board to handle such matters, or may empower any officer to handle such matters subject to the approval of the executive board.*

Counsel for Mr. Johnson argued that this segment of the constitution provides for three possibilities for handling grievances, and that none of them was the method chosen by the local Union. Mr. McCormick said that he had never understood this article of the constitution to contain an exhaustive list of administrative options for handling grievances.

Given the view we have taken of this set of arguments made on behalf of Mr. Johnson, it is not necessary to consider in detail all of the points made by his counsel. In a decision in *Guy Stewart v. Saskatchewan Brewers' Bottle & Keg Workers, Local 340*, [1995] 2nd Quarter Sask. Labour Rep. 204, the Board acknowledged, in light of amended language in the Act, that we have a role in monitoring the internal procedures of trade unions. In that decision, however, we reiterated that our role in this respect is a limited one, and that our general posture is one of deference to the decisions which are made and the procedures which are followed by trade unions in pursuing their organizational objectives.

In this case, the Union assigned tasks associated with the handling of grievances in a manner which was, to all appearances, within the scope of the provisions of the constitution and bylaws. We are not persuaded that the interpretations of these provisions put forward by counsel for Mr. Johnson are so obviously correct that they should override the reading which was given them by officers at the local and international Union level over a long period of time.

Counsel for Mr. Johnson further argued that Mr. McCormick and his colleagues did not press the case on behalf of Mr. Johnson with sufficient vigour, and that they approached the meetings associated with the first two steps of the grievance procedure in an offhand or perfunctory manner. A related argument was that the officials of the Union were not sufficiently careful in the discussions associated with these meetings to ensure that all of the issues related to the grievance of Mr. Johnson were given a full and fair airing.

We must make two observations in connection with this aspect of the argument advanced by counsel on behalf of Mr. Johnson. The first is that the argument as it was formulated suggests a misunderstanding of the nature of the grievance procedure. Though a trade union is bound by the duty of fair representation to attend carefully to the interests of employees, the discussions which take place in the

course of the grievance procedure cannot be seen as separate proceedings in themselves. In the *Rachelle Kowal*, decision, *supra*, the Board made this comment, at 129:

> *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.*

A related comment was made in a decision in *Brent Liick v. Canadian Union of Public Employees*, [1995] 3rd Quarter Sask. Labour Rep. 78, at 106:

> *It would not be anticipated that a Union would rehearse fully all of the evidence related to the case at each stage of the grievance procedure, or even be in possession of it. The task of the Union is to assess the information which is available to them and the firmness of the Employer's position in relation to such factors as the level of discipline, the interests of the griever and others in the bargaining unit, and the overall interests and strategies of the Union.*

The stages of the grievance procedure which lead up to arbitration are more accurately seen as part of the collective bargaining process. As we have seen, a trade union has considerable latitude in handling grievances, and can utilize the discussions of grievances with representatives of the employer as a means of obtaining information, assessing the extent to which an employer is committed to adhere to the decision which is the basis of the grievance, putting forward elements for a settlement, or placing the grievance in the context of other bargaining issues.

Our second observation is that we cannot agree that the evidence indicates any laxity on the part of the representatives of the Union in their discussions in the course of the grievance procedure. Mr. McCormick and his colleagues identified and put forward two general bases for disputing the dismissal of Mr. Johnson. Though Mr. McCormick acknowledged that he had some reservations about the defence which might be offered on the first ground - disagreement with the cause for dismissal cited by the Employer - on the basis of his own investigation of the circumstances, he did not yield on this point in discussions with the Employer, and continued to press for reinstatement of Mr. Johnson to the

position from which he had been dismissed. The Union had, as well, added a second ground, that of the alleged violation of Article 9(e) of the collective agreement.

It was reasonable for Mr. McCormick to conclude, as he said he did, that the Employer was unlikely to budge in the course of the grievance procedure from the original decision to terminate the employment of Mr. Johnson. Though the representatives of the Union continued to argue strongly that Mr. Johnson should be reinstated, or, in the alternative, permitted to bump into another position, they were unable to put forward any fresh evidence which might cast the matter in a whole new light, or otherwise to make arguments which they could realistically hope would alter the position held by the Employer. In these circumstances, it was reasonable for Mr. McCormick and the other Union officers to direct their attention to pursuing the grievance to arbitration.

The argument which was pressed most strongly by counsel for Mr. Johnson concerned the referendum vote among bargaining unit members which was the ultimate means of determining whether the grievance would be pursued to arbitration. He argued that, though the idea of having such questions put to a vote of the widest possible number of employees seems consistent with the democratic norms and traditions of trade unions, the application of majoritarian democracy to this kind of issue results, as he put it, in a "paradigm of arbitrariness."

The cumulative jurisprudence of Canadian labour relations boards concerning the duty of fair representation is extensive, but we have been unable to discover a case which deals directly with this issue. In most of the settings described in the cases, particular union officers or committees are entrusted with the task of submitting grievances, discussing them with representatives of the employer, and deciding whether they should be settled, withdrawn or pursued to arbitration. By far the most common complaints from employees represented by trade unions seem to be that trade union officers responsible for handling grievances are guilty of ill will, unfairness, discrimination, neglect or perfunctoriness in addressing the problems cited by the members they represent.

We wish to make it clear that we do not find that the conduct of any of the Union officers involved in this case could be said to fall within such a description. The executive committee were experienced trade union representatives, committed to the interests of their members, and in our view they conducted themselves properly at every stage of the grievance procedure. Mr. McCormick himself is a

highly competent and dedicated official, and he went to extraordinary lengths in attempting to secure a fair and complete consideration of the case of Mr. Johnson.

In a smaller number of cases, decisions regarding the pursuit of a grievance to arbitration have been made by a group of union members at a membership meeting. An example of this was cited to the Board by counsel for the Union, in a decision of the British Columbia Labour Relations Board in *Laurie White v. Amalgamated Transit Union and Pacific Transit Co-operative,* [1993] B.C.L.R.B. No. B61/93 (unreported).

In this kind of case, the focus is commonly on such questions as whether the grievor was given an opportunity to attend the meeting or to address the membership, whether there sufficient opportunity for questions to be answered and debate to take place, and whether the membership was presented with sufficient information to allow them to make a fair decision.

It is not necessary for us to comment here on the status of this kind of decision-making process. In this case, membership meetings were held at which the grievance of Mr. Johnson was discussed; from the evidence, it would appear that he attended two of these. We accept that there was nothing to prevent him addressing his co-workers at these meetings, although he decided to leave the presentation of his case in the hands of Mr. McCormick. The result of these meetings, however, was not a decision whether to take the grievance to arbitration, but a decision to submit the question to the entire membership of the local Union for determination by secret ballot.

Trade unions are democratic organizations, with a tradition of strong reliance on the opinions and directions of their members. This is one of their chief strengths, and one of the foundations for confiding to them the important interests which they are charged with representing.

The genesis of the duty of fair representation, however, lies in a recognition that any organization which is governed exclusively by majoritarian principles has the potential to be oppressive to individual employees or minority groups of employees. Because these individuals and groups have no option but to rely on the certified trade union to represent their interests, the courts, legislatures and labour relations boards which have considered the issue concluded that their bargaining agents must be held to a minimal standard of fairness in dealing with them, a standard, described earlier in these reasons,

defined in terms of a proscription of trade union decision-making which is arbitrary, discriminatory or in bad faith.

The roots of the duty of fair representation lie in a recognition that, in addition to an expression of the will of the majority, democratic principles must provide for the protection of individuals and minorities from the excesses of majoritarianism. An individual, in the scheme of collective bargaining, cannot assert that his or her interest should prevail over others, or that it represents an entitlement of an absolute kind. The duty of fair representation requires, however, that he or she can require that any decision which is made concerning those interests does not reflect malice, ill will, or denigration on discriminatory grounds. More importantly for our purposes here, those decisions should, to use language which has become common in the discourse concerning the duty of fair representation, reflect a consideration of all of the factors which are relevant to the decision and of no factors which are not relevant.

A decision-making process of the kind followed here falls afoul of the duty of fair representation, in our view, because it is impossible to know whether the decision was based on the appropriate considerations and only those considerations. Mr. McCormick speculated that the vote went against the pursuit of the grievance because "Mr. Johnson's past caught up with him " - that is to say, that his colleagues felt his cumulative record might make dismissal reasonable. Mr. McCormick said that he did not think that the employees disliked Mr. Johnson, who was personally popular, but that they may have felt his work performance justified the criticisms levelled at him by the Employer. Mr. Johnson said that he had heard "talk" about the high cost of arbitration, and his sense was that this might have played a role in the outcome of the vote.

The problem with the use of a referendum ballot as a means of making this kind of decision is that there is no way of knowing whether either of these explanations played a role in the decision, or what range of other factors the voters may have taken into account. The decision is neither amenable to explanation nor accountable to Mr. Johnson or to the Union executive which had reached a contrary conclusion through a process of investigation and careful thought. Mr. McCormick made considerable efforts, as apparently did other officers, to persuade the employees to support the executive recommendation; it cannot be said, however, whether their activity had any influence at all, or whether the employees considered another set of considerations entirely.

Mr. McCormick himself seems to have sensed that there was something not quite right about the outcome of this process; this is suggested by his inquiries with the international vice-president about whether a second vote could be taken. It is to the credit of Mr. McCormick that he continued to try to find ways of reversing both the result of the vote and the dismissal decision after the vote had been taken.

Mr. McCormick and the other members of the executive took what steps they could to ensure that the members of the bargaining unit were properly briefed prior to the vote, and that they understood that the executive was in favour of proceeding to arbitration. The mechanism of the vote among the entire group of employees, many of whom had not participated in the discussion at the membership meeting, and some of whom may not have been in possession of any information beyond what was on the notice, was, in our opinion, inherently arbitrary as a means of making a decision about the fate of an individual employee, however useful it might be as a means of obtaining direction about issues of more general significance.

We therefore find that the Union was in breach of the duty of fair representation in this respect. It was agreed at the hearing that the Board should reserve on the question of remedies, and a further hearing will be scheduled to consider any remedial issues the parties wish to address.

**CHRISTINE MEADEN, Applicant and SASKATCHEWAN UNION OF NURSES, Respondent**

LRB File No. 174-96; January 17, 1997
Chairperson, Beth Bilson; Members: Don Bell and Bob Todd

For the Applicant: Christine Meaden
For the Respondent: Neil McLeod

**Duty of fair representation - Posting grievance - Union did not violate duty of fair representation by refusing to grieve Applicant's failure to obtain regular part-time position where Applicant claimed her qualifications exceeded those of more senior employee who was appointed to position - Union is entitled to develop policy favouring seniority on promotion cases.**

***The Trade Union Act*, s.25.1**

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** The Saskatchewan Union of Nurses has been designated by this Board as the bargaining agent for a unit of employees of the Royal University Hospital in Saskatoon, who are now employees of the Saskatoon District Health Board.

Ms. Christine Meaden has filed this application alleging that the Union has failed to represent her fairly within the meaning of 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.*

Ms. Meaden alleges that the Union breached the duty to represent her fairly by declining to pursue a grievance on her behalf in relation to the awarding of a posted position to another employee.

Ms. Meaden had returned to Saskatchewan in 1991 after a period working outside the province in order to take up a part-time position as an instructor in a continuing nursing education program offered through the College of Nursing at the University of Saskatchewan. In addition to this position, she

filled a series of casual and part-time positions in the Hemodialysis Unit at the Royal University Hospital and the Renal Unit at St. Paul's Hospital in Saskatoon.

In October of 1994, she applied for a permanent "Other than Full-Time - Regular Part-Time" position in the Hemodialysis Unit at the Royal University Hospital. This position was described as follows in the posting notice to which she responded:

*SASKATOON DISTRICT HEALTH BOARD*
*EMPLOYMENT OPPORTUNITY*

*October 3, 1994*

| | |
|---|---|
| *POSTING DATE:* | *October 3, 1994* |
| *POSITION:* | *OTHER THAN FULL-TIME-REGULAR PART-TIME REGISTERED NURSE* |
| *DEPARTMENT:* | *Hemodialysis* |
| *FACILITY:* | *Royal University Hospital* |
| *AFFILIATION:* | *S.U.N.* |
| *HOURS OF WORK:* | *Eight (8) shifts of Eight (8) Hours/Four (4) week rotation* |
| *SALARY:* | *$17.89 to $21.37 (Six Step Range)* |

*ANTICIPATED APPOINTMENT DATE: As soon as possible*

| | |
|---|---|
| *COMPETITION #:* | *0830* |
| *FACILITATOR:* | *Donna Wonsiak, Phone # 665-2429* |

*CLOSING DATE: OCTOBER 13, 1994*

***THE POSITION:***
*Under the direction of the Nurse Manager, the RN will be responsible for the assessment, planning, implementation and evaluation of patient care in Hemodialysis.*

***THE NURSE:***
*A diploma/degree in nursing, current registration with SRNA and certification in Basic Life Support at Level C are required.*

***SELECTION:***

*Selection for this position will be based on Article 20.03 of the SUN/SAHO Collective Agreement. The employer will consider the following in making the selection:*

*a) The ability, experience, performance and qualifications of the employee.*

*b) The seniority of the employee.*

*It will be desirable if you possess a knowledge of the principles, methods and techniques involved in performing nursing services relating to the care of patients in Hemodialysis. This knowledge is commonly obtained through previous experience in Intensive Care nursing.*

***ELIGIBILITY:***

*This competition is open to all S.U.N. employees of the Saskatoon District Health Board and its affiliated agencies. Please submit your Application for Internal Transfer or resume to your local Human Resources office by the CLOSING DATE.*

On October 30, 1994, Ms. Meaden was informed that the position had been awarded to Ms. Colleena (Joanne) Montagnon. Ms. Meaden said that she was aware that she had considerably more experience in nursing related to hemodialysis than the successful candidate; indeed, she was asked to provide some instruction to Ms. Montagnon when she appeared for orientation to the new position.

Ms. Meaden said that she asked Ms. Wilma Cresswell, nursing unit manager in the Hemodialysis Unit, why she had not been successful in obtaining the position and was told that Ms. Cresswell had been instructed to select an applicant based on seniority and no other criteria. When she made further inquiries, another management representative denied that such an instruction had been given.

Ms. Meaden said that she was aware that the selection criteria were set out in article 20.03 of the collective agreement, which reads as follows:

*20.03 In all cases of promotion, transfer and filling of vacancies, the following factors shall prevail:*

*a) The ability, experience, performance and qualifications of the Employees;*

*b) The seniority of the Employee.*

*Where ability, experience, performance and qualifications are relatively equal, seniority shall be the deciding factor. Preference shall be given to applications from within the bargaining unit. The Employee who is the successful applicant shall be provided with unit orientation and training for certifiable skill.*

Ms. Meaden sought a further explanation from the Employer. While she awaited this, she became concerned that she might miss the deadline indicated in the collective agreement for filing a grievance, and made efforts to contact Ms. Lorraine Bray, president of the local Union, and Ms. Jan Lavoie, grievance chair of the local. Ms. Meaden testified that neither of these officers returned her telephone messages. She ultimately went to the Union office on November 18, 1994, and spoke to Ms. Bray.

She said that Ms. Bray did not have long to talk to her but that she informed Ms. Meaden that it was "not a grievance matter". Ms. Bray said that Ms. Montagnon had been judged to be "relatively equal" to Ms. Meaden because her nursing experience in other areas was considered to be equivalent to the specific experience of Ms. Meaden in connection with hemodialysis; the determining factor had therefore been the respective seniority of the two candidates.

Ms. Meaden failed to be convinced by the explanation given by Ms. Bray, and felt that Ms. Bray had no intention of conducting any further investigation into her circumstances. Ms. Bray did say, however, that she would have the situation reviewed at a district level meeting of Union officers.

Ms. Meaden followed up her conversation with Ms. Bray by telephoning Mr. Garth Robson, an employment relations officer (ERO) employed by the Union. The Union assigns these officials to take periods of "on-call" duty to answer questions and respond to concerns from members of the Union. According to the evidence of Ms. Meaden, she was told by Mr. Robson that it was unlikely the Union would pursue a grievance on her behalf because it would be "contrary to SUN philosophy." He explained that the Union favoured having all decisions concerning promotions, transfers and filling of vacancies on the basis exclusively of seniority; he said that the Union was not satisfied with the existing article of the collective agreement because it did not totally support this principle. Mr. Robson advised Ms. Meaden that it was open to her to ask Ms. Beverly Crossman, director of labour relations and educational services for the Union, to review the decision of Ms. Bray not to file a grievance.

At this point, Ms. Meaden decided to seek the advice of legal counsel to make representations on her behalf. Mr. Peter Derbawka, the solicitor who initially acted for her, sent a letter dated November 29, 1994, to Ms. Lana Clark, director of nursing for critical care nursing services at the Royal University Hospital. In this letter, Mr. Derbawka purported to file a grievance on behalf of Ms. Meaden.

It should be noted that it is not entirely clear from the wording of the collective agreement whether an individual employee can file a grievance on his or her own behalf. In any case, Ms. Clark responded that the Employer intended to deal exclusively with the Union in any matters concerning the grievance, which is consistent with the obligation imposed under a certification Order to discuss terms and conditions of employment of bargaining unit employees exclusively with the Union.

A copy of the letter from Mr. Derbawka was sent to the local Union, and Ms. Bray responded to it by arranging with Ms. Lois Spizawka, a representative of the Employer, to extend the time limits under the collective agreement for dealing with the grievance.

According to the evidence of Ms. Meaden, Mr. Derbawka asked Ms. Bray on December 13, 1994, to provide him with a written explanation for the refusal on the part of the Union to file a grievance on behalf of Ms. Meaden. He wished to obtain an explanation in preparation for asking Ms. Crossman to review the case. Ms. Meaden said that neither Ms. Bray nor Ms. Lavoise seemed willing to provide such an explanation within a reasonable time. Mr. Derbawka then contacted Ms. Leah Currie, an ERO employed by the Union in Saskatoon. Ms. Currie also indicated that she could not provide a response before the new year. Ms. Pat Stuart, another ERO, eventually sent a written response dated January 24, 1995, in the following terms:

> *I am writing on behalf of Ms. Currie, who has been called out of the office unexpectedly.*
>
> *Please be advised that the following constitute reasons why the Saskatchewan Union of Nurses and its Local 75 did not proceed with a grievance on your behalf related to filling of a vacancy in the Hemodynamics Unit at Royal University Hospital:*
> * *the successful applicant was the most senior nurse by approximately 19,000 hours;*
> * *both applicants were RNs;*
> * *both had several years of general nursing experience;*
> * *you had hemodynamic unit experience and the successful applicant had critical care experience.*
>
> *As previously identified to you, you may appeal this decision to Beverly Crossman, Director of Labour Relations. She may be reached through the Regina SUN Office.*

By this time, Ms. Meaden had engaged the services of a student-at-law, Ms. Jean Torrens, as Mr. Derbawka had left his law firm. Ms. Torrens sent a letter dated February 15, 1995, to Ms. Crossman asking her to review the decision not to pursue a grievance on behalf of Ms. Meaden.

It is not necessary for our purposes to reproduce this entire document. It will be sufficient to summarize the views which Ms. Meaden and the Union held concerning the issues at that point, views which they still held at the time of the hearing before the Board.

The argument made by Ms. Meaden was based on her assertion that she and the employee who was awarded the position could not reasonably have been found to be "relatively equal" in relation to ability, qualifications, performance and experience within the meaning of article 20.03(a) of the collective agreement. She argued that the factor of seniority was therefore irrelevant to the selection of an incumbent for the position.

She argued that, because she had extensive experience related specifically to hemodialysis, her standing in relation to the four criteria listed in article 20.03(a) was manifestly superior to Ms. Montagnon, who had prior experience in critical care, but not in hemodialysis. With respect to ability, Ms. Meaden argued that she could function expertly at the job without any further preparation, and that this meant that she should be regarded as having superior ability to someone who would have to undergo orientation and training to be ready to perform the duties associated with the position.

She argued that "performance" should signify something more than simply the absence of negative assessment, and she sought an opportunity to present the Union with positive comments on her performance of the job from colleagues, physicians and supervisors.

She also argued that her qualifications were superior to those of Ms. Montagnon. She acknowledged that, in the interpretation which has been given to article 20.03(a) of the collective agreement and comparable clauses in arbitral jurisprudence, this term must be taken to refer to academic credentials or training, and is not simply another way of referring to experience. In the letter sent to Ms. Crossman, however, it was argued on her behalf that her qualifications were "broader and better" than those of Ms. Montagnon. In addition to her designation as a registered nurse, she had taken a number of courses

towards a degree in nursing, and had been engaged in providing instruction in continuing nursing education courses.

In her testimony before the Board, Ms. Crossman outlined the position which the Union has taken on the significance and interpretation of article 20.03 of the collective agreement. She acknowledged that the Union has been pressing over time to increase the weight accorded to seniority as a factor in the selection process, as well as in promotions, layoffs, and transfers, and would ideally like to see article 20.03 of the collective agreement altered to make seniority the chief or even exclusive criterion for selection.

She conceded that the Union has been unable to achieve this objective at the bargaining table. She said that, when the opportunity arises, the Union has always tried to obtain an interpretation of the collective agreement from the Employer or at arbitration which gives as heavy a weight as possible to seniority within the context of the existing provision.

She said that the implications of the list of criteria in article 20.03 of the collective agreement, and related clauses concerning layoffs and transfers, have been considered by arbitrators on numerous occasions. Though the Union continues to press for an interpretation which accords even more significance to seniority, she said that the Union operates on the basis of a working understanding of the meaning which the terms in article 20.03 of the collective agreement are currently considered to bear.

Ms. Crossman said that the Union works to limit as much as possible the number of "specialist" positions which the Employer is permitted to create, and to maximize the number of positions which are regarded as "general duty nursing" positions. By these means, the Union hopes to increase the mobility of members of the Union, and to create as many opportunities as possible for them to have access to a variety of positions.

The understanding the Union has of the current interpretation of the collective agreement is that the Employer is entitled to indicate that certain kinds of prior experience may be "desirable" or may be taken into account in making selection decisions, but the Employer may not place any requirements for specific kinds of experience on general duty nursing positions. On the basis of the decisions of several

arbitrators, the Union argues that the Employer may not place "undue weight" on experience specific to a particular unit or type of position.

With respect to the criterion of ability, the Union understands this to mean, not immediate ability to step into a job, but the capacity to function effectively in the job after a reasonable period of orientation and training. In the view of the Union, this interpretation is also supported by arbitration decisions.

The Union understands the concept of performance to refer to adequate and competent performance, and in their responses to Ms. Meaden they allude to the absence of any negative assessments of the performance of Ms. Montagnon.

From the point of view of the Union, the qualifications referred to in article 20.03 of the collective agreement are those which are necessary to perform the duties associated with a position, primarily the R.N. designation which is required for general duty nursing. While additional academic credentials may have some significance in relation to more specialized positions, they are of limited relevance to general duty nursing positions.

According to Ms. Crossman, the Union viewed the position for which Ms. Meaden applied in October of 1994 as a general duty nursing position, rather than a specialized position in hemodialysis. The position fell within the general duty nursing pay scale, and was not recognized by the Union as having any specialized characteristics. On the basis of their understanding of how the criteria in article 20.03 of the collective agreement are properly interpreted, and on the basis of the aspirations of the Union with respect to having greater emphasis placed on seniority, said Ms. Crossman, local officials of the Union, Mr. Dobson and Ms. Crossman herself came to the conclusion that there had not been a violation of the collective agreement which could be the subject of a grievance.

Ms. Crossman indicated this conclusion to Ms. Meaden in a letter to Ms. Torrens dated March 22, 1995. At the end of the letter, Ms. Crossman indicated that Ms. Meaden had the right to appeal the decision of Ms. Crossman to the executive committee of the Union.

The hearing of the appeal filed by Ms. Torrens on behalf of Ms. Meaden was scheduled for June 16, 1995. Though Ms. Meaden had requested to have the hearing held in Saskatoon, the meeting was scheduled to take place in Regina.

There were some significant differences in the recollections of Ms. Meaden and Ms. Crossman of what transpired at this meeting. The minutes of the meeting, which were recorded by a member of the executive, indicate that the executive committee spent some time prior to the arrival of Ms. Meaden and Ms. Torrens in reviewing the relevant documents and discussing how to proceed. The minutes show that Ms. Meaden and Ms. Torrens arrived at approximately 2:30 pm.

Ms. Meaden had arranged to have a number of witnesses available to make representations by teleconference. The first of these, apparently, was a management representative from St. Paul's Hospital. The minutes indicate that the hearing was interrupted at this point.

The recollection of Ms. Meaden is that the hearing was stopped at the request of Ms. Torrens because she felt that Ms. Meaden was not getting a fair hearing. Ms. Meaden said it had been suggested that she should not have a lawyer present, and that the executive seemed to think there should not be a "formal" hearing.

Ms. Crossman remembered the events somewhat differently. She said that this was the first occasion on which the executive committee had been called upon to consider an appeal of this kind from a member. She said that members of the executive did express concern when it was proposed to call a management representative as a witness. She said that it was anticipated that this person might be asked to make comparisons between the work of Ms. Meaden and Ms. Montagnon, and they were not certain how the interests of Ms. Montagnon, who had not been invited to participate, should be protected under these circumstances. Ms. Crossman conceded that there was some anxiety expressed by members of the executive about how to proceed when the appellant had the benefit of legal advice and they did not. Her recollection was that the executive committee asked to have the hearing adjourned so that they could consult their own lawyer about the procedural aspects of the hearing.

However it came about, the hearing was adjourned at this point, and it was agreed that Ms. Meaden would make her submissions to the executive committee in written form.

Ms. Judy Junor, president of the Union and chairperson of the executive committee, subsequently sent a letter to Ms. Torrens indicating that the option was still open to have the hearing reconvened, and witnesses called, if Ms. Meaden would prefer that to making written submissions. Appended to this letter was a list of the documents which were available for review by the executive committee. In the letter, Ms. Junor also made the following assurance to Ms. Torrens:

> *Further to our discussions at the hearing of June 16, 1995, I am writing to clarify the option of reconvening the hearing.*
>
> *We want to ensure that your client, Christine Meaden, has been afforded the maximum opportunity to present her case using whatever witnesses you have deemed necessary. Therefore, the Executive Committee is available to you if you so desire.*
>
> *The situation as we left the hearing was to have you submit your remaining evidence in writing. If you choose to do so that is still acceptable to us.*
>
> *Regardless of how we proceed, the Executive Committee will be making its decision based on evidence submitted by yourself on Christine's behalf, and by Beverly Crossman in support of her decision. There will be no different access to the Executive Committee by Christine or Beverly.*
>
> *As agreed in our telephone conversation of June 21, 1995, I am enclosing a list of documents included in the red book the Executive Committee used at the hearing.*
>
> *I await your response for further action in this matter.*

Ms. Torrens wrote to Ms. Junor in a letter dated July 24, 1995, that Ms. Meaden had chosen to make her representations in written form. She enclosed copies of a submission some 36 pages in length.

This submission was considered at a further meeting of the executive committee on August 30, 1995, and it was decided that the decision made by Ms. Crossman should be upheld. The reasoning for this was outlined in the minutes, and Ms. Torrens was notified that a written decision would be sent to her on September 15, 1995. In the letter giving reasons for the decision, Ms. Junor stated the position of the Union on the interpretation of article 20.03 of the collective agreement, and referred to a number of arbitration awards. She concluded in the following terms:

> *Our task as an Executive Committee was not to judge the two candidates. The committee reviewed the Union's position on vacancy awarding. The committee agreed that we have established our position on this issue with supporting arbitration awards and that there will be no change in that position. It would compromise our objectives to proceed with a grievance on the grounds you wish to use.*

> *SUN defends all its members equally within the goals and objectives of the Union as a whole. Whether you have the most or least seniority within your facility or district does not influence that advocacy.*
>
> *It is beneficial to have dissenting positions brought forward so that we may continue to review our positions and ensure that they are current, fair and representative of our union philosophy.*

During the period in which Ms. Meaden was attempting to persuade the Union to pursue the grievance on her behalf, she also took her concerns to the main political forum available to members of the Union. At the annual meeting in April of 1995, she presented and spoke to a resolution supporting the continuation of article 20.03 of the collective agreement in its current terms. She argued, in support of the resolution, that the existing article gave nurses an opportunity to pursue a specialized career path, and that selection on the basis of the criteria listed in article 20.03(a) of the collective agreement reinforced the quality of nursing practice.

The resolution was defeated. At the same time, those present at the meeting passed the following resolution:

> *The SUN Negotiating Committee endeavour to negotiate that in all cases of promotion, transfer and filling of vacancies and postings, the seniority of the employee shall prevail.*

This Board has often referred to the historical origins of the duty of fair representation as an outgrowth of the assignment to trade unions of exclusive status as bargaining agents for groups of employees. In a decision in *Mary Banga v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93, the Board made the following comment, 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.*

The principles underlying the duty of fair representation were described by the Supreme Court of Canada as follows in *Canadian Merchant Services Guild v. Gagnon*, [1984] 84 C.L.L.C. ¶ 14,043 at 12,188:

> *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.*

Citing the British Columbia Labour Relations Board decision in *Rayonier Canada (B.C.) Ltd.*, (1975) 2 CLRBR, 196 at 201 and 202, the Court went on to encapsulate the meaning of the terms "arbitrary," "discriminatory" and "in bad faith" in the following way, at 12,185:

> *... 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 judgement about what to do after considering the various relevant and conflicting considerations.*

This Board also described those terms in a decision in *Glynna Ward v. Saskatchewan Union of Nurses*, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at 47:

> *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 judgement.*

Ms. Meaden argued that all three of these terms applied to the conduct of the Union in relation to her grievance. She said that representatives of the Union had never taken her grievance seriously, and that they had only been interested in defending the Union "philosophy" with respect to seniority. In this context, they had brushed off her concerns and showed no interest in examining the evidence and arguments she wished to put forward. Despite the fact that she was convinced, and remains convinced, that a grievance on her behalf would have been successful before an arbitration board, the Union refused to pursue it for her, or to abandon the position they had adopted from the beginning.

She argued that some of the treatment which was given to her smacked of bad faith, although she conceded that most of her interchange with representatives of the Union had been fairly civil. She said that the position taken by the Union was discriminatory against junior nurses with more ability and experience than more senior nurses. She also argued that the response to her by the Union was arbitrary because the representatives of the Union never made any effort to understand her position fully or to consider her circumstances in an objective way.

We have pointed out in a number of cases that, although the duty of fair representation was conceived to protect the interests of individual members of minority groups within a trade union, the duty does not require a trade union to put aside all other considerations in pursuit of those interests, or to achieve an unrealistic standard of competence or diligence. In *Glen Yearley v. Service Employees' International Union*, [1993] 4th Quarter Sask. Labour Rep. 57, LRB File Nos 055-92, 080-92 and 081-92, the Board made the following comment, at 61:

> *It is our view that the duty of fair representation does not require that a trade union comply absolutely with the wishes or demands of individual members. The union is entitled to assess those demands in the light of a variety of considerations relating to its obligation to represent the group of employees as a whole. These considerations may include the resources which are available to pursue grievances or to present cases to arbitration, and the effect which a particular strategy might have on other aspects of the negotiating process or on other employees. What is expected of the union is that it will act conscientiously, honestly, fairly and thoughtfully in the interest of its members, not that it will meet perfectly the expectations of each individual.*

A trade union certainly has a responsibility to represent individual members conscientiously, carefully and with even-handedness. A trade union also has a responsibility, however, to place the interests of individual members in the context of the overall interests of the employees they represent, and this often involves making choices which have negative implications for some employees in relation to others. In *John Barabe v. Communications, Energy and Paperworkers Union*, [1994] 3rd Quarter Sask. Labour Rep. 162, LRB File No. 116-94, the Board summarized as follows our overall role in assessing the performance by a trade union of the duty of fair representation, 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, 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.*

In the *Barabe* decision, *supra*, the Board went on to comment on the difficulties which face trade unions in making the choices which they must make, at 171:

> *Decisions which involve the competing interests of more than one union member are among the most difficult which trade unions have to make. In making such decisions, of which those concerning competition for promotions or appointments are perhaps the most frequent, there comes a point at which the union must choose to make a case for one of its members and not the others. As we have often said, the fact that a trade union chooses a course of action which is to the detriment of one of its members is not in itself a sign that the duty of fair representation has been breached.*

In that case, the Board found that the trade union had breached the duty of fair representation. We expressed this conclusion in the following terms, at 174:

> *In cases of this kind, as we have said, it is necessary for a trade union, after considering all of the factors which are relevant, to come to a decision as to which position best balances the interests of individual members with those of the bargaining unit as a whole. In our view, the Union failed to ascertain fundamental facts in this case and made the choice prematurely, without giving consideration to either the interests of Mr. Barabe, or the broader considerations of policy which might be affected by the decision. This failure to consider all of the relevant factors resulted in*

> *a decision which was arbitrary, and which was therefore in breach of the duty of the Union to represent Mr. Barabe fairly.*

In this instance, Ms. Meaden claimed that the representatives of the Union, notably Ms. Bray and Ms. Lavoie, had shown bad faith by failing to pay attention to her complaint when she first tried to bring it to their attention.

It seems clear that the Union representatives were somewhat offhand in their response to Ms. Meaden. Ms. Crossman conceded that it might have been desirable for them to have given Ms. Meaden a more prompt and clear response. She said that the Union has now introduced changes to ensure that the steps which a member must follow prior to making contact with the EROs in Regina, or with herself, are made clearer and that local officials are given clearer instructions.

Though the nature of the interchange between Ms. Meaden, on the one hand, and Ms. Bray and Ms. Lavoie, on the other, was perhaps regrettably curt and uninformative, we do not think the actions of the two local Union officials amounted to bad faith. In any case, the Union subsequently took steps to offer Ms. Meaden a full opportunity to state her arguments and bring forward any evidence she wished in support of that claim.

We do not think, either, that the response of the Union to the claim of Ms. Meaden can be characterized as discriminatory. As we have said, the duty of fair representation evolved, in part, to prevent trade union decision-making on a basis which draws invidious distinctions between individual members or groups of members. This does not mean, in our view, that a trade union cannot adopt positions of policy or principle which may have a negative impact on particular groups within the membership. On issues such as the question of the weight which is to be accorded to seniority, it is not improper for a trade union to adopt a consistent approach.

Adherence to such a policy might be of some concern to us if there were no mechanisms available to members through which they could initiate discussion and proposals for change. In this case, however, it is clear not only that such a vehicle exists, in the form of the annual general meeting, but that Ms. Meaden has availed herself of this forum as a means of challenging the current policy of the Union with respect to seniority.

Ms. Meaden argued that the annual general meeting is merely a soapbox for "union supporters." It is, however, open to all members to attend the annual meeting; there is no system of selecting delegates. This suggests that the Union is prepared to accommodate whatever discussion and resolutions any individual or dissident group wishes to bring forward, although persons who wish to bring forward such issues must obtain the support of a majority of other members in order to secure any change in established policy or practice. In this case, as we have noted, Ms. Meaden was unable to muster such support.

Ms. Meaden also alleged that the decision made by the Union not to pursue a grievance on her behalf was an arbitrary one, and that they never took her representations seriously enough to give conscientious consideration to her circumstances.

It is certainly true that the claim Ms. Meaden wished to make ran head-on into a well-entrenched position on seniority which seems to have had wide support among the membership. It cannot be denied that Ms. Meaden was faced with an uphill struggle to dislodge the approach which the Union had decided to take to questions involving the weight to be given to seniority.

This does not mean, however, that the decision of the Union to adhere to their fixed policy in this case can be described as arbitrary.

Ms. Meaden argued that the meaning of article 20.03 of the collective agreement is self-evident, that her superiority with respect to the criteria laid out in article 20.03(a) of the collective agreement was manifest, and that a refusal to pursue a grievance on her behalf represented a refusal on the part of the Union to abide by and respect the terms in the existing collective agreement.

We cannot agree that the meaning to be given to the terms of article 20.03 of the collective agreement is so clear that it was not open to the Union to make the decision they did in this case. The selection process contemplated under article 20.03 of the collective agreement clearly involves the assessment of a variety of factors. In the application, interpretation and adjudication of this article, it is to be expected that the Union would press for a version of the wording as sympathetic as possible to seniority as a determining factor, and that the Employer would attempt to have the balance shifted in favour of the criteria of experience, ability, performance and qualifications. In this instance, it must be assumed that

the Employer concluded that Ms. Montagnon and Ms. Meaden were "relatively equal" in relation to the criteria in article 20.03(a) of the collective agreement and that, therefore, seniority should be the deciding factor.

From the point of view of the Union, this represented the correct interpretation of the collective agreement as they understood it, and the selection was, furthermore, consistent with the general approach they favoured. It was not unreasonable for the Union to conclude that no violation of the collective agreement had occurred.

We should note that we think no significance can be attached to the fact that Ms. Meaden had been informed by representatives of the Employer that, in two previous cases where she had been a successful candidate for similar positions, the selection was made on the basis of her superiority under article 20.03 of the collective agreement. We know nothing about the comparisons which were made or the candidates who were considered in the case of those selections. In any case, the Union is not expected to monitor each of the multitude of selection procedures which take place; they can only react to those which are brought to their attention, or about which there seems to be something irregular.

Though Union officials at various stages in the process involving Ms. Meaden may have viewed it as unlikely that she would be successful in convincing them to go forward, we have concluded that they made all reasonable efforts to provide her with real opportunities to persuade them that her circumstances would justify a deviation from their normal approach to the seniority question.

In this respect, we do not think it was necessary for the Union to proceed simply because Ms. Meaden and her successive counsel estimated that a grievance could have been successful. Given the complexity and range of the jurisprudence which has arisen in connection with these issues, she may well have been right.

In our view, however, the Union is entitled to wide discretion in choosing the ground on which they choose to fight an employer, provided that they do it in accordance with the duty of fair representation. In this instance, the Union had concluded at a previous time that the interests of their membership as a whole were best served by an insistence on obtaining the greatest emphasis on seniority which could be gained within the terms of the existing collective agreement, and by making continuing attempts to alter

the terms of the agreement to reflect an even greater weight for seniority. By this means, they hoped to ensure that their members would have the widest range of job options, and the highest possible degree of mobility in the event of selections, transfers or layoffs.

As we have seen, this position could be expected to have a less favourable impact in general on employees with less seniority as other characteristics would be relatively devalued in accordance with this stance. It is, however, a position which the Union is entitled to take, and entitled to take consistently.

The Union decided here that they could not pursue a grievance on behalf of Ms. Meaden without abandoning principles which were long-established, which were supported, as far as the Union officials knew, by the majority of members of the Union, and which reflected what they considered to be the most important interests for the widest number of members. They permitted Ms. Meaden a number of opportunities to present her particular circumstances, and to persuade them that the grievance could be pursued in a way which would not jeopardize these principles. That she was unsuccessful in changing their minds does not signify to us that they made the decision in an arbitrary way, simply that having considered her situation, they did not see any reason to vary their position.

For the reasons we have given, we find that this application must be dismissed.

**SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 336, Applicant and SOUTH WEST CRISIS SERVICES INC., Respondent**

LRB File No. 196-96; January 21, 1997
Vice-Chairperson: Gwen Gray; Members: Gerry Caudle and Terry Verbeke

For the Applicant: Ted Koskie
For the Respondent: Collette Therrien-Heschel

**Employee - Status - Volunteer - Second-stage co-ordinator who is paid through reduction of rent and who is contractually obligated to provide services is an employee, not a volunteer.**

**Employee - Independent contractor - Second-stage housing co-ordinator whose work is directed and controlled by agency is not an independent contractor.**

***The Trade Union Act*, s. 2(f).**

## REASONS FOR DECISION

**Gwen Gray, Vice-Chairperson:** The Union applied to be certified for "all employees of the South West Crisis Services Inc. employed at Swift Current, Saskatchewan, except the Administrator and Administrative Assistant." Both parties agree that the unit as described is an appropriate bargaining unit. The only outstanding issue is the employment status of Yvonne Conroy, Genesis House Co-ordinator, who the Employer argues is not an employee but is a volunteer.

The South West Crisis Services Inc. is a non-profit corporation which provides telephone crisis intervention, temporary safe shelter for battered women and their children through a residential facility called Safe Shelter and long-term second stage housing for battered women through a facility known as Genesis House. The Corporation operates with funding from the Government of Saskatchewan and with funds raised at the local level.

Genesis House opened in June of 1993. It is a fourplex apartment building with special security systems designed to protect the security of women and children who reside in the House. Unlike Safe Shelter, women are permitted to stay in the House for up to one year. In return, the women pay rent of

$300/month and contribute to the maintenance of the common areas in accordance with a schedule set by the Genesis House Co-ordinator.

Ms. Conroy became Genesis House Co-ordinator and moved into the House in May of 1995. After she began to work in her position she was asked to sign a document entitled "Contract of Employment" dated November 1, 1995 to April 30, 1996, which appears to be a standard contract of employment for employees of the service. In return for acting as Genesis House Co-ordinator, Ms. Conroy receives a discount in her rent from the normal rent of $300/month to $150/month. She is expected to perform a variety of functions within Genesis House. These functions can be broadly broken down into two categories. Her first responsibilities are described in the position description as "[being] a supportive friend to women in house." This function includes providing support and assistance to women as required and acting as a resource person to women by referring them to appropriate outside agencies for assistance. Her second general area of responsibility is to ensure the upkeep, maintenance and security of the House. This involves regular cleaning duties, some of which are shared with other residents of the House, and monitoring of the maintenance in the House. Ms. Conroy attends meetings of staff at Safe House, but is excused from the meetings when discussions turn to confidential client matters. She is responsible to and reports to the Executive Director of the Employer.

Ms. Conroy is not expected to maintain regular hours and she is entitled to go on holidays and be absent from the House. In cross-examination, she acknowledged that she has not been prevented from seeking employment outside of the House.

Ms. Collette Therrien-Herschel testified that the position of Genesis House Co-ordinator was a "volunteer" position, similar to other volunteer positions within the Crisis Service. She testified that Ms. Conroy is not on payroll. She testified that Ms. Conroy was asked to sign an employment contract to incorporate her more as a team player and, in part, to satisfy Department of Social Services requirements. On cross-examination, Ms. Therrien-Herschel acknowledged that she had not told Ms. Conroy that her position was a volunteer position.

In *The Trade Union Act*, R.S.S. 1978, c. T-17, "employee" is defined in s. 2(f) as follows:

> *(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;*
>
> *(ii) Repealed.*
>
> *(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;*

The *Act* itself does not draw a distinction between "volunteer" and "employee" except in a general way. An employee is one who is "in the employ of an employer" or who is "engaged by another person to perform services" or who is an "independent contractor" in common law. The notion of "employee" clearly imports (1) a contract of service; (2) performance of service or work; and (3) remuneration. These elements characterize many relationships in our modern society, not all of which are subsumed under the title of employment. Nevertheless, these relationships differ from a "volunteer" relationship in that they are premised on a contractual obligation to provide a service in return for pay in one form or another. Generally, the services provided by volunteers, although they may be of considerable value to the institution, are performed without pay and without contractual or legal obligation.

Courts have drawn distinctions between volunteers and employees in a number of cases typically involving interpretations of employment standards statutes, such as *The Labour Standards Act*, R.S.S. 1978, c. L-1. In *Fenton v. Forensic Psychiatric Services Commission*, [1991] 5 W.W.R. 600, leave to appeal refused [1992] 1 S.C.R. vii, the British Columbia Court of Appeal held that patients at the Forensic Psychiatric Institute who performed work at the Institute and who were rewarded for their

work with pay were not "employees" within the meaning of the *Employment Standards Act*, S.B.C. 1980, c. 10. The Court looked to the substance of the relationship to determine if it fell within the Act. At 618-619, it concluded:

> *The test should be whether there is real economic benefit flowing to the institution from the work programs. That test is consistent with the test approved by the Ontario divisional court in Kaszuba v. Salvation Army Sheltered Workshop [(1983), 41 O.R.(2d) 316]. It was an application for review of the decision of a referee under the Employment Standards Act. All three judges approved the following from the decision of the referee [at p. 317]:*
>
> > *"If the substance of the relationship is one of rehabilitation, then the mischief which the Employment Standards Act has been designed to prevent is not present and a finding that there is no employment relationship within the meaning of the Employment Standards Act must be made."*
>
> . . .
>
> *I think this decision is helpful. Where the issue is whether the institution derives merely some economic benefit from the work as distinguished from real economic benefit, examination of the substance of the relationship may provide the answer. It may show which side of the line between rehabilitation and exploitation the program lies.*

In *Saskatoon Horses and The Handicapped Inc. v. Abdirashid Mohamed Nur*, [1987] S.J. No. 216 (Q.B.), the Court overturned a certificate issued by the Director of Labour Standards for wages owing to the respondent. The Court found that it was understood between the respondent and the corporation that he would work for the corporation as a volunteer unless he qualified for a Winter Works Program, in which event he would receive wages. The respondent did not qualify for the Program and the Court found, as a result, that he was a volunteer, not an "employee" and was therefore not entitled to payment of wages.

In the present case, Ms. Conroy had entered into a contract of employment with the corporation. She was expected to and did perform certain services for Genesis Home and its residents. In return, she received a rental subsidy of $150 per month. In these circumstances, the Board concludes that Ms. Conroy is not a volunteer but is an employee of the Employer. Both the substance of the relationship, which is one of providing needed services for clients of Genesis House, and the contractual trappings surrounding the position distinguish it from the *Fenton* case, *supra*, and the *Saskatoon Horses and The Handicapped Inc.* case, *supra*. There may be some question as to whether Ms. Conroy is an

independent contractor of the type to take her position outside the definition of employee in the *Act*. We conclude, however, that the Employer has effective control over her work in all respects and that she is an employee within the meaning of s. 2(f) of the *Act*.

The Board therefore holds that the Genesis House Co-ordinator falls within the bargaining unit proposed by the Union. Based on the support evidence filed, the Board directs that a vote be conducted to determine if a majority of the employees in the bargaining unit wish to be represented by the Union.

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

LRB File No. 053-96, January 22, 1997
Chairperson: Beth Bilson; Members: Hugh Wagner and Bob Cunningham

For the Applicant: Drew Plaxton
For the Respondent: Kevin Wilson

**Collective agreement - First contract arbitration - Board reviews report of Agent and determines basis for further intervention in deciding terms of first contract.**

**Practice and procedure - First collective agreement - Board decides proceedings should not be terminated on basis that union failed to bring three letters of understanding to attention of employer, Agent and Board.**

***The Trade Union Act*, s. 26.5**

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** The United Food and Commercial Workers, Local 1400, has been designated by this Board as the bargaining agent for a unit of employees of Madison Development Group Inc. at the Madison Inn in Prince Albert.

On March 7, 1996, the Union filed this application seeking the assistance of the Board with the conclusion of a first collective agreement between the parties pursuant to s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17.

The Board appointed an agent, Mr. Fred Cuddington, whose mandate was both to assist the parties in attempting to reach a collective agreement without further intervention from the Board and to make recommendations to the Board. Mr. Cuddington rendered his report on September 10, 1996.

The Employer requested an opportunity to make representations to the Board concerning the recommendations made by Mr. Cuddington. In a letter dated October 21, 1996, the Board laid out guidelines to indicate the scope of representations which would be entertained at such a hearing.

The Employer then raised certain preliminary objections which concerned the status of Mr. Cuddington and his report, and which also related to the capacity of the Board, and specifically the Chairperson, to hear further phases of the application. A separate hearing was scheduled on November 28, 1996, to consider these objections. The Board gave Reasons for dismissing these objections which are reported at *United Food and Commercial Workers, Local 1400 and Madison Development Group Inc.,* [1996] Sask. L.R.B.R. 469, LRB File No. 053-96. It may be noted that in the course of the hearing of those objections, the Board made further comments to counsel for the parties concerning the scope of the hearing which would be held.

On December 19, 1996, the Board heard the representations of the parties on the basis of the guidelines previously issued. These representations were confined to arguments concerning the status of the report submitted by Mr. Cuddington, and stating the reasons why the Board should or should not consider intervening with respect to the collective agreement as a whole or particular issues. These Reasons relate to those arguments.

At the outset of the hearing, counsel for the Employer raised a preliminary objection to further proceedings with respect to this application. The basis of his objection was that three letters of understanding had been brought to his attention which concerned the application or interpretation of provisions in a collective agreement between this Union and the PADC Development Group operating the Prince Albert Inn. The terms of this collective agreement have assumed considerable significance in relation to this application. A copy of the collective agreement was given to Mr. Cuddington in the course of his dealings with the parties, and a copy has also been filed with this Board. The three letters of understanding to which counsel for the Employer referred were not appended to any of the copies of the agreement which have been the subject of consideration at various stages of the proceedings, although two other letters of understanding formed part of both the photocopied and the printed versions of the agreement.

All three letters of understanding indicate an agreement to radically different approaches to the issues they address than are set out in the terms of the collective agreement. In all three cases, the provisions set out in the letters of understanding are more favourable to the employer than the provisions in the agreement itself.

Counsel for the Employer argued that the failure of the Union to bring these letters of understanding to the attention of Mr. Cuddington or to the Board represented a serious breach of the obligation on the part of the Union to deal with the Employer in a truthful and trustworthy manner. He argued that the application for first contract arbitration should be dismissed on this basis.

The Board heard evidence from Mr. Bill Humeny and Ms. Lise McKenna, both of whom are members of the Employer bargaining committee, and also from Mr. Don Logan and Mr. Glenn Stewart, who represented the Union in negotiations. All four witnesses gave evidence that the morning of the hearing was the first time they had seen the three letters of understanding.

We are satisfied that neither Mr. Stewart nor Mr. Logan knew of the existence of the letters of understanding or knowingly withheld them in the course of dealing with Mr. Cuddington or the Board.

Generally, of course, one would expect a trade union to be aware of all of the terms and conditions negotiated with employers who are the subject of certification orders held by that union. On the other hand, letters of understanding often represent interim agreements, resolutions to specific problems, or agreements which are more informal than full collective agreements. For anyone who has had experience in a bargaining relationship, it would not necessarily come as a surprise that particular letters of understanding would not be readily recalled or religiously monitored by union officials or management representatives.

It should be noted, as well, that the certification Order covering the Prince Albert Inn was the subject of a successful application for rescission, and the collective agreement in question is not subject to ongoing interpretation or reference. In addition, it should be pointed out that neither Mr. Logan nor Mr. Stewart have had any direct responsibility in regard to the relationship or the collective agreement at the Prince Albert Inn.

We have concluded that, however unfortunate this confusion may have been, the fact that the letters of understanding did not form part of the documents put before Mr. Cuddington or the Board does not represent any sharp practice or intention to mislead on the part of the Union representatives who have been involved in this application.

Section 26.5 of the *Act* was part of a set of amendments to the legislation which were proclaimed on October 28, 1994. Since that time a number of applications have been filed pursuant to this section.

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 summarized the general approach we proposed to take to cases of this kind. The Board reviewed the origins of first contract arbitration, the nature of statutory provisions in other jurisdictions, and the jurisprudence and academic commentary in which the character and scope of first contract arbitration provisions have been discussed. The Board outlined as follows general conclusions which could be reached from such a review, at 47:

> *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 acknowledgement 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.*

In reviewing the experience in other jurisdictions, and in interpreting s. 26.5 of the *Act* itself, the Board concluded that in making first contract arbitration available, the legislature did not intend that it should supplant collective bargaining as the primary medium of relationships between trade unions and employers, even in the early days of those relationships. The Board made the following comment about the place of first contract intervention, at 49:

> *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 ss. 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 went on to state our general expectations, at 49:

> *In reference to a first contract arbitration conducted either by the Board itself or by an arbitrator, ss. 26.5(6) and 26.5(7) refer to the setting of "any term or terms" or 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 26.5(7) which would rule this out.*

In a decision in *Yarrow Lodge Ltd. v. Hospital Employees' Union; Bevan Lodge Corporation v. Hospital Employees' Union; Louisiana-Pacific Canada Ltd. v. Communications, Energy and Paperworkers Union of Canada* (1993), 21 C.L.R.B.R. (2d) 1, the British Columbia Labour Relations Board made the following related comment, at 47:

> *It is the fundamental collective agreement rights, such as just cause provisions, a fair and accessible grievance procedure, adequate seniority and promotion clauses, layoff and recall rights, union security clauses (the statutory minimum being a union shop), which are critical in the establishment of the goals of collective bargaining and which underlie the values of voice, dignity and security. In our view, arbitrators in this province have long recognized this fact. The focus of first collective agreements should be on establishing these rights in preference to other issues. Further, the type of provisions to be incorporated should be sensitive to the sector or industry in which the first collective agreement is to operate.*

In the earlier comments made by the Board, we made it clear that we do not view first contract arbitration as a mechanism to provide a means of escape from the difficulties of vigorous collective bargaining, or a means of achieving a level of terms and conditions in a first contract which exceeds what one might expect as the result of bargaining in a new relationship. We have stated that we see first contract arbitration as a way of supporting collective bargaining between the parties, not replacing it. In this respect, we have also said that we would be more likely to intervene in connection with the kinds of issues which are tied directly to the strength of the collective bargaining relationship and the capacity of a trade union to function effectively as the representative of employees in this relationship.

In this context, counsel for the Employer argued that it is neither necessary nor appropriate for the Board to intervene in this case. He argued that circumstances have changed considerably since earlier findings by the Board that the Employer was failing or refusing to bargain, and even since the filing of this application. He said that the parties have reached agreement on a large number of issues, and that they should be given an opportunity to reach a final agreement on the issues which remain.

In any event, he argued that the parties have essentially reached agreement on all of the issues which might be of concern to the Board, such as union security and a grievance procedure, and that the Board is not in the best position to deal with monetary issues or questions of workplace management.

The basic position of the Union, on the other hand, is that the collective bargaining relationship continues to be a dysfunctional one. Counsel argued that if the rationale for first contract arbitration is that the intervention of a third party is sometimes necessary to make possible the development of a healthy collective bargaining relationship, this situation justifies the imposition of a collective agreement by the Board.

The Union has taken the position that the draft collective agreement contained in the report of Mr. Cuddington would be acceptable. If, on the other hand, the Board decides to consider the individual provisions of the draft agreement, the Union would like to contest some of the provisions which Mr. Cuddington recommended.

We do not wish to review in detail the troubled history of the relationship between the Union and the Employer, which is, in any case, well documented in earlier decisions of the Board.

The Board has commented many times that we are reluctant to intervene directly in collective bargaining, given that it is the vigour of collective bargaining which we understand to be the basic objective of the *Act*. As a general proposition, the parties are in the best position to arrive at the bargain which will be most satisfactory in the long run, and which best represents the balance of power and the preferences of the parties.

The existence of a provision which permits our intervention in the conclusion of a first contract, however, indicates that we must be prepared to consider intervention in the appropriate circumstances. We cannot agree with counsel for the Employer that the circumstances in which these parties find themselves at the present time are such that it can be safely left to the parties to conclude a collective agreement without further third party involvement.

At the same time, it has been the case throughout this process, and continues to be the case, that the parties have the option of reaching a mutually acceptable agreement. If they are able to do this prior to the imposition of an agreement by the Board, we would regard this as a positive outcome.

It is not necessary here to review our earlier assessments of the character of this bargaining relationship. It is sufficient to record that this history does not lead us to be confident that the parties are able, without assistance, to conclude an agreement in a timely and constructive fashion.

We have also reached the conclusion that the rationale and the principles which underlie the application of a first contract arbitration provision do not necessarily entail the imposition of every term which one might find in a collective agreement between parties who have had a healthy bargaining relationship for some time.

In the *Yarrow Lodge* decision, *supra*, the British Columbia Labour Relations Board concluded, on the basis of their review of jurisprudence and commentary related to first contract arbitration, that their approach to intervention in first contracts should be guided by two basic considerations. The first of these was what they termed "replication theory," the idea that a labour relations board should be trying to simulate what the parties themselves might have achieved had they reached a collective agreement through normal collective bargaining.

The second consideration the British Columbia Board termed "what is fair and reasonable in the circumstances". Though they did not articulate it in quite these terms, it is our view that the inclusion of this criterion in approaching the imposition of a first collective agreement represents an acknowledgement that third party intervention in the conclusion of a first agreement is a deviation from normal practice. It is unrealistic to suppose that a labour relations board, a mediator or an interest arbitrator will be able to reproduce exactly what might hypothetically have resulted from the give and take, the wear and tear of the bargaining process. Since the foundation for first contract arbitration is a relationship in which it has proven impossible for some reason to reach agreement by the usual means, it stands to reason that a third party must have standards for deciding what should be included in an imposed agreement in addition to speculation about what bargain the parties themselves might have struck.

As we have noted, our focus in first contract arbitration is on the construction of a first agreement which will establish a framework to support the development of a healthy collective bargaining relationship. In the passages which we quoted earlier from the *Prairie Micro-Tech* decision, *supra*, we identified such issues as union security and a grievance procedure as being elements we would regard as basic to the protection of the status of the trade union and to the formation of a sound bargaining relationship.

We do not, however, share the view expressed by counsel for the Employer that a clean line can be drawn between provisions in a collective agreement which deal with the protection and administration of the collective bargaining process, on the one hand, and those which deal with monetary issues and workplace management, on the other. We are willing to concede that first contract arbitration may not in general be an appropriate way of settling detailed matters such as scheduling of work, regulation of dress or provision of fringe benefits. We do not accept that a corollary of this is that all financial matters or matters of workplace administration are none of our affair. Insofar as certain of these issues have the potential to support or to undermine the collective bargaining relationship in a significant way, we may think it appropriate to make our determinations on such issues part of the general framework which we choose to impose on the parties.

We have appended to these Reasons as Schedule "A" those collective agreement provisions which we understand the parties have agreed to. We invite the parties to bring to our attention any errors which may have been made in recording these provisions. In addition, we propose to dispose of a number of other issues, on which we will comment briefly. In making these comments, we will refer to the provisions as they were numbered in the draft collective agreement submitted by Mr. Cuddington.

**Article 4.01**

In the case of this clause, we propose to include in the agreement the wording recommended by Mr. Cuddington.

**Article 5.02 and Appendix "B"**

Our view is that provisions concerned with union security are exceedingly important in setting the stage for a viable collective bargaining relationship. The parties have not yet reached any agreement on this particular clause, and we propose to entertain their arguments at a further hearing.

**Article 5.04(a)**

We propose that the following clause, the wording of which is modelled on s. 11(1)(d) of the *Act*, be included as Article 5.04(a):

> *The Employer shall permit duly authorized representatives of the Union to negotiate with representatives of the Employer during working hours for the settlement of disputes and grievances of employees covered by this collective agreement.*

**Articles 7.01(b), 8.02 and 8.03**

It is our view that the establishment of a seniority system is one of the most important distinguishing features of ordinary collective bargaining relationships. In this case, the parties have agreed that seniority should be a determining factor in making certain kinds of decisions. They have not yet agreed, however, on the benchmark which should be used to establish the seniority of employees. The Employer wishes to have seniority calculated in terms of the number of hours worked, while the Union proposes that seniority should be calculated on the basis of the start date of an employee. We will also entertain argument from the parties concerning their respective proposals.

**Article 14.01**

It is important, in our opinion, that employees be entitled to take part in the affairs of their trade union, and it is therefore necessary to contemplate what union leave should be allowed to employees. We will allow the parties to present to us their proposals on this issue.

**Article 17.02**

In many cases, collective agreements contain provisions of this kind, which incorporate the legal proposition that a collective agreement cannot derogate from the terms of regulatory statutes. We would propose to include a provision which provides a mechanism for disputes arising over the

relationship between terms and conditions of employment for the employees covered by this agreement, and relevant legislative provisions.

In addition, since we have decided not to intervene in connection with a number of matters which were canvassed by the parties during negotiations, we will include a clause which will make it clear that we would expect the terms and conditions which cover employees at the present time to be observed during the term of the collective agreement. The clause will also make it clear that the question of what constitute these terms and conditions of employment is an arbitrable question.

Article 17.02 will read as follows:

> *a) Any dispute over whether the terms and conditions contained in this agreement, or the provisions of The Labour Standards Act or other Legislation, should prevail, may be resolved through the grievance and arbitration procedure set out in Articles 19 and 20 of this agreement.*
>
> *b) All terms and conditions of employment which, at the time this agreement comes into effect, apply to employees covered by this agreement, shall continue to apply during the term of this agreement, except as modified by this agreement. The question of whether any particular term or condition falls within this article may be determined through the grievance procedure set out in Article 19, and the arbitration procedure set out in Article 20.*

**Article 18.02**

This clause will be included in the agreement as follows:

> *Job classifications are noted by department in Appendix "A" hereto, and form part of this collective agreement.*

**Article 19.04**

We have also indicated the central place of a grievance procedure in a collective bargaining relationship which is to have any hope of reaching maturity. This article deals with one aspect of this procedure, and we will entertain argument from the parties concerning their views on this point.

**Article 20.04**

It is usual in collective agreements to provide for a means of selecting a chairperson for an arbitration board in the event the parties are unable to reach agreement. Since the parties are not in agreement on this point, we propose the inclusion of one of the mechanisms provided for in the *Act* in the case of a collective agreement which does not contain a detailed grievance and arbitration procedure. This clause will read as follows:

> *In the event of the failure of the Union and the Employer to agree on a Chair, the Minister of Labour shall be requested to make an appointment.*

**Article 20.05**

This clause will be included in the collective agreement in the form contained in the report of Mr. Cuddington. In this form, it is in accordance with s. 25(3) of the *Act*.

**Article 21.01**

In the decision of this Board in the *Prairie Micro-Tech* decision, *supra*, we reiterated the reluctance of the Board to become involved in the determination of monetary issues. At that time, however, we also indicated that we could imagine circumstances in which the inability of the parties to come to agreement on wage rates would pose a sufficient threat to the continuation of the bargaining relationship that the Board would feel compelled to intervene. We have concluded that this is a situation in which intervention is warranted.

We will therefore permit the parties to make representations concerning the appropriate wage scale which should be included in the collective agreement.

We will make the determination as to the scale of wages to be included in the agreement on the basis of final offer selection. In this connection, we would expect each party to present the Board with a single proposal for a schedule of wages to cover an agreement two years in length, although each party may also present evidence and argument in support of this proposal.

In addition to the actual wage scale, we invite the parties to comment on the following matters:

- whether there should be any retroactivity or signing bonus included as part of the payment of wages.

- how the current wages actually paid to employees relate to the wage scale proposed by the parties, and how each party proposes to deal with any anomalies which may exist.

**Article 22.01**

We would again propose to include a version of this clause based on the wording in the *Act*:

> *a) The Employer shall not cause a lock-out during the term of this agreement.*
>
> *b) No employee covered by this agreement shall strike, and neither any employee nor the Union shall declare, authorize or participate in a strike, or counsel a strike to be effective, during the term of this agreement.*

**Article 24**

The actual dates of the term of the agreement will be determined when the Board disposes of the issues argued by the parties at the time of the next hearing. The length of that term, however, will be two years, in accordance with our understanding of the meaning of s. 26.5(8).

It will be noted that, with respect to certain issues, the Board envisions an agreement which would set the terms and conditions of employment in accordance either with applicable legislation or with currently existing practice. If the Union would prefer, on any of these matters, to have included in the agreement the final offer of the Employer, we invite them to indicate this to the Board.

Schedule "A" - Collective Agreement Provisions

THIS AGREEMENT MADE THIS DAY OF , 1997

BETWEEN

**MADISON DEVELOPMENT GROUP INC.**

operating as the Madison Inn, in the City of Prince Albert
in the Province of Saskatchewan

Hereinafter referred to as the "Employer"

AND

**UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1400**

Hereinafter referred to as the "Union"

## ARTICLE 1 - PURPOSE

1.01 It is the purpose of this Agreement, in recognizing a common interest between the Employer and the Union in promoting the utmost co-operation and friendly spirit between the Employer and it's employees, to set forth conditions covering rates of pay, hours of work and conditions of employment, which have been agreed to through collective bargaining, to be observed between the parties. This Agreement shall provide a procedure for prompt and equitable adjustment of grievances, as defined in this Agreement, in order that there will be no impeding of work, work stoppages or strikes, or other interferences with the Employer's operations or their facilities during the life of this Agreement.

1.02 To these ends, this Agreement is signed in good faith by the two parties.

## ARTICLE 2 - SCOPE

2.01 This Agreement shall cover:

All employees of Madison Development Group Inc., employed at its business know as the Madison Inn, in the City of Prince Albert in the Province of Saskatchewan, except the General Manager, Assistant General Manager, Bar Manager, Restaurant Manager, Kitchen Manager and Security Manager.

## ARTICLE 3 - CLARIFICATION OF TERMS

3.01 In this Agreement, whenever the word "she", "her" or "hers", or the word "he", "him" or "his" appear, it shall be construed as any employee, male or female, where the context so requires.

3.02 The word "employee" or "employees" shall mean any person or persons covered by this Agreement.

3.03 The term "Agreement" shall mean this Collective Agreement.

3.04 "Full-time employee" means a person who is normally scheduled to work between 37.5 to 40 hours per week.

3.05 "Part-time employee" is an employee who is normally scheduled to work less than full-time.

3.06 The term "probationary employee" shall mean an employee as defined in Article 7 of this Agreement.

## ARTICLE 4 - RECOGNITION

4.01 *Not agreed upon*

4.02 The Union recognizes that the Employer retains the sole and exclusive right to manage its' business as it sees fit in all respects, except to the extent abridged by a provision of this Agreement.

## ARTICLE 5 - UNION SECURITY

5.01 Every employee who is now or hereafter becomes a member of the Union shall maintain his membership in the Union as a condition of his employment, and every new employee whose employment commences hereafter, shall, within thirty (30) days after the commencement of his employment, apply for and maintain membership in the Union, and maintain membership in the Union as a condition of his employment provided that any employee in the appropriate bargaining unit who is not required to maintain his membership or apply for and maintain his membership in the Union, shall, as a condition of his employment, tender to the union the periodic dues uniformly required to be paid by the members of the Union.

5.02 *Not agreed upon*

5.03 (a) The Employer and the Union agree that neither of them will discriminate against an employee covered by this Agreement because of the employee's membership or non-membership in the Union, or because of his lawful activity or lack of activity in or for the Union, or for reporting an alleged violation of this agreement to the Union, or for exercising any right under this Agreement.

(b) The parties further agree that there shall be no discrimination against an employee on the basis of any reason prohibited by the Saskatchewan Human Rights Code.

5.04 (a) *Not agreed upon*

(b) The Shop Steward, or in his absence another employee in the bargaining unit chosen by the employee concerned, may, at the request of the employee, be present when that employee is given a written reprimand, suspension or is discharged. The Employer will inform the employee of his right to have such person present.

5.05 Meetings between the parties to discuss grievances will be held on the Employer's premises at a time mutually agreeable to the parties. Duly appointed employee Union officers, committee members and the griever shall not suffer any loss of regular straight time pay for time spent in attending grievance meetings with Employer's officials.

5.06 The Employer will provide a copy of all written discipline to the affected employee, the receipt of which will be acknowledged by the employee's signature. This signature shall not indicate agreement with such discipline.

## ARTICLE 6 - UNION DUES CHECK-OFF

6.01 Upon receipt of a written request from any employee, the Employer shall deduct and pay in periodic payments out of the wages due to the employee, to the person designated by the Union to receive the same, the Union dues, initiation fees and assessments regularly required of all members, and the Employer shall furnish to the Union a written list of the employees from whom such deductions have been made. The Union dues, initiation fees, and assessment deduction, accompanied by the statement of deductions from individuals, shall be remitted to the Union within twenty (20) calendar days of the day on which the aforementioned deductions are made.

This statement shall be accompanied by a list of new employees hired and employees terminated since the last statement.

6.02 The Union will provide the Employer as much notice as possible of any changes of the amount to be deducted.

6.03 The Employer shall include yearly Union dues on T-4 slips for income tax purposes.

## ARTICLE 7 - SENIORITY

7.01 (a) Seniority is defined as the length of an employee's employment with the Employer, and shall include service with the Employer prior to certification of the Union.

(b) *Not agreed upon*

(c) Seniority shall operate on a Department basis within the bargaining unit unless specifically provided otherwise elsewhere in this Agreement.

7.02 (a) The Employer shall maintain a seniority list showing the name, classification and seniority date in their department and the hotel.

(b) An up to date seniority list shall be supplied to the Union and posted on the bulletin board in March and September of each year.

(c) The list supplied to the Union will include the address and telephone number of each employee.

7.03 A newly hired employee shall be on probation until they have completed fifty (50) days of actual work without a break in continuous employment. After completion of the probationary period, seniority shall be established effective from the last date of hire. Probationary employees are employed at the sole discretion of the Employer and if they are dismissed it is agreed that it shall be deemed to be for just cause.

7.04 An employee shall lose seniority and the employment relationship shall end in the event:

(a) The employee is discharged for just cause and not reinstated.

(b) The employee leaves of his own accord or retires.

(c) The employee fails to report to work within seven (7) calendar days after receiving notice in person or by registered mail of recall from layoff. Each employee shall keep the Employer advised of his current address and phone number.

(d) An employee accepts a position outside the bargaining unit for a period in excess of three (3) months, except in cases of temporary relief. Temporary relief cannot exceed thirty-six (36) weeks.

(e) An employee has been laid off for a period in excess of nine (9) months.

(f) The employee does not do any work during any forty-five (45) day period, unless such absence from work is a result of sickness, disability, accident or leave of absence granted in accordance with this Agreement, or other leave approved, in writing, by the Employer.

7.05 (a) No employee shall be assigned a position outside the bargaining unit unless the employees has consented to such.

(b) Except in cases of temporary relief, if an employee accepts a position outside the bargaining unit the employee shall retain seniority for a period of three (3) months during which time the employee can return to his former position and pay range in the bargaining unit, or the Employer can return the employee to the employee's former position and pay range in the bargaining unit. Temporary relief cannot exceed thirty-six (36) weeks.

## ARTICLE 8 - PROMOTIONS AND VACANCIES

8.01 All vacancies of greater than thirty (30) days shall be posted for a minimum of five (5) days. All employees desirous of a posted position shall apply in writing to the appropriate person within the expiry date of the posting.

8.02 *Not agreed upon*

8.03 *Not agreed upon*

## ARTICLE 9 - LAYOFFS AND RECALLS

9.01 A layoff shall be defined as any reduction in the work force in which it is decided that the number of employees required to perform the work in any department will be reduced.

9.02 (a) In the event of layoff, employee(s) shall be laid off from their department in the reverse order of seniority provided that those to be retained on the basis of seniority have the ability and qualifications to perform the remaining work in an efficient manner.

(b) A laid off employee may bump an employee with less seniority outside the department provided the employee exercising this right has the ability and qualifications to perform the work in an efficient manner.

9.03 Employees shall be recalled to work in their department in the inverse order of their layoff provided that those to be recalled on the basis of seniority have the ability and qualifications to perform the work in an efficient manner.

9.04 (a) New employees shall not be hired until those laid off have been given an opportunity to be recalled provided they have the ability and qualifications to perform the work in an efficient manner.

(b) *Not agreed upon*

9.05 Except for just cause, other that shortage of work, the Employer shall not discharge or lay off any employee who has been in its service for at least three (3) months without giving that employee at least:

(a) One (1) week written notice, or pay in lieu of notice, if his period of employment is less than one (1) year.

(b) Two (2) weeks written notice, or pay in lieu of notice, if his period of employment is one (1) year or more but less than three (3) years.

(c) Four (4) weeks written notice, or pay in lieu of notice, if his period of employment is three (3) years or more but less than five (5) years.

(d) Six (6) weeks written notice, or pay in lieu of notice, if his period of employment is five (5) years or more but less than ten (10) years.

(e) Eight (8) weeks written notice, or pay in lieu of notice, if his period of employment is ten (10) years or more.

**ARTICLE 10 - HOURS OF WORK**

10.01 The normal daily hours shall consist of eight (8) hours of work and the normal weekly hours shall consist of forty (40) hours, Sunday to Saturday, inclusive.

10.02 *Not agreed upon*

10.03 Where work is intermittent in character, split shift assignments may be established containing no more than two (2) tours of duty within a twelve (12) hour period. Split shifts shall be used as little as possible.

10.04 (a) *Not agreed upon*

(b) *Not agreed upon*

(c) *Not agreed upon*

10.05 (a) *Not agreed upon*

(b) *Not agreed upon*

10.06 *Not agreed upon*

10.07 Employees shall record their hours of work in the form and manner required by the Employer.

10.08 *Not agreed upon*

10.09 (a) Employees shall have the right to restrict their availability by written notification to the Employer.

(b) Every employee shall be required to fill out a Declaration of Availability/Restriction form (Appendix "D") before commencing work. Opportunity to make changes to this form arise four (4) times a year. Two (2) times on the following dates: January 1st, 19XX and July 2nd, 19XX and two (2) times during the calendar year at the option of the employee [..... not agreed upon]. No changes to availability shall be permitted except on the given dates.

(c) *Not agreed upon*

10.10 (a) The calling in of part-time employees shall be in order of seniority within the classification within the department [ .... not agreed upon].

(b) Restricted employees may be scheduled for less hours than allowed by their seniority if their restrictions prevent the scheduling of sufficient hours or if they restrict themselves from working at busy times.

(c) Full-time employees will be scheduled 37.5 to 40 hours per week provided the hours are available.

10.11 *Not agreed upon*

10.12 *Not agreed upon*

**ARTICLE 11 - OVERTIME**

11.01 All authorized time worked in excess of forty (40) hours per week or eight (8) hours per day shall be overtime.

11.02 All overtime hours shall be paid at the rate of time and one-half (1 1/2). Employees will work only overtime authorized by the employee's out of scope supervisor.

11.03 *Not agreed upon*

11.04 There shall be a minimum of eight (8) hours rest within a twenty-four (24) hour period except in the case of emergency.

11.05 *Not agreed upon*

11.06 *Not agreed upon*

## ARTICLE 12 - ANNUAL VACATIONS

12.01 All employees shall receive annual vacation with the appropriate pay relating to the vacation time taken based upon the following:

(a) After one (1) year of employment and each year thereafter, until the completion of nine (9) years of employment, three (3) weeks' vacation with pay at 3/52nds of the employee's earnings in the year prior to the vacation.

(b) After nine (9) years of employment, and each year thereafter, four (4) weeks' of vacation with pay at 4/52nds of the employee's earning in the year prior to the vacation.

12.02 The Employer reserves the right to limit the number of employees allowed to be on vacation from any department at any one time.

12.03 If a paid holiday falls or is observed during an employee's vacation period, the vacation shall be extended by one (1) working day, or the employee can receive another day off, with pay, at a time mutually agreed upon between the Employer and the employee.

12.04 (a) Vacation schedule forms shall be posted by March 1st of each year. Employees shall mark in their requested vacation times by April 1st. In case of conflict, as to selection of vacations, the senior employee(s) will be given priority over junior employees.

(b) Vacation schedules shall be finalized and posted by May 1st of each year, and shall not be changed without the consent of the affected employee(s).

12.05 When employment of an employee terminates, the Employer shall pay, in addition to all other amounts due the employee, all vacation pay earned but not received.

12.06 Wherever practical, employees shall have the right to schedule vacation continuous with their days off.

12.07 Vacation pay shall be paid to employees through the regular payroll process, at the written request of the employee. Payment will be made on the next regular payroll following the request, by separate cheque.

## ARTICLE 13 - HOLIDAYS

13.01 The following shall be recognized as holidays:

| | |
|---|---|
| New Years Day | Saskatchewan Day |
| Good Friday | Thanksgiving Day |

Victoria Day — Remembrance Day

Canada Day — Christmas Day
Labour Day

and any other day declared or proclaimed as a holiday by the Federal or Provincial Government [ .... *not agreed upon.*]

13.02 *Not agreed upon*

13.03 When one (1) holiday falls in a week, overtime shall apply after thirty-two (32) hours in that week, exclusive of any hours worked on the statutory holiday.

13.04 *Not agreed upon*

## ARTICLE 14 - LEAVE OF ABSENCE

14.01 *Not agreed upon*

14.02 *Not agreed upon*

14.03 Employees shall be granted Maternity, Parental and Adoption leave in accordance with applicable Labour Legislation.

14.04 *Not agreed upon*

14.05 The Employer may grant leave of absence without pay to any employee. The granting of such leave of absence shall be within the discretion of the Employer [ .... *not agreed upon.*] The Union will be advised of any such leave in excess of thirty (30) days.

## ARTICLE 15 - BENEFITS

15.01 *Not agreed upon*

## ARTICLE 16 - HEALTH AND SAFETY

16.01 The Union and the Employer shall comply with the requirements of the *Occupational Health and Safety Act*.

16.02 Time spent by members of the Committee during Health and Safety meetings shall be considered as time worked and shall be paid for as such.

16.03 The Employer shall provide a first aid kit at the place of employment and shall keep the same properly supplied.

## ARTICLE 17 - GENERAL

17.01 The Employer shall provide sufficient bulletin boards, which shall be placed so that all employees will have access to them and upon which the Union shall have the right to post notices of meetings and other Union events. Other material may be posted only with the prior approval of the Employer.

17.02 *Not agreed upon*

17.03 If an employee is short in any, or all, cash floats for which that employee has sole access, this shortage shall be the responsibility of the employee. With reference to the above, both the Employer and the employee recognize that as part of the inventory control system, employees and Management are required to accurately monitor and record both promotional inventory and inventory spillage. As such, employees will accurately record promotional items as promotions and spillage and breakage of inventory as spillage.

17.04 *Not agreed upon*

17.05 *Not agreed upon*

17.06 *Not agreed upon*

17.07 *Not agreed upon*

17.08 *Not agreed upon*

17.09 *Not agreed upon*

17.10 *Not agreed upon*

## ARTICLE 18 - JOB CLASSIFICATIONS

18.01 *Not agreed upon*

18.02 Job classifications are noted by department in Appendix "A" hereto.

## ARTICLE 19 - GRIEVANCE PROCEDURE

19.01 It is mutually agreed that it is the spirit and intent of this Agreement to process and adjust (where appropriate) as quickly as possible, grievances arising from the application, administration, interpretation or alleged violation of this Agreement.

19.02 "Grievance" means an alleged difference over the application, administration, interpretation or alleged violation of this Agreement.

19.03 In order to be considered, a grievance shall be submitted no later than ten (10) days after the circumstances which gave rise to the grievance.

19.04 *Not agreed upon*

19.05 The procedure for processing grievances shall be as follows:

Step 1:

The employee, or shop steward, or Union Representative, shall submit the written grievance to his Department Manager. The Department Manager, or his designee, shall give his reply within ten (10) days of receipt of the grievance.

Step 2:

If the reply of the Department Manager or his designee does not resolve the grievance, the written grievance shall be submitted to the General Manager or his designee within 10 days of the giving of the reply at Step 1. The General Manager or his designee shall give his reply within 10 days after the receipt of the grievance.

Step 3:

In the event the Employer's reply at Step 2 does not resolve the grievance, the grievance may, within 10 days following the giving of the reply at Step 2, but not thereafter, be referred to arbitration as set out in Article 20 of this Agreement.

19.06 Any grievance concerning the discharge of an employee, shall be submitted in writing to the General Manager or his designee at Step 2 within ten (10) days of the discharge.

19.07 The limits are exclusive of Saturdays, Sundays and Statutory Holidays.

19.08 Employees who have been duly elected or appointed to appropriate positions with the Union and the grievor shall suffer no loss of straight time pay while attending grievance meetings with the Employer. It is agreed that not more than one (1) employee Union Officer and the griever shall attend such meetings at the Employer's expense.

19.09 *Not agreed upon*

**ARTICLE 20 - ARBITRATION**

20.01 A party referring the grievance to arbitration shall give notice of referral to arbitration in writing within the time limit set forth in Article 19 of this Agreement. The notice shall also contain the name and address of the referring party's nominee to the Board.

20.02 Within ten (10) days of receipt of the notice referred to in 20.01 herein, the other party shall reply in writing informing the party referring the grievance to arbitration of the name and address of its nominee to a Board of Arbitration.

20.03 The parties shall agree upon the selection and appointment of a Chairperson for the Board of Arbitration within 10 days from the appointment of the second of the nominees to the Board.

20.04 *Not agreed upon*

20.05 Where the Board of Arbitration determines that an employee has been improperly discharged [ .... *not agreed upon*], the Board may substitute such other penalty for the discharge or discipline as the Board deems just and reasonable in the circumstances.

20.06 The Board of Arbitration shall sit to the grievance within thirty (30) days after the appointment of the last of its members and shall render a decision within thirty (30) days after the conclusion of its hearings.

20.07 *Not agreed upon*

20.08 Each party shall pay the fees and expenses of its nominee to a Board of Arbitration. Each party shall pay one-half (50%) of the fees and expenses of the Chairperson of the Board of Arbitration.

## ARTICLE 24 - PAYMENT OF WAGES AND ALLOWANCES

21.01 The schedule of wage rates for all job classifications shall be provided in Appendix "A" annexed hereto and forming part of this agreement. [*Actual rates not agreed upon.*]

21.02 The Employer shall issue pay cheques to each employee no later than the 20th of each month, for all pay due to employee as of the 15th of that month, and again of the 5th of each month for all pay due the employee as of the last day of the previous month. An itemized statement indicating rate of pay, overtime, specific deductions, etc., shall accompany each cheque. Where pay day falls on a Saturday, Sunday, or Statutory Holiday pay cheques will be issued by noon of the preceding banking day.

21.03 a) When an employee temporarily relieves in and/or performs the principal duties of a higher paying classification for a period of one (1) shift or more, the employee shall receive the rate for the job.

*Not agreed upon*

21.04 *Not agreed upon*

21.05 (a) When new classifications are established, the Employer will establish a rate (if one does not already exist) and the Union reserves the right to grieve the rate if

it believes the rate is unsuitable following the grievance procedure set out in this Collective Bargaining Agreement. The rates for new classifications established will be in conformity with rates of pay of similar kind or class within this Agreement.

(b) The parties acknowledge that the duties and responsibilities of the job classifications shall be determined by the Employer, and where the duties and/or responsibilities of a position are changed substantially during the term of this Collective Bargaining Agreement, it may be considered a new classification and Article 21.05(a) will apply.

**ARTICLE 22 - NO STRIKES - NO LOCKOUTS**

22.01 *Not agreed upon*

**ARTICLE 23 - MODE OF DRESS**

23.01 *Not agreed upon*

23.02 *Not agreed upon*

**ARTICLE 24 - DURATION OF AGREEMENT**

24.01 This Agreement will become effective on (date of signing or Board Order) and shall continue in effect until the 31st day of December, 1997, and automatically from year to year thereafter unless either party gives written notice of its desire to negotiate revisions thereof. Such notice shall be given not less than 30 days and not more than 60 days prior to the expiry date of this Agreement.

**SIGNED THIS DAY OF , 19**

**FOR THE COMPANY:** **FOR THE UNION:**

_____ _____

_____ _____

_____ _____

APPENDIX "A" - SCHEDULE OF WAGES

(MADISON INN - PRINCE ALBERT)

EFFECTIVE DATE OF Signing or Board Order

| HOUSEKEEPING | START | PROBATION | 12 MONTHS | 24 MONTHS |
|---|---|---|---|---|
| Housekeepers | | | | |
| **FRONT DESK ADMINISTRATION** | | | | |
| Office & Promotion Clerks | | | | |
| Front Desk Clerks | | | | |
| **TERRACE CAFE** | | | | |
| Waiters/Waitresses | | | | |
| Cooks | | | | |
| Cook's Helpers | | | | |
| **DEPUTIES** | | | | |
| Waiters/Waitresses | | | | |
| Bartenders | | | | |
| D.J./Porter/Door/Floor Persons | | | | |
| **MAINTENANCE & SECURITY** | | | | |
| Maintenance Persons | | | | |
| Night Security Maintenance | | | | |

APPENDIX "D"

DECLARATION OF AVAILABILITY/RESTRICTIONS FORM

This is to advise that the following form has been set out in Article 10 - Hours of Work, clause 10.09 of the Collective Agreement between Madison Development Group, operating as Madison Inn, and United Food and Commercial Workers Local 1400.

| | Available | Unavailable | Hours Unavailable |
|---|---|---|---|
| Sunday | _____ | _____ | _____ |
| Monday | _____ | _____ | _____ |
| Tuesday | _____ | _____ | _____ |
| Wednesday | _____ | _____ | _____ |
| Thursday | _____ | _____ | _____ |
| Friday | _____ | _____ | _____ |
| Saturday | _____ | _____ | _____ |

Both the employee and Management acknowledge that this declaration of availability will remain in effect from _____ to _____.

Dated this ____ day of _____

_____
Signature

(a) Do you wish to be called in during periods of unavailability? Yes No

(b) Do you want call-ins? Yes No

# SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and RAIDER INDUSTRIES INC., MARTIN BROWN AND BILL HUMENY, Respondents

LRB File Nos. 169-96 & 170-96; February 19, 1997
Vice-Chairperson: Gwen Gray; Members: Gloria Cymbalisty and Ken Hutchinson

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

**Unfair labour practice - Interference - Communication - Threatened closure - Employer's threat was communicated for purpose of intimidating and coercing union committee members to change bargaining position to accommodate employer demands - Board finds communications improper.**

**Unfair labour practice - Duty to bargain in good faith - Threatened closure - Board finds employer conduct in threatening closure, where purpose of threat was to intimidate and coerce committee members to accept employer bargaining position, an improper bargaining tactic and a breach of duty to bargain in good faith.**

**Collective agreement - First collective agreement - Board appoints Board agent to report on state of collective bargaining and to provide Board with opinion on whether Board should provide assistance to parties in concluding collective agreement.**

**Evidence - Conciliation - Privilege - Board refuses to permit parties to give evidence in chief or otherwise of collective agreement offers made in course of conciliation - Board holds that communications are privileged under s. 40 of Act - Parties can waive privilege that attaches to own offers but not to offer made by other party and communicated through conciliator.**

***The Trade Union Act*, ss. 2(b), 11(1)(a) and (c), and 26.5**

## REASONS FOR DECISION

**Gwen Gray, Vice-Chairperson:** The Union applied to the Board to determine if the Employer had engaged in an unfair labour practice within the meaning of s. 11(1)(a), (c), (e), (f) and (i) of *The Trade Union Act*, R.S.S. 1978, c. T-17, and simultaneously applied for assistance in concluding a first collective agreement under s. 26.5 of the *Act*.

**History of parties before Board**

In their short bargaining history, the parties have been before the Board on several occasions. The Union was certified to represent employees at the Drinkwater location of the business on May 4th, 1995 ([1995] 2nd Quarter Sask. Labour Rep. 71; LRB File Nos. 010-95 & 012-95). At the same time, the Union alleged that the Employer had engaged in various unfair labour practices during the organizing drive. The Board, however, dismissed these allegations. The certification Order was later expanded to include employees working at the Employer's Moose Jaw location ([1996] Sask. L.R.B.R. 27; LRB File Nos. 274-96 & 275-96). In a later decision, the Board found the Employer had committed an unfair labour practice within the meaning of s. 11(1)(c) of the *Act* by failing to bargain collectively with the Union concerning the creation of a "team leader" classification ([1996] Sask. L.R.B.R. 297; LRB File No. 005-96).

**Unfair labour practice**

In the present unfair labour practice application, Cliff Talbot, Chief Shop Steward at the Moose Jaw location, testified that Martin Brown, President of Raider Industries Inc., approached him at his work station on June 27th, 1996, and asked why the Union was threatening to apply to the Labour Relations Board for the imposition of a first collective agreement. Mr. Talbot is a member of the Union's bargaining committee and had attended bargaining meetings on June 26th, 1996. In his testimony, Mr. Talbot indicated that he responded to Mr. Brown's inquiries by informing him that the Union was frustrated with the lack of progress at the bargaining table and was considering applying to the Board for assistance. Mr. Talbot testified that Mr. Brown then remarked to him that if the contract was decided by the Board and Mr. Brown did not like it, the company would pack up and move to the United States. Mr. Talbot reported that Mr. Brown's words shocked him because he felt Mr. Brown was placing members of the bargaining committee in a position of deciding the fate of the work force if the committee did not satisfy the Employer's bargaining demands. He recalled Mr. Brown telling him that he did not understand why the Union was proceeding to seek first contract assistance from the Board.

Mr. Talbot, who is one of the most senior employees at Raider Industries Inc., indicated that he had no union experience prior to the Union being certified at Raider Industries Inc. He indicated that his

discussions with Mr. Brown went on for appropriately 45 minutes and that it interrupted his work for which he is paid on a piece work basis.

On cross-examination, Mr. Talbot indicated that since January, 1996, when he became a member of the Union's negotiating committee, all of the bargaining meetings between the Union and the Employer involved the services of a conciliator with the exception of one or two face-to-face meetings. The last two days of bargaining occurred June 25th and 26th, 1996. At the conclusion of the meeting on June 26th, 1996, the Union advised the conciliator that it would seek the imposition of a first collective agreement. Mr. Talbot indicated that he did not think that any member of the Union's negotiating committee advised Mr. Brown directly of the plan to seek the assistance of the Board for the imposition of a first collective agreement. He acknowledged that Mr. Brown came to see him because of his role as Chief Shop Steward and negotiating committee member, and he further agreed with counsel for the Employer that on June 27th, 1996, Mr. Brown appeared to be upset. Mr. Talbot recalled that Mr. Brown encouraged him to speak to Mr. Haughey, the Union's staff representative.

In cross-examination, counsel for the Employer suggested to Mr. Talbot that Mr. Brown was simply expressing a concern that the majority shareholders of Raider Industries Inc. who reside in the United States may move the company across the border if there was an unfavourable outcome as a result of the imposition of a first agreement. Mr. Talbot disagreed and indicated that he thought Mr. Brown was speaking as to his own intentions as a shareholder and President of Raider Industries Inc.

Mr. Brian Miller, Chief Shop Steward at the Drinkwater location, also testified about a conversation he had with Martin Brown in Mr. Brown's office in Drinkwater. Mr. Miller is also a senior employee with Raider Industries Inc. having worked with the company for 11 1/2 years. The purpose of the meeting was to discuss Mr. Miller's return to work subsequent to an injury he had received that had kept him off the job for four months.

After some discussion of this issue, Mr. Miller testified that Mr. Brown asked another management representative to leave the meeting and remarked to Mr. Miller that he wanted to get something off his chest. Mr. Brown told Mr. Miller that "they", meaning he and Mr. Miller, had to get the contract settled as the majority shareholders who reside in the United States were getting tired of the on-going contract talks. Mr. Brown further indicated to Mr. Miller that the contract problems would not affect Mr. Brown

or his family. Mr. Brown indicated to Mr. Miller that if there was a strike, the company, including presumably Mr. Brown, would pack up and move across the border. Mr. Miller testified that Mr. Brown also stated the company had a lease on the Moose Jaw building that it could get out of. According to Mr. Miller's testimony, the conclusion Mr. Brown came to was that the only ones who would suffer from the bargaining were the 150 employees. Mr. Brown indicated to Mr. Miller that the company had a number of items that it needed in the contract and if it did not achieve those items, it would move across the border. Further, Mr. Miller testified that Mr. Brown stated no other business plans would be put in place until the contract was resolved, in particular, no retail store would be set up in Moose Jaw to sell the companies' products.

On cross-examination, Mr. Miller acknowledged that there had been 23 bargaining sessions held between the parties, five or so which occurred without the participation of a conciliator. He indicated that the Union applied for conciliation on September 14th, 1995 because it felt negotiations were not progressing. He acknowledged that the Employer agreed to conciliation in October, 1995.

No one testified for the Employer in relation to the unfair labour practice application.

Mr. Kowalchuk argued that Mr. Brown's conversations with the two shop stewards were designed to intimidate and threaten them in order to have them alter their position at the bargaining table or face responsibility for the owner's decision to move the business from Canada to the United States with the resulting loss of employment for 150 members. Mr. Kowalchuk also argued that the *Act* prohibits Mr. Brown from conveying this information directly to individual members of the negotiating committee and requires the Employer to communicate only and directly with the Union's negotiating committee. Mr. Kowalchuk argued that the effect of the communication was to chill the shop stewards' support for the negotiating committees position, and thereby undermine the Union's bargaining position.

Mr. Ball argued that there is no rule restricting the bargaining process to committee to committee discussions. He characterized the discussions between Mr. Brown, Mr. Miller and Mr. Talbot as being a legitimate part of the bargaining process wherein one party is conveying legitimate information to another through individual discussions with committee members. He characterized the discussion between Mr. Talbot and Mr. Brown by indicating that Mr. Talbot knew Mr. Brown was referring to the United States owners of the company. He was relaying his worry that if the contract was not to the

United States owners' liking, they would move the plant across the border. Mr. Ball argued that there was no evidence that the Employer was dealing directly with employees or communicating inappropriately to employees. Further, he argued that the company had not refused to meet and engage in discussions with the Union. He characterized the purpose of the meetings between Mr. Brown, Mr. Talbot and Mr. Miller as attempts by Mr. Brown to influence Mr. Talbot and Mr. Miller, not to intimidate or coerce them.

The relevant provisions in the *Act* are 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;*
>
> *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;*

The Board has discussed its general approach to the supervision of collective bargaining in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Western Grocers, A Division of Westfair Foods Ltd.*, [1992] 4th Quarter Sask. Labour Rep. 83, LRB File No. 168-92, at 85-86:

> *This case raises a number of interesting issues related to the role of this Board in supervising collective bargaining between an employer and the union certified to represent its employees. Under current labour law, two major restrictions on the role of the Board are clear. It is not within the mandate of the Board, under ordinary conditions, to seek to modify the substantive bargaining positions of the parties or to monitor too closely the bargaining strategies adopted by the parties as each seeks to attain the agreement of the other to their terms.*
>
> *Neither is it the role of the Board to intrude upon the legitimate decision-making of the management of an enterprise as they seek to steer their organization on their chosen economic course. Thus, the decision to close a plant, or to cease operation, may have drastic and regrettable consequences on a group of employees, but, provided it is taken solely for legitimate business reasons, such a step cannot ordinarily be reversed or challenged by this Board.*
>
> *It does lie within the province of this Board, however, to examine allegations that one of the parties to a collective bargaining relationship has gone beyond the liberal boundaries of permitted tactical alternatives in bargaining, and is guilty of conduct rendered unlawful by the Act, conduct which may be derogate from a healthy bargaining process.*
>
> *Such an inquiry is complicated, of course, by the subtlety of the distinctions which must often be made between features characteristic of robust bargaining, and the signs which betray improper motives or unlawful conduct. The reality of collective bargaining was described in Canadian Industrial Relations: The Report of Task Force on Labour Relations (Ottawa: Privy Council Office, December 1968) (Chair: H.D. Woods) in these terms:*
>
> > *... collective bargaining is designed to resolve conflict through conflict, or at least through the threat of conflict (paragraph 392).*
>
> *Accordingly, many of the events which occur in the course of any sequence of collective bargaining may potentially be a source of controversy and bad feeling between the parties; it is the responsibility of the Board to determine whether, in the case of any of these events, either of the parties has contributed to the controversy by the violation of the standards set out in the Act.*

As indicated, the dividing line between bargaining tactics that are legitimate and those that exceed the parameters set by various provisions contained primarily in s. 11 of the *Act* is not easy to discern. One event that gives rise to frequent litigation is employer's communications with employees outside the negotiating room. The *Act* does not prohibit all communication between Employer and employees in this setting. In *Saskatchewan Government Employees' Union v. Government of Saskatchewan*, [1989] Fall Sask. Labour Rep. 28, LRB File Nos. 250-88 and 290-88, the Board summarized the employer's right to communicate with employees as follows:

> *It is settled that an employer has a right to communicate with its employees, provided that its communications do not coerce, intimidate or threaten them with respect to the exercise of a right conferred by the Act; do not constitute direct bargaining with them; and do not attempt to undermine the union's ability to properly represent them. (see, for example, Saskatoon Co-operative Association Limited, April 1985 Sask. Labour Report 36, at 29). The Board's inquiry concentrates on whether in the particular circumstances a communication has likely interfered with, coerced, intimidated, threatened or restrained an employee in the exercise of a right conferred by the Act. This is an objective test. The Board's approach is to ascertain the likely effect of the communication on an employee of average intelligence and fortitude (see Insurance Corporation of British Columbia (1978) 1 CLRBR 53; Whitespot Ltd. (1984) 5 CLRBR 161; Greb Industries Limited (1979) 2 CLRBR 567; and Holiday Inn Ltd. [1989] Spring Sask. Labour Rep. 72, LRB File No. 207-88).*

The Board must discern the purpose and effect of the communication from "the circumstances and environment in which the communications are made, as well as the content and subject matter of the communications itself" (*Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Ltd. et al.*, [1995] 2nd Quarter Sask. Labour Rep. 234, LRB File Nos. 246-94 and 291-94, at 260). It was noted, for instance, in the *Government of Saskatchewan* decision, *supra*, at 34, that "restrictions on the employer's right to communicate with employees have generally been more relaxed" where the communication did not take place during an organizing campaign or collective bargaining and where the employees have been represented by a union for many years. In *Saskatchewan United Food and Commercial Workers, Local 1400 v. Moose Jaw Co-operative Association Limited*, [1985] April Sask. Labour Rep. 43, LRB File No. 315-83, the Board considered the location of the conversation between an employee, who was also a member of the union's bargaining committee, and the employer's representative that took place on a picketline. The Board noted, at 45, as follows:

> *Insofar as the conversation with Mr. Beadle and the other employees related to the question of the management rights clause, the Board has decided that there was no infringement of the Act. It is worth noting that the conversation was directed at a union member who had actually participated in the negotiations. It took place on a picketline during a strike in the vicinity of customers - a situation in which the employees were not a captive audience or likely to feel coerced, threatened, intimidated or restrained. Their ability to terminate the conversation at any time and their ability to withstand the employer's influence was considerably greater than it would have been if, for example, the employer had been discussing matters with them individually in the workplace during a union organizing campaign.*

The Board in this case went on to find that certain communications went beyond the scope of legitimate employer comments. At 45, the Board concluded:

> *In particular, Mr. Francis' effort to elicit information directly from the employees regarding what it would take to resolve the strike, and his suggestion that a "Safeway" management rights clause could be exchanged for wage parity with Safeway employees, was clearly designed to circumvent the union and to receive new positions and place new proposals directly before the employees.*

After reviewing the evidence in the present case, we conclude that the remarks made by Mr. Brown to Mr. Talbot and Mr. Miller, particularly the threat of the removal of the plant to the United States, were made for the purpose of intimidating or coercing the two bargaining committee members in order to convince the union to adopt a more accommodating bargaining position. There are a number of factors that lead to this conclusion. First, the content and subject matter of the message was intimidating and coercive in the circumstances. Mr. Brown, speaking as President, conveyed the message that the committee members would be personally responsible for job losses should the Union fail to review its bargaining position. The committee members had no prior experience in collective bargaining and were engaged in work and a meeting from which they could not easily retreat. In a newly certified shop it is reasonable to expect that the shop floor committee members would be frightened and intimidated by the Employer's conduct, particularly because they have not experienced the rigours of a mature collective bargaining relationship. Such members could be expected to be less secure than more seasoned union representatives in their ability to respond on an equal footing to the Employer's intemperate remarks. In the opinion of the Board, a committee member of average intelligence and fortitude would be intimidated by the Employer's conduct in suggesting that the committee member will be responsible for job losses.

Another factor arises from the lack of a coherent explanation or rational discussion of the Employer's bargaining position. It is one thing to notify the Union, which would normally be done during the course of a bargaining meeting, that the bargaining position of the Union will result in the closure or removal of a plant. Indeed, in some circumstances the Employer is obligated to disclose such information. However, the communication of similar information through threats and the assignment of personal responsibility to individual committee members during workplace exchanges does not constitute communications of a harmless variety that is intended to clarify or explain the employer's position.

In the present application, the Board concludes that Mr. Brown's threats of plant closure were made for the illicit purpose of intimidating the members into adopting a more conciliatory bargaining stance. Mr. Brown was not attempting to persuade or to inform the Union of the rational consequences of its bargaining position but was squarely placing the responsibility for job losses on the two committee members should no accommodation of the Employer's demands be made by the Union.

When examining employer communication made in the course of collective bargaining, the Board is primarily concerned with the purpose of the communication. In the present case, it is the coercive nature of the communication that taints it as an improper bargaining tactic and not the fact that the communication occurred between a member of the management team and a Union committee member. The Board does not discourage all discussions that may occur between members of the employer and union negotiating committees. Often such "off the record" conversations can break a bargaining impasse or can be used to informally test the waters on a bargaining proposal. Such conduct is to be encouraged, not discouraged. The Board does not accept as a general rule the Union's position that all communication between the Employer and the Union must be made between the negotiating committees. In this instance, however, the Employer's purpose was to achieve its collective bargaining goals in a manner that coerced and intimidated committee members. For these reasons, the Board finds that the Employer has violated the prohibition contained in s. 11(1)(a) of the *Act*.

Similarly, the Board finds that the communication violated the prohibition contained in s. 11(1)(c) of the *Act*. The Employer failed in this instance to bargain in good faith with the Union when it resorted to using an illegitimate bargaining tactics, that is, the intimidation and coercion of bargaining committee members in order to gain concessions at the bargaining table. While the Board seldom evaluates the positions taken by either party during the course of collective bargaining and attempts to avoid measuring the merits of the relative positions of both parties on the contents of collective bargaining, it does monitor tactics or proposals that the *Act* in other contexts renders illegal. Parties to a collective bargaining relationship have few rules to follow in developing their bargaining strategy. The Board finds, however, that the use of coercive or intimidating tactics which are used to alter the course of the bargaining do not constitute good faith bargaining.

The Board therefore finds that the Employer and Martin Brown violated s. 11(1)(a) and (c) of the *Act*. The Board does not think it necessary to address the Union's allegations that the Employer's conduct

also violated s. 11(1)(e), (f) and (i) of the *Act*. The Board heard no evidence relating to Bill Humeny and will dismiss the Union's application in so far as it alleges that Mr. Humeny committed any unfair labour practices. The Union requested that the Board reserve on the remedy to be granted in the event that the unfair labour practice application was granted. The Board will not issue an order for 15 days from the date of these reasons in order to give both parties an opportunity to signify that they wish to convene the Board on the remedial issue. If no request is made within the 15 day time frame, the Board will issue a cease and desist order.

**Application for assistance in concluding the first collective agreement**

In a letter to the Board and subsequently at the commencement of the hearing, counsel for the Employer raised an objection over the admissibility of evidence relating to the bargaining positions that had been communicated to the other party through the conciliator assigned by the Department of Labour to the dispute. The Employer's position, simply put, is that the communication of offers made in the course of conciliation are made on a "without prejudice" basis and as such are privileged in a labour relations sense. Mr. Ball pointed to s. 40 of the *Act* to support his objection. Section 40 states:

> *40(1) Information obtained for the purpose of this Act in the course of his duties by:*
>
> . . .
>
> *(d) a conciliation officer of the department over which the minister presides;*
>
> *shall not be open to inspection by any person or by any court.*
>
> *(2) None of the persons mentioned in subsection (1) shall be required by any court or the board to give evidence about information obtained for the purposes of this Act in the course of his or her duties.*

While s. 40 of the *Act* does not specifically address the question as to whether the results of conciliation meetings can be disclosed by parties other that the conciliator, it is a long-standing practice of this Board to not permit parties to give evidence as to events that occurred during the conciliation process. In *Retail, Wholesale and Department Store Union, Local 955 v. Morris Rod Weeder Co. Ltd. et al.*, [1977] Sept. Sask. Labour Rep. 32, at 34, the Board stated as follows:

> *The Board ruled that it would not accept any evidence from Mr. Mitchell with respect to the mediation process in which he participated unless with reference to matters*

> *which occurred when representatives of both parties were present. From the evidence given by Mr. Mitchell the Board is satisfied that he was acting as a conciliation officer of the Department of Labour within the meaning of s. 39 of the Act. Although ss. 39(2) of the Act probably has no application to this situation since the Board is not a Court within the meaning of that section, it is the opinion of the Board that the provisions of ss. 39(1) of the Act apply to the situation under consideration. To require a conciliator to give evidence would be to open to inspection information obtained by that officer in the course of his duties. If the Board is wrong in this conclusion, it would, in any event, have exercised the broad discretion given to it with respect to evidence under s. 18 of the Act and have refused to receive such evidence on the basis of that it would be against the public interest to do so in that it would destroy the usefulness of conciliation officers of the Department of Labour. Parties would obviously refuse to confide confidential information, or make bargaining concessions during the course of conciliation, to a conciliation officer, if they knew that this information could be obtained by the adverse party in proceedings before this Board.*

This view was reinforced in *Retail, Wholesale and Department Store Union v. Westfair Foods Ltd. and its Western Grocers Division,* [1993] 2nd Quarter Sask. Labour Rep. 100, LRB File Nos. 007-93 & 011-93, at 116, where the Board stated:

> *It should be noted that the Board ruled early in the hearing that neither party would be allowed to present evidence concerning the exchanges which took place under the guidance of the mediator who was appointed in early January; nor would either party be open to cross-examination concerning the contents of the report submitted by the mediator at the end of February.*
>
> *In making this ruling, we were cognizant that the inability to rely on anything which occurred during mediation might be something of a handicap to the parties. It seems important, nonetheless, to protect the confidentiality of the mediation process, especially since many of the statements in the report could only be corroborated by the mediator himself. Though the proceedings under the Act which take place before the Board are of great importance, there are occasions when we must defer to other forums. The success of mediation as a process depends heavily on the creation of an atmosphere of trust and openness between the mediator and the parties. It would be irresponsible, in our opinion, to create the risk to this process which might arise from the prospect of having its contents open to scrutiny by this tribunal.*

As intimated in the above decisions, the purpose of conciliation is to permit parties to exchange bargaining proposals through a neutral third party who, in addition to playing the role of go-between, is also expected to float ideas and proposals that may resolve a bargaining impasse. The conciliator may use various tactics to encourage settlement. Conciliation is designed to allow for a free-wheeling exploration of bargaining positions in a secure environment. In addition, and perhaps more significantly from the Board's perspective, an evidentiary ruling that does not allow either party to lead

evidence in chief or cross-examination relating to the conciliation process avoids the problem of the parties' disputing what the conciliator communicated to them as representing the position of the other party. Such disputes are impossible for the Board resolve given the s. 40 prohibition against calling the conciliator as a witness.

As the Board indicated at the hearing, the provisions contained in the *Act* which permit the Board to assist the parties reach a first collective agreement are designed to support and facilitate collective bargaining, not interfere with it. If the Board were to permit the parties to disclose the final positions taken during an obviously unsuccessful conciliation process, the Board may well be discouraging the use of voluntary conciliation in the first collective agreement process. Obviously, such a result would be counterproductive for the parties and for the Board.

As a result, however, of maintaining the evidentiary prohibition on positions communicated through a conciliator during the conciliation process, the Board is left without an accurate picture of the final bargaining positions taken by the parties. Section 26.5(3) of the *Act* contemplates that on an application for assistance in concluding a first collective agreement, the applicant will "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". Similarly, s. 26.5(5) of the *Act* contemplates that the responding party will file similar information with the Board. Although it is open to either party to waive the privilege that attaches to their last offer made in the course of conciliation, they cannot be required by the Board to disclose such positions and can rely on the last pre-conciliation offer made with respect to the issues then outstanding. The parties could also avoid the dilemma by seeking one face-to-face meeting to exchange final offers when the conciliation process has run its course.

The primary purpose for requiring the parties to state their final positions in an application for assistance in concluding a first collective agreement is to permit the Board to determine, as it is required under s. 26.5(1)(c)(iii) of the *Act*, if "it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement". 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 described the reasons for intervening in a first contract environment in the following terms, at 49-51:

> *Section 26.5(1) of the Act 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 ss. 11(1)(c) or 11(2)(c) of the Act, 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, ss. 26.5(6) and 26.5(7) of the Act 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 s. 26.5(6) or (7) of the Act 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 of the Act 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., 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, (1993), 21 C.L.R.B.R. (2d) 1, at 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 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, s. 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 s. 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 s. 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.*

In the present case, the Union has met the criteria set forth in s. 26.5(1) of the *Act* to apply to the Board to request assistance. It has been certified as required by s. 26.5(1)(a) of the *Act*; it has bargained collectively with the employer unsuccessfully as required by s. 26.5(1)(b) of the *Act*; and the Board has made a determination pursuant to s. 11(1)(c) of the *Act*, as required by s. 26.5(1)(c) of the *Act*. As indicated, however, the Board lacks information on which it can assess the appropriateness of rendering assistance to the parties. As a result, the Board appoints as Board Agent, Mr. Terry Stevens, Executive Director, Labour Relations and Conciliation Branch, Saskatchewan Labour, and/or his designate, to report to the Board within 60 days from the date of this Order on the following matters:

1. the current position of both parties on the matters that have been agreed to in collective bargaining and the terms of any such agreements, the matters that remain in dispute, and the current position of each party on the matters in dispute;

2. whether or not the Board should provide assistance to the parties in concluding a first agreement; and

3. if the Board Agent and/or designate is of the opinion that the Board should provide assistance, what issues does the Board Agent and/or designate recommend the Board address in the imposition of a first collective agreement.

During the process of reporting to the Board, the Board Agent and/or designate may use whatever means seem reasonable to encourage the parties hereto to reach a first collective agreement.

The Board Agent may request an extension of time for filing his report with the Board from the Board Vice-Chairperson who may grant such an extension. Following receipt of the Board Agent's report, the Board will convene a hearing of the parties to determine:

1. if the Board should render assistance in the conclusion of a first collective agreement, and

2. if so, what terms should be included in such collective agreement.

## ROB HERBERT, Applicant and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 870 AND GUNNER INDUSTRIES LTD., Respondents

LRB File No. 375-96; February 20, 1997
Vice-Chairperson: Gwen Gray; Members: Bob Cunningham and Bruce McDonald

For the Applicant: Rob Herbert
For the Respondent Union: Neil McLeod
For the Respondent Employer: David McKay

**Decertification - Practice and procedure - Timeliness - Employer is bound by collective agreement negotiated between employer representative organization and trade union - Application filed outside 30-60 day period prior to anniversary of effective date of collective agreement is dismissed.**

### REASONS FOR DECISION

**Gwen Gray, Vice-Chairperson:** The Applicant, Mr. Herbert, applied for a rescission order on December 24th, 1996. The Union responded by claiming, among other things, that the application for rescission was filed outside the time frame set out in s. 5(k) of *The Trade Union Act*, R.S.S. 1978, c. T-17, which reads as follows:

> *5 The board may make orders:*
>
> *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*
>
> *(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;*

The Union lead evidence through Mr. Brian Woznesensky, Assistant Business Manager of Local 870, that the Union had certified Gunner Industries Ltd. on January 29, 1985. The Union further filed an unfair labour practice against the Employer before this Board that was determined by the Board on October 10th, 1996 ([1996] Sask. L.R.B.R. 749 LRB File No. 160-96). In the unfair labour practice application, the Union alleged that the Employer had failed to bargain with the Union with respect to a grievance that had been filed by the Union dated July 9th, 1996. In its Reasons for Decision, the Board details the history of the bargaining relationship between these parties which commenced with the Employer wrongly assuming that the certification Order issued in 1985 did not apply to him. The Board found that the Employer had committed an unfair labour practice by failing or refusing to bargain with the Union.

Mr. Woznesensky testified that the Union has entered into a "Saskatchewan Provincial Operating Engineers Agreement" with the CLR Construction Labour Relations Association of Saskatchewan Inc. which is the designated representative employers' organization for the Operating Engineers' trade division. The Board takes judicial notice of the Ministerial designation of the CLR as the representative employers' organization for this trade division on February 19, 1993, pursuant to the powers granted to the Minister of Labour under *The Construction Industry Labour Relations Act, 1992, S.S. 1992*, c. 29.11.

Mr. Woznesensky also testified as to the nature of the work performed by employees at Gunner Industries Ltd. and indicated that the work performed by batch plant operators, vacuum pump operators, mechanics, concrete pump operator, truck driver and their foremen fall within the jurisdiction of the Operating Engineers' trade division. On the Statement of Employment filed in this application, the Employer identified 14 employees as falling within the Operating Engineers' bargaining unit.

No other evidence was called on the issue of the timeliness of the application. The Board indicated to the parties that it intended to rule first on the issue of timeliness and would reserve all other issues to a further hearing if one was needed.

Mr. Herbert indicated that he filed the application for rescission after receiving advice from a Board officer indicating that the *Act* required him to bring the application in the 30 to 60 day period prior to the anniversary date of the certification Order. Mr. Herbert did file the application in accordance with

this time frame by filing it on December 24th, 1996. Mr. Herbert could not recall if the Board officer asked him if a collective agreement was in existence.

Mr. McLeod argued that the application for rescission is untimely as it was filed outside the 30 to 60 day period prior to the anniversary of the effective date of the Agreement, which is May 1st, 1995. He argued that the collective agreement entered into between the Union and the CLR binds the Employer and bars the bringing of an application for rescission except in accordance with the open period set in s. 5(k)(i) of the *Act*.

Mr. McKay argued that there is no collective agreement in force within the meaning of s. 2(d) of the *Act*. He argued that on a strict reading of s. 5(k)(i) of the *Act*, applications for rescission are only barred under that provision if there is a collective agreement signed between the Employer and the Union. Mr. McKay stated that the Employer and Applicant were unaware that *The Construction Industry Labour Relations Act*, 1992 applied to their work or that a collective agreement concluded pursuant to the terms of this *Act* applied to the work performed by the Employer. In these circumstances, he argued, it would be unfair to impose the bar contained in s. 5(k)(i) of the *Act* to the rescission application.

The Board has some sympathy for employees who are trying to ascertain an open period for filing an application for rescission or amendment in these circumstances. The Employer, in the present case, has ignored his obligations under both *The Trade Union Act* and *The Construction Industry Labour Relations Act, 1992* as is demonstrated in the Reasons for Decision (LRB File No. 160-96) referred to above. *The Construction Industry Labour Relations Act, 1992* imposes a legal regime on employers in the construction industry that is quite unlike the legal regime established for collective bargaining under *The Trade Union Act*. The purpose of *The Construction Industry Labour Relations Act, 1992* is succinctly stated in s. 4 thereof as follows:

> *4 This Act shall be construed so as to implement bargaining collectively by trade on a province-wide basis between an employers' organization and a trade union with respect to a trade division.*

The effect of designating a representative employers' organization is set out in s. 14 of *The Construction Industry Labour Relations Act, 1992* as follows:

> *14 Where an employers' organization is designated or determined to be the representative employers' organization for a trade division:*
>
> *(a) all of the rights, duties and obligations of unionized employers in a trade division vest in the representative employers' organization to the extent that is necessary to give effect to this Act;*
>
> *(b) the representative employers' organization is the exclusive agent to bargain collectively on behalf of all unionized employers in the trade division;*
>
> *(c) a trade union representing the unionized employees in the trade division shall bargain collectively with the representative employers' organization with respect to those unionized employees; and*
>
> *(d) a collective bargaining agreement that is made after the designation or determination with any person or organization other than the representative employers' organization is void.*

In essence, the representative employers' organization becomes the bargaining agent for all employers in the unionized construction sector. Its legal mandate is to bargain collective agreements for each trade division that it is designated as the representative employers' organization on a province-wide basis with the appropriate craft union. Agreements reached between the representative employers' organization and a union are made on behalf of all unionized construction employers, and binds them in the same way that a collective agreement entered into between a union and employer under *The Trade Union Act* binds an employer.

In the present case, it is clear to the Board that the Employer is a unionized employer and is bound by the terms of the collective agreement entered into between the CLR as its representative employers' organization and the Union. The Employer's claim to lack of knowledge concerning the application of the CLR agreement is not credible. The Employer has had ample opportunity to clarify its responsibilities under both *The Trade Union Act* and *The Construction Industry Labour Relations Act, 1992*, and the CLR agreement either through discussions with the Union, its agent, the CLR, or by reference of dispute to the Board. As in any other aspect of business, employers have an obligation to inform themselves of the laws that regulate the manner in which they conduct their labour relations.

It is unfortunate that the Applicant has been put to the time and expense of organizing the rescission application. The Board, however, is bound by the time limit set in s. 5(k)(i) and must dismiss Mr. Herbert's application. An application for rescission can be submitted to the Board in the 30 to 60 day period before May 1st.

The Board holds that the application for rescission has not been filed within the required time frame as stated under s. 5(k)(i) of the *Act* and orders that it be dismissed.

For the assistance of the Applicant and the employees at Gunner Industries Ltd., the Board is attaching a copy of the collective agreement that applies to their workplace to this Reasons for Decision.

**HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN, Applicant and GOVERNMENT OF SASKATCHEWAN, SASKATCHEWAN ASSOCIATION OF HEALTH-CARE ORGANIZATIONS, SASKATCHEWAN UNION OF NURSES, SASKATCHEWAN GOVERNMENT EMPLOYEES' UNION, SERVICE EMPLOYEES INTERNATIONAL UNION AND CANADIAN UNION OF PUBLIC EMPLOYEES, Respondents**

LRB File No. 022-97; March 5, 1997
Chairperson: Beth Bilson; Members: Terry Verbeke, Bruce McDonald

For the Applicant: Larry Kowalchuk
For the Government of Saskatchewan: Graeme Mitchell
For SAHO: Bonnie Reid
For SUN: Cathy Zuck
For SGEU: Rick Engel
For SEIU: Ted Koskie
For CUPE: John Elder

**Constitution - *Charter* - Jurisdiction of Board to interpret *Charter* and other external statutes - Board finds that it is not necessary to resolve question of Board jurisdiction.**

**Health care - Whether Board should consider preliminary objection to implementation of *Health Labour Relations Reorganization (Commissioner) Regulations* - Board deciding objection should not be considered in light of similar application to court.**

**Statutory interpretation - Whether *Trade Union Act* overrides other statutes administered by Board - Board decides that *Trade Union Act* does not have primacy.**

**Practice and procedure - Choice of forum - Whether Board should consider preliminary objection when related application before court - Board decides that preliminary objection should not be considered.**

***The Trade Union Act***
***The Saskatchewan Human Rights Code***
***The Health Labour Relations Reorganization Act***
***The Health Labour Relations Reorganization (Commissioner) Regulations***

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** In a number of previous decisions, this Board has had occasion to comment on the implications for collective bargaining relationships of the changes which have taken place in the administration and configuration of health services in the province over the past several years. It is not necessary for our purposes here to enter into a detailed description of the changes which have taken place. It should be noted, however, that the collective bargaining landscape has been altered significantly by the reallocation of primary responsibility for employment relationships from several hundred employers, defined mainly in terms of individual facilities, to 30 health districts, charged to pursue the objective of integrating various aspects of health care delivery.

In a decision in *Health Sciences Association of Saskatchewan v. Saskatoon City Hospital and Service Employees' International Union*, [1994] 4th Quarter Sask. Labour Rep. 56, LRB File No. 266-93, the Board summarized its general approach to the issues arising out of the reorganization of health services, at 60-61:

> *Trade unions and employers in the health care field have been pragmatic in their approach to the complexities which have always been present in the relationships which arise out of the delivery of health care services. For example, though certification Orders have named individual acute care hospitals or special care homes as employers, the practical difficulties of bargaining on this basis led to the development of province-wide bargaining mechanisms for both of these types of facilities. Through these mechanisms, and in other ways, both employers and trade unions had arrived at practical methods of dealing with such features of the existing configuration as the fact that there are several trade unions which represent separate bargaining units containing similar classifications of employees.*
>
> *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 acknowledgement 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.*
>
> *It may prove to be the case, of course, that there are aspects of the altered labour relations environment for which it is appropriate to invoke the assistance of this Board. We are not persuaded, however, that there are grounds on which we should upset the collective bargaining rights and relationships which have grown up between trade unions and health care employers in order to pursue the goal of standardization of health care bargaining units.*

The shift from the previous configuration to a new map of collective bargaining relationships raised an enormous number of issues, and the parties to collective bargaining in the health care sector made significant efforts to confront and resolve the questions which arose. Many of those with major roles in these events ultimately concluded that the usual mechanisms for the resolution of collective bargaining issues - negotiations between collective bargaining parties, submission of disputes for resolution by arbitration, and the submission of issues to this Board for resolution within the terms of *The Trade Union Act*, R.S.S. 1978, c. T-17 - were inadequate to deal with all of the issues which had arisen out of the reorganization of the health care sector.

Four of the major trade unions representing health care employees, namely the Saskatchewan Government Employees' Union (SGEU), the Canadian Union of Public Employees (CUPE), the Saskatchewan Union of Nurses (SUN) and the Service Employees' International Union (SEIU), made a request to the Government of Saskatchewan for a legislative means of resolving many of the outstanding questions. They proposed that a commission be appointed to consider collective bargaining issues, such as the configuration of bargaining units, trade union representation and the seniority rights of employees. The Health Sciences Association of Saskatchewan (HSAS) did not formally endorse the proposal, although they indicated their intention to co-operate with a commission should one be set up. The Saskatchewan Association of Health-Care Organizations (SAHO) eventually indicated their support for the commission proposed by the four trade unions.

*The Health Labour Relations Reorganization Act*, S.S. 1996, c. H-0.03, became effective on July 12, 1996. That *Act* provided for the appointment of a commissioner with a general mandate described as follows in s. 5(1):

> *5(1) The commissioner shall examine the organization of labour relations between health sector employers and employees.*

Section 6(2) of *The Health Labour Relations Reorganization Act* empowered the commissioner to make regulations, in the following terms:

> *6(2) The Commissioner shall make regulations reorganizing labour relations between health sector employers and employees and resolving issues arising out of that reorganization and, for that purpose, may make regulations:*
>
> > *(a) defining appropriate units for the purposes of this Act and establishing the composition of those appropriate units;*
> >
> > *(b) determining trade union representation of employees in any appropriate unit;*
> >
> > *(c) respecting the integration of employees in any appropriate unit;*
> >
> > *(d) respecting any matters the commissioner considers appropriate arising out of the integration of employees in any appropriate unit, including the integration of seniority of employees who were previously represented by a trade union and the recognition of service of employees who were not previously represented by a trade union;*
> >
> > *(e) establishing a multi-employer bargaining structure through the designation of bargaining councils and representative employers' organizations;*
> >
> > *(f) respecting the establishment of articles of association for bargaining councils and representative employers' organizations;*
> >
> > *(g) if an appropriate unit established pursuant to clause (a) consists of employees who are covered by two or more collective bargaining agreements:*
> >
> > > *(i) determining which one of the collective bargaining agreements will apply to all employees in the appropriate unit; or*

> *(ii) fixing a common expiry date for all of those collective bargaining agreements;*
>
> *(h) delegating to the board any of the commissioner's responsibilities pursuant to this subsection that the commissioner considers appropriate, including the authority to determine any matter or thing that is to be determined or established by the commissioner in the regulations;*
>
> *(i) respecting any other matter or thing the commissioner considers necessary to carry out the intent of this Act.*

Section 9(1) prohibited this Board from entertaining any applications concerning the subject matter before the commissioner:

> *9(1) During the period prescribed in subsection (2):*
>
> *(a) no trade union or other person shall make any application to the board pursuant to The Trade Union Act with respect to any matter that is or may be covered by the regulations to be made by the commissioner; and*
>
> *(b) the board shall not consider any application, including any application made before this Act comes into force, with respect to the matters mentioned in clause (a).*

Under s. 8, the Board was also prohibited from departing from the regulations for a period of three years:

> *8. Until the expiry of three years from the date that the regulations made by the commissioner are filed with the Registrar of Regulations, the board shall not make an order pursuant to clause 5(a) or (b) of The Trade Union Act that amends, varies or rescinds those regulations.*

Mr. James Dorsey was appointed as the commissioner under *The Health Labour Relations Reorganization Act*. The results of his deliberations were contained in *The Health Labour Relations Reorganization (Commissioner) Regulations*, R.R.S. c. H-0.03 Reg. 1 ("The Regulations"), which came into effect on January 17, 1997.

*The Regulations* contemplated the creation of three basic kinds of bargaining units in the health care sector, in addition to several small units of employees of for-profit employers, and one at the Regina Health District Laundry Services.

In the case of those employees defined as "nurses", *The Regulations* provided that there would be a bargaining unit corresponding to each health district, as well as units for several other employers. These units would be merged into one province-wide unit at the end of one year.

*The Regulations* created a second province-wide unit for "health support practitioners". A schedule appended to *The Regulations* listed a series of para-professional classifications which would be included in this unit.

The third type of bargaining unit was for "health services providers". Employees falling into this category would be included in bargaining units defined by health district boundaries.

In addition to defining the bargaining units which would form the basis of collective bargaining relationships, *The Regulations* reached conclusions about trade union representation for employees in those units. *The Health Labour Relations Reorganization Act* had given the commissioner authority to consider a model of multi-union and multi-employer bargaining. *The Regulations* indicate, however, that the commissioner decided that a single trade union should have bargaining rights with respect to each of the bargaining units delineated.

In all but two cases, *The Regulations* named the trade union which would be the bargaining representative for the employees in the unit. In the case of the province-wide unit of health support practitioners, and in the case of the health services provider unit in the North Central Health District, *The Regulations* directed the Board to conduct votes to determine which trade union should represent employees and laid down criteria for conducting those ballots.

*The Regulations* were openly opposed by two trade unions which perceived their interests to be threatened by the new configuration of bargaining units and bargaining rights. SGEU filed an application with the Court of Queen's Bench for Saskatchewan seeking to have *The Regulations* struck

down on two basic grounds. The first was that *The Regulations* were not consistent with the mandate for the commission laid out in *The Health Labour Relations Reorganization Act*. The second was that the effects of *The Regulations* constituted a violation of rights guaranteed under s. 2(d) of *The Canadian Charter of Rights and Freedoms* as an infringement of freedom of association. This application has been the subject of argument before the court extending over three days.

HSAS chose instead to file a notice with this Board that they wished to make an objection to the Board proceeding to carry out any steps required under *The Regulations*. In their letter describing the nature of this objection, the HSAS took the position that *The Regulations* constitute a violation of ss. 2(b) and (d) of the *Charter*, those sections relating to freedom of association and freedom of expression. In addition, they argued that *The Regulations* constitute a violation of *The Saskatchewan Human Rights Code*, R.S.S. 1978, c. S-24.1, and of international obligations with respect to the rights of workers.

HSAS argued, in the alternative, that it is open to the Board to interpret the *Regulations* in the light of the overall principles set out in *The Trade Union Act* which have been elaborated in Board decisions over a long period of time.

The Board directed that a hearing be held to allow all of the interested parties to express their views with respect to the single issue of whether the Board should entertain this objection, and conduct a further hearing of the substance of the objection raised by HSAS. These Reasons for Decision relate only to this preliminary issue.

At the outset of the hearing, counsel for HSAS stated that he would not be pursuing the allegation that *The Regulations* constitute an infringement of rights under s. 2(d) of the *Charter* as this matter had been thoroughly canvassed before the court. He outlined the arguments he wished to make with respect to s. 2(b) of the *Charter*, as well as *The Saskatchewan Human Rights Code*, and the obligations arising from international law.

He stated in broad terms the proposition that the Board is entitled to make findings with respect to the constitutionality of legislative provisions in carrying out our mandate, and argued, indeed, that the Board has an obligation to do so.

In responding to this argument, counsel for the Government of Saskatchewan acknowledged that it is part of the responsibility of the Board to interpret statutory provisions or make findings with respect to the consistency of statutory provisions with the overriding standards set by the constitution, at least in the course of deciding matters which clearly lie within the jurisdiction of the Board to determine. He argued that this must be distinguished from an invitation to overthrow the very regulatory scheme which the Board has been charged with implementing.

He referred the Board to the recent decision of the Supreme Court of Canada in *Cooper v. Canadian Human Rights Commission*, [1996] 3 S.C.R. 854; 140 D.L.R. (4th) 193. In that case, the Court considered the implications of earlier decisions discussing the scope of the jurisdiction of administrative tribunals to address questions of the constitutionality of statutory provisions in light of the *Charter*. The issue arose when the Canadian Human Rights Commission decided that a qualification contained in *The Canadian Human Rights Act*, R.S.C. 1985, c. H-6, was of no force and effect because it was inconsistent with the guarantee of equality under the *Charter*; this determination resulted in an application being sent forward to a tribunal for adjudication, although the application was affected by the proviso.

In *Canadian Union of Public Employees v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227, a case which was decided before the advent of the *Charter*, the Court discussed the rationale for recognizing the jurisdiction of administrative tribunals, notably labour relations boards, to address questions relating to the parameters of their own jurisdiction. The Court grounded the decision, in part, on the privative clause in the statute setting out the mandate of the tribunal. They commented, at 235-236:

> *Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a*

> *comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.*

In *Cuddy Chicks v. Ontario Labour Relations Board*, [1991] 2 S.C.R. 5, (1991) 81 D.L.R. (4th) 121, the Court took up this theme in relation specifically to issues concerning the fit of certain statutory provisions with the guarantees under the *Charter*. The majority judgment of LaForest J. contained the following comment, at 16-17 (S.C.R.):

> *It must be emphasized that the process of Charter decision-making is not confined to abstract ruminations on constitutional theory. In the case of Charter matters which arise in a particular regulatory context, the ability of the decision-maker to analyze competing policy concerns is critical. Therefore, while board members need not have formal legal training, it remains that they have a very meaningful role to play in the resolution of constitutional issues. The informed view of the board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance. This is evidenced clearly by the weight which the judiciary has given the factual record provided by labour boards in division of powers cases: see, for example, Northern Telecom Canada Ltd. v. Communication Workers of Canada (1983), 147 D.L.R. (3d) 1, [1983] 1 S.C.R. 733, 48 N.R. 161.*

A related comment was also made, at 18 (S.C.R.):

> *It is apparent, then, that an expert tribunal of the calibre of the board can bring its specialized expertise to bear in a very functional and productive way in the determination of Charter issues which make demands on such expertise. In the present case, the experience of the board is highly relevant to the Charter challenge to its enabling statute, particularly at the s.1 stage where policy concerns prevail. At the end of the day, the legal process will be better served where the board makes an initial determination of the jurisdictional issue arising from a constitutional challenge. In such circumstances, the board not only has the authority but a duty to ascertain the constitutional validity of s. 2(b) of the Labour Relations Act.*

The Court did register the caveat that an administrative tribunal cannot expect deference from a court on any finding in this respect. Nor can a tribunal make a formal declaration of invalidity, but only treat the defective statutory provision as ineffective in relation to the matter which is being decided.

Writing for the majority of the Court in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, (1995), 125 D.L.R. (4th) 583, McLachlin J. reiterated another important proposition in connection with this issue, at 962-963 (S.C.R.):

> *It follows from R. v. Mills (1986), 29 D.L.R. (4th) 161, that statutory tribunals created by Parliament or the Legislatures may be courts of competent jurisdiction to grant Charter remedies, provided they have jurisdiction over the parties and the subject matter of the dispute and are empowered to make the orders sought.*

In the decision in *Cooper*, *supra*, the Court revisited this question of the capacity of an administrative tribunal to make determinations concerning the implications of the *Charter* for statutory provisions which come before them. The decision of the majority drew the following propositions from the accumulated jurisprudence of the courts on this issue, at 884 (S.C.R.):

> *First, that the power of an administrative tribunal to refuse to apply a law of Parliament on the basis that such law was unconstitutional had to be found in its enabling statute. Second, that the intention of Parliament to confer this power on a tribunal could be given in express terms or could be inferred from the mandate assigned to the tribunal and particularly, from a requirement that it deal with all necessary questions of law.*

The majority of the Court went on to draw a distinction between the "adjudicative" and "administrative" functions of a tribunal, and to approve the finding in the court below that the Canadian Human Rights Commission was charged with an "administrative" function which did not provide them with any room in which to make adjudicative determinations about the application of the *Charter* to the case before them.

It is somewhat difficult, on the basis of the *Cooper* decision, *supra*, to draw a conclusion about the scope of the jurisdiction of this Board to address questions concerning the application of the *Charter* to matters before us. On the one hand, the majority of the Court relied heavily on the distinction between administrative and adjudicative functions, and there is little in previous decisions concerning the decisions of labour relations board to suggest that they would view many of the determinations by tribunals such as this one as falling into the "administrative" category.

On the other hand, it is clear that the Court was withdrawing to some extent from the broad propositions made in cases like *Cuddy Chicks, supra*, concerning the scope of our jurisdiction to confront *Charter* issues. Certainly, the dissenting members of the Court expressed their views in terms of the undesirability of resiling from those earlier propositions.

Counsel for the Government of Saskatchewan referred us to a decision of the British Columbia Supreme Court in *Union of Psychiatric Nurses v. Attorney-General of British Columbia*, [1996] 25 B.C.L.R. (3d) 131, a case which raised related issues to those which have been put forward here in connection with regulations which were promulgated following reorganization of the health care system in that province. In that decision, which was decided prior to the *Cooper* case, *supra*, the court held that there must be a clear indication in the statute empowering a tribunal to function that they are expected to "interpret laws."

The approach taken by the British Columbia court in that case did not involve any discussion of the possible significance of an "administrative", as opposed to "adjudicative" mandate. It seems to have rested on a requirement that the legislative have provided a fairly explicit indication of an intention to allow an administrative tribunal to determine issues of law.

This certainly seems to be a departure from the approach, grounded in the privative clause, suggested in the judgement of Dickson C.J.C. in the *New Brunswick Liquor Corporation* case, *supra*, and from the observations in *Cuddy Chicks, supra* concerning the usefulness, in public policy terms, of eliciting from administrative tribunals their comments on the implications of the *Charter* and other legislative enactments for their own regulatory or adjudicative regimes.

Given the view we have taken of the matter, it is not necessary for us to arrive at a categorical conclusion about the scope of our ability to comment on the consistency of *The Regulations* with the provisions of the *Charter*, *The Saskatchewan Human Rights Code* or the international obligations undertaken by federal or provincial governments. It is sufficient to note that we do not regard this matter as clearly settled by the results of the *Cooper* case, *supra*. That decision leaves open, in our view, the question of the jurisdiction in this regard of a tribunal charged with the adjudication of

questions arising under a statute, whose capacity to adjudicate is protected by a strong privative clause, such as that contained in s. 21 of *The Trade Union Act*.

We have decided not to proceed to deal further with the objection raised by HSAS and our decision rests on different grounds. The first of them is based on an acknowledgment that, whatever our jurisdiction to confront the constitutional implications of statutory provisions which are brought before us, we are not entitled to deference with respect to decisions other than those made on matters lying within our jurisdictions. Whether or not, as LaForest J. suggested in the *Cuddy Chicks* decision, *supra*, a court might gain benefit from our observations about the interface between the statutory world within which we operate and the *Charter* or any other legislative enactment, the courts do have the authoritative voice in deciding the meaning and reach of *Charter* or other legislative provisions.

This is a somewhat unusual case in that respect. This is not a situation in which the interpretation of the *Charter* or other statutes comes before us in the course of carrying out a task lying clearly within our statutory mandate, and a court is subsequently asked to review our conclusions for their correctness. In this case, SGEU has already placed the whole question of the constitutional legitimacy of *The Regulations* before the court, and there has been opportunity for representations from all of the parties who appeared before us with respect to this challenge.

It is difficult to see why it would be helpful to inaugurate a second parallel challenge to the validity of *The Regulations*, commencing with a determination by us, when this determination must in any case pass judicial muster in the long run.

Counsel for HSAS stated that he had not made representations to the Court of Queen's Bench with respect to the alleged infringement by *The Regulations* on territory occupied by *The Saskatchewan Human Rights Code* or by obligations undertaken in the context of international law. It was not suggested that he could not have canvassed these matters before the court. He simply stated that he felt it was more appropriate to submit these questions to the Board as a body which has continuing responsibility for determining questions relating to collective bargaining matters.

We indicated earlier that we do not think the question of our jurisdiction to entertain challenges of the kind intended here has been settled by the *Cooper* decision, *supra*. We do not see the value, however, of undertaking a second proceeding which would inevitably cover the same ground as the application already filed by SGEU.

With respect to the second arm of the objection raised by the HSAS, we understand this aspect of the argument to rest on the premise that *The Health Labour Relations Reorganization Act*, and *The Regulations* made under it, occupy a position which is somehow inferior to *The Trade Union Act*. The suggestion is that *The Regulations*, and any action the Board undertakes which is required by *The Regulations*, should be subjected to scrutiny in the light of the provisions of *The Trade Union Act* and the principles which the Board has developed in interpreting that statute.

In our view, this is a false premise. *The Trade Union Act* lays out the basic structure for collective bargaining relationships and the basic rules which govern those relationships, and empowers this Board to grant certain remedies. As counsel for HSAS pointed out, the essential structure of *The Trade Union Act*, and the interpretations which the Board has made of its provisions, have remained remarkably consistent over the five decades since it was first passed.

This does not mean that the legislature cannot decide to make alternative legislative dispositions for collective bargaining matters with or without confiding their interpretation to this Board. Counsel for HSAS mentioned the responsibilities of the Board under *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. 29.11 ("The Construction Act"), as an analogy to *The Health Labour Relations Reorganization Act* and *The Regulations*. We accept that this analogy has some force, though not perhaps in the way suggested by counsel.

*The Construction Act* provides for a bargaining structure in the construction industry which is not contemplated under *The Trade Union Act*. The major feature of this scheme is the accreditation of multi-employer bargaining agents as exclusive representatives of unionized employers grouped in trade divisions. This Board administers *The Construction Act* and is responsible for adjudicating questions which arise under its provisions.

This does not mean that the Board decides every question which arises under that statute according to the same criteria which would be used in connection with issues arising under *The Trade Union Act*, or that we subject the provisions of *The Construction Act* to the test of whether they are consistent with *The Trade Union Act* before giving them effect. Many aspects of disputes arising in the construction industry are decided according to *The Trade Union Act*, but where the legislature has chosen to create a special regime for the construction industry, we feel obliged to give that full effect.

For example, the idea of a multi-employer bargaining agent is not one which is envisioned by the provisions of *The Trade Union Act*, with the exception of associated employers within the meaning of s. 37.3 of *The Trade Union Act*. The Board must obviously look to the provisions of *The Construction Act* in order to understand what kind of collective bargaining regime the legislature had in mind in passing that statute. Indeed, in the determination of the trade divisions, and in making the original designation of the representative employers' organizations for those trade divisions, the legislature relieved the Board of any responsibility at all, choosing instead to confide this role to the Minister of Labour.

In *Canadian Iron, Steel and Industrial Workers Union v. Emerald Oilfield Construction Ltd.*, [1994] 2nd Quarter Sask. Labour Rep. 105, LRB Files No. 019-94, 020-94 and 021-94, aff'd [1995] 7 W.W.R. 331 (Sask. Q.B.), the Board concluded that the provisions of *The Construction Act* require that the building trades unions enjoy exclusive representational rights for unionized construction employees. This question was obviously not decided by making any assumption that s. 3 of *The Trade Union Act* enjoys some kind of primacy in interpreting *The Construction Act*, as it meant, in circumstances somewhat analogous to those before us here, that employees were denied any opportunity to select other trade unions as their representative.

The Board has a role in interpreting both of these statutes. It may be appropriate to decide some disputes in the construction industry by reference to *The Trade Union Act*, and others by reference to *The Construction Act*. In some cases, it may be necessary for the Board to decide what the relationship between the two statutes is, or to resolve an issue at the interface of their respective provisions. It is not appropriate to approach this task, however, by assuming that the latter statute should be ignored wherever its provisions are not compatible with a provision or interpretive principle drawn from *The*

*Trade Union Act*. We are obliged to respect the integrity of the statutory scheme set out in *The Construction Act*, and to regard it as being on an equal footing with *The Trade Union Act*.

We think the same is true of our relationship with *The Regulations*. We do not think we have room to exercise the functions which we might otherwise perform if *The Health Labour Relations Reorganization Act* had not been passed. Indeed, it was presumably the inadequacies of the options available under *The Trade Union Act*, and perhaps the inadequacies of the approach the Board had adopted to resolving the issues which arose out of the reorganization of health care, which led the legislature to the conclusion that legislative intervention was necessary.

As we noted earlier, the Court of Queen's Bench for Saskatchewan has been asked to determine whether *The Regulations* are flawed, either in terms of their relationship to their enabling statute, or in relation to the overriding effect of the guarantees under the *Charter*. Absent their invalidation on these grounds, however, we cannot see that they leave us with discretion to undertake any of the adjudicative tasks suggested by counsel for HSAS in the letter which initiated this hearing.

It is not clear to us how we could interpret *The Regulations* other than requiring us to issue orders describing bargaining units in the terms laid out there, identifying the bargaining agents designated, and conducting the two votes provided for according to the criteria set out. It is clear to us that the legislature intended to remove from the Board for a period of three years any discretion to apply the principles we would usually apply to the delineation of bargaining units or the selection of bargaining agents. There is no basis on which we could ignore this in order to answer the questions which HSAS apparently wishes to ask us, or on which we could pretend that *The Trade Union Act* clothes us with some sort of overarching jurisdiction to set aside part or all of what *The Regulations* on their face require us to do.

Counsel for HSAS suggested that if he is not allowed to raise his objection with regard to *The Regulations* as a whole, he will raise it in connection with each order the Board proposes to issue pursuant to *The Regulations*. In our view, an objection in this context would be subject to the same comments we have just made. In respect of the issues cited in the letter from counsel, it is hard to

describe the role of the Board as an adjudicative one. Our role in connection with the orders referred to in s. 8(1) of *The Regulations* is simply to issue an order identifying parties and describing a bargaining unit which in terms already specified in *The Regulations*. Unless *The Regulations* are invalidated, it is hard to see how the objection would be any more well-founded in relation to the individual orders the Board would issue.

There are, of course, likely to be interpretive and adjudicative tasks which come to light in the course of implementing the basic scheme of *The Regulations*. We have already made provision for HSAS to make representations concerning one issue which is explicitly assigned to the Board, that of bargaining unit exclusions. Other examples may arise which require the Board to interpret the meaning of *The Regulations*, or to explore the interface between *The Regulations* and *The Trade Union Act*. In our view, however, the issues raised in connection with this objection do not fall into this category.

For these reasons, we have concluded that it would not be useful to hear further representations concerning the objection made by HSAS.

**THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, Applicant and THE GOVERNMENT OF SASKATCHEWAN, Respondent AND THE SASKATCHEWAN GOVERNMENT EMPLOYEES' UNION, Intervenor**

LRB File Nos. 018-97 and 031-97; March 6, 1997
Chairperson, Beth Bilson; Members: Donna Ottenson, Judy Bell

For the Applicant: Kevin Wilson
For the Respondent: Darryl Bogdasavich, Q.C.
For the Intervenor: Rick Engel

**Remedy - Certification - Interim order - Board issues interim order to prevent continuation of scope review for managerial and professional classifications in public service.**

***The Trade Union Act*, s. 5.3.**

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** On February 7, 1997, the Professional Institute of the Public Service of Canada (PIPSC) filed an application, designated as LRB File No. 018-97, seeking to be certified as the bargaining representative for a unit comprising of persons in a number of professional and "middle management" classifications employed by the Government of Saskatchewan. This application was filed following an organizing campaign undertaken by PIPSC in October and November of 1996.

Though the Board is not at this time in possession of all of the relevant information concerning the organizing efforts undertaken by PIPSC, it seems fair to say that the catalyst for the organizing drive was a series of events connected to a review which was being conducted by the Employer in concert with the Saskatchewan Government Employees' Union (SGEU), the trade union which represents a large unit of employees of executive government. The object of this review was to determine whether certain classifications should remain outside the scope of the collective agreement between the Employer and SGEU, or whether the incumbents in those classifications should be brought within the SGEU bargaining unit.

In an application, designated as LRB File No. 031-97, which was filed on February 27, 1997, PIPSC has alleged that the Employer committed unfair labour practices and violations of a number of provisions of *The Trade Union Act*, R.S.S. 1978, c. T-17.

One of the complaints of PIPSC is the continuation of the scope review exercise by the Employer in the face of the PIPSC organizing campaign. PIPSC feels this represents an attempt to undermine the ability of PIPSC to have a fair opportunity to gain the support of employees in the classifications for which they wish to obtain bargaining rights. A further element of the unfair labour practice application is the allegation that the Employer chose to assign additional responsibilities of a managerial nature to persons in these classifications in order to prevent them being eligible to be included in the PIPSC bargaining unit, or, at the least, to create uncertainty in the minds of these employees about their status.

The third allegation made by PIPSC is that the Employer interfered in the organizing campaign. PIPSC alleges that the Employer made use of the opportunities offered by the activities connected with the scope review to discourage the PIPSC campaign and to show partiality to SGEU.

At the outset of the hearing, counsel for PIPSC argued that SGEU should be required to establish a claim to have standing to participate in the proceedings connected with these applications. Counsel for SGEU argued that his client has a clear interest in the outcome of these proceedings as many of the classifications which are listed in the PIPSC application for certification have been the subject of discussion between SGEU and the Employer over the years, and have been regarded by SGEU as employees who should actually be included in the bargaining unit which they represent. He stated that the status of these classifications has been under discussion at least since the early 1980s, with the parties agreeing that a review of the scope of the bargaining unit should be undertaken. He alluded to a number of historical developments which prevented the parties from actually embarking on this review until 1996.

Counsel for PIPSC referred to a number of cases in which the Board has denied standing to parties wishing to intervene in proceedings before the Board. In a decision in *Service Employees' International Union v. Saskatoon District Health Board at Parkridge Centre and Health Sciences Association of*

*Saskatchewan*, [1994] 1st Quarter Sask. Labour Rep. 238, LRB File No. 015-94, the Board made the following comment, at 240:

> *On the other hand, we do not accept the more sweeping claim made by the Health Sciences Association, which is essentially that they have an automatic interest whenever there is a certification application in which a para-medical bargaining unit is proposed. To accept this argument, the Board would have to acknowledge, not only that there should be standard bargaining units in the health care field, but that those bargaining units should be allocated to particular unions. Even in the case of the construction industry, the Newbery units defined were not earmarked for any particular trade unions, in keeping with the spirit of s. 3 of the Act:*
>
> > *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.*
>
> *With respect to this aspect of the argument, we are not persuaded that there is any reason to permit the Health Sciences Association to intervene. The fact that this Board has on occasion recognized para-medical professional or technical bargaining units does not translate into some sort of pre-emptive right for the Health Sciences Association to stake a claim to all employees who might belong to such a unit. The Service Employees' International Union has filed evidence to demonstrate that they enjoy the support of the majority of employees in the unit as they suggest it should be defined. These employees are perfectly entitled to support the Service Employees' International Union, and that Union is perfectly entitled to file an application for certification on the basis of that support.*

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 reiterated this proposition, at 138:

> *The arguments made by the Saskatchewan Government Employees' Union and, in some respects, the Saskatchewan Union of Nurses, in support of their requests for status to intervene seem to us to be similar to those which were rejected by the Board in the Parkridge Centre decision, supra. Though the claim of the latter trade union may be distinguished in the sense that it was backed by evidence of support belatedly acquired, in both cases the trade unions were asserting a position based, not on their existing bargaining rights for a group of employees, but on the idea of some pre-emptive entitlement to bargain on behalf of certain kinds of employees, whether they had previously been organized or not. As the Board explained in the Parkridge Centre*

> *case, supra, the recognition of this kind of claim would not be consistent with the approach we have taken to the acquisition of bargaining rights, in the health care sector or elsewhere.*

The Board ruled that SGEU is entitled to participate in these proceedings as an intervenor. It is our view that the situation here is considerably different than the circumstances described in the passages we have just quoted.

The position of SGEU is that they will be able to establish, by reference to historical events, as well as to Orders of this Board, and agreements which have been made in the course of collective bargaining with the Employer, that many or all of the classifications for which PIPSC seeks bargaining rights are covered by the certification Order granted to SGEU, and that the question of whether they are within or outside the scope of the existing SGEU bargaining unit lies to be completely decided in the context of the collective bargaining relationship between SGEU and the Employer.

The position of PIPSC, on the other hand, is that these employees have been expressly excluded by the certification Order issued by the Board, by the collective agreement between SGEU and the Employer, or by both, and that it is therefore open to PIPSC to make an ordinary certification application seeking bargaining rights for a group of unrepresented employees.

These clearly represent two entirely different characterizations of the status of these employees. The matter is further complicated by the fact that PIPSC is seeking to represent a "middle management" bargaining unit. The recognition of the appropriateness of bargaining units of this kind rests on an acknowledgment that the criteria for assessing whether someone is an "employee" within the meaning of s. 2(f) of the *Act* may be applied differently in the case of groups of employees performing certain kinds of managerial functions than in circumstances concerning the description of a bargaining unit which includes only non-managerial employees. The possibility of a conflict of interest, which is generally the basis for the assessment of whether someone is an employee or should be excluded, may have a different significance in the context of a bargaining unit which is composed only of those who might be susceptible to such a conflict if included in a unit with their subordinates, but who would have no such conflict when combined with persons exercising similar levels of authority.

The Board has had no occasion in recent years to re-examine the rationale for the recognition of such units, or to articulate a firm set of principles which might apply to them in the current industrial relations context. Indeed, these issues have never been the subject of extensive comment by the Board.

It is readily apparent that these applications raise a series of highly complex issues related to the status of the classifications of employees included in the bargaining unit proposed by PIPSC, and the appropriateness or desirability of that unit. We have concluded that none of these issues can be determined without reference to the interests of SGEU and to the position they have taken on these questions. As we pointed out in our oral ruling, we do not think it is feasible, as we have done on some occasions, to limit the terms on which an intervenor is permitted to participate in the proceedings or to restrict them to representations on certain issues. Even in the case of the unfair labour practice allegations, the legitimacy of the conduct of the Employer is entangled with that of whether the position of SGEU or that of PIPSC - which differ radically - is the more accurate representation of the status of the employees.

In the application for interim relief, PIPSC has asked the Board to make Orders with respect to a number of aspects of their applications. Perhaps the most significant of these is a request that the Board order that no further steps be taken in connection with the scope review.

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 criteria which would be used in consideration of applications for interim relief of an interlocutory nature, 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 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].*

As the Board has subsequently commented, these standards have continued to develop and evolve in the hands of both this Board and the courts. In *International Brotherhood of Electrical Workers v. Saskatchewan Power Corporation*, [1996] Sask. L.R.B.R. 243, LRB File No. 069-96, the Board made this comment, at 256-257:

> *It will be noted that the principles formulated in the WaterGroup 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 was formulated has been to bring together what were listed as a first and second principle in the WaterGroup case, supra, as a composite criterion. In the decision of the Supreme Court of Canada [RJR-MacDonald Inc. v. Canada (Attorney-General), [1994] 1 S.C.R. 331 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, supra, [at 150] the Board summarized the result of the evolution exemplified by the RJR-MacDonald case, supra, 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, supra - the requirement of irreparable harm, and a consideration of the balance of convenience.*

In the decision in *Prairie Micro-Tech*, *supra*, the Board made a further comment to this effect, at 152:

> *Whether it is described as an interlocutory injunction or an interim order - and we think it is safe to say that there are some aspects of both in the application of the Union - what the Board is being asked to do is to issue an Order for relief in circumstances where there is no opportunity for the parties to present evidence, and no full consideration can be given to the merits of the complaints enumerated in the application. Under these conditions, it is our view that the applicant must be required to show that there will be some prejudice to them which cannot be fairly addressed if they are required to await the full hearing and determination of the main application. There are, no doubt, circumstances in which the Board would issue Orders pursuant to s. 5.3 of the Act without putting the applicant to such a test, but in this kind of case, where we are being asked to issue an order without the benefit of a hearing, we feel it is necessary that the applicant provide us with a persuasive rationale for granting relief in the form of a description of the harm which will accrue to them if the order is not granted.*

It will be seen from the cases cited here that the Board has imposed a relatively low standard on applicants for interim relief with respect to meeting the threshold requirement for consideration of such an application, particularly in circumstances where the interim order will not preclude a full hearing of the merits of the issues at a later time. It is, of course, necessary for an applicant to show that the application properly belongs within the framework of the process of the Board. The Board must retain the capacity to screen out frivolous or abusive applications, or applications which raise issues which clearly do not fall within the jurisdiction of the Board to decide.

It is our view that PIPSC has raised a number of issues in the applications which they are entitled to have determined, and that these issues lie within the capacity of this Board to determine. These are serious issues, and, on the face of the applications, PIPSC has a legitimate interest in their outcome.

The more important question, as it has been in other cases, is whether PIPSC has been able to demonstrate that, in the absence of intervention by the Board at this stage, harm will be done to the interests of PIPSC which cannot be redressed in the event they are successful in their applications on the merits after a full hearing of the substantive questions.

Of the items of interim relief applied for, the most significant is the request that the Board prevent further steps being taken under the scope review. The documentation provided to the Board indicates that the scheduled date for the reassignment of the positions which have been under review is April 1, 1997. A number of employees have already received notice that, pursuant to the scope review, their positions have been reclassified within the scope of the SGEU bargaining unit. The apparent intention, as expressed by representatives of SGEU and the Employer, is to give these decisions formal effect as of April 1, 1997, which would be the date for the commencement of representational rights for SGEU.

In the application, PIPSC also seeks an Order that the Employer be required to withdraw all letters and notices which have purported to alter the duties or functions of persons within these classifications, as well as Orders permitting representatives of PIPSC to have access to employees by various means for the purpose of carrying on further organizational activities.

Counsel for PIPSC argued that the supporters of that union will suffer a number of kinds of harm in the event the Board declines to intervene. These would include the payment of union dues to SGEU, and the incursion of additional costs for pension and long term disability benefits. He argued as well that if the Board allows these employees to be simply transferred into the SGEU bargaining unit without canvassing their wishes in this respect, they will suffer a loss of the democratic rights contemplated in s. 3 of the *Act*.

Counsel further argued that PIPSC itself would suffer irreparable harm if the scope review is allowed to proceed to its anticipated conclusion. He referred the Board to the comments made in a decision in

*Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Courtyard Inns Ltd.*, [1996] Sask. L.R.B.R. 673, LRB Files No. 154-96, 155-96 and 156-96, as follows, at 568:

> *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 change for the Union to be able to recoup some of the effects of an action of the part of the Employer which they allege to be in contravention of the Act.*

He remarked that the Board has often commented on the vulnerability of a trade union in the course of organizing activity. He argued that the support which a trade union gathers during an organizing campaign is fragile, and may be influenced by a variety of factors, including statements which are made or actions which are taken by an employer. In this case, he said, the effect of allowing the scope review to continue would be to create a new regime in which PIPSC would be marginalized and rendered irrelevant.

With respect to those items of potential harm related to monetary costs to PIPSC members or supporters, we are not satisfied that these constitute harm of a kind which could not be compensated in an ultimate hearing on the merits. Items of this kind, which are of a purely monetary nature, can be calculated and redressed in the course of further proceedings.

We are persuaded, however, that the concerns expressed by counsel with respect to the ability of PIPSC to conduct a vigorous campaign for support among this group of employees do constitute irreparable harm. A trade union is always in a vulnerable position when conducting a campaign to obtain the support of employees. In this case, the situation is complicated by the presence of SGEU, which, rightly or wrongly, denies the legitimacy of the organizing activities of PIPSC altogether. To permit the transfer into the SGEU bargaining unit of large numbers of potential members of the bargaining unit

described in the PIPSC application would create a new regime in which PIPSC would face the additional burden of reversing what might be seen as a *fait accompli*.

The jurisprudence of the Board makes it clear that other parties to an application for interim relief have an opportunity to put up against the harm anticipated by the applicant some damage to their own interests which they foresee as the result of interim intervention by the Board, damage which would arguably outweigh the harm incurred by the applicant by awaiting the outcome of a hearing on the merits.

Counsel for the Employer argued that his client faced a difficult dilemma in responding to the organizing activities undertaken by PIPSC. The Employer had agreed in the course of collective bargaining with SGEU to enter into the joint review of a number of professional and managerial classifications. Failure to carry out this obligation would have exposed the Employer to unfair labour practice allegations on the part of SGEU. The Employer nonetheless took what steps they could to make clear that they took a neutral position on the representational claims which PIPSC was trying to establish by conducting organizing efforts among many of the employees in the classifications being discussed in the course of the scope review.

The argument just summarized may well have some bearing on the outcome of the unfair labour practice application once the Board has had an opportunity to hear the full range of evidence and arguments in that regard. It does not, however, establish any prejudice to the Employer which would be incurred if the Board were to freeze the scope review exercise at its present stage, or to make other Orders requested by PIPSC.

Counsel for SGEU argued that it would be highly prejudicial to his client if the April 1, 1997 deadline were not complied with. He argued that it is necessary for SGEU to begin planning a bargaining strategy for the next round of bargaining with the Employer, and that it is important for this purpose to bring the scope review to completion.

Given the time and effort which have gone into the scope review, we acknowledge that there may be some inconvenience both to SGEU and to the Employer should the Board decide to freeze this

enterprise at the point it has reached to date. We are not satisfied, however, that this inconvenience is of a sufficient degree that it outweighs the potential harm to PIPSC if the exercise is allowed to proceed to the next phase.

The April 1, 1997 target date for completion of the scope review was agreed to by the parties, and we accept that they have been making serious efforts to comply with this timetable. We recognize that a deadline of this kind does achieve symbolic importance, and becomes a benchmark by which the commitment and good will of the parties is measured.

This date seems to have been chosen fairly arbitrarily, however. At one point, it was thought by the parties that certain factors, such as the issue of whether or how seniority was to be recognized for the managerial and professional employees, might make the target date an unrealistic one. It is not clear that any sanctions would have attended any failure to achieve the completion of the scope review by April 1, 1997, or that anyone perceived that a series of discussions which had been many years coming to fruition would be seriously injured by further modest or reasonable delays.

On the other side of the scale, the establishment of a new equilibrium poses a threat to the interests of PIPSC, in our view, which could not be fully redressed by the Board as a result of determining the merits of the applications.

We would like to comment on one aspect made by counsel for SGEU in this connection. He argued that, were the Board to decide to intervene as requested by PIPSC, this would constitute a departure from neutrality, and an indication of a predisposition in favour of the claims made by PIPSC.

We must reject this argument. It is the essence of the jurisdiction to grant interim relief that a tribunal is not bound by the award of interim relief to any particular position on the substantive aspects of an application. The two kinds of proceedings are very different in nature. In the case of an application for interim relief, the Board is making an estimation, on the basis of arguments and minimal written material which cannot be fully assessed, whether a particular party is exposed to consequences which will unduly and unfairly affect the outcome of a full consideration of the substantive issues.

In the *Saskatchewan Power* case, *supra*, the Board prohibited an employer from taking certain steps to implement an early retirement program pending the outcome of an arbitration based on a grievance filed by the applicant. By doing this, the Board was not reaching any conclusion that the trade union was right in the interpretation of the agreement which had sanctioned the early retirement program, and the employer was wrong. Rather, the Board was concluding that permitting the employer to proceed on the basis that their own interpretation was the correct one would prejudice the ability of the trade union to have the dispute over interpretation decided fairly.

In other cases where the Board has awarded interim relief, we have proceeded on the basis that a failure to reverse a dismissal which is arguably improper could unfairly tilt the balance of an organizing campaign, or that permitting an employer to proceed to the unilateral implementation of new terms and conditions of employment has the potential to render moot objections to these changes by the trade union, or that a total failure to deal with the trade union cannot be redressed by any more deliberative proceeding.

The award of interim relief in such circumstances, however, does not preclude the Board from finding that a decision to dismiss an employee was properly made, or that an employer is entitled, after all, to proceed with unilateral changes to terms and conditions of employment, or that there are good reasons for not compelling an employer to deal with a particular union. The point of an award of interim relief is to determine what set of conditions should be put in place to cause the least possible harm or disruption to the interests of the parties pending a final disposition of those interests, and to prevent any serious imbalance in the ability of all those affected to have those interests fully adjudicated.

In the subsequent proceeding, the Board cannot be held to have made any factual findings or conclusions on the merits of the issues which would determine what the disposition of those matters will be. With the benefit of a full range of evidence and argument available to us, the Board may decide that the putative claims which were the basis of the interim order cannot be sustained, or that the interests which were held in place until the final hearing are not, in the final analysis, worthy of protection.

The application for interim relief requested that the Board direct the Employer to grant PIPSC full access to the e-mail and internal mail systems which are used for communication between and among government employees. We share the view expressed by counsel for the Employer that an employer is not required to provide resources to allow trade unions to conduct their organizing. It seems from a memorandum circulated by the Employer that a general prohibition was issued to employees from utilizing government equipment - including e-mail, copiers, and internal mail -in connection with activities to gather support for any trade union, and to prevent employees from engaging in such activities during work hours.

The memorandum made it clear that any trade union could use bulletin boards in government workplaces for the posting of information about trade union activities. At the hearing, counsel for the Employer also indicated that the Employer is willing to permit meetings or other arrangements for discussion of trade union issues in lunch rooms used by employees, if reasonable arrangements are made.

It is our view that the Employer has offered reasonable facilities to the two trade unions involved in these proceedings, and we will make no further orders in this connection at this time.

We will, however, make the Orders to the following effect:

- that no further steps be taken in connection with the scope review which was undertaken by the Employer and the Saskatchewan Government Employees' Union insofar as that review affects any of the persons whose positions are included in the bargaining unit which is described in the application for certification filed by the Professional Institute of the Public Service of Canada on February 7, 1997;

- that, in particular, no steps be taken which would have the effect of placing any of these persons in the scope of the bargaining unit represented by the Saskatchewan Government Employees' Union described in a certification Order last amended by this Board as of October 21, 1987;

- that the Orders above are intended to be of binding effect upon both the Employer and the Saskatchewan Government Employees' Union;

- that the Employer take steps to advise all the employees included in the classifications included in the bargaining unit described in the application for certification filed by the Professional Institute of the Public Service of Canada that these Orders are in effect;

- that the Employer assign no new or additional duties of a managerial nature to any of the classifications included in the bargaining unit described in the application for certification filed by the Professional Institute of the Public Service of Canada;

- that, in addition to advising affected persons that these Orders are in effect, the Employer post copies of these Orders, and the Reasons for Decision issued by the Board, in prominent places where they may be reasonably be expected to be seen by all affected persons;

- that these Orders shall remain in effect until the final disposition by this Board of the two applications designated in LRB Files No. 018-97 and 031-97.

The issue which is in need of clarification concerns the status of certain non-managerial employees of the affiliated employers listed in Table A to the *Regulations*. The employees in question are those who have not previously been represented by a trade union.

It is worth noting at the outset that the employers listed in Table A are affiliated employers who have been engaged in collective bargaining relationships with trade unions representing some of their employees. Those affiliated employers who have not had unionized employees are not caught by the *Regulations*.

The position which has been taken by some representatives of trade unions is that the intention of the *Regulations* is that all non-managerial employees who are employed either by a health district or by an employer in Table A would be included within the scope of the new bargaining units which are to be the basis of certification under the *Regulations*. This would have a number of implications, the most important of which is that all of those employees would be entitled to have their seniority recognized without cost to them in the newly configured units.

The Saskatchewan Association of Health Organizations (SAHO) has indicated that their understanding of the *Regulations* is that, in the case of the employers listed in Table A, the new bargaining units would not include any employees who had not previously been represented by any trade union. This they would contrast with the situation of employees of the health districts, who would all be swept into the new units without regard to whether they were previously represented by any trade union.

It is our conclusion that the latter interpretation of the *Regulations* is the correct one. While there is certainly some support in the language of the final report of the Health Labour Relations Organization Commission for the proposition put forward by some representations of the trade unions, the *Regulations* themselves do not bear this reading.

Section 3(2) of the *Regulations*, which defines those employees who are to be included in the newly configured bargaining unit for nurses, reads as follows:

# HEALTH LABOUR RELATIONS REORGANIZATION (COMMISSIONER) REGULATIONS - INTERPRETATIVE RULING #1

LRB File No. 152-97, March 10, 1997
Chairperson, Beth Bilson; Members: Ken Hutchinson, Hugh Wagner

**Health care - *The Health Labour Relations Reorganization (Commissioner) Regulations* - Status of non-managerial employees employed by affiliated health sector employers - Board rules that non-managerial employees employed by affiliate who are not currently unionized are not included in bargaining units created by *Regulations*.**

**Certification - Amendment - Add-on to existing unit - Board holds that non-managerial employees employed by affiliated health sector employers can be added to legislated bargaining unit by show of majority support among group sought to be added to unit - Board requires union and employer to reach agreement on seniority entitlement prior to inclusion of group in bargaining unit.**

**Certification - Interim order - Add-on to existing unit - Board may permit union to apply for interim certification order to overcome time limit bars in s. 5 of *The Trade Union Act* if required to amend orders to include non-managerial employees of affiliated health sector employers.**

***The Health Labour Relations Reorganization (Commissioner) Regulations***
***The Trade Union Act*, ss. 5(a), (b), (c) and 5.3.**

## INTERPRETIVE RULING #1

**Beth Bilson, Chairperson:** The Board has recently circulated copies of sample drafts for certification Orders to be issued pursuant to the provisions of *The Health Labour Relations Reorganization (Commissioner) Regulations*, R.R.S. c.H-0.03 Reg. 1 ("*Regulations*").

In making their comments on these drafts, the parties have brought to light a question of interpretation of the *Regulations* on which they are in disagreement. We have decided to issue a Ruling to indicate the interpretation of the *Regulations* which will be the basis of the Orders which are issued by the Board.

*3(2) Subject to subsections (4) and (5), for each health district, there is to be one multi-employer appropriate unit respecting nurses composed of:*

*(a) all nurses who are employed by the district health board; and*

*(b) all nurses who:*

*(i) are employed by a health sector employer listed in Table A that operates a facility within the boundaries of that health district; and*

*(ii) on the day these regulations come into force, were represented by a trade union for the purposes of bargaining collectively.*

The definitions for the bargaining unit of health support practitioners are as follows in s. 4(2):

*4(2) There is to be one multi-employer appropriate unit respecting health support practitioners composed of:*

*(a) all health support practitioners who are employed by a district health board or by a health sector employer listed in Table B; and*

*(b) all health support practitioners who:*

*(i) are employed by a health sector employer listed in Table A; and*

*(ii) on the day these regulations come into force, are represented by a trade union for the purposes of bargaining collectively.*

In the case of the bargaining units for health services providers, the basic description is contained in s. 5(2):

*5(2) Subject to subsection (5), for each health district, there is to be one multi-employer appropriate unit respecting health services providers composed of:*

*(a) all health services providers who are employed by the district health board; and*

*(b) all health services providers who:*

> *(i) are employed by a health sector listed in Table A that operates a facility within the boundaries of that health district; and*
>
> *(ii) on the day these regulations come into force, were represented by a trade union for the purposes of bargaining collectively.*

We read these sections as contemplating two different sets of circumstances. One of these scenarios concerns those nurses, health support practitioners or health services providers who are employed by district health boards. In the case of health support practitioners, this scenario also includes those employers listed in Table B to the *Regulations*, which lists several facilities in the north of the province.

As we interpret these sections of the *Regulations*, non-managerial employees of district health boards are to be included in the new bargaining units without reference to whether or not they were previously represented by any trade union.

A different scenario is described in ss. 3(2) (b), 4(2)(b) and 5(2)(b). In order to be included in the bargaining units delineated pursuant to these sections of the *Regulations*, the employees must meet two criteria: 1) they must be employed by an employer listed in Table A; and 2) they must have been represented by a trade union on the date the *Regulations* came into force.

The distinction between these two situations is also evident in s. 11(3) of the *Regulations*, which reads as follows:

> *11(3) If a health sector employee employed by a district health board was not represented by a trade union prior to the coming into force of these regulations and, pursuant to these regulations, is included in an appropriate unit, section 36 of The Trade Union Act applies to the health sector employee and the health sector employee is entitled:*
>
> > *(a) at no cost to the health sector employee:*
> >
> > > *(i) to recognition by the representative employers' organization, every health sector employer and the trade union of his or her years of service with the health district and*

> *with any previous employer whose services were assumed by the health district; and*
>
> *(ii) to include the years of service mentioned in subclause (i) to the extent and in the manner necessary to ensure that, when calculating his or her seniority, the health sector employee is placed on the same basis as other health sector employees in the appropriate unit in which the health sector employee is included;*
>
> *(b) to choose whether or not he or she will join the trade union that becomes, by or pursuant to section 7, the trade union to represent the health sector employees in the appropriate unit for the purposes of bargaining collectively; and*
>
> *(c) for the purposes of any union security clause contained in any collective bargaining agreement pursuant to section 36 of The Trade Union Act, to be considered to be a health sector employee who is not required to apply for and maintain his or her membership in the union.*

The effect of this provision is to ensure that the seniority of certain employees who were not previously represented by any trade union is recognized on an equivalent basis to the seniority of those employees who have been included within previous bargaining units. The opening words of the provision, however, limit the application of this principle to health sector employees "employed by a district health board." There is no reference to the affiliated employers listed in Table A.

The *Regulations* do not leave it open to us to accept the position put forward in favour of including these employees in the bargaining units described in the Orders which will shortly be issued, as the Board is precluded from issuing Orders which are inconsistent with the *Regulations*.

It is our view that the Orders which will issue within the time limits prescribed in the *Regulations* must, in the case of the affiliated employers listed in Table A, reflect the positions which were excluded from the pre-existing bargaining units as of the date the *Regulations* came into effect.

Their exclusion from these new bargaining units has several implications:

1. There are a number of positions whose inclusion in any of the new bargaining units is in dispute on the grounds that they may be managerial or confidential in nature. It is highly unlikely that all of the issues related to these positions will have been resolved by the time the Board issues the Orders pursuant to the *Regulations*. As with any description of a bargaining unit, the issue of whether the incumbents of certain positions are "employees" within the meaning of s. 2(f) of *The Trade Union Act* may be addressed at any time by joint submission of the parties under s. 24. It is anticipated that any outstanding issues of this nature will be put before the Board in the period after the Orders are issued. The employees we have been describing in this interpretive ruling are not "in dispute" in the same sense, and it would be misleading to suggest, in the Orders or elsewhere, that their inclusion or exclusion depends on a review of whether they are "employees" within the meaning of *The Trade Union Act*. The persons whose positions we have been discussing here are, by definition, "employees" in that sense.

2. It is open to the trade unions which are to be designated as the bargaining agents in those Orders to seek the inclusion of these employees in the relevant bargaining unit. In the event a trade union wishes to have any of these positions included in a bargaining unit configured in accordance with the *Regulations*, the Board would require the presentation of evidence of support in the same way which would be required in the case of other "add-on" situations. In addition, the Board would require the trade union and the representative employers' organization to be in agreement about the seniority entitlements of the employees affected by their inclusion in one of the bargaining units.

3. It is anticipated that there will be a certain number of issues, such as those related to the exclusion of managerial or confidential positions, which will continue to be outstanding after the Board issues the Orders which are being prepared to be issued within the time limits set in the *Regulations*. The resolution of questions related to the future inclusion of the non-managerial employees of Table A employers who have not previously enjoyed trade union representation is an issue which may be addressed in the ways we have outlined at a time after the Orders have been issued.

This ruling does not encompass any findings about whether the open periods laid out in s. 5 of *The Trade Union Act* would have any relevance to the resolution of these issues. In *Saskatoon Civic Middle Management Association v. City of Saskatoon*, [1996] Sask. L.R.B.R. 684, the Board exercised our power under s. 5.3 of *The Trade Union Act* to issue an interim certification Order. It is possible that some accommodation of that kind might be employed in this case in the event the restrictions placed by the open periods appear to be an obstacle to the resolution of important issues.

**UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Applicant and CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF SASKATCHEWAN INC., Respondent and SASKATCHEWAN CONSTRUCTION LABOUR RELATIONS COUNCIL, Interested Party**

LRB File No. 328-96; March 11, 1997
Chairperson, Beth Bilson; Members: Ken Hutchinson, Hugh Wagner

For the Applicant: Drew Plaxton
For the Respondent: Alan McIntyre
For the Interested Party: Larry Seiferling, Q.C.

**First collective agreement - Whether Board should intervene in conclusion of collective agreement in circumstances where memorandum of agreement is concluded, and procedural difficulties prevent ratification vote - Board decides that it would be premature to intervene.**

***The Trade Union Act*, s. 26.5.**

## REASONS FOR DECISION

The United Brotherhood of Carpenters and Joiners of America, Local 1985 (Carpenters Union) has filed this application seeking the assistance of the Board pursuant to s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17, in the conclusion of a first collective agreement with the Construction Labour Relations Association of Saskatchewan (CLR), which has been designated as the representative employers' organization in the carpenter trade division under s. 10 of *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11.

After a period of negotiations, these parties concluded a memorandum of agreement in May of 1994. The ratification and execution of the agreement has been delayed since then, however, because of a series of developments relating to the implementation of the collective bargaining scheme set out in *The Construction Industry Labour Relations Act, 1992*. In relation to the agreement itself, the question arose of which employers in the carpenter trade division fall within the definition of "unionized employer" in the *Act* for the purpose of participation in the ratification vote. These same parties filed a joint application, designated as LRB File No. 039-95, asking the Board to resolve this issue.

The question of which employers are entitled to exercise a franchise in connection with the statute also arose in connection with an application, designated as LRB File No. 023-94, which was filed by the Saskatchewan Construction Labour Relations Council (SCLRC). In that application, the SCLRC sought to replace the CLR as the representative employers' organization in a number of trade divisions, on the basis of a claim to represent a majority of "unionized employers" in those trade divisions.

At the time the application in LRB File No. 039-95 was filed, the Board had determined several issues in connection with LRB File No. 023-94. Nonetheless, since these two applications raised questions concerning the interpretation of some of the same provisions of *The Construction Industry Labour Relations Act, 1992*, it was agreed that they should be heard together.

At the outset of the hearings concerning LRB File No. 023-94, the Board granted standing to the Saskatchewan Provincial Building and Construction Trades Council (SPBCTC) to make representations concerning the interpretation of terms in the *Act*, making it clear that the building trades unions did not have standing to address any issues related to the actual choice of a representative employers' organization by the unionized employers. The Board has also allowed counsel representing the Carpenters Union to make argument concerning interpretive issues on both applications. It should perhaps be noted that status was granted to the building trades unions in connection with these applications over the vociferous and continuing objections of counsel for the SCLRC.

The application which has now been filed by the Carpenters Union asks the Board to intervene in the conclusion of a first collective agreement between that Union and the CLR for the carpenter trade division. Counsel for both the CLR and the SCLRC raised a preliminary objection to the Board taking any steps with respect to this application on the grounds that it is premature.

These Reasons for Decision are related to that objection.

Counsel for both of the organizations which represent employers argued that the determination of the issues raised in LRB File No. 039-95 will ultimately provide a basis for the ratification and execution of the contract which was negotiated between the Union and the CLR in 1994. They argued that, having

set out to resolve those issues, it would be inappropriate for the Board to adopt a different means of arriving at an agreement.

Counsel for the Union argued that the matter of the franchise, which has become the focus of proceedings in connection with LRB File No. 039-95, is not relevant to an application under s. 26.5 of the *Act*, and that the two sets of proceedings do not necessarily have anything to do with each other. He urged the Board to proceed to deal with the application for first contract arbitration without reference to the issues which are under consideration in connection with the two applications being heard by the Board.

All of the parties involved in these applications have expressed legitimate concern at the length of time which has elapsed since they were initiated. The "raid" application in LRB File No. 023-94 was filed on January 28, 1994, and the application in LRB File No. 039-95 was filed on January 26, 1995. The Board has also added its voice to the chorus of discontent about the delays which have attended the final determination of these applications, which have occurred for a variety of reasons.

Though he did not put it quite this way, it was evident in the argument made by counsel on behalf of the Union that the primary motivation in bringing this application is a desire to cut through the complications which have arisen in connection with the other applications and to have the terms of the collective agreement which was reached in 1994 implemented without further delay.

We have concluded that the objection to proceeding at this time with the application for first contract arbitration must be upheld.

This Union is one of the parties to the application designated as LRB File No. 039-95, in which the guidance of the Board is sought in compiling a list of employers to participate in the ratification of the collective agreement which the parties reached in 1994. For a variety of reasons, it has proved difficult to bring the proceedings associated with that application and the application designated as LRB File No. 023-94 to an expeditious conclusion.

It is natural that the Union has experienced frustration at the course of events surrounding those two applications. Though the CLR, as the bargaining representative designated by the Minister of Labour for the unionized contractors in the carpenter trade division, committed those contractors in 1994 to observe the terms and conditions of employment which are laid out in the memorandum of understanding, it has not yet been possible to ensure that those terms and conditions of employment are implemented, and the employees represented by the Union have yet to notice any positive impact on their situation as a result of this agreement.

In spite of the difficulties which have attended the proceedings associated with LRB File No. 039-95, we are confident that these proceedings, in which the Union has been a participant, will, within a fairly short time, reach a conclusion, and it will be possible to hold a ratification vote.

In this context, it is our view that it would be inappropriate to enter into a process which would constitute an attempt to bring about an agreement between the parties by a different route. If the Union is hoping that the process of first contract arbitration would represent a "short cut" in this respect, we have difficulty sharing their optimism that this would be the case. We have to agree that an application under s. 26.5 of the *Act* would raise a number of complicated questions. One of these, as counsel for the CLR pointed out, would be whether this would in fact qualify as a "first contract" at all, given that many, if not all, of the employers represented by the CLR have been bound by previous collective agreements with this Union, albeit in a different legal environment.

A further issue which would arise from this application is that of the role the Board would or should play in a circumstance where the terms and conditions of the proposed collective agreement have already been agreed on by the parties, and the obstacle to their implementation is a procedural or jurisdictional difficulty, rather than a defect in the collective bargaining relationship between the parties.

There may be other issues which cannot be identified at this time. Our point is that the request for intervention by the Board under s. 26.5 of the *Act* cannot be assumed to be a simple or straightforward

matter, particularly when all of the same parties are involved in parallel proceedings which may shortly arrive at the same destination.

We do not rule out the possibility that the Board might be persuaded to use the power conferred on us under s. 26.5 of the *Act* to overcome problems of a procedural nature which stand in the way of putting a collective agreement into effect. It may be that it would be appropriate to take up this application in the future. At this time, however, we must agree that it is premature to consider Board intervention in this manner. The application will therefore be adjourned *sine die*.

**SASKATCHEWAN CONSTRUCTION LABOUR RELATIONS COUNCIL, Applicant and CONSTRUCTION LABOUR RELATIONS ASSOCIATION, Respondent** (LRB File No. 023-94)

**UNITED BROTHERHOOD OF CARPENTERS AND JOINERS, Applicant and CONSTRUCTION LABOUR RELATIONS ASSOCIATION, Respondent** (LRB File No. 039-95)

LRB File Nos. 023-94 & 039-95; March 11, 1997
Chairperson, Beth Bilson; Members: Brenda Cuthbert and Gloria Cymbalisty

For the Construction Labour Relations Association: Alan McIntyre
For the United Brotherhood of Carpenters and Joiners and the Saskatchewan Provincial Building and Construction Trades Council: Neil McLeod
For the Saskatchewan Construction Labour Relations Council: Larry Seiferling, Q.C.

**Construction industry - Certification Order - Board reiterates earlier conclusion that certification Order is not sufficient indication that employer is "unionized employer" in current circumstances in construction industry.**

**Construction industry - Employer - Board provides further clarification of term "unionized employer" as basis for franchise in connection with raid application and ratification of collective agreement.**

**Construction industry - Voluntary recognition - Board decides that project agreement may constitute voluntary recognition, subject to considering situation in individual cases.**

**Reconsideration - Whether applicant entitled to have Board reconsider earlier decision - Board decides that reconsideration is warranted.**

***The Construction Industry Labour Relations Act, 1992*, ss. 2(s), 4, 11, 30, 37.**
***The Trade Union Act, s. 13.***

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** These Reasons for Decision are being issued as a result of a further hearing before the Board concerning two applications which have been joined together for the purpose of our proceedings. One application, which has been designated as LRB File No. 023-94, was filed by the

Saskatchewan Construction Labour Relations Council (SCLRC), which seeks to replace the Construction Labour Relations Association of Saskatchewan (CLR) as the representative employers' organization for a number of trade divisions pursuant to s. 11 of *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11.

There have been several hearings before the Board concerning various aspects of this application. Since this was the first application of its kind under this statute, the parties have asked the Board for the determination of a number of preliminary issues, many of them involving the definition of terms or the interpretation of statutory provisions. One of the issues which was raised in these proceedings was the question of which employers are entitled to take part in the vote which will determine the outcome of the "raid" application.

It should be noted that the Saskatchewan Provincial Building and Construction Trades Council (SPBCTC) was allowed to participate in the proceedings with respect to questions of interpretation of terms in the statute, over the strenuous objection of counsel for the SCLRC.

The other application, designated as LRB File No. 039-95, was filed jointly by the Construction Labour Relations Association of Saskatchewan and the United Brotherhood of Carpenters and Joiners of America (Carpenters Union). In this application, the parties sought the guidance of the Board with respect to the criteria which would establish the list of employers who are entitled to participate in the ratification of a collective agreement which the parties reached in 1994 with respect to the carpenter trade division.

In a decision in *International Union of Operating Engineers v. Dominion Company Inc., and United Brotherhood of Carpenters and Joiners of America v. PCL Industrial Constructors Ltd.*, [1994] 1st Quarter Sask. Labour Rep. 146, LRB Files No. 158-93 and 176-93, this Board reviewed the complicated history of collective bargaining and statutory intervention in the construction industry over the last two decades. In that case, we concluded that the chaos and confusion into which the industry had sunk, from a legal point of view, had not been conclusively remedied by the passage of the new statute in 1992. We made the following comment, at 149:

> *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.*

It was perhaps not surprising, therefore, that the question of who qualified as a "unionized employer" for various purposes under *The Construction Industry Labour Relations Act, 1992* did not prove capable of easy or straightforward resolution. In a preliminary decision in connection with LRB File No. 023-94, which was reported at [1994] 2nd Quarter Sask. Labour Rep. 190, the Board responded to the issues which had been raised at that hearing with the following set of criteria, at 207-208:

- *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 s. 2(s)(i) who meet the above criteria, as well as those described in s. 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.*

It should be noted that the Board acknowledged that the interpretation of the term "unionized employer" which underlay this list of criteria would provide some restrictions on the exercise of the franchise by employers who had at one time been named in a certification Order by this Board. The Board

concluded, however, that in defining the eligibility to participate in decision-making, it is always necessary to draw a balance between the democratic rights of those who make a claim to the franchise and a purposive understanding of the statutory framework. The Board made this comment, at 198:

> *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 s. 3 of the 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 s. 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 s. 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 this set of criteria may have resolved certain issues which were in dispute, it apparently did not make it possible for the parties to the "raid" application to proceed to a vote on the issue of whether the claim of the SCLRC to represent a majority of unionized employers in a number of trade divisions should be upheld.

At a further hearing, the Board considered additional representations on the matter of the franchise for unionized employers, in connection both with the raid application and with the matter of ratification of a collective agreement which had been brought forward by the Carpenters Union and the CLR. The arguments made at this hearing made it clear that the identification of "unionized employers" for the purpose of compiling a list of those eligible to vote in connection with the raid and the ratification of the collective agreement in the carpenter trade division has become a hotly-contested and difficult matter for the parties.

The Board decided that the question of entitlement to the franchise could not be determined, as counsel for the SCLRC urged, on the basis of the existence of a certification Order naming an employer who was still active in the construction industry in the province. The Board conceded that, under more normal circumstances, a certification Order might be a sufficient indication of the existence of a collective bargaining relationship. In the context of the quagmire into which the construction industry had fallen, however, the Board concluded that there must be some indicia of the existence of a relationship between an employer and a trade union representing employees in addition to the mere presence of a certification Order.

In our Reasons for Decision, which were reported at [1996] Sask. L.R.B.R. 277, we made the following observations, at 295:

> *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 Act or The Construction Industry Labour Relations Act, 1992. This includes the contractors on whose behalf counsel for the SCLRC 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.*

The Board went on to express the hope that the collective bargaining environment in the construction industry might eventually be normalized to the extent that the existence of a certification Order might be relied on as a sufficient sign that a collective bargaining relationship is in place.

In that decision, the Board formulated a list of criteria which might be used to identify employers who fell within the category of "unionized employers" under *The Construction Industry Labour Relations Act, 1992*, which were summarized as follows, at 293:

> • *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 employers have, 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 employers have employed an employee whose most recent hiring was done through being dispatched by the trade union*
>
> • *that the employers have 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 employers have 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 employers are a signatory to a collective agreement which they currently recognize as binding upon them*
>
> • *that the employers have, 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*
>
> • *that the employers have, 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*

Though the parties were able, in consultation with the vice-chairperson of the Board, to make some progress towards compiling a list of voters on the basis of this decision, they were still unable to finalize the list. The CLR filed an application with the Board seeking reconsideration of the earlier decision, the one reported at [1996] S.L.R.B.R. 277. This application was supported by the Carpenters Union and the SPBCTC, and opposed by the SCLRC.

At the hearing of the reconsideration application, the Board made some effort to ascertain whether the issues which were raised in the application constituted an obstacle to the finalization of the list of voters in practical terms, or whether the CLR was seeking further guidance from the Board for reference in future situations. The Board expressed the hope that it might be possible to sever matters of practice from those of policy so that the list could be finalized in the near future.

The Board was assured that our response was necessary in order to allow the resolution of disputes about the presence of a number of names on the actual list of voters, and the Board proceeded to hear argument on this basis. Counsel for the CLR referred the Board to a decision in *Kindersley Co-operative Association Ltd. v. Saskatchewan Joint Board Retail, Wholesale and Department Store Union*, [1996] S.L.R.B.R. 140, LRB File No. 034-95. In that case, the Board alluded to the grounds for reconsideration listed in a decision of the British Columbia Industrial Relations Council. The sixth of these was described as follows, at 141:

> *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.*

We indicated orally that we have little doubt that the initial interpretation of key terms contained in *The Construction Industry Labour Relations Act, 1992* falls within this category, and that the CLR would be entitled to reconsideration of the earlier decision on this basis.

The arguments presented by counsel for the SCLRC, on the one hand, and counsel for the CLR and the building trades unions, on the other, encapsulated positions at the extremes of the range of available possibilities. Counsel for the SCLRC stated that he thought the original decision was deeply flawed, and urged the Board to rectify this upon reconsideration. In the alternative, he made it clear that he wished

to have a speedy resolution of the issue so that he could proceed to make an application for judicial review of the decisions of the Board.

As he had at earlier hearings, counsel argued that the meaning of the term "unionized employer" for the purpose of determining the eligibility to participate in decisions under the scheme laid out in *The Construction Industry Labour Relations Act, 1992*, is very straightforward. The term "unionized employer," he argued, means any employer in the construction industry who holds a certification Order, or who has voluntarily recognized a trade union, and who he would describe as "active" in the construction industry, meaning that the employer had employed at least one employee within the year preceding the relevant application.

He pointed out that the representational and collective bargaining questions which will be determined by these votes will have an impact on all such employers, and that what he referred to as their "democratic rights" should not be removed from them on the basis which the Board laid out in the earlier decision. He further argued that, if any of these employers failed to observe provisions of collective agreements by which they were bound, or if they committed unfair labour practices, the onus lay on the building trades unions to enforce these obligations. In the absence of any findings of misconduct on their part, no assumptions should be made that they were not complying with whatever obligations applied to them.

Counsel for CLR, on the other hand, supported by counsel for the building trades unions, argued that the Board had not set a sufficiently rigorous standard for the enfranchisement of unionized employers. While he applauded the conclusion of the Board that the existence of a certification Order was an insufficient basis for granting entitlement to vote, he argued that the Board should have gone further, and should have ruled that only employers who were in full compliance with the collective agreements by which they were bound should be allowed to exercise the franchise in these situations.

We accept that the adoption of either of these positions might provide a more clear-cut basis for the identification of "unionized employers" than the means chosen by the Board in the earlier decision. If we were either to pare down the requirements to the existence of a certification Order, or to enhance

them to require full-fledged compliance with a collective agreement, it might make the task of distinguishing among various scenarios somewhat easier. We have not, however, been persuaded that we should abandon our own original position in favour of either of the candidates put forward by the parties.

Counsel for the SCLRC urged us to revise our interpretation of the term "unionized employer" to comprehend those contractors who are "active" in the construction industry who have a certification Order from this Board. Leaving aside for the moment the complicated issue of voluntary recognition, we can accept that for many purposes the equation of the term "unionized employer" with the term "certified employer" represents an accurate equivalence. In the context of the circumstances as they currently exist in the construction industry, however, we reiterate our conclusion that a certification Order is not necessarily a reliable proxy for the existence of a collective bargaining relationship in any real sense of the term.

In our view, the term "unionized employer" does not have the absolute or self-evident meaning which counsel for the SCLRC would give to it. We have mentioned before the analogy with the term "employee" in *The Trade Union Act*, R.S.S. 1978, c. T-17, and we would repeat it as a helpful comparison. Some factors related to the employment relationship may be relevant to some kinds of decisions and not to others. The Board may, for example, deny employees an opportunity to participate in a vote concerning representation by a trade union if they were not hired until after the date an application was filed, or if their employment was terminated prior to the date of the vote, or if their relationship with an employer has been so sporadic or tenuous that a real employment relationship cannot be found to exist. For other purposes, such as a determination as to whether the employment of an employee was terminated for reasons related to union activity, the date of hiring of the employee, or the number of hours the employee has worked, may not be relevant considerations.

Though we take seriously the limits which are placed on us by the terms of the statutes which are administered by this Board, it is a well-established principle of statutory construction that any statutory definition or provision must be interpreted in the context of the statute in which it is found. In *The*

*Construction Industry Labour Relations Act, 1992* itself, s. 4 provides instruction to the Board on the interpretive principle which should be followed:

> *4 This Act shall be construed so as to implement bargaining collectively by trade on a province-wide basis between an employers' organization and a trade union with respect to a trade division.*

This provision invites the Board to consider all issues raised under the provisions of *The Construction Industry Labour Relations Act, 1992* with an eye to the general statutory objective which is laid out there.

At the previous hearing, evidence was presented concerning the situation of one of the contractors represented by the SCLRC. We should note, parenthetically, that one of the difficulties which has attended the deliberations of the Board in relation to these applications has been the relative absence of concrete evidence of the actual scenarios which are part of this dispute. All counsel involved in the case are apparently in agreement that any evidence presented concerning particular contractors has just been used for the purpose of illustration. The evidence concerning the situation of one contractor, which was summarized in our earlier decision, is as good an example as any, however, to demonstrate the point we are making here.

Although this contractor had, more or less fortuitously, retained an employee who may at one time have been a union member, he stated candidly that he had not had any dealings with the trade union named in the relevant certification Order. His method of setting wage rates and other terms and conditions of employment for his employees has been to discuss these matters with individual employees, not to consult the trade union.

It may not have been clear to this employer for some time what collective agreement, if any, was binding on him, although the status of various collective agreements has become considerably more clear since the decision of the Saskatchewan Court of Appeal in *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada v. Metal Fabricating and Construction Limited* (1990), 84 Sask. R. 195. It was always clear, however, that the

certification Order itself imposed upon this employer a positive obligation to bargain with the trade union and only with the trade union concerning the terms and conditions of employment of employees covered by the Order. It does not seem to us a sufficient answer in this respect to say it was up to the trade union to enforce this obligation if the employer chose to ignore it. Though breaches of *The Trade Union Act*, or of collective agreements, are most commonly brought to light as a result of a grievance or an application filed by a trade union, this does not mean that in the absence of such a challenge, the obligation of the employer ceases to have any meaning. What is created by the certification Order is a relationship of a reciprocal nature.

In coming to the conclusion we did in our earlier decision, the Board rejected the argument that the possession of a certification Order is sufficient to establish that such a relationship exists. We sought to find some means of identifying employers who have been parties to a collective bargaining relationship which has some substance, and in which the employer has given some sign of an effort to comply with the obligations imposed by a certification Order from this Board. The means we selected was to make a list of some of the indicia which are typical of collective bargaining relationships in the construction industry, and to say that if an employer could demonstrate the presence in a relationship of three of these indicia, this would bring that employer within the category of a "unionized employer" for the purposes of these applications.

Counsel for the CLR, with the support of counsel for the building trades unions, has now argued that we should make the criteria for identification of unionized employers more rigorous by ruling that only employers who have been in full compliance with collective agreements should be entitled to vote in connection with the issues raised in these applications. He argued, for example, that an employer should not be entitled to vote on the basis of having made contributions to trade union benefit plans, or pension plans, for one employee, but should only be accepted if contributions have been made for all employees.

In devising the set of criteria which were laid out in our original decision, we consciously set a rather low threshold for entitlement to the franchise, and we are not persuaded that we should raise the bar higher than we have done. As we have said, possession of a bare certification Order is insufficient, in

our view, to indicate that there is in existence a collective bargaining relationship with some substance. On the other hand, we think it is unrealistic to impose as a standard the requirement that an employer have fully and completely complied with a collective bargaining agreement. This, no doubt, means that the list will include employers who, in the view of the CLR and the building trades unions, are undeserving because of lapses on their part during the period after 1983. What we have been trying to do, however, is not to establish a list of those with unblemished records in their dealings with the trade unions, but to provide a practical means of identifying situations in which there could be said to have been a collective bargaining relationship of some substance in the period preceding the filing of these applications.

Having said that we are not persuaded that we should alter our general approach we accept that certain aspects of out earlier decision have caused legitimate confusion to the parties, and these might profitably be the subject of further comment from the Board.

Section 2(s) of *The Construction Industry Labour Relations Act, 1992* reads as follows:

> *2 In this Act:*
>
> *(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.*

As we have said in our earlier decisions on this issue, this definition clearly includes within the group of employers who are covered by the provisions of the statute those whose relationship with a trade union arises from a certification Order granted by this Board, and those whose collective bargaining relationship arises from the voluntary recognition of a trade union.

In the case of the existence of a certification Order, this criterion may be fairly self-explanatory. We should, however, have made it clearer that either a certification Order or voluntary recognition must be one of the three criteria demonstrated by each employer who is to be included on the list of voters.

The existence of a certification Order provides a standard which can be easily tested. The instance of voluntary recognition is somewhat more complicated. In the earlier decision which was reported at [1994] 2nd Quarter Sask. Labour Rep. 190, the Board made these comments concerning voluntary recognition, at 200:

> *Under the 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., [1990], Fall Sask. Labour Rep. 93, 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 CLR argued that, in order to fall within the list of criteria set out in the decision being reconsidered here, an employer ought to be able to produce some kind of documentation proving that voluntary recognition exists. In our view, imposing for these purposes a requirement that voluntary recognition be recorded in written form would be inconsistent with the traditions of the construction industry, and would have the potential to exclude some legitimate collective bargaining relationships.

As the passage quoted above suggests, the Board has not formulated any clear criteria for the identification of legitimate voluntary recognition, since, until its inclusion in s. 2(s) of the *Act*, voluntary recognition had a rather equivocal existence under Saskatchewan labour law and jurisprudence. In our view, the legitimacy of any putative voluntary recognition would depend on the circumstances, and we must consider these relationships on a case-by-case basis. In the event the existence of a relationship based on voluntary recognition is a matter in dispute with respect to any of the employers in question in connection with these applications, it may be necessary for the Board to deal with the actual circumstances of these cases.

It should be noted that the CLR raises the question of how our criteria would apply to employers whose full or partial adherence to a collective agreement was mandated by the provisions of the Crown Construction Tendering Agreement (CCTA), which placed certain conditions on contractors wishing to be involved in construction projects tendered by a number of Saskatchewan Crown Corporations. It is difficult to see that the CCTA has any direct relevance to these applications, as the important period where they are concerned is the year before the respective applications were filed.

The status of employers whose connection with trade unions has been established because of work covered by the CCTA, however, does lead into the broader question raised in the application for reconsideration, that of the requirements laid down in connection with many "project agreements" for recognition of trade unions or observance of collective agreements.

In our view, the conditions which are laid down in connection with particular projects create a version of voluntary recognition. Though the recognition of the trade union and the collective agreement in these cases may not be "voluntary," in the sense that there is no opportunity to do the work unless the contractor agrees to "work union," this is a very common situation in the construction industry, and these relationships have often been regarded as falling into the category of voluntary recognition.

We have concluded that, if the status of work done in connection with a project agreement would affect the standing of any of the contractors whose franchise is at issue here, there would need to be a

determination of that standing by the Board in the event the parties are unable to agree on the inclusion or exclusion of a particular name.

The second criterion set out in the earlier decision of this Board was that:

> *the employer have, within the year preceding the application in question, employed at least one employee who is a member of the trade union or pays dues to the trade union*

For the purpose of clarifying this criterion, we can say that we contemplated that this would include members who were members in good standing of their trade union, who were paying dues to the union or working on a permit issued by the union.

With respect to the other questions posed in the application in relation to this criterion, we reiterate that the list of criteria was not intended to set a standard which could only be achieved by total compliance with all collective agreements in relation to all employees. We intended instead to provide some basis for identifying employers who had a relationship with a trade union which could be considered to have some content. On this basis, an employer who had at least one employee who was a union member during the relevant period would be permitted to include that as one of the three "credits" towards inclusion on the list of voters. Employers who had other employees who were not union members, or who had union members working for them for only part of the time, would not be disqualified on this basis.

The next criterion in the list set out by the Board reads as follows:

> *that...the employer have employed an employee whose most recent hiring was done through being dispatched by the trade union*

This criterion seems clear to us. It does not seem to us reasonable to read it as requiring that the "most recently-hired employee" have been dispatched by the union, as the application for reconsideration suggests. Nor does it eliminate contractors who have had at least one employee, originally dispatched by the union, working continuously from some time prior to the period leading up to the application, but who have hired other non-union employees since.

The application for reconsideration suggests that the following two items - the payment of contributions to pension and benefit plans, and the payment of contributions to training and apprenticeship funds - should, along with the payment of union dues, be subsumed under one criterion. We are not persuaded that this is necessary.

The application asks whether this separation was made to accommodate the particular situation, described in evidence at the previous hearing, of contractors who had reached an agreement with the union under which pension contributions were waived pending the resolution of certain issues. Though the separation of these criteria was not meant as a direct response to that evidence, it may certainly have an impact on those particular cases, in the sense that it may allow the contractors covered by that agreement to substitute other kinds of contributions for the pension contributions they were not required to make under this agreement. It would seem reasonable that, if they were excused from making these contributions by agreement with the union, it should not count against them in deciding whether they qualify as "unionized employers" for our purposes here.

A further criterion suggested by the Board is the following:

> *that the employer is a signatory to a collective agreement which they currently recognize as binding upon them*

A review of this criterion does suggest that some clarification of this formulation is in order. The term "signatory" may be a source of confusion in this context. Under the version of the current statutory régime which was in place from 1979 until 1983, as under the current *Act*, many employers did not literally "sign" the collective agreements which were negotiated on their behalf by the SCLRC, which was then the bargaining representative of unionized contractors in most trade divisions. As we have pointed out in earlier decisions, there was serious confusion in the period between 1983 and 1990 about the status of the agreements which were negotiated under the repealed statute. In the interim, some employers negotiated separate agreements with trade unions, some employers continued to observe the terms of the agreements for the 1982-84 period, some employers operated from time to time under collective agreements related to particular projects, some employers may have reverted to an earlier

collective agreement and, of course, it would appear that some employers decided to observe no collective agreement at all.

What the Board meant to signify by this criterion was that an employer who had acknowledged a collective agreement as binding at the time of the application in question should be considered as having demonstrated some adherence to a collective bargaining relationship. This would obviate the difficulties of deciding what particular collective agreement was, speaking objectively or legally, actually binding upon an employer during this period.

The final criterion set out by the Board was as follows:

> *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*

As the application for reconsideration points out, *The Construction Industry Labour Relations Act, 1992* provides that the responsibility for negotiating collective agreements in each trade division lies with the representative employers' organization acting on behalf of all unionized employers in that trade division.

In the case of the application designated as LRB File No. 039-95, dealing with the ratification of the collective agreement for the carpenter trade division, the significance of this may indeed be that all of the contractors with certification Orders or a voluntary relationship with a trade union satisfy this test, because they are bound under the statute to observe collective agreements arrived at by this means, and precluded from bargaining collectively with the trade union other than through the representative employers' organization.

In the case of the application designated as LRB File No. 023-94 - the raid application - the situation is slightly different. The raid application was filed on January 28, 1994, the earliest possible date provided under the statute for the filing of such an application. The designation of the CLR as the representative employers' organization by the Minister of Labour occurred on February 19, 1993. As the

reconsideration application suggests, this means that, within the year prior to the filing of the raid application, there was a brief window from January 28, 1993 until February 19, 1993, during which contractors were still not compelled to rely on the CLR as their bargaining agent.

It should further be noted that s. 37 of *The Construction Industry Labour Relations Act, 1992* reads as follows:

> *37(1) Subject to ss. (5) and to s. 34 of the Act, every collective bargaining agreement between a trade union and a unionized employer that is in force prior to the designation or determination of a representative employers' organization, and every other agreement between a trade union and a unionized employer that governs wages and working conditions and that has been filed with the department, continues in force until the day on which a new collective bargaining agreement between the trade union and the representative employers' organization comes into force.*
>
> *37(2) Subject to ss. (1), every agreement mentioned in ss. (1) is deemed to expire on the earlier of:*
>
> *(a) the expiry date stated in the agreement; and*
>
> *(b) April 30, 1993.*
>
> *37(3) An agreement mentioned in ss. (1) is deemed to have been negotiated by the representative employers' organization and the trade union representing unionized employees in a trade division.*
>
> *37(4) After the determination of a trade division and the designation or determination of a representative employers' organization, the trade union and the representative employers' organization:*
>
> *(a) may, subject to clause (b), commence collective bargaining at any time; and*
>
> *(b) shall commence collective bargaining not later than April 30, 1993.*
>
> *37(5) Every collective bargaining agreement that was continued by s. 4 of The Construction Industry Labour Relations Repeal Act and that was in effect on the day before the coming into force of this section terminates on the coming into force of this section.*

In the *Dominion Company and PCL Industrial Constructors* decision, *supra*, we noted that it is somewhat difficult to determine the full implications of s. 37 from its wording. It does seem, however, to contemplate a variety of scenarios arising in the transition phase to the new bargaining scheme. Section 37(4) requires the building trades union and the representative employers' organization in each trade division to "commence collective bargaining" before April 30, 1993. The term "bargaining collectively" as used in this statute is derived from s. 2(b) of the *Act*, and it must therefore be taken to include not only the negotiation of a collective agreement, but the resolution of "disputes and grievances."

The period between January 28, 1993, and April 30, 1993, might also be taken to be a "window" in this sense, during which there may have been an obligation or an opportunity for individual employers to discuss terms and conditions of employment, or to deal with grievances, without recourse to the new bargaining structure.

Sections 37(1) and 37(2) also seem to contemplate that a previous collective agreement might continue to have some effect into this period, that it might expire, and that some kind of transitional or provisional agreement might be necessary to fill in the gap which might occur prior either to the assumption of bargaining authority by the representative employers' organization or the conclusion of a new collective agreement.

As we pointed out earlier, the Board was somewhat handicapped in the formulation of these criteria by the absence of concrete circumstances to consider. We do not say that there are any employers whose franchise is at issue whose situation would parallel the circumstances we have described here. We raise them only as illustrations of the kind of contingencies which we thought it might be necessary to include under this final criterion.

What the Board set out to do in the earlier decision was to create a practical and reasonable basis for determining a list of voters who would participate in important decisions at an early point in the life of the legislative scheme laid out in *The Construction Industry Labour Relations Act, 1992*. We were not intending to formulate a list of authoritative standards which will determine forever how various players

in the collective bargaining system in this sector should be regarded. These criteria may or may not be relevant when we are confronted with future raid applications or applications concerning other aspects of the bargaining structure.

We think we have gone as far as we can in setting guidelines for the identification of those who should be allowed to participate in the votes contemplated in these two applications. If the criteria as we initially formulated them, in light of the comments we have made in these Reasons, do not provide the parties with sufficient information to resolve the case of any actual individual employer, it may be necessary to hold a hearing concerning these particular cases.

At the hearing, counsel for all parties expressed frustration at the length of time which has elapsed since these applications were filed. This is a sentiment which we share, particularly in the case of the raid application. As with any situation in which a choice must be made between one option and another, one of the parties which has made representations to us stands to have their interests impaired. We cannot think, however, that the current state of uncertainty and irresolution is preferable to achieving a clear outcome at an early date, no matter how cruel the disappointment of one or other organization will be.

In light of this, we must insist that the parties provide to the vice-chairperson of the Board, within ten days of the date of these Reasons, their response concerning the list of voters. If it is necessary to hold a hearing concerning any particular contractor, we expect the fullest co-operation from the parties and their counsel in making arrangements for such a hearing, in order that the development of a sound collective bargaining system in the construction industry will not be further retarded.

# CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 600-5, Applicant and CANADIAN UNION OF PUBLIC EMPLOYEES, SASKATCHEWAN DIVISION, Respondent

LRB File No. 028-97; March 13, 1997
Chairperson, Beth Bilson; Members: Bruce McDonald and Brenda Cuthbert

For the Applicant: Catherine Sloan
For the Respondent: Neil McLeod

**Remedy - Interim order - Criteria - Serious issue to be tried - Manner of reorganization of local union structures by parent union following legislated reorganization of health bargaining units does raise serious issue.**

**Remedy - Interim order - Criteria - Irreparable harm - Where relief requested is monetary, Board does not find irreparable harm necessary to grant interim relief.**

**Union - Internal affairs - Interim order - Board refuses to grant local union interim order to restrain parent union from restructuring funds of local union following restructuring of health bargaining units.**

***The Trade Union Act*, s. 5.3.**

## REASONS FOR DECISION

The Canadian Union of Public Employees, Local 600-5 (CUPE 600-5), has brought an application alleging that the Canadian Union of Public Employees, Saskatchewan Division (CUPE Sask.) committed breaches of their duty to the members of CUPE 600-5 and violations under ss. 11(2)(c), 25.1 and 36.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17. These provisions read as follows:

> *11(2) It shall be an unfair labour practice for any employee, trade union or any other person:*
>
> > *(c) to fail or refuse to bargain collectively with the employer in respect of employees in an appropriate unit where a majority of the employees have selected or designated the trade union as their representative for the purpose of bargaining collectively;*
>
> *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.*
>
> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
>
> *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*
>
> *(3) No employee shall unreasonably be denied membership in a trade union.*

Among the remedies requested in the application, CUPE 600-5 has asked for an interim Order in the following terms:

> *An interim order enjoining the Respondent from freezing or otherwise attempting to deal with the assets of CUPE Local 600-5 and/or preserving the status quo pending the final determination of this Application, the final determination of the Court action styled as Queen's Bench No. 257 of 1997, Judicial Centre of Regina and Application brought by the Health Sciences Association of Saskatchewan before the Saskatchewan Labour Relations Board referred to in paragraph 4(k) above.*

These Reasons for Decision address only the request for interim relief made in the application.

The events which have given rise to this application are all connected with the genesis, the proceedings and the results of the Health Labour Relations Reorganization Commission (Dorsey Commission). The *Dorsey Commission* was appointed in July of 1996 to consider a range of issues related to the configuration of bargaining units and the definition of collective bargaining relationships in the health care sector on the basis of the changes which have occurred in the administration of health services.

The establishment of district health boards to replace the facility-based or service-based structures which had previously been in existence resulted in the emergence of a large number of issues concerning how bargaining structures should be delineated to reflect new employment relationships, how the rights and obligations under collective agreements would apply to new circumstances, and how

the entitlements of individual employees would be affected by the merger, consolidation or elimination of their previous facilities or services.

A number of these issues were raised in applications before this Board, and many more were the subject of discussion and negotiation among the trade unions and employers in the health care sector. Several major applications before the Board precipitated a comprehensive discussion among the major trade unions representing health care employees of whether the mechanisms available for the determination of these issues were adequate. Four of these trade unions made a proposal to the Government of Saskatchewan suggesting the creation of a commission to address the broad range of issues facing the parties; it was proposed that the conclusions of the *Dorsey Commission* take the form of regulations which would set out whatever new bargaining structures were thought desirable.

As a result of this proposal, *The Health Labour Relations Reorganization Act* (The Health Act) was passed, which set out the terms of reference for the *Dorsey Commission*. Mr. James Dorsey was appointed to undertake the review of the issues outlined in the statute. His report was presented on January 15, 1997, and the *Health Labour Relations Reorganization (Commissioner) Regulations* (The Regulations) came into effect on January 17, 1997.

The major effect of *The Regulations* was to create a series of standard bargaining units and, in the case of all but two of these bargaining units, to designate a trade union as the bargaining agent for employees in them. *The Regulations* contemplated what would eventually become a province-wide unit for nurses, and a province-wide unit which would include a list of medical, paraprofessional and technical classifications. In addition, *The Regulations* provided for the creation of a bargaining unit of "health services providers" in each health district. The Canadian Union of Public Employees was designated as the bargaining agent for a number of these latter units.

The basic administrative pattern which had been employed by this trade union prior to the changes in health care administration was to charter individual locals to represent employees in each facility. The parent local of CUPE 600-5, known as CUPE 600, was treated as a special case for purposes of internal

union organization and administration. This particular local union had enjoyed a considerable amount of autonomy in dealing with the sub-locals, such as CUPE 600-5, which were formed within it.

Though CUPE 600 has had special characteristics, it has functioned as part of what might roughly be described as a pattern of facility-based local unions. It was perhaps natural that the utility of this model came into question in light of the anticipated reconfiguration of bargaining responsibilities after the *Dorsey Commission*. CUPE Sask. initiated a process of merging existing locals into new locals which would function on a district-wide basis.

This process has clear implications for CUPE 600-5. Though there is apparently some prospect that this local will continue to exist in a new form, a number of the current members will be placed in the new nurse and health support practitioner units. The majority will be in a bargaining unit represented by the new district-based local union which is currently being established.

The constitutional validity of *The Regulations* was challenged by the Saskatchewan Government Employees' Union in an application to the Court of Queen's Bench for Saskatchewan (Q.B.G. No. 257 of 1997, J.C.R.). This application was dismissed in a judgment issued on March 10, 1997. A parallel application was made to this Board by the Health Sciences Association of Saskatchewan, and was dismissed in a decision at [1997] Sask. L.R.B.R. 117, LRB File No. 022-97.

In the application now before us, CUPE 600-5 has made a number of allegations impugning the process followed by CUPE Sask. in connection with these developments. The application attacks the role played by CUPE Sask. in the discussions and the formulation of the proposal which led to the establishment of the *Dorsey Commission*. The application further alludes to the submissions made by CUPE Sask. to the *Dorsey Commission*, and to the acceptance of the results by CUPE Sask. Finally, the application speaks of the process which has been followed in restructuring or eliminating CUPE 600-5.

In the case of all of these events, it is alleged in the application that CUPE Sask. has breached the duty to represent the members of this local fairly; that CUPE Sask. has failed to consult with the local union or to provide a fair process for them, either within the terms of the CUPE constitution or by reference to

the principles of natural justice; and that CUPE Sask. has moved to take over the assets of CUPE 600-5 in an unfair manner.

At the outset of the hearing, counsel for CUPE Sask. raised a preliminary objection to further consideration of the application. He based this argument on the dismissal of the applications made to the Court of Queen's Bench and to this Board. In the absence of anything which would cast doubt on the validity of *The Regulations* themselves, he argued that the questions raised in the application all becomes moot. *The Regulations* envisage a shift to bargaining units based on health district boundaries, and this removes any future role for CUPE 600-5.

The Board concluded that the application should not be dismissed out of hand at this stage. In making an oral ruling, the Board drew a distinction between the effects of *The Regulations* in terms of setting up a new structure for bargaining rights, and the organizational changes which are taking place within the union in response to the redrawing of the collective bargaining map. The Board acknowledged that the internal structure and process of the union may be affected by such changes as are mandated by the legislation. The legislation itself, however, does not purport to direct what steps the trade union, as a voluntary organization, may take to accommodate the rights and obligations accrued to it under the new legislative regime. It is still possible, in our view, that legitimate questions might be raised about the process followed by CUPE Sask. in moving to a new organizational structure.

We have commented before on the principles which have evolved for the consideration of claims for interim relief made before the Board. 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 laid out the basic criteria for assessing such applications, 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 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 subsequent decisions, the Board has commented that these criteria have continued to evolve. In particular, the Board has observed that there is considerable overlap between the first and second, and the third and fourth, of the standards articulated in the *WaterGroup* case, *supra*.

In *Professional Institute of the Public Service of Canada v. Government of Saskatchewan and Saskatchewan Government Employees' Union*, [1997] Sask. L.R.B.R. 133, LRB Files No. 018-97 and 031-97, the Board commented on the implications of the first two criteria set out in the *WaterGroup* case, *supra*. These two standards require that the applicant have a clear entitlement to relief, and that there be a "serious issue to be tried," in the event, at least, where the disposition of the application for interim relief will not in effect determine all of the issues raised in the main application. The Board said, at 139:

> *It will be seen from the cases cited here that the Board has imposed a relatively low standard on applicants for interim relief with respect to meeting the threshold requirement for consideration of such an application, particularly in circumstances where the interim order will not preclude a full hearing of the merits of the issues at a later time, It is, of course, necessary for an applicant to show that the application properly belongs within the framework of the process of the Board. The Board must retain the capacity to screen out frivolous or abusive applications, or applications which raise issues which clearly do not fall within the jurisdiction of the Board to decide.*

Counsel for CUPE 600-5 filed a brief of law in which she took some pains to show how the allegations made by her client were related to the provisions of *The Trade Union Act*.

Counsel for CUPE Sask. renewed his argument in this context that all of the complaints which are made in the application have been rendered moot by the decisions which have upheld the validity of *The Regulations*, and that there can therefore not be any serious issue to be tried.

We are of the view that the comments we made in relation to the preliminary objection apply in this context as well. The decision of the Court of Queen's Bench upholding *The Regulations* disposed of the question of whether the reconfiguration of bargaining units and the reassignment of bargaining rights would be implemented. It may be that, to some degree, this affects the practical significance to the applicants of the issues they have raised in their application.

This development does not, however, have the effect of rendering their concerns moot. They have raised issues concerning the internal processes followed by the union in responding to the changes mandated by *The Regulations*, and they have framed these issues in the form of claims under particular provisions of *The Trade Union Act*. We have concluded that they have met the threshold requirement of showing that there is a serious issue to be tried within the meaning the Board has attached to that term in previous cases.

In a 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, the Board commented as follows on the importance of the "irreparable harm" criterion in the context of an application for an interim order, at 152:

> *Whether it is described as an interlocutory injunction or an interim order - and we think it is safe to say that there are some aspects of both in the application of the Union - what the Board is being asked to do is to issue an Order for relief in circumstances where there is no opportunity for the parties to present evidence, and no full consideration can be given to the merits of the complaints enumerated in the application. Under these conditions, it is our view that the applicant must be required to show that there will be some prejudice to them which cannot be fairly addressed if they are required to await the full hearing and determination of the main application. There are, no doubt, circumstances in which the Board would issue Orders pursuant to*

> *s. 5.3 of the Act without putting the applicant to such a test, but in this kind of case, where we are being asked to issue an order without the benefit of a hearing, we feel it is necessary that the applicant provide us with a persuasive rationale for granting relief in the form of a description of the harm which will accrue to them if the order is not granted.*

In their application, CUPE 600-5 have sought certain declaratory relief in relation to the conduct of CUPE Sask. which is the basis of their complaints. The essence of their claim for relief, however, is of a monetary nature. Counsel for CUPE 600-5 made it clear in the course of her argument that what the Applicants seek is to have a distribution *pro rata* of the assets of the local union, and also payment of the costs they have incurred for legal representation in bringing the application.

In connection with the interim application, the Applicants seek to have the assets of the local frozen until the Board has an opportunity to consider the main application. Counsel also suggested that the interim order should direct that the assets be frozen pending a possible appeal of the decision of the Court of Queen's Bench upholding *The Regulations*.

We are not persuaded that the Applicants have established that, absent intervention by the Board through an interim Order, harm will occur to them which cannot be adequately addressed by the Board should they be successful on the main application. There was no evidence to suggest that it would not be possible to assess a monetary claim at a later time, or that the Canadian Union of Public Employees would be unable to satisfy any compensatory order made by the Board after a full hearing on the merits.

We should further comment that, on the basis of the written material filed with the Board in relation to the application for interim relief, we are satisfied that the union has arranged for an orderly transition process which would enable identification of the funds which are currently under the control of CUPE 600-5.

We have therefore decided that the application for interim relief must be dismissed.

It is somewhat unusual for us to comment at this stage on the issues which may be brought forward at a hearing of the main application. We make this comment because we are somewhat concerned that the

request for relief in the application may rest on a misapprehension about the nature of the relationships between members and their trade union or their local union. If this is the case, we think it desirable that the Applicants be in possession of all of the information which may affect the course of the proceedings so that they can properly prepare their case.

We do not think there is any general principle which suggests that the assets of a trade union or of a local union "belong" to the individual members of the organization in a proprietary sense. The funds which are accumulated over time represent contributions of previous members, as well as those presently there, and must be seen as funds belonging to the organization, not to individuals.

We would refer the Applicants to a decision of the Alberta Court of Queen's Bench in *Letter Carriers Union of Canada v. Canadian Union of Postal Workers*, [1994] 2 W.W.R. 450, for a recent comment on this point.

We are not sufficiently familiar with the constitution of the Canadian Union of Public Employees, or with the interpretations which might possibly be given to the provisions of that constitution, to know whether the constitution contemplates that individual members are entitled to a share of the assets under the circumstances which are before us here, and we have no wish to foreclose any argument which might be made in connection with this claim. We merely wish to bring to the attention of the Applicants our concern that they may be proceeding on a basis which we will be unable to accept when the main application comes forward for hearing.

# HEALTH LABOUR RELATIONS REORGANIZATION (COMMISSIONER) REGULATIONS - INTERPRETATIVE RULING #2

LRB File No. 152-97; March 17, 1997
Chairperson, Beth Bilson; Members: Ken Hutchinson, Hugh Wagner

For Saskatchewan Association of Health Organizations: Bonnie Reid
For Service Employees' International Union: Ted Koskie
For Health Sciences Association of Saskatchewan: Alice Robert
For Saskatchewan Union of Nurses: Cathy Zuck
For Saskatchewan Government Employees' Union: Rick Engel
For Canadian Union of Public Employees: John Elder

**Union - Union security - Dues authorization cards - *The Health Labour Relations Reorganization (Commissioner) Regulations* - Section 39 of *The Trade Union Act* is sufficiently broad to continue in effect for benefit of successor trade union authorization cards signed by members of predecessor unions even though change in union representation was effected through legislative action - Employees who were not members of trade unions but who were brought into bargaining units by regulation are required to sign dues authorization cards in order to comply with union security provisions imposed by s. 36(1) of the *Act* and the *Health Labour Relations Reorganization (Commissioner) Regulations.***

***The Health Labour Relations Reorganization (Commissioner) Regulations.***
***The Trade Union Act, ss. 36 and 39.***

## INTERPRETIVE RULING #2

**Beth Bilson, Chairperson:** *The Health Labour Relations Reorganization (Commissioner) Regulations*, R.S.S. c.H-0.03 Reg 1, ("*Regulations*") delineated a new configuration of bargaining units in the health care sector. In all but two cases a trade union was designated as the bargaining agent for employees in each unit. In the other two bargaining units, the *Regulations* contemplate that a vote will be conducted, according to certain conditions, to determine which trade union will represent employees.

A major effect of the *Regulations* is to move significant numbers of employees who have been represented by trade unions into bargaining units where they will be represented by different trade unions.

Section 11 of the *Regulations* further contemplates that a number of health sector employees employed by district health boards will be included within the new bargaining units which have become the basis for collective bargaining, although these employees were not previously represented by any trade union. The relevant wording in s. 11 of the *Regulations* is as follows:

> *11(3) If a health sector employee employed by a district health board was not represented by a trade union prior to the coming into force of these regulations and, pursuant to these regulations, is included in an appropriate unit, section 36 of The Trade Union Act applies to the health sector employee and the health sector employee is entitled:*
>
> > *(b) to choose whether or not he or she will join the trade union that becomes, by or pursuant to section 7, the trade union to represent the health sector employees in the appropriate unit for the purposes of bargaining collectively; and*
> >
> > *(c) for the purposes of any union security clause contained in any collective bargaining agreement pursuant to section 36 of The Trade Union Act, to be considered to be a health sector employee who is not required to apply for and maintain his or her membership in the union.*

It will be noted that these clauses of the *Regulations* refer to s. 36 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). The relevant subsection of s. 36 of the *Act* for our purposes here 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.*

The Saskatchewan Association of Health Organizations (SAHO), which has been designated as the representative employers' organization for the purpose of collective bargaining, has raised an interpretive question in relation to the relationship of the *Regulations* and s. 36 of the *Act* in this connection. This issue is related to the significance of s. 32(1) of the *Act* in these circumstances. Section 32(1) reads as follows:

> *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.*

Counsel for SAHO expressed the view that in the case both of employees who will be represented by trade unions other than the ones who have previously been their bargaining agents, and of employees who have not previously been represented by any trade union, the employers require, in the words of s. 32(1) of the *Act*, a "request in writing" from employees before they can begin to deduct dues and remitting them to the trade unions which will henceforth represent the employees. The practical significance of this would be that the trade unions would be required to sign up all of these employees in order to present written authorization for the deduction of dues.

Counsel further expressed the opinion that s. 39 of the *Act* has no application to this situation. This provision reads as follows:

> *39 Except where otherwise ordered by the board:*
>
> > *(a) no order of the board, collective bargaining agreement or proceeding had or taken under this Act shall be rendered void, terminated, abrogated or curtailed in any way by reason only of:*
> >
> > > *(i) a change in the name of a trade union;*
> > >
> > > *(ii) the amalgamation, merger or affiliation of a trade union or any part thereof with another trade union; or*
> > >
> > > *(iii) the transfer or assignment by a trade union of its rights or any of its rights under or with respect to any such order, agreement or proceeding to another trade union; and*
> >
> > *(b) where a trade union has, as a result of an amalgamation, merger or affiliation with another trade union changed its name, all such orders, agreements and proceedings and all records pertaining to the trade union shall, on and from the effective date of the amalgamation, merger or affiliation and without any order of the board, be deemed to be amended by the substitution of the new name of the trade union for the former name wherever it occurs, and, notwithstanding the change of name, amalgamation, merger, affiliation, transfer or assignment, all such orders, agreements and proceedings shall inure to the benefit of the successor, transferee or assignee, as the case may be and shall apply to all persons affected thereby.*

She argued that this section does not appear to contemplate a circumstance where the transfer or assignment of bargaining rights comes about because of a legislative enactment rather than by a merger or transfer originating with the trade union.

Counsel for the Service Employees' International Union (SEIU) argued that the effect of the reference to s. 36 of the *Act* in ss. 11(3)(b) and (c) of the *Regulations* is to impose a "Rand formula" union

security clause on all of the employees who are included in the new bargaining units, including those who were previously represented by another union and those who have not been represented by any trade union. He argued that though the provisions in the *Regulations* make it clear that employees who have not previously been represented by any trade union may choose not to join or maintain membership in the trade union which represents them, they must pay dues pursuant to the union security clause in the collective agreements which is derived from s. 36(1) of the *Act*.

In this respect, they have no choice as to whether to pay dues the trade union, and there is therefore no requirement for them to signify to the employer that they authorize the deduction of dues.

We have concluded that a distinction must be drawn between the two groups of employees whose status was raised before us. In the case of those employees who were represented by a trade union prior to the creation of the new bargaining units, and who will henceforth be represented by a different trade union, we are satisfied that the language of s. 39 of *The Act* is sufficiently broad to comprehend these circumstances.

It must be conceded that the process by which this group of employees have been included within bargaining units represented by unions, other than the ones which previously represented them, was the result of legislative enactment and not the process of discussion and reconfiguration among trade unions which is normally associated with s. 39 of the *Act*. We are persuaded, however, that it is not necessary that the process of "amalgamation, merger or affiliation" be initiated by the trade unions themselves in order to come within the language of this provision. Insofar as they were the bargaining agents for certain employees, the trade unions have become merged with other trade unions, and their bargaining rights have been transferred to new bargaining agents, resulting in the change of the name of the trade union representing the employees. In our view, these circumstances are included among those to which s. 39 of the *Act* applies.

The conclusion to be drawn from this is that the employees who were previously represented by a trade union do not need to complete a fresh authorization for the deduction of dues to be paid to their new bargaining agent.

With respect to the other group of employees, those who were not previously represented by any trade union, the case is somewhat different. We cannot agree with counsel for SEIU that the reference in s. 11 of the *Regulations* to the union security provisions of the *Act* obviates the need to obtain the "request in writing" required in s. 32 of the *Act*.

It is true that the effect of this part of the *Regulations* is to make the payment of dues to the trade union a term or condition of the continued employment of these employees. If they wish to continue in their current employment, they have no choice but to comply with the union security provisions.

This does not, in our opinion, eliminate the necessity of compliance with the requirement of written authorization laid out in s. 32 of the *Act*. The effect of this requirement is to protect the employer from exposure to a complaint under *The Labour Standards Act*, R.S.S. 1978, c. L-1, which restricts the capacity of an employer to make deductions from employee wages other than those mandated by law. Even though these employees may have no choice other than to provide their written authorization, we do not think this means that the requirement must not be met.

We are therefore of the view that, in the case of employees who are included in the new bargaining units by virtue of s. 11(3) of the *Regulations*, they must be asked to provide written authorization for the deduction of union dues.

A second issue which was raised by SAHO concerned the appropriate timing for the first remission of dues to the trade unions which will henceforth represent employees who were previously represented by other bargaining agents. The date for the changeover which was proposed by SAHO is the first day following the end of the last pay period in March. This date was chosen to accommodate both the

different divisions of time used as the basis for calculating dues for different trade unions, and the fact that the new Orders are being issued in the middle of a month.

There was no disagreement from the other parties present with respect to this date, and we accept this as a reasonable way to designate a uniform date for the shift in the remission of dues.

# HEALTH LABOUR RELATIONS REORGANIZATION (COMMISSIONER) REGULATIONS - INTERPRETATIVE RULING #3

LRB File No. 152-97; March 20, 1997
Chairperson, Beth Bilson; Members: Ken Hutchinson, Hugh Wagner

For Saskatchewan Association of Health Organizations: Bonnie Reid
For Service Employees' International Union: Ted Koskie
For Health Sciences Association of Saskatchewan: Alice Robert
For Saskatchewan Union of Nurses: Cathy Zuck
For Saskatchewan Government Employees' Union: Rick Engel
For Canadian Union of Public Employees: John Elder

**Health care - *The Health Labour Relations Reorganization (Commissioner) Regulations* - Transition of LTD Plans - Board appoints Board Agents to attempt to secure agreement between health care employers and unions regarding transfer of SGEU members with unique LTD plan to other trade unions.**

## INTERPRETIVE RULING #3

**Beth Bilson, Chairperson:** A hearing was conducted by the Board on March 14, 1997, for the purpose of issuing Orders pursuant to *The Health Labour Relations Reorganization (Commissioner) Regulations*, R.R.S. c. H-0.03 Reg 1. The Board also entertained representations concerning several interpretive or collateral issues relating to the circumstances created by these Orders.

Counsel for the Saskatchewan Government Employees' Union (SGEU) raised for consideration an issue arising from the transfer of employees previously represented by SGEU to bargaining units represented by other trade unions. He referred to certain transitional problems stemming from the particular characteristics of the long-term disability (LTD) plan administered by SGEU. This plan is not covered by any of the provisions of the collective agreements between SGEU and various employers. It is administered exclusively by that trade union, and counsel described it as being fully integrated in this respect into the representative and democratic processes of the union. For these reasons, the transfer of employees - both those who are claimants under the plan and those who have been contributing to the plan - into other bargaining units poses unusual problems.

Among the issues which were mentioned by counsel for SGEU, and by counsel for the Saskatchewan Association of Health Organizations (SAHO), as being problematic were those related to current and potential liability to claimants under the plan; to the entitlements and liability of employers and employees who have contributed or will contribute either to the SGEU plan or to the LTD plan offered under the auspices of SAHO to employees represented by other trade unions; to the implications of the deficit position of the SGEU plan in the past and of the recovery plan, including a contribution surcharge, which has been implemented to reverse that deficit; and to the differing structure of the SGEU plan in terms of input from the membership of the union.

Counsel stated that SGEU would offer to maintain the *status quo* with respect to the plan for a period of 60 days after the issuing of the Orders which would create new bargaining units. During this period, SGEU would continue to receive and to process claims, and would make no distinctions on the basis that certain employees had been transferred to new bargaining units. What they asked was that the Board appoint an agent to assist SGEU, the health care employers and the trade unions which would henceforth be the bargaining agent for employees formerly represented by SGEU, to arrive at an understanding of how the transition from this plan would be made.

After the other parties had an opportunity to consult, counsel for the Canadian Union of Public Employees (CUPE) indicated that SAHO and the other trade unions affected were in agreement with this proposal.

Pursuant to this agreement, the Board has decided to appoint Mr. Hugh Wagner and Mr. Ken Hutchinson as agents of the Board on the following terms:

1) Mr. Wagner and Mr. Hutchinson shall, during the period of 60 days following March 14, 1997, attempt to secure agreement among the parties on strategies or mechanisms for facilitating the transfer into new bargaining units of employees formerly represented by the SGEU who were covered by and/or contributing to the LTD plan administered by that trade union;

2) At or before the end of the period, Mr. Wagner and Mr. Hutchinson shall report to the Board concerning their progress in assisting the parties to reach agreement; and

3) The parties may, by agreement, refer any issues to the Board for determination in the course of this process. Mr. Wagner and Mr. Hutchinson may also refer issues to the Board, with notice to the parties.

**UNITED FOOD AND COMMERCIAL WORKERS, LOCAL NO. 1400, Applicant and MADISON DEVELOPMENT GROUP INC., Respondent** (LRB File No. 329-96)

**WALTER CHOPONIS, Applicant, MADISON DEVELOPMENT GROUP INC., Respondent and UNITED FOOD AND COMMERCIAL WORKERS, LOCAL NO. 1400, Certified Union** (LRB File No. 226-95)

LRB File Nos. 329-96 & 226-95; March 20, 1997
Chairperson, Beth Bilson; Members: Bob Todd, Brenda Cuthbert

For the Applicant(s): Scott Spencer
For the Respondent: Kevin Wilson
For the Certified Union: Drew Plaxton

**Unfair labour practice - Communication - Threat of closure - Whether statements attributed to representative of employer in newspaper article constituted improper threat of closure - Board decides that statements did not amount to threat.**

**Unfair labour practice - Communication - Interference - Whether statements attributed to representative of Employer in newspaper articles constituted improper communications - Board deciding newspaper articles did not constitute unfair labour practice.**

**Unfair labour practice - Communication - Interference - Whether employer is entitled to free expression through media - Board cautions that some kinds of communication through press may constitute unfair labour practice.**

***The Trade Union Act*, ss. 11(1)(a), 11(1)(e), 11(1)(j).**

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** The United Food and Commercial Workers, Local 1400, has been designated in a certification Order issued by this Board as the bargaining agent for a unit of employees of Madison Development Group Inc. at the Madison Inn in Prince Albert, Saskatchewan. The Union has filed an application alleging that the Employer committed unfair labour practices and violations of ss. 11(1)(a), (e) and (j) 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;*
> >
> > *(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;*
> >
> > *(j) to declare or cause a lock-out or to make or threaten any change in wages, hours, conditions or tenure of employment, benefits or privileges while any application is pending before the board or any matter is pending before a board of conciliation or special mediator appointed under this Act;*

The parties to this application have been before this Board on a number of occasions, beginning at the time of the certification application in 1994. Two of the applications concerning their relationship are of significance in connection with this application, as their resolution is outstanding at the present time. In an application designated as LRB File No. 053-96, the Union applied for the assistance of the Board in the conclusion of a first collective agreement pursuant to s. 26.5 of the *Act*.

In addition, an application designated as LRB File No. 226-95 was filed on behalf of a number of employees who seek rescission of the certification Order. At the hearing concerning that application, the Union alleged that the application for rescission had been initiated or influenced by the Employer, and that it should therefore be dismissed pursuant to s. 9 of the *Act*. The Board concluded in *Walter Choponis v. Madison Development Group and United Food and Commercial Workers*, [1996] Sask. L.R.B.R. 511, that Employer influence had not been established. The Board decided, however, that the vote to be held in connection with the application for rescission should be deferred pending the outcome of the application for first contract arbitration.

In the application which is now before us, the Union has alleged that certain statements attributed to a representative of the Employer which were reported in several newspapers in Saskatchewan constitute unfair labour practices. The Union has linked these allegations to the application for rescission by suggesting that the remedy for the unfair labour practices should be the dismissal of the rescission application, and the reversal of the earlier decision of the Board concluding that a vote should be held.

On October 12, 1996, the *StarPhoenix* newspaper in Saskatoon published a story bearing the headline "Board labours over decision," under the byline of Ms. Joanne Paulson, a Saskatoon reporter. In the same issue, there was a story, also by Ms. Paulson, titled "Employees' bid to decertify union stalled." Edited versions of the same stories appeared on or about the same date in the *Daily Herald*, the Prince Albert newspaper. The two stories discussed various aspects of both the application for first contract arbitration and the application for rescission of the certification Order. They contained statements which were purportedly quotations from interviews with Mr. Bill Humeny and Mr. Steen Hansen, members of the negotiating committee representing the Employer; Mr. Don Logan, a staff representative of the Union; the Chairperson of this Board; Mr. Larry Seiferling, a spokesperson for the Saskatchewan Chamber of Commerce; Ms. Barb Byers, the President of the Saskatchewan Federation of Labour; Mr. Walter Choponis, the named applicant in the application for rescission; and Mr. Fred Cuddington, the agent of the Board in connection with the application for first contract intervention.

The statements to which the Union took exception were drawn from an interview with Mr. Humeny. One of the passages cited in the application read as follows:

> *For example, a Madison Inn maintenance worker would make $10.50 per hour at the top of the scale, 73 per cent higher than $6.06 negotiated in the Prince Albert Inn contract. A waitress could receive $6.25 per hour, well above the $5.41 negotiated at the P.A. Inn. Some Madison employees already receive wages at the higher end due to long service.*

A second passage read as follows:

> *"The first agreement should be lean enough to dissuade unions from turning to imposition as a substitute for bargaining, and generous enough that employers realize it's in their interests to fashion their own agreements," he said.*

The third statement was as follows:

> *Previous negotiations had solidified about a quarter of the issues at the table, says Humeny. Out of the 56 outstanding issues, Cuddington recommended 49 union demands.*
>
> *"This issue is damn important to business across the province," said Humeny. "Can you imagine what would happen if unions could get that kind of help from board agents along the way?"*

A further story by Ms. Paulson appeared in the *StarPhoenix* on October 29, 1996. This story outlined comments made by Mr. Humeny about the application now before us. One comment which conveys the tenor of his remarks is to the following effect:

> *"It's unbelievable and outrageous that the union is trying to curtail my freedom of speech and the freedom of the press," said Humeny in an interview.*
>
> *"To me, it's obvious that the union would like to have a matter that's crucial to business, labour and government dealt with outside public scrutiny."*

The story also referred briefly to comments by the Vice-Chairperson of this Board and by Mr. Greg Eyre, a staff representative of the Union.

The Union has alleged that the comments attributed to Mr. Humeny in these stories could be expected to have a coercive and intimidating impact on employees, and that they therefore constituted unfair

labour practices. Counsel for the Union alluded to the tension which was already in existence in the workplace because of the history of troubled relations between the Union and the Employer, as well as the divisive effect of the application for rescission. These factors have created a particularly sensitive situation in which the statements made by Mr. Humeny are especially damaging.

Counsel drew particular attention to the statement by Mr. Humeny that layoffs would be certain to follow the imposition of the wage rates recommended by Mr. Cuddington in his report to the Board. He characterized this as a "threat" within the meaning of s. 11(1)(j) of the *Act*, and also as an unlawful act of coercion and intimidation on the part of the Employer, within the meaning of ss. 11(1)(a) and (e) of the *Act*.

Counsel for the Union also alleged that the Employer was responsible for posting copies of the stories from the *StarPhoenix* and the *Daily Herald* in the workplace in locations where they could be seen by employees. Ms. Rhonda Hudak, an employee, was called to give evidence that several copies of the stories had been posted on bulletin boards in several locations. She testified that it was her understanding that the bulletin boards were only to be used for the posting of information by the Employer.

Mr. Walter Choponis, the employee who has leant his name to the application for rescission, also gave evidence concerning the circulation of the press stories in the workplace by means of the bulletin boards. It was his evidence that he was personally responsible for the copying and posting of the cuttings. He said that he had used the bulletin boards on several previous occasions to bring items to the attention of his fellow employees. One of these was a clipping containing several letters to the editor of the newspaper defending waiters in public eating places.

We accept that it was Mr. Choponis, rather than anyone representing the Employer, who was responsible for placing the newspaper stories on the bulletin boards in the hotel where they could be seen and discussed by the employees in the bargaining unit.

Mr. Humeny said in his evidence that he had initially been approached by Ms. Paulson, who said that she was doing a story about the application for first contract arbitration. He said he was willing to answer her questions. He said that he also told her she should get in touch with Mr. Logan or Mr. Glenn Stewart, who were representing the Union in negotiations.

He testified that those parts of the stories which were purportedly quoting his comments were, by and large, accurately reported. He did qualify this in two respects. He referred to the following statement:

> *"Three per cent is a good settlement these days," he said. "If these rates were to be imposed, it's sure to result in layoffs."*

He said that this was in fact a combination of two thoughts he had expressed. The first half of the statement referred to some things he had said about current trends concerning wage rates contained in collective agreements. The other part of the statement, he said, came from a comment he had made about the position the Employer had communicated to the Union. He said that he had told Ms. Paulson that the Employer had tried to impress upon the Union that an insistence on excessive wage rates would make layoffs inevitable.

The other qualification made by Mr. Humeny concerning the statements attributed to him related to the following comment:

> *"The first agreement should be lean enough to dissuade unions from turning to imposition as a substitute for bargaining, and generous enough that employers realize it's in their interests to fashion their own agreements," he said.*

He pointed out that this is a quotation from jurisprudence referred to by the Board in our 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.

This Board has had a number of opportunities to assess communications from employers with a view to determining whether they constitute violations of the *Act*. In most cases, it has been an allegation of a violation of s. 11(1)(a) of the *Act* which has led to a consideration of this issue, though, as is the case here, other related provisions have been cited as well.

Provisions similar to s. 11(1)(a) of the *Act* have often been referred to as "employer free speech" provisions because of the common inclusion of a proviso that "nothing in this *Act* precludes an employer from communicating with his employees." This proviso was contained in the version of s. 11(1)(a) in the *Act* prior to its amendment in 1994. It has often been pointed out that the characterization of the issue as "employer free speech" does not constitute a license to an employer to communicate with employees without any restrictions whatever.

In a passage from the decision of the United States Supreme Court in *N.L.R.B. v. the Fedderbush Co. Inc.* (1941), 121 Fed.(2d) 954, which has often been quoted, Learned Hand C.J. addressed this issue in the following terms:

> *The privilege of "free speech", like other privileges, it not absolute; it has its seasons; a democratic society has an acute interest in its protection and cannot indeed live without it; but it is an interest measured by its purpose. That purpose it to enable others to make an informed judgement as to what concerns them, and ends so far as the utterances do not contribute to the result. Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, a pro tanto the privilege of "free speech" protects them; but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. The Board (N.L.R.B.) is vested with the power to measure these two factors against each other - words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first.*

In *Saskatchewan United Food and Commercial Workers v. Moose Jaw Co-operative Association Limited*, [1985] Apr. Sask. Labour Rep. 43, LRB File No. 315-83, this Board commented on this point, at 44:

> *Counsel for the applicant argued that an employer must remain neutral during collective bargaining and has no right to communicate with its employees on those issues which are the subject of collective bargaining. Although that course of conduct may be the most prudent one, it is not correct to say that an employer is precluded*

> *from communicating with employees about any matter that may be the subject of collective bargaining.*
>
> *Section 11(1)(a) of the Act was amended in 1983 to declare that an employer is not precluded from communication with his employees. That right to communication, however, continues to be balanced in s. 11(1)(a) with the right of employees to bargain collectively through a trade union of their own choosing free from interference, intimidation, threats, coercion and restraint. The addition of the words "nothing in this Act shall preclude an employer from communication with his employees" in s. 11(1)(a) was intended to codify the law. It was not intended to eliminate or restrict the continuing prohibition against employer interference in the exercise of fundamental employee rights under the Act.*

In *Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Brown Industries (1976) Ltd.*, [1995] 2nd Quarter Sask. Labour Rep. 75, LRB File Nos. 101-95 and 012-95, the Board returned to this issue, at 85:

> *The proviso which was included in the previous version of s. 11(1)(a) of the Act 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.*

The Board went on to draw the following conclusion about the amendment of s. 11(1)(a) of the *Act* when it was put in its current form:

> *It is our view that the new wording in s. 11(1)(a) of the Act 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.*

The Board reiterated this view in the following terms in a decision in *Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Westfair Foods Ltd.*, [1995] 2nd Quarter Sask. Labour Rep. 234, at 259:

> *It is our view that the amendment has not materially altered the import of s. 11(1)(a) of the Act, 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 that case, the Board proceeded to make the following statement. also at 259:

> *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 situation, as the Board suggested in the United Food and Commercial Workers, Local 1400 v. F.W. Woolworth Company Limited, [1993] 1st Quarter Sask. Labour Rep. 64, at 67, there may be no room for any communication from the employer which does not have a coercive implication.*

As this passage indicates, the Board scrutinizes each circumstance carefully for signs that an employer has used oral or written communications with employees in a way which might be expected to have an impact on employees deriving from the unequal balance of power which is inherent in the employment relationship. In this context, an employer is not entitled to freedom of speech in an absolute sense, and,

on occasion, the Board has found it necessary to curtail the right which an employer might enjoy in other situations to vent opinions in an unrestrained way.

This does not mean that employees must be protected from all utterances of an employer, or that the trade union must be regarded as the sole legitimate intermediary for all exchanges between an employer and employees. The "employee of average intelligence and fortitude," to use the phrase of the Board in *Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Dairy Producers Co-operative Limited*, [1990] Winter Sask. Labour Rep. 75, at 94, can be expected to have a reasonable capacity to assess information and opinion which emanates from the employer. The Board is cognizant, however, that the parties to this communication are not on an equal footing, and allowance must be made for the coercive potential of employer statements.

The Board also recognizes that this coercive potential may vary according to the circumstances. In some situations, an employer and a trade union may have a collective bargaining relationship of long standing, and employees may be practised at conducting their affairs through a trade union and confident in the ability of their union to represent them. This is considerably different from the context of an organizing campaign, a labour dispute, or even a difficult set of negotiations. In such situations, employees may be more susceptible to signals from their employers about what choices and opinions it is safe to adopt.

The circumstances of this case raise the issue of the permissible limits of employer communication in a somewhat novel context. The impugned statements were contained in stories in two newspapers which distinguishes them from the more usual examples we have dealt with, of "captive audience" meetings, discussions with individual employees, or written material circulated to employees.

Collective bargaining can be a sensitive process. The positions and strategies adopted by each party are largely focused on persuading or influencing the other party. In this respect, their exposure to public scrutiny may be both incomprehensible to a wider audience, and dangerous to the bargaining objectives of the parties. For this reason, seasoned representatives of parties involved in collective bargaining

relationships often place an embargo on discussion in public or through the press of bargaining developments.

We therefore do not share the view attributed to Mr. Humeny in the newspaper story of October 29, 1996, that an employer has some inherent right to free expression in the press. Such expression is amenable to scrutiny in the same terms as other forms of employer communication. If it could be established that an employer was cynically or wilfully manipulating media coverage as part of a strategy of communication with employees, it would be a matter of considerable concern to this Board. Though the negotiations in this case have been subjected to an unusual degree of discussion and scrutiny in public, owing to the application for first contract arbitration, we do not accept that this has the effect of liberating the representatives of the Employer entirely from the limits placed on communication by the *Act*.

On the other hand, we think considerable caution is justified in assessing communications which are published by this means. For one thing, the statements which are reported may be altered or given an editorial gloss in their reporting. It would be a matter of extreme difficulty for the Board to devise a standard for assessing the extent to which statements have undergone change or have been inaccurately or misleadingly reported, and to thus arrive at a reasonable assessment of the extent to which an employer should be held responsible for the statements as reported.

In this case, for example, Mr. Humeny did not deny the essential accuracy of a number of the statements attributed to him. His testimony did, however, differ from that of Ms. Paulson concerning the statement which the Union considered most objectionable, the statement that the payment of the recommended wage rates would mean job losses.

According to his recollection, he had been describing to Ms. Paulson the position the Employer had expressed to the Union. Though this form of communication has been subject to certain limits, employers have generally been granted a certain amount of latitude if what they are communicating is a restatement of a bargaining position they have conveyed to the trade union. Ms. Paulson, on the other

hand, recalled and reported it as a simple statement, which the Union characterizes as a threat to the job security of employees.

A further feature of the newspaper stories in this case highlights the difficulties which would face the Board were we to enter into an assessment of every statement attributed to an employer in the press.

Ms. Paulson made a clear effort in this case to include in her report the viewpoints of a variety of players, both those directly involved in the situation, and those with broader interests. It was not a case where she was summarizing a press release or news conference initiated by the Employer. She initiated contact with a number of persons, whose views were not all synchronous with those expressed by Mr. Humeny. These included Mr. Logan, who was reported as disagreeing with Mr. Humeny on certain points. It cannot, in our view, be said that the overall effect of the stories was to provide a platform for the views of Mr. Humeny. His statements were considerably qualified by the remarks attributed to others.

In addition, we have concluded that the coercive potential of statements such as those attributed to Mr. Humeny is considerably diluted when they are made through this medium. In contrast to meetings called by an employer, or letters distributed directly to employees, the reporting of statements in a newspaper creates a distance between the maker of the statement and the employees which creates an opportunity for them to assess those statements and reach their own conclusions about their implications. This is particularly the case here, where the statements of Mr. Humeny appeared in conjunction with statements emanating from a representative of the Union.

Because of the nature of the forum, and the nature of the stories, we have concluded that the statements complained of by the Union do not constitute violations of the *Act*. We do not think that the employee of "average intelligence and fortitude" would have experienced them as coercive or intimidating in arriving at a personal conclusion about the question of continued union representation which employees have been asked to determine in the application for rescission.

For the reasons we have give, we find that the application must be dismissed.

## SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and MCGAVIN FOODS LIMITED, Respondent

LRB File No. 173-96; March 20, 1997
Vice-Chairperson, Gwen Gray; Members: Don Bell and George Wall

For the Applicant: Larry Kowalchuk
For the Respondent: Larry LeBlanc, Q.C.

**Employee - Status - Independent contractor - Franchise distributors operating as owner-operators and who may employee relief helpers in the delivery of bread and bread products to customer of employer are found to be employees, not independent contractors.**

**Employee - Status - Independent contractor - Franchise distributors who employ others to drive franchised routes are independent contractors and are not employees within meaning of *The Trade Union Act* or bargaining unit.**

**Duty to bargain in good faith - Collective agreement - Employer is required to negotiate changes to organization of workforce with trade union where employer proposes to create franchise distributorships that are intended to be operated by owner-operators.**

**Duty to bargain in good faith - Unilateral change - Employer is prohibited from implementing unilateral change, except to extent collective agreement currently permits, until it reaches agreement with union on reorganization of workforce.**

**Technological change - Notice - Board finds employer complied with notice requirements of *The Trade Union Act*.**

***The Trade Union Act*, ss. 2(f)(i.1) & (iii), 11(1)(c), 33, 34 & 43.**

### REASONS FOR DECISION

**Gwen Gray, Vice Chairperson:** In this application the Union has applied for Orders from the Board seeking to prevent McGavin Foods Ltd. (the "Employer") from proceeding to franchise its distribution routes in the bargaining unit represented by the Union without negotiating the same with the Union. The Union also argues that the Employer failed to provide the Union with notice of technological change in accordance with s. 43 of *The Trade Union Act*, R.S.S. 1978, c. T-17. The Union is seeking an

Order declaring that the Employer's plans to franchise existing distribution routes would be a violation of s. 33 of the *Act*. Additionally, it seeks an Order prohibiting the Employer from proceeding with the creation of franchised distribution routes without the agreement of the Union unless the Employer applies for and receives an amendment to the certification Order which removes franchise distributors from the certification Order.

The Employer manufactures bread and bread products at facilities in Langley, Edmonton and Winnipeg, and distributes these products throughout western Canada. It's head office is located in Langley. The Saskatoon and Prince Albert depots distribute products to various retail and wholesale stores, restaurants and institutions within the northern half of Saskatchewan. The Union has been certified as the bargaining agent for the employees who work out of the Saskatoon and Prince Albert depots since September 30, 1953.

With the exception of one franchise operator in Saskatoon and one in Prince Albert, the sale and delivery of the Employer's products in the northern half of Saskatchewan has been carried out by bargaining unit employees operating company owned vehicles on predetermined routes. These employees are called sales representatives. In addition, the Employer employs relief sales representatives, service truck sales representatives and bread basket retail sales clerks. Only the sales representatives and the relief sales representatives are affected by this application.

The delivery trucks that are operated by sales representatives are owned by the Employer and the cost of maintaining the fleet of vehicles is borne by it. Sales representatives who operate trucks are paid a base salary of $552.00/week plus commission calculated at various percentages depending on the products sold. They earn between $40,000 and $55,000 a year and receive the normal benefits of working under the terms of a collective agreement, including overtime and fringe benefits.

The sales representatives play an important role in maintaining good relationships between customers and the Employer as they have daily contact with the customers. The sales representatives deliver products on routes that are assigned to them by the Employer. They are responsible for delivering the Employer's products to customers in a volume that meets the customer's needs. At the retail store, sales

representatives are responsible for stocking shelves and displaying the products in a fashion that encourages greater sales. Sales representatives are also responsible for ensuring the return rate of products from retail customers is within the margins set by the Employer. The return rate margins are set to ensure that shelves are adequately, but not overly, stocked.

The prices charged to customers are set largely in head office meetings between the Employer and its large national customers. Credit is similarly arranged and the Employer looks after the collection of its accounts from credit customers. Smaller customers may pay in cash which is collected by the sales representative and turned into the office for accounting and billing purposes.

The Employer's main competitor in its western Canadian territory is Westons Foods. In 1995, Westons franchised all of its routes in western Canada and the Employer concluded that Westons had gained a significant competitive advantage as a result of moving totally to a franchise sales and distribution system. As a result, the Employer began to franchise routes starting in Lethbridge, Alberta where routes were sold in the winter of 1995-96, some of which were purchased by former employees. In Manitoba, routes were franchised in Brandon and Winnipeg in late 1995. At the time of the hearing of this matter, the Manitoba Labour Relations Board was hearing an application similar to the one before this Board relating to the conversion of sales representatives to franchise distributors. In May, 1996, the Employer announced the sale of routes in Edmonton and at the date of hearing, 16 of 22 routes had been sold, with four or five of them being purchased by former employees. In Regina, the franchising of routes has commenced with the sale of four or five out of nine routes.

On June 28, 1996 the Employer provided the Union with the following letter:

> *This is to notify you that McGavin Foods Limited intends to enter into agreements with independent contractors (franchise distributors) for the distribution and sale of the company's products commencing Monday, September 30, 1996 in areas currently served by members of your bargaining unit. As a result, the employment of approximately 13 employees covered by the collective agreement between the company and your union will be terminated as of that time. Those employees will consist of approximately 10 Sales Representatives and 3 Relief Sales Representatives.*

> *In the event that the foregoing constitutes a technological change within the meaning of the Saskatchewan Trade Union Act, please consider this letter as notice of such technological change.*
>
> *This decision is in response to marketplace and economic pressure and recent competitive changes in our industry.*
>
> *While we recognize that this situation will create some uncertainty for employees, we will be giving current employees first opportunity to express an interest in purchasing a distributorship. Also, please rest assured that we will undertake to make the transition as smooth as possible for employees.*
>
> *We will be meeting with all employees at a later date to advise them of how this change will occur. You will be welcome to attend this meeting if you wish and we are prepared to meet with you to discuss this matter.*

A copy of the letter was delivered as well to the Minister of Labour along with a cover letter indicating that the Employer was providing the letter to the Minister in compliance with s. 43 of the *Act*.

The Union filed its application for an unfair labour practice on August 13, 1996. On the following date, the Employer met with the sales representatives and Union officials to discuss the Employer's proposal to offer franchised distributorships to current employees. During the meeting with the employees, the Employer's representatives explained the general terms of the franchise agreement that would be offered to current employees and answered questions regarding the distributorship. The Employer did not provide employees with draft agreements to peruse although employees did have in their possession from other sources agreements that had been offered to franchise distributors in British Columbia.

To the Employer's credit, it has allowed this matter to proceed to the Board for determination prior to implementing the change. No steps were taken by the Employer to sell the distributorships prior to the hearing except to advertise in the Star Phoenix for persons who may be interested in obtaining a distributorship franchise. Prior to the hearing, the Employer undertook not to conclude any distributorship agreements prior to October 28, 1996 and further, at the hearing extended this time to November 28, 1996.

The Board is asked in the present application to determine if the proposed franchising of distribution routes has the effect of replacing the sales representatives, who are clearly "employees" within the meaning of the *Act*, with independent contractors who are not "employees" within the meaning of the *Act*. In order to determine this issue, the Board must review the terms of the proposed agreement and assess the status of franchise distributors against the background of the definition of "employee" contained in the *Act*.

The proposed franchise agreement is called McGavin Foods Limited Distributorship Agreement. It is 12 pages in length with two schedules attached. Schedule "A" sets out the list of products manufactured by the Employer. Schedule "B" sets out the customer list assigned to the franchise route, the product discounts charged to the distributor by the Employer for goods delivered to each customer, the return rates allowed for each customer, and a special "C Part %" which allows the franchise distributor to negotiate a special product discount for the customer in question. The main text of the agreement is non-negotiable between the Employer and a franchise distributor; however, the franchise fee and the "C part %" product discounts are open to negotiation.

Distributors are also committed by the agreement to abide by other policies and practices set by the Employer. The policy and practice documents are circulated to distributors in a manual prepared by the Employer for distributors to assist them in the management of their business. These policies will be reviewed along with the distributorship agreement.

In the franchise agreement, the distributor purchases the right to distribute certain listed company products on a non-exclusive basis to a list of customers. The Employer retains the right to sell products directly to the customers covered by the agreement in five circumstances which includes the failure of the distributor to supply customers according to the agreement.

In return, the franchise distributor pays a franchise fee for the route, which fee varies depending on the route in question. The franchise fee amounts to a significant investment on the part of the franchise distributor. In addition, the distributor is required to purchase or lease a suitable delivery truck which is estimated to cost approximately $15,000 to $25,000 used or $35,000 to $40,000 new. Other expenses

incurred by the distributor include the costs of the Employer's products, which are calculated at a wholesale price less a percentage discount, called the product discount. The percentage discount varies depending on the products purchased, the customer and the ability of the distributor to negotiate a special "C part %" product discount for the customer in question. Distributors must also pay the vehicle expenses, accounting, legal and other costs related to running a small business operation, and employee wages and payroll costs if the distributor elects to hire employees. The distributor is responsible for remitting all UIC, CPP, income tax, WCB contributions, and group insurance premiums for himself or herself and for his or her employees. The distributor must also have a GST account.

The Employer can change the list of products referred to in Schedule "A" of the agreement. It can also remove or add customers to the list of customers referred to in Schedule "B" of the agreement. The details of removing and adding customers is dealt with in the "Buying and Selling Customers" policy which requires the distributor to pay 20 weeks earnings for a new customer added to his route by the company. Similarly, if the company removes a customer from a route, the distributor is paid twenty weeks earnings for the loss of the customer. The policy permits distributors to acquire new customers on their own without charge. There is no geographic restriction for the solicitation of new customers, however, the distributor is not permitted to steal customers from another distributor.

Under the agreement, distributors are permitted to sell products other than the Employer's products to customers so long as the products added are pre-approved by the Employer and are compatible with the sale of bakery products. The Employer indicated that franchise distributorships in other centres have been approved to sell milk, confectionaries, bottled water and other bakery products that are compatible with the Employer's products. The purchase and sale of these additional products are the responsibility of the distributor, not the Employer.

The Employer offers distributorships to individuals or to corporations in which the operator is a major shareholder after going through an interview process with potential distributors. The purpose of the interview is to assess the health of the distributor and his or her financial ability. The Employer has made arrangements both with a bank and an automobile credit company to facilitate the making of

loans and granting of letters of credit to distributors. It does not, however, guarantee such loans or letters of credit.

Distributorships can be terminated in a number of ways. The distributor can seek a buyer for his franchise, in which event the Employer retains a right of first refusal to purchase back the franchise on the terms offered by the third party. The distributor requires the Employer's approval to sell to a third party in the event that the Employer does not wish to buy back the franchise. In the event of the death or permanent disability of a distributor or the principal operating employee of a corporate distributor, the agreement requires the distributor, or his or her estate in the event of a death, or the corporate distributor to make one of three choices: (1) to sell the franchise back to the Employer on terms that are set out in the agreement; (2) to sell the franchise to a third party; or (3) in the case of a corporate distributorship, to find a replacement for the principal operating employee who must be approved by the Employer.

The franchise agreement may also be terminated at the end of each year of operation, with the distributor recouping his or her investment by selling the franchise to a third party or back to the Employer on terms agreed to in the agreement.

Finally, the Employer may terminate the agreement for various reasons, including financial insolvency of the distributor, abandonment of the franchise, conduct on the part of the distributor that "reflects unfavourably upon or is detrimental or harmful to the Trade Marks or to the good name, goodwill or reputation of" the Employer or a purported sale not conducted in compliance with the agreement. In this event, the Employer is not obligated to purchase the distributorship from the defaulting franchise holder, but the latter is permitted to attempt to find a buyer for the distributorship.

The Employer determines the price at which its products are sold to customers, except for customers who are obtained directly by the franchise distributor. Many of the prices will continue to be set in national negotiations between the customers and the Employer. The Employer then sells its products to the franchise distributor at a wholesale price set out in Schedule "B" to the agreement. The Employer will continue to collect payment from customers in most cases and will credit the distributor with the

sale. Credit accounts will continue to be arranged for customers through the Employer, except for small customers that the distributor might extend credit to on his or her own. The distributor's account is settled weekly by the Employer.

The distributor is permitted to return a certain percentage of the products without charge. The amount of returns permitted is set out in Schedule "B" to the agreement. The management of returns is an area that affects the financial outcomes of the distributorship as the cost of returns in excess of the negotiated margins are born by the distributor.

The agreement describes the distributor as an independent contractor and specifically, not an employee of the Employer. The agreement further provides that the Employer is not liable for loss, damage or injury caused by the distributor.

The agreement requires that the distributor "work within recognized and generally accepted good manufacturing or good principles of distribution codes or other industry practices". To encourage such practices, the Employer has established a number of policies that it expects franchise distributors to follow. For instance, the "Business Development Standard" encourages a business growth of 5%, requires distributors to be available seven days a week to fulfil the needs of the customers, and places responsibility for finding, training and paying for a replacement driver for vacation and other coverage on the distributor. The "Insurance Coverage" policy requires the distributor to carry certain minimum amounts of vehicle, commercial general liability insurance and health and dental insurance. The "Image Standard" requires the distributor to keep the image of his truck and personnel in good order and to display the Employer's logo on truck and uniforms. The Employer pays for the initial painting of the truck. The "Annual Business Review Standard" requires twice yearly meetings between the distributor and the Employer to review the distributor's performance. The "Product Freshness Standard" requires the culling of stale-dated products from customers' shelves and the return of goods to the thrift stores or other company locations. The "Demo's/Promotion/Sample Standards" policy places responsibility for these functions on the distributor provided he or she has obtained written approval from the Employer. The "Product Purchase and Credit Standard" requires the distributor to pay his accounts on a weekly basis. The "Product Handling and Merchandising Equipment" provides that the

Employer will provide certain equipment designed for the display of its products to distributors at half-price. Lastly, the package of distributor policies contains an application form for Group Benefit Plans that has been organized by the Employer for distributors with an insurance company.

As indicated earlier, the Employer perceived that Westons Foods had gained a competitive advantage against it by franchising its distribution routes in 1995. In the Employer's view, this competitive advantage came about because the franchise distributors are more motivated to sell products to existing customers and to solicit new customers than are sales representatives. The motivating force is of course the personal debt or equity invested by the franchise operator in his or her work. McGavin Foods believes that distributors can influence the outcome of his or her business in a number of ways including increasing sales through better management of shelves, by sampling products in stores and by establishing a good relationship with store managers. The distributor may also increase sales by attracting new customers. Distributors may be able to cash in on their equity by selling customers to other distributors. In addition, distributors can reduce costs by reducing returns and by reducing other costs of operating.

Although franchise distributors can influence their personal outcomes as indicated above, it is also acknowledged that their overall viability depends on the ability of the Employer to retain its corporate clients. The Employer acknowledged that the loss of its main corporate client in Saskatchewan would jeopardize the economic viability of all distributors.

In addition, the margins within which the distributors can influence their profitability are set by the Employer by its ability to control the main customer lists and the wholesale and retail prices. In addition, the nature of the product and the need for its timely delivery is a further factor limiting the ability of the distributor to control major outcomes.

The agreements also provide for considerable control by the Employer over the ownership of the distributorships. Although the agreement allows for the sale of a distributorship, or the sale of shares of a corporate distributorship, the Employer retains a right to refuse the sale.

The agreement itself does not require the owner to drive the route in question. However, the evidence indicated that it is the expectation of the Employer that routes will be operated by owner-operators although the owner-operators may be required to hire relief employees, from time to time, to cover for holidays and sick time. It is not expected that the Employer would enter into distributorship agreements with large trucking companies, for instance. Clearly, it is looking for a small owner who will have a significant personal stake in the way the work is performed. This is evidenced by the concern of the Employer over the health of the distributor and the provisions dealing with the selling options available in the event of the disability of the distributor. As the application was heard prior to the implementation of the franchise distribution system, it is not known if any distributorships will employ drivers to operate on their routes.

With the above evidence in mind, the Board must assess whether the proposed franchise distributors are or are not "employees" within the meaning of the *Act*. The *Act* defines "employee" in s. 2(f) 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.*
>
> *(ii) Repealed.*

> *(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;*

Traditionally, the Board determines the status of owner-operators under both ss. 2(f)(i.1) and (iii) of the *Act*. Section 2(f)(i.1) of the *Act* sets out a purposive test for determining if the relationship between contractors, in the opinion of the Board, could be the subject of collective bargaining. Section 2(f)(iii) of the *Act* prevents the common law test of "vicarious liability" that was developed to determine the legal liability of a master for the acts of a servant from being determinative of employment status. In *Retail Wholesale Canada, A Division of the United Steelworkers of America v. United Cabs Ltd., Johnson et al.*, [1996] Sask. L.R.B.R. 337, LRB File No. 115-95, the Board, at 345, held that the focus of the assessment under s. 2(f)(i.1) and (iii) of the *Act* is an 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."

In other jurisdictions, this assessment is woven around the term "dependent contractor" which is included in the definition of "employee" in many labour relations statutes. This term, which was coined by Professor H. W. Arthurs in his article "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power" (1965-1966), 16 U.T.L.J. 89, is used to capture the distinction noted in the *United Cabs Ltd.* case, *supra*, between an entrepreneur and a contractor whose relationship with the person he or she contracts with is such that it would benefit from collective bargaining.

A useful summary of the tests used to determine whether a person is an entrepreneur and employee is found in *Canada Post Corporation v. Canadian Postmasters and Assistants Association et al.* (1989), 5 CLRBR (2d) 79, at 82-85:

*When assessing if someone is an independent contractor, one must look at the totality of the operation of activity being carried on. To isolate any one segment of an operation to determine status can be quite misleading. A key consideration is whether the operation or activity is a separate and distinct enterprise from that of the business with which contractual arrangements have been entered into. To identify a distinct enterprise one must look to see if the economic control of the operation or activity is truly in the hands of the operator. The type of control contemplated here is not limited to legal subordination - it is a much wider concept that relates to the ongoing control over every aspect of the operation or activity. It goes to the everyday discretion of how, when and where activities are carried out, work is performed and how assets are utilized. How this control is exercised can often make the difference between the chances of profit or loss. This control, which is probably better described as decision-making discretion or "risk-taking", is a fundamental characteristic of a distinct enterprise.*

> *A businessman is a risk-taker. His success depends on the decisions he makes. He competes in a market that rewards or punishes his risk-taking. This is self-evident. It is equally self-evident that risk-taking is implemented through control. A person cannot take risks in doing work if he does not have control over all or part of the performance of the work. Nor can a person take risks in the cost management of the assets (for example, purchase or lease a less expensive but less safe piece of equipment) if he does not control their cost management. This is why control is of fundamental importance in identifying a separate enterprise. Its assessment identifies where the risk-taker emanates from.*
>
> *If risk is the essential characteristic of an enterprise, a distinct enterprise should be found wherever the worker has complete control over every aspect of the activity or operation.*

*(Robert Flannigan, "Enterprise Control: The Servant-Independent Contractor Distinction" (1987), 37 U.T.L.J. 25 at p. 46)*

*This excerpt from Mr. Flannigan's article forms the basis for what he describes as "the enterprise control test." Although in this article the "enterprise control test" is analyzed in the context of tort law, it is, in our opinion, a useful tool when making the distinction between dependent and independent contractors in a labour relations context.*

*For our purposes, we shall refer to this test as the "economic control test" and we would like to point out that by adopting this rationale we are not breaking new ground. This economic control test is nothing more than an expanded and reconstructed version of the fourfold test described by Lord Wright in Montreal v. Montreal Locomotive Works Ltd., [1947] 1 D.L.R. 161, [1946] 3 W.W.R. 748 (P.C.) - i.e. (1) control; (2) ownership of tools; (3) chance of profit; and (4) risk of loss. The economic*

> *control test also incorporates the "integration test" developed by Lord Denning L.J. in Stevenson Jordan & Harrison Ltd. v. MacDonald & Evans, [1952] 1 T.L.R. 101, 69 R.P.C. 10 (C.A.), by approaching status determination by searching for the existence of separate enterprises. The "integration test" of Lord Denning basically sought to determine whether the work in question was being done as an integral part of the employer's business and therefore whether the contractor was employed as part of the employer's business.*
>
> *What the economic control test does is to update the concepts of the "fourfold test" and the "integration test" and reconstruct them to suit the modern business milieu. It focuses on the contractor's activities rather than on the employer's business. This is important for the Board as it administers the Code in today's ever-changing business world where corporate takeovers, mergers and practices such as "contracting out" and "privatization" are becoming commonplace.*

In making the determination of who is an employee, labour relations boards have often drawn a distinction between owner-operators who benefit from their own labour and capital and those who benefit from their own labour, capital and the labour of others. For instance, in the *United Cabs Ltd.* case, *supra,* the Board held that franchise drivers who own one car, lease operators and regular drivers were "employees" within the meaning of s. 2(f)(iii) of the *Act*. The Board found that franchise operators who owned more than one car were properly excluded from the bargaining unit as "they presumably have an interest of a more purely entrepreneurial nature". Similarly, in *Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Dominion Dairies Limited*, [1979] 1 Can. LRBR 305, at 313, the Ontario Labour Relations Board held as follows:

> *Having regard to all of the evidence, the Board is satisfied that all of the contract drivers examined, with the exception of one, are dependent contractors within the meaning of section 1(1)(ga) of The Labour Relations Act.*
>
> . . .
>
> *The exception from the Board's finding is Mr. Leo Lanoue. Mr. Lanoue owns and operates two trucks. The trucks are used to service separate routes on a full-time basis. Normally he drives one and his son drives the other, but at the date of examination he was not active on the trucks, and both were being driven by persons employed by Mr. Lanoue. In its decision in Canada Crushed Stone, [1977] OLRB Rep. Dec. 806, the Board noted that the dependent contractor provisions of The Labour*

> *Relations Act do not extend the protection and benefits of collective bargaining to persons who are themselves sufficiently entrepreneurial as to be substantially engaged in deriving profit from the labour of others. While the Act has been extended to protect persons in a position of economic dependence whose whole endeavour is analogous to wage earning, it does not extend to give the added strength of collective bargaining to contractors who are substantially engaged in an entrepreneurial undertaking with a view to the pursuit of a greater profit through the employment of others.*

The distinction was also noted by the Ontario Board in *Algonquin Tavern v. Canadian Labour Congress, Chartered Local 1689*, [1981] 3 Can. LRBR 337 where the Board listed as one of 11 factors useful in determining the employment status of an individual the following factor, at 360:

> *1. The use of, or right to use substitutes. It has been considered inconsistent with an employment relationship if one could fulfil the bargain with someone else's labour rather than one's own work and skill. This is significant, however, only to the extent that it is the alleged employee who makes that decision.*

This factor was relied on in *Atway Transport Inc. v. International Woodworkers of America* (1989), 3 CLRBR (2d) 1 (Ont. L.R.B.) as one of the reasons for finding that a contractor for hauling wood was not an "employee" within the Ontario *Labour Relations Act*. In that instance, the owner-operator hired a driver to haul logs on a second shift when he was unavailable to drive.

In *E. M. Carpentry (1982) Ltd. v. Labourers' International Union of North America, Local 183 and United Brotherhood of Carpenters and Joiners of America, Local 27* (1982), 4 CLRBR 60, the Ontario Board held, at 75.

> *In reviewing the evidence in the Reports concerning those pieceworkers with two or more helpers, the Board is satisfied that these pieceworkers are engaged in an entrepreneurial activity of the sort which more closely resembles that of an independent contractor rather than that of an employee. The more helpers a pieceworker has, the greater the opportunity to increase his profitability. The pieceworker in this situation is clearly profiting from the labour of others and is very much the master of his own business.*

The hiring of drivers by owner-operators was also a significant factor considered by the Board in *United Food and Commercial Workers, Local 241-2 v. Beatrice Foods Ltd., Dennis Mierau, Michael Woodhouse, and Doug Elkew*, [1994] 3rd Quarter Sask. Labour Rep. 302, LRB File No. 264-93 and in *Retail, Wholesale and Department Store Union, Local 539 v. Sherwood Co-operative Association Limited, William Evitts et al.*, [1988] Fall Sask. Labour Rep. 82, LRB File No. 194-87. In both instances, the owner-operators were held to be independent contractors, not employees.

In *Weston Bakeries (Québec) Corp. v. Bakery, Confectionery and Tobacco Workers International Union, Local 324*, (unreported, Québec: Montreal Division No. 500-28-000190-959, April 17, 1996, Prud'homme J.) the Labour Court overturned a decision of the Labour Commissioner which held in similar situation to the one presented to this Board that franchise distributors of Weston Bakeries remained employees under Québec's *Labour Code*. The primary test applied by the Labour Court to determine employment status was quoted from its earlier decision in *Gaston Breton Inc.*, 1980 T.T. 471 [at 32 in *Weston Bakeries (Québec) Corp.*]:

> *[Translation] In my view, unless the case is an exceptional one, such as a contract of employment involving highly specialized work or a contract of enterprise with special clauses as to conduct, the essential test is the following: when an individual must perform certain work personally on a regular basis to the satisfaction of another for the duration of his contract, this qualifies as the lease and hire of services and not the lease and hire of work. I believe that this is the customary way, in our modern age, of exercising true control over the performance of work. Conversely, the person who can get someone of his choice to replace him for a major portion of the term of his contract would seem to me to have agreed merely to carry out certain work and not to furnish his services. He enjoys an autonomy that is characteristic of the contractor.*

The Labour Court concluded in the *Weston Bakeries (Québec) Corp.* case, *supra*, as follows, at 34:

> *Is there or is there not an obligation on the part of the distributor to perform the work personally? The contract is explicit: there is no such obligation; the opposite is stated.*

The Québec Labour Court appears to have given primacy to the contractual provision that entitled franchise distributors to employ others to perform the work in question whether or not they do in fact employ their own workforce. We would agree with the Labour Court that the employment of others by

the franchise distributor is a solid indicator of his or her entrepreneurial status in that it demonstrates that he or she will profit not only from his or her own labour, but also from the labour of others. However, in our view, the existence of a contractual right to employ others to perform the work in question does not render all franchise distributors "independent contractors". The right to employ others in your stead may be a relatively easy contractual provision to write into a franchise agreement, while the actualization of the right may elude most franchise distributors. Where the right is not actualized, the Board must ask if the franchise distributors are truly entrepreneurs or are they more like employees in their relationship with the employer. In some cases, examples of which are contained in the *United Cabs Ltd.* case, *supra*, and the *Dominion Dairies Limited* case, *supra*, labour relations boards distinguish between franchise holders who do employ others to perform the work and those who perform the work personally. Outside of the *Weston Bakeries (Québec) Corp.* case, *supra*, the significance of the contractual right to employ others does not appear to have been a determining factor in deciding if a group of individuals are "dependent contractors". It is our view that the contractual right to employ others where it is stated explicitly in the contract documents is not determinative of employment status. Rather, an examination of all factors, such as those suggested in the passage quoted from the *Canada Post Corporation* case, *supra*, above, is required.

There remains an issue as to whether the use of casual replacement help takes a franchise owner outside the definition of employee. Generally, an owner-operator's use of replacement drivers for relief work, sick time and vacation time has not impeded a finding of dependent contractor status. In *Kamloops News Inc. v. Communication Workers of America, Local 226* (1990), 11 CLRBR (2d) 70, the British Columbia Labour Relations Board stated, at 81:

> *In addition, the News argues that the hiring of replacements by the delivery drivers depicts the independence of the drivers. In Salmon Arm (District), B.C.L.R.B. (No. l236/82), the Board stated (at p. 5):*
>
> > *[W]e agree with the proposition advanced by the Employer that a person can be both a dependent contractor and an employer.*

Similarly, in *Dominion Dairy Limited*, *supra*, at 313-314, the Ontario Board considered the issue of helpers and concluded as follows:

> *In a more recent decision, Comfort Guard Services Ltd., Re Fuel Oil & Natural Gas Service Technicians Association, et al., [1978] October OLRB Rep. 905 the Board found that a hearing equipment service contractor was not deprived of status as a dependent contractor merely because he sometimes made use of a helper on his service calls. In that case the Board determined that the use of a helper merely to lighten the serviceman's load was to be distinguished from the use of an employee hired on a regular basis to drive a second vehicle and make separate service calls, thereby substantially increasing the contractor's capacity for profit.*

A similar exception was noted in the *Weston Bakeries (Québec) Corp.* case, *supra*, in a quotation from the *Gaston Breton Inc.* case, *supra*, at 20, (*Weston*):

> *[Translation] Upon reflection, there is nothing unusual about an employee getting third parties to assist him in performing his duties and incurring expenses in this regard, provided that in doing so, he is merely procuring minor and incidental relief from the burden he personally bears. In this context, there is no sense in which the employee can really stand to profit from the increase in value provided by the work of another, or sustain a loss; such act can only be characterized as an almost automatic, limited expenditure in the course of performing the work.*

The Board shares this last characterization of the use of relief drivers by franchise distributors. The use of such drivers does not significantly alter the relationship between the franchise distributor and the Employer; it is not a case of the distributor profiting or attempting to profit from the labour of others in the management of his or her business.

In its overall assessment, the Board concludes that the franchise distributorship arrangements proposed by the Employer more resemble an employment relationship than an independent contractor arrangement with one exception that will be expanded on below. The Board comes to this conclusion after examining the following factors which were first outlined in the *Algonquin Tavern* case, *supra*:

1. Use of, or right to use replacements

The distributorship agreement is silent on the topic of the use of replacements. As indicated in the summary of evidence, the Employer indicated that franchise distributors were entitled to employ other drivers to perform the work. However, as also indicated, the expectation of the Employer is that

franchise distributors will primarily be owner-operators. This is in keeping with the main rationale for changing from wage labour to franchises which was expressed as a desire on the part of the Employer to achieve a higher degree of motivation on the part of the distributor due to his or her equity investment in the operation. It is difficult to see how the Employer's goal would be achieved if distributors used wage labour to perform the work. Although there may be exceptions, it would be anticipated that the Employer intends to offer distributorships to owner-distributors who use only relief helpers to cover vacation, sick leave and other brief absences.

2. Ownership of instrumentalities, tools, equipment or the supply of materials

The franchise distributors are required to purchase the delivery trucks used in the delivery of the Employer's products. The costs of the vehicle are not insubstantial; however, they are also a common expense incurred by franchise operators and are comparable, for instance, to the expense of owning a taxi cab. The Employer leases hand-held computers and printers to the drivers for ordering products. The Employer also provides tables, gravity racks, tote boxes, hand carts and the like to the distributor for half price. Other product container equipment belongs to the Employer and is to be returned to it in good condition.

3. Evidence of entrepreneurial activity

The franchise distributor is encouraged to find new customers which typically would be small convenience stores. There is no geographic restriction limiting distributors to a certain area of a city or the province. Obviously, however, there are restrictions imposed on the number of new customers that could be serviced in a timely fashion by a distributor. It remains the case that the majority of the distribution will be to the Employer's national accounts with retailers, restaurants and institutional customers. Distributors are able to set prices with their own customers but they would not be entitled to offer prices lower than the Employer's national accounts. Distributors are allowed to sell other products in conjunction with the Employer's products, provided in both instances they receive prior approval from the Employer. The overriding obligation in this regard, however, is to use their best efforts to sell the Employer's products. The promotion side of the business remains in the hands of the Employer, except for store demonstrations and sampling. The "know-how" of the distributor that is likely to

contribute to the success of the venture is his or her ability to judge customer needs and stock accordingly. This same "know-how" is also factor in the success of a commissioned salesperson.

4. The selling of one's services to the market generally

The relationship between the franchise distributorship and the Employer is premised on the distributor being available to service customer accounts seven days a week. Generally, five days would be devoted to distribution. On the remaining two days, distributors are expected to keep shelves stocked, arrange demos and respond to enquiries from customers. The distributorship agreement also contains a restrictive covenant which prevents the distributor from working for a competitor of the Employer for a period of one year following the termination of the distributorship. As indicated above, distributors can seek approval from the Employer to sell other items along with the Employer's products and in this sense it could be argued that the distributors are able to provide services to more than one manufacturer. However, the primary work is clearly to service the Employer's customers and to sell the Employer's products.

5. Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes

This factor must, of necessity, be tempered by the nature of the industry under discussion. It is a time sensitive industry where the products sold and the customer needs dictate the delivery schedules. However, aside from this natural restraint, the Employer through its assignment and removal of customers from Schedule "B" of the agreement controls the majority of the work assigned to the distributor. Distributors have little say in the customer list or location of the customers. This factor can influence the profitability of the distributorship and is one of the reasons given for negotiating a "C Part %" which can take into account long distances between delivery points and the like.

6. Evidence of some variation in the fees charged for the services rendered

The pricing system, by and large, is set by the Employer, both the discounted wholesale cost to the distributor and the cost to the customer. The distributor has some ability to negotiate the "C Part %" product discount and to set the price for his or her own customers. However, the bulk of the margins are controlled by the Employer.

7. Integration into the Employer's business

With the exception of the change in remuneration, accounting and truck ownership, there is little to distinguish the position of the distributor from the current sales representatives. They perform the same function for the Employer and are an integral part of its business.

8. The degree of specialization, skill, expertise or creativity involved

The main factors leading to a successful distributor will be the same factors that contribute to the success of a commissioned salesperson. The distributor will also be required to gain knowledge of small business accounting, tax and other legal requirements of operating a small business. This is the case for all owner-operators and does not constitute a significant factor in the determination of employment status.

9. Control of the manner and means of performing the work

The ability of the distributor to control the manner and means of performing his or her work is limited by the customer list which is determined by the Employer. The work to be performed will be scheduled in accordance with the delivery needs of those customers and the need for timely delivery of the product. The Employer has set out a number of policies governing the means of performing the work such as the Business Development Standard, the Insurance Coverage policy, the Image Standard, the Product Freshness Standard and the like. It retains the ability to terminate the distributorship without notice if, in the language of the agreement, "the conduct of the distributor which, in the reasonable opinion of the company, reflects unfavourably upon or is detrimental or harmful to the Trade Marks or to the good name, goodwill or reputation of the company."

10. The magnitude of the contract amount, terms, and manner of payment

The Employer projects income levels for distributors based on past sales experiences for the customer list in question. The gross sales income must then be adjusted to take into account the distributor's costs, including financing costs of the distributorship fee and vehicle, and the different tax implications of operating a small business with the ability to income split between spouses if one spouse performs accounting or other related duties. Although the Employer's witness was not pressed on this matter, one would suspect given the economics at work that the distributor's net income would be comparable to the

net income of sales representatives. The "economics at work" include the desire of the Employer to be more profitable by transferring the cost of the vehicles to distributors while at the same time controlling both the price charged to most customers and the product discount charged to the distributor. In this scenario it is hard to imagine that the rewards available to the distributors would be greater than the labour and vehicles costs currently paid by the Employer. The Board attempted to clarify the economic advantages to the distributors resulting from the change with the Employer's witness. The only significant response was that they would enjoy better tax treatment than the current sales representatives. The advantages gained include the lower taxation rate for small business and the income splitting devices available to small business. There was no evidence on the question of whether the franchise distributor's equity investment is expected to increase over time.

11. Whether the individual renders services or works under conditions which are similar to persons who are clearly employees

The work to be performed by distributors is indeed the same work currently being performed by sales representatives. The differences are: (1) the form of remuneration; (2) the ownership of the delivery vehicle; (3) the ability to sell other products, with approval; (4) the ability to obtain new customers; and (5) the taxation structures.

There is no question that franchise distributors are involved in "risk-taking" as that term is used by Professor Flannigan in the passage quoted earlier. They are asked to invest both labour and equity in the distributorship. It is our view, however, that the risks are confined to very narrow parameters or margins that are determined and controlled by the Employer through the customer list, prices, method of performing the work, the "buy-back" provisions, and the termination for "cause" provisions in the agreement. In other words, the chance of profit and risk of loss are subject to some minor influence and adjustment by the distributor, as they would be for a commissioned salesperson or a taxi driver, but only within the broader parameters set by the Employer. In these circumstances, franchise distributors lack the degree of entrepreneurial control that is characteristic of independent contractors and they fall instead within the definition of "employee" contained in the *Act* and within the scope of the certification order issued to the Union. It is this Board's view that the terms of the franchise distributorship can be the subject of meaningful collective bargaining.

Having reached that conclusion, the Board must state one exception which follows the observation made in the quotation cited above in the *Canada Post Corporation* case, *supra*, to the effect that the focus of the "economic control test" as propounded by Professor Flannigan requires the labour relations board to "focus on the contractor's activities rather than on the employer's business". If distributorship opportunities are offered by the Employer to individuals or corporations who intend to hire a workforce to perform the actual delivery work and do not intend to operate solely as owner-operators using occasional relief labour, then those distributorship agreements would fall outside the definition of "employee" within the meaning of the *Act*. There may still be an issue with respect to whether the franchise distributor is a "related employer" within the meaning of s. 37.3 of the *Act* and its employees fall within the bargaining unit assigned to the Union. However, this matter is speculative at this point.

The Board holds that as a result of determining that franchise distributors who are owner-operators do fall within the definition of "employee" within the meaning of the *Act*, the Employer has an obligation under s. 11(1)(c) of the *Act* to bargain with the certified Union with respect to the proposed changes to the organization of the workforce and is prohibited from implementing any such change until and unless agreement is reached with respect to the change with the Union except to the extent that its current collective agreement may permit such change to be implemented. This requirement is in keeping with the recent amendments to ss. 33 and 34 of the *Act* which no longer permit a collective agreement to be terminated on notice to bargain and require instead the continuation of the current agreement until a new agreement has been negotiated.

As a further result, the Board finds that the Employer did not violate the technological change provisions contained in s. 43 of the *Act* as no work has been transferred or removed from the bargaining unit and, in any event, notice of the change was provided in accordance with the *Act*.

An Order will be issued accordingly.

## JEFF GABRIEL, Applicant, SASKATCHEWAN SCIENCE CENTRE, Respondent and UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Certified Union

LRB File No. 345-96; March 24, 1997
Chairperson, Beth Bilson; Members: Bruce McDonald, Terry Verbeke

For the Applicant: Noel Sandomirsky, Q.C.
For the Respondent: Mary Neufeld
For the Certified Union: Drew Plaxton

**Employer's agent - Whether incumbent of position not yet determined to be out of scope is employer's agent - Board deciding incumbent in these circumstances is employer's agent.**

**Decertification - Interference - Whether evidence demonstrated employer interference in application - Board decides that inference of employer interference could be drawn justifying dismissal of application.**

***The Trade Union Act*, ss. 2(h) & 9.**

### REASONS FOR DECISION

**Beth Bilson, Chairperson:** The United Food and Commercial Workers, Local 1400, was designated in an Order of this Board dated December 14, 1995, as the bargaining agent for a unit of employees of the Saskatchewan Science Centre. Mr. Jeff Gabriel has brought an application on behalf of himself and other employees seeking rescission of that certification Order.

The Union seeks to have the application dismissed on the grounds set out in 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 his evidence, Mr. Gabriel said that he is a full-time student who has had a part-time position at the Science Centre for several years. He said that many other employees in the bargaining unit are also students, and that there is a high level of turnover among the employees. He testified that he has had little contact with the Union, and that he and other employees had not received much information about the bargaining which was taking place with the Employer. He acknowledged that the Union was not requiring this group of employees to pay union dues until a first collective agreement has been concluded, but he said that the cost of future deductions for union dues was a concern for him. He said that he believed, from discussions with other employees, that many of them share his view on these issues.

Mr. Gabriel further said that he had formed an opinion about the financial situation of the Employer and felt that it was unlikely that the Union would be able to achieve any significant benefits for the employees through negotiations. He also alluded to his intellectual views about the value of trade union representation, views which he had formed as a result of reading he had done and classes he had taken in the course of his studies.

The claim of the Union that the application for rescission was brought forward as the result of Employer influence was based on the role played in the organizing campaign by Ms. Crystal Godfrey, who at the time of the hearing held the position of house manager. Counsel for the Union argued that Ms. Godfrey either held a management position, which would render her involvement in the application suspect under s. 9 of the *Act*, or was an "employer's agent," within the meaning of s. 2(h) of the *Act*, which reads as follows:

> *2. In this Act:*
>
> *(h) "employer's agent" means:*
>
> *(i) a person or association acting on behalf of an employer;*
>
> *(ii) any officer, official, foreman or other representative or employee of an employer acting in any way on behalf of an employer with respect to the hiring or discharging or any of the terms or*

> *conditions of employment of the employees of the employer;*

Mr. Gabriel described the involvement of Ms. Godfrey in the initiation of the application, and in the gathering of evidence of employee support, and it is clear that her role in this connection was a prominent one. Mr. Gabriel said that the first time there was serious discussion of the possibility of filing an application for rescission was in the course of a conversation between himself, Ms. Godfrey and Ms. Shelley Logan, a visitor services clerk who has some supervisory responsibilities (as Mr. Gabriel himself does).

The evidence of Mr. Gabriel was that he did not think the application was "inspired" by this conversation as he had been thinking of the possibility for some time, but he acknowledged that it was the first time there was discussion among employees of the practical requirements for making such an application. He said that he had become aware through his studies that it was necessary to make an application for rescission during the open period related to the anniversary of the certification Order, and at the time of the conversation with Ms. Logan and Ms. Godfrey there were only about two weeks remaining in the open period.

Mr. Gabriel said that he was willing to become involved in preparing and presenting the application for rescission, but he was unable to participate in the gathering of evidence of support from employees. This was, in part, because he only worked in the evenings and on weekends when there were not many other employees at work; it was also partly because he had heavy academic commitments at that time.

Ms. Godfrey apparently undertook to obtain information from the office of this Board concerning the requirements for filing an application for rescission. Mr. Gabriel sought the assistance of Ms. Roberta Ursu, head accountant, in obtaining a current list of employees; he testified that he left a sealed request to this effect with a secretary in the administrative office, and asked that it be given to Ms. Ursu. In due course he received a list of employees.

To the best of his knowledge, employees were contacted and the evidence of their support for the application collected by Ms. Godfrey, Ms. Logan and Ms. Nicole Warken, who is described on the list

of employees as a "visitor services supervisor." These activities were conducted during working hours and in the workplace. One witness called by the Union said, for example, that Ms. Logan was making telephone calls to employees during working hours while he was working with her.

Mr. Glenn Stewart, a staff representative employed by the Union, gave evidence concerning the status of the position of house manager occupied by Ms. Godfrey. At the time of the certification Order, there was in existence the position of visitor services manager; this position was explicitly excluded from the scope of the bargaining unit because of its managerial nature. Though the date is somewhat uncertain, the incumbent in the position of visitor services manager departed in the spring of 1996 and was not replaced. The new position of house manager was created, and certain of the duties previously performed by the visitor services manager were assigned to this position. The person appointed to the house manager position was Ms. Godfrey.

At some point during the negotiations between the Union and the Employer concerning a first collective agreement, the representatives of the Employer indicated to the Union that they thought the house manager position should be out of scope. Mr. Stewart said that there had been very little discussion of this issue, and it had not been resolved at the time of this hearing. It was his understanding, however, that the Employer had not abandoned its position that the house manager classification should be out of scope.

Mr. Stewart testified that Ms. Godfrey had been elected to the Union bargaining committee in January of 1996. In June of 1996, she initiated a conversation with him in which she indicated that she wished to step down from this position. According to Mr. Stewart, the reason she gave for this was that her appointment to the house manager position would create a conflict of interest in relation to acting as a representative of the Union. In particular, she said that she expected to have regular discussions with Mr. Ed Helm, who was then the Director of Finance and Operations. She felt that the interaction with Mr. Helm necessitated by her new position would be inconsistent with a role on the Union bargaining committee.

Evidence was given by Ms. Tammy Ward, a member of the Union bargaining committee, of a conversation she had with Ms. Godfrey around the time she took over the house manager position.

According to Ms. Ward, Ms. Godfrey said that Mr. Helm wanted her to remain in the bargaining unit for the time being because it would provide "the best chance of getting the Union out."

Ms. Sharon Ritchie, who held the position of visitor services manager prior to her departure in the spring of 1996, was called by the Union as a witness. She stated that she had had conversations with two employees, Ms. Godfrey and Mr. Tim Allen, at the time of the Union organizing campaign in the late fall of 1995. She said that they were very opposed to the Union, and she advised them that they should attend the certification hearing before this Board. After this hearing, she said that both Ms. Godfrey and Mr. Allen expressed dissatisfaction at the way things had gone, and said that they hoped there was some way they could get out of the Union.

Ms. Ritchie said that she brought this issue up with her superior, Mr. Helm, some time in late December, 1995. Mr. Helm said that there were ways the Employer could support an effort by employees to decertify the Union, and that payments could be made which were "hush hush" and "under the table." According to Ms. Ritchie, Mr. Helm said that payments for legal fees could be made through his consulting company and there would be "no questions asked." He also gave Ms. Ritchie the name of a lawyer to pass on to Ms. Godfrey and Mr. Allen.

She said that she passed on this information, including the piece of paper with the name of a lawyer on it, to Mr. Allen. She had no further discussion with the two employees about this matter and did not know whether they had any direct discussion with Mr. Helm.

One of the responsibilities assigned to Ms. Godfrey in her position as house manager is to conduct some of the staff meetings held to convey information and instruction to employees. These meetings are held on a fairly regular basis and employees attend them as part of the duties for which they are paid. One employee gave evidence that Ms. Godfrey approached her about signing documents indicating support for decertification prior to one of these meetings. A second employee testified that Ms. Godfrey had been out in the hall following the meeting approaching employees and asking them to sign the documents.

Ms. Alexandria Albert gave evidence that she had been approached by Ms. Logan and Ms. Warken, who asked her to sign some documents. She asked if she could take some time to consider it, but they removed the documents from her possession. She was later approached by Ms. Godfrey and asked if she would sign. Ms. Albert said that she again asked if she could have time to think about it. According to Ms. Albert, the response given by Ms. Godfrey was along these lines: "What is there to think about? The Union has done nothing - just sign it." Ms. Albert indicated that she did sign the documents at that point.

Ms. Albert also said that Ms. Godfrey had spoken to her about attending the hearing before the Board for the purpose of testifying. She said, "You'll probably be there a long time," and asked Ms. Albert if she was interested in accompanying her to Saskatoon to a trade show scheduled at the same time as the hearing.

This Board has commented in the past on the place of s. 9 of the *Act* in relation to an application for rescission. In *Betty L. Wilson v. Remai Investment Corporation and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1990] Fall Sask. Labour Rep. 97, LRB File No. 088-90, the Board made this comment, at 99:

> *Whenever the representation issue is before the Board, the Board must look through the bitter divisions between management and union and between employee and employee and keep the fundamental object of the Act in view. That object is the right given to all employees by s. 3 of the Act to decide for themselves whether or not they wish to be represented by a union for the purpose of bargaining collectively with their employer. Section 9 of the Act is a necessary adjunct to that right.*

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 made the point in these terms, at 63:

> *The Board has frequently commented upon the relationship between s. 3 of the Act, 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. Section 3 of the Act declares the employees' right and s. 9 of the Act 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 describe the implications of a finding under s. 9 of the *Act*, 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 *Ken Chrunik v. National Electric Ltd. and International Brotherhood of Electrical Workers*, [1996] Sask. L.R.B.R. 568, LRB File No. 060-96, the Board made the following comment, at 573:

> *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 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 suggests 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.*

In this passage, the Board alluded to the two aspects of the dilemma which faces the Board when an allegation is made that an employer has interfered in relation to an application for rescission. On the one hand, the Board should not easily make the decision to remove from employees an opportunity to express their own views on the question of continued representation by a trade union. On the other hand, the Board must be careful that an employer has not, in however subtle a fashion, manipulated or influenced this expression of opinion so that it cannot be relied on to present an accurate assessment of the true wishes of employees.

The interference or influence which an employer may bring to bear on an application for rescission may take a variety of forms, as the Board pointed out in the following comment in *Donna Wells v. Remai Investment Corporation (Imperial 400 Motel, Prince Albert) and United Food and Commercial Workers*, [1996] Sask. L.R.B.R. 194, LRB File No. 305-95, at 198:

> *This statement makes clear that s. 9 of the Act 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 goes without saying that the difficulties for the Board in assessing the origins and preparation of an application for rescission are magnified when the interference alleged against the employer is of an indirect nature, and the Board is being asked to draw an inference from circumstances other than those created by overt statements or actions of management representatives.

In this case, the Union has asked us to draw inferences from evidence relating to a number of disparate events, not all of them directly connected with the application for rescission as such. The role played by Ms. Godfrey forms the common link among these different elements, and an assessment of her status is clearly an important starting point.

The scope of the duties associated with the house manager position which Ms. Godfrey has occupied since the summer of 1996 is not entirely clear, but it is evident that some, at least, of her responsibilities may be described as managerial. The witnesses who were called by the Union generally agreed that Ms. Godfrey does not have independent power to hire and fire employees, though she does take part in the interview process. One witness said that he was "hired" into a visitor services position by Ms. Godfrey; this was, however, a temporary change from his regular job as a demonstrator.

Though most of the witnesses acknowledged that the house manager position differs from the previous visitor services manager position with respect to the degree of authority Ms. Godfrey exercises in relation to hiring and firing, they did attribute to her the responsibility for a number of aspects of the job which had been performed at one time by Ms. Ritchie. One of the witnesses described Ms. Godfrey as

her "boss," and said that Ms. Godfrey had been responsible for her performance review. Another witness said that he had received verbal reprimands from Ms. Godfrey on several occasions.

In a decision in *Todd Weathered v. Harmon International Industries Ltd. and United Steelworkers of America*, [1994] 2nd Quarter Sask. Labour Rep. 61, LRB File No. 276-93, the Board discussed the significance of the term "employer's agent," as it appears in s. 9 of the *Act*. The Board concluded that the definition of this term in s. 2(h) of the *Act* cannot be interpreted too literally, or it would disqualify virtually any in-scope supervisor from participating in a campaign directed at the rescission of a certification Order. The Board made this comment, at 69:

> *In the sense that he has had some minor role in implementing employer policy as a supervisor, Mr. Weathered may marginally fall into that part of the definition of an "employer's agent" in s. 2(h) of the Act which refers to "acting in any way on behalf of an employer with respect to ... any of the terms or conditions of employment of the employees of the employer." This would, however, be true of many persons at a supervisory level who have been included within the scope of a bargaining unit of employees. For us to exercise our discretion under s. 9 of the Act to reject an application, it is our view that something more is required.*

In this case, Ms. Godfrey is in a somewhat unusual position. The issue of whether her position should ultimately be within the scope of the bargaining unit or not has not been resolved and, as the Union understands it, the Employer continues to lay claim to it as a management position.

In the *Harmon Industries* decision, *supra*, the Board considered the involvement of an "employer's agent" in a campaign for rescission from two points of view. As the Board pointed out, the clearer of the two possible scenarios occurs when someone is acting as an "agent" in the sense that they are bringing the vicarious influence of the employer to bear, with the encouragement or support of the employer.

In this connection, there was the evidence of Ms. Ward that Ms. Godfrey claimed to enjoy the encouragement of Mr. Helm in initiating discussion of rescission. There was also the evidence of Ms. Ritchie that Mr. Helm used her as a go-between to convey assurances of financial support to employees who were interested in rescission.

It is true that both of these events occurred at a time some months before the campaign for rescission began. Nonetheless, it does provide some indication that Ms. Godfrey had, or thought she had, the blessing of at least one member of management in making efforts to bring about the rescission of the certification Order.

It must be said, as well, that it is somewhat difficult to believe that the activities carried out by Ms. Godfrey, Ms. Logan and Ms. Warken escaped the notice of senior management as they took place on the premises and during the working hours of employees.

In *Harmon Industries, supra*, the Board also considered whether the activities of an employer's agent might be grounds for dismissing an application under s. 9 of the *Act*, aside from circumstances of actual encouragement or support from management. The issue, as outlined by the Board, was whether a person who may be acting without actual support from an employer may nonetheless be perceived by other employees as an agent of the employer.

The definition in s. 2(h) of the *Act* seems to contemplate both possible meanings for the term "employer's agent." In s. 2(h)(i) of the *Act* reference is made to persons "acting on behalf of an employer." Section 2(h)(ii) of the *Act*, however, defines the term by reference to the supervisory or managerial responsibilities of the person, not to any direct encouragement or instruction from an employer.

This is consistent, in our view, with the purpose of s. 9 of the *Act*, which is to ensure that the application for rescission has arisen independently and spontaneously as an expression of the wishes of employees.

In this case, Ms. Godfrey was perceived by employees as a person who performed managerial functions. In our view, this was a reasonable conclusion on their part. Indeed, the Employer also perceived the house manager position as one which should be outside the scope of the bargaining unit.

We did not hear from Ms. Godfrey herself. The evidence of other witnesses made it clear, however, that she expressed her opposition to the Union openly and, on occasion, somewhat aggressively. There

is nothing wrong in employees expressing their views on the representation question vigorously, as Mr. Gabriel said that he had also done on occasion.

Ms. Godfrey, however, cannot be described as an ordinary employee. She was seen by other employees as a management person, whether or not the dispute over her status would ultimately have been resolved on that footing. According to the evidence of two employees, she linked the signing of the documents supporting the application for rescission with the presence of employees at a staff meeting which they were expected to attend as part of their duties, and which she presided over as a representative of the Employer.

In the case of the sequence of events described by Ms. Albert, Ms. Godfrey can only be described as having bullied her into signing a document she was not given an opportunity to study. Ms. Albert said she experienced this as a situation in which she was under pressure from someone who was her supervisor.

We accept that Mr. Gabriel undertook his role in connection with the application in good faith, and that he has sincere reasons for supporting rescission. We accept that there may be other employees whose reasons for supporting the application are equally sincere.

Counsel for the Union referred us to the decision of the Board in *Rick 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 commented that the absence of plausible reasons for supporting an application for rescission may be a sign that the application was initiated by the employer. In his cross-examination of Mr. Gabriel, he sought to cast doubt on the validity of some of the concerns expressed by Mr. Gabriel.

The Board has observed, however, that the requirement of a "credible rationale" does not mean that the Board should scrutinize the reasons given by employees for supporting an application for rescission to determine whether they are well-founded or articulated in a sophisticated way. In the *Remai Investment Corporation* decision, *supra*, the Board made this comment, at 198:

> *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.*

We should make it clear, as well, that we do not impute to counsel retained by Mr. Gabriel to appear before the Board any connection with the Employer or with management representatives. If, as Ms. Ritchie suggested, he was the lawyer whose name was given to her by Mr. Helm to be passed on to Ms. Godfrey, we are persuaded that there was no contact with him at that time.

On balance, however, we have concluded that the application must be dismissed. Though we have no doubt of the *bona fides* of Mr. Gabriel, and we accept that he sincerely believes that a number of employees share his views, Mr. Gabriel did not play a prominent role in the collection of evidence of support for the application. In that respect, Ms. Godfrey played a significant part. Whether or not she was given indications of management support for her activities in this connection, we do not think that the reaction of employees to a person occupying a position such as that held by Ms. Godfrey can be relied on as an accurate indication of their independent wish to have the certification Order rescinded. We are further of the view that, given her prominence in the organizing activities and the genesis of the application, a vote would not provide an accurate picture of the wishes of employees

For these reasons, we find that the application must be dismissed.

## SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and ROCA JACK'S ROASTING HOUSE AND COFFEE COMPANY LTD., Respondent

LRB File No. 016-97; March 26, 1997
Chairperson, Beth Bilson; Members: Gloria Cymbalisty and Judy Bell

For the Applicant: Paul Guillet
For the Respondent: Larry LeBlanc, Q.C.

**Bargaining unit - Geographic scope - Board confirms policy of using municipal boundaries as usual means of defining geographic scope of bargaining unit.**

**Practice and procedure - Evidence - Evidence of support - Board confirms policy of relying on evidence of support filed by Union at time of application as basis for granting certification Order.**

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

### REASONS FOR DECISION

**Beth Bilson, Chairperson:** The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union has filed an application seeking to be certified as the bargaining agent for a unit of employees at Roca Jack's Roasting House and Coffee Company Ltd. Prior to the hearing, the parties had reached an agreement on which positions should be excluded from the bargaining unit.

The Employer raised two issues in relation to the application. The Employer argued that the description of the bargaining unit should be restricted to the current municipal address of the restaurant which is operated by the Employer. The Employer further argued that a representation vote should be held to determine whether the application for certification enjoys the support of the majority of the employees in the proposed unit.

Counsel for the Employer referred the Board to a number of cases in which we have commented on the issue of the geographic scope allocated when bargaining units are described in certification Orders. In

*Tricil Limited v. Chauffeurs, Teamsters and Helpers Union*, [1986] May Sask. Labour Rep. 48, LRB File No. 334-85, the Board made the following comment, at 50:

> *The Board recognizes that certification orders which bear no reasonable correlation to the employer's operations may be inconsistent with the 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. It therefore favours bargaining units that encompass whatever geographical area will promote the greatest degree of industrial stability with the least interference with the right of future employees to choose their own bargaining agent.*

In *United Steelworkers of America v. Industrial Welding (1979) Limited*, [1986] Feb. Sask. Labour Rep. 45, LRB File No. 274-85, the Board observed that the application of these considerations may lead to different conclusions, depending on the circumstances, at 47:

> *This Board's frequently expressed policy favouring larger bargaining units in terms of employee complement is compatible with its preference for units encompassing whatever geographical area will promote the greatest degree of industrial stability with the least interference in employee freedom of choice. Depending upon the facts, an appropriate unit may comprise some or all of the employees of an employer in the entire province, in a portion of the province, in a municipality, or in a combination of municipalities. It may also be (and often is) restricted in area to a particular plant, retail outlet, or shop.*

In a decision in *Communications, Energy and Paperworkers Union of Canada v. Prince Albert Community Workshop Society Inc.*, [1995] 2nd Quarter Sask. Labour Rep. 294, LRB File No. 019-95, the Board followed the passage just quoted from the *Industrial Welding* decision, *supra* with the following comment, at 302:

> *In the special circumstances of the construction industry, the Board has accepted that the geographical scope of bargaining units is appropriately described in terms of the province. In many other cases, the Board has recognized municipal boundaries as providing the right balance between the protection of the bargaining rights obtained under the certification order, and the right of employees not currently included in the unit to make their own choice with respect to collectively bargaining at some time in the future.*

In our view, particular attention should be paid to the second sentence of this passage, as we think it captures the position of the Board that bargaining units described in terms of municipal boundaries usually represent the most sensible balance between the stability and viability of the collective bargaining relationship, and the rights of hypothetical future employees to make a free choice with respect to trade union representation. In some special circumstances, such as those which obtain in the construction industry, the Board has concluded that the balance is best struck by defining bargaining units in province-wide terms. In other cases, the Board may conclude that a single plant or outlet of a number operated by the same employer in one municipality is the appropriate bargaining unit.

In general, however, the Board has accepted municipal boundaries as the most reasonable geographic description for an appropriate bargaining unit. In the case of an employer, such as this one, which operates only one outlet, this protects the trade union in the event the enterprise is moved from one civic address to another.

Counsel for the Employer referred us to the decision of the Board in *United Food and Commercial Workers v. Burns Philip Food Limited*, [1993] 2nd Quarter Sask. Labour Rep. 162, LRB File No. 120-93. The trade union in that case had applied for a bargaining unit described in terms of the Saskatoon location operated by the employer "or any replacement for such business." The Board made the following comment, at 165:

> *In this case, the employer operates at one location in the City of Saskatoon. It has done so for some time, and no expansion or change of location is anticipated. To allow the description sought by the Union would be in effect to recognize a province-wide unit. This would be somewhat unusual, in terms of Board practice. It would tilt the balance against freedom of employee choice in the event that there are changes in the configuration of the business carried on by this Employer, and would do so at a point where the Union can demonstrate no concrete or even imminent countervailing interest. The Union failed to persuade us that there would be any significant prejudice to them arising from the necessity of applying for an amendment to their certification order should that become appropriate in the future.*

It seems clear from this statement that the concern of the Board was not with describing the bargaining unit by reference to municipal boundaries - indeed, the certification Order which was issued described the bargaining unit in those terms. What was of concern to the Board was the proposition that the trade

union might be permitted to track the employer beyond the municipal boundaries should the enterprise be moved to another location altogether.

There is no absolute value to describing bargaining units in terms of the boundaries of a municipality, and the Board has shown itself ready to consider alternatives where the circumstances warrant that. On the other hand, it is in our view helpful to have a general policy for the delineation of bargaining units, and the reference to municipal boundaries as a benchmark seems to us to do the least possible violence to the interests which must be considered.

With respect to the issue of whether a representation vote should be ordered to determine the level of support among employees, the Board has had a long practice of issuing certification Orders on the basis of the evidence of support which is filed along with an application, where that evidence shows that the application is supported by a majority of the employees in the bargaining unit.

In a decision in *United Food and Commercial Workers v. Holiday Inn Ltd.*, [1994] 4th Quarter Sask. Labour Rep. 227, LRB File No. 240-94, the Board reviewed the practice in this regard, and made this comment, at 228:

> *Some of the earliest decisions made by the Board disclose the choice made at that time to rely on evidence of support by a trade union at the time an application for certification is filed as the basis for issuing a certification order. In Hotel and Restaurant Employees' and Beverage Dispensers' Union v. Ritz Cafe Limited, LRB File No. 024-45, the request of the employer for a vote was based on allegations that the trade union had made threats and false statements to employees; on satisfying themselves that this was not the case, the Board rejected this request.*

In *Saskatchewan Government Employees' Union v. Saskatchewan Institute of Applied Science and Technology*, [1985] May Sask. Labour Rep. 42, the Board commented as follows, at 50:

> *For many years the Board has granted outright certifications on the basis of individual support cards signed by a majority of employees in an appropriate bargaining unit. It has done so because that evidence of support is generally relatively free from potential employer influence and therefore at least as reliable as a representation vote. At the same time the Board has carefully guarded the confidentiality of employee support cards, and as a result only the Board and the party filing them can subject them to any scrutiny.*

Counsel for the Employer argued that the Board should consider directing that a representation vote be conducted in this case because many of the employees had only been working for this Employer for a short time prior to the filing of the application for certification.

We are not persuaded that this is a factor which should lead us to depart from our established policy in this respect. There was no suggestion in this case that there was anything improper about the organizing campaign conducted by the Union, or any other sign that the evidence of support filed by the Union, including that evidence relating to the employees who were only working for a short period, is not as accurate an indication of their wishes with respect to the representation issues as a vote would be.

On reviewing the evidence filed by the Union, we are satisfied that the application for certification is supported by the majority of employees in the bargaining unit. We will issue a certification Order accordingly.

**UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant and P.A. BOTTLERS LTD. OPERATING UNDER THE BUSINESS NAME OF P.A. BEVERAGE SALES AND SASCAN BEVERAGES, Respondent**

LRB File No. 017-97; April 10, 1997
Chairperson, Beth Bilson; Members: Donna Ottenson and Don Bell

For the Applicant: Drew Plaxton
For the Respondent: Bob Watson

**Practice and procedure - Particulars - Board decides that further particulars not required, with exception of direction to specify applicability of s. 12.**

***The Trade Union Act*, ss. 3, 11(1)(a), 11(1)(e), 11(1)(g), 12.**

## REASONS FOR DECISION

## REQUEST FOR PARTICULARS

**Beth Bilson, Chairperson:** The United Food and Commercial Workers, Local 1400, have filed an application alleging that P.A. Bottlers Ltd., committed unfair labour practices and violations of certain provisions of *The Trade Union Act*, R.S.S. 1978, c. T-17, in connection with the circulation of certain memoranda to employees. In the application, the Union places these communications in the context of an organizing campaign conducted by the Union, and of a representational vote subsequently directed by this Board.

In a letter to counsel for the Union dated February 21, 1997, counsel for the Employer requested further particulars in relation to the application. A response from counsel for the Union, dated February 24, 1997, was regarded as inadequate, and counsel for the Employer is now seeking an Order from this Board directing the Union to supply further and better particulars concerning both the facts on which the Union proposes to rely, and the application of those facts to the specific provisions in the *Act* cited in the application.

On several previous occasions, the Board has been asked to direct that particulars be provided. In *International Brotherhood of Electrical Workers v. Saskatchewan Construction Labour Relations*

*Council*, [1982] Oct. Sask. Labour Rep. 43, LRB File No. 323-82, the Board considered the implications of the requirement stated in Form 2 appended to the Saskatchewan Regulations 163/72, as amended, under the *Act* that an applicant "state clearly and concisely all relevant facts indicating exact nature of the practice or violation complained of." The Board made the following comment concerning the purpose of requiring particulars, at 44:

> *The Board ruled that the particulars given were not sufficient and that the application must state sufficient facts to identify the transaction or transactions complained of to a sufficient degree to enable the respondent to identify the actions on the part of the respondent which it was alleged constituted the unfair labour practice so as to enable them to properly defend the application. The Board adjourned the matter to enable the applicant to supply further particulars.*

It may be noted that the allegations which were the subject of the request for particulars were reproduced in the decision as follows, at 43:

> *The Respondent... has, since the 24th day of March, 1982, purported to bargain collectively with the Applicant but the unionized employers in the trade division referred to in sub-paragraph (a) hereof have not been and are not making decisions with respect to negotiating and concluding a collective bargaining agreement on behalf of the unionized employers in the said trade division, contrary to the provisions of Section 14(2) of the Construction Industry Labour Relations Act.*

In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Companies Inc.*, [1993] 1st Quarter Sask. Labour Rep. 252, LRB File No. 009-93, the Board commented as follows on the place of particulars in connection with the proceedings of the Board, at 257:

> *To this statement of the Board's long-standing practice on this issue, the Board would like to add that the need for particulars in the originating document is especially important before tribunals like the Labour Relations Board, which employ a summary procedure that does not provide for examinations for discovery or pre-hearing disclosure of documents, and that permits relatively little time to prepare a defence. If the Board's hearings are to be conducted in accordance with the basic requirements of natural justice, a respondent is entitled to, and the Board must require, reasonable clarity and particularity in the originating documents.*

> *Failure to provide reasonable particulars in the initial application would justify the Board in dismissing the application, adjourning the application pending the provision of particulars, or proceeding with any part of the application which has been particularized and refusing to proceed with the remainder. It is absolutely no answer for an applicant to argue that the respondent "knows what the case is about." As part of a fair hearing, the respondent is entitled to have the allegations against it particularized in writing. It should not be forced to guess which of its interactions with the applicant are the subject of the application.*

The Board has thus made it clear that it is necessary for an applicant to state with some precision the nature of the accusations which are being made, both in terms of the specific events or instances of conduct which are considered objectionable, and of the provisions of the *Act* which have allegedly been violated. The Board has linked this requirement with the capacity to provide a fair hearing to a respondent.

On the other hand, the Board must balance the requirement for a fair hearing with other values which are also of pressing importance to the Board, including those of expedition in the hearing of applications, and maintaining relative informality in Board proceedings. Whatever might be the case in a civil court, the nature of the proceedings before this Board cannot accommodate extensive pre-hearing or discovery processes without running the risk that the ability to respond in a flexible and timely way to issues which arise in the time-sensitive context of industrial relations will be seriously impaired.

We do not interpret the requirement for the provision of sufficient particulars, in any case, to contemplate a complete rehearsal of evidence and argument in the exchange between the parties prior to a hearing. What is necessary is that an applicant make it clear what conduct of the respondent is the subject of their complaint, and how this conduct, in the view of the applicant, falls foul of the *Act*. In assessing the degree to which an applicant has met this requirement, the Board must be guided not only by our desire to ensure a fair hearing, but by the demands placed upon us by the objectives of efficacy and timeliness in our proceedings.

In this case, the Union has not only specified the nature and dates of the communications to which they have taken exception, but they have attached the documents themselves to the application. In our view, it is clear from the application what conduct on the part of Employer representatives is impugned in the

application. In our view, the statements in the application are stated with sufficient particularity to permit the Employer to respond to the allegations.

Counsel for the Employer alluded specifically to the failure of the application to identify which particular persons became aware of the communications and how they became aware of them. Counsel for the Union expressed some concern about being required to identify individual employees as sources of information to the Union.

One can conceive of circumstances in which it might be appropriate to require the disclosure of the means by which employees or a trade union have become aware of the information or events on which an application is based. In this case, however, all of the communications which are complained of were addressed to all employees, and it is difficult to see how the Employer is prejudiced by not knowing the names of individual employees in advance of the hearing.

With respect to the provisions of the *Act* which are cited in the application, counsel for the Employer stated that he wished to know how the conduct of the Employer described in the application is alleged to breach the cited provisions, and which parts of those sections are invoked.

In the course of the hearing on the request for particulars, counsel for the Union made it clear that the portion of s. 11(1)(e) of the *Act* on which the Union proposes to rely is the following:

> *11(1)(e) ...to use coercion or intimidation of any kind... with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization.*

Subject to this clarification, it is our view that the nature of the allegations under ss. 11(1)(a), (e) and (g) of the *Act* are sufficiently clear to permit the Employer to prepare to defend the allegations made in the application.

With respect to s. 3 of the *Act*, participants in many proceedings before this Board have invoked the general entitlement of employees to participate in trade union activity in support of their case.

The one point on which we would agree with counsel for the Employer is that it is not entirely clear what the Union had in mind when they cited s. 12 of the *Act* in the application, and we would direct them to provide clarification to the Employer on this matter. With the exception of this matter, we have concluded that the request for particulars must be dismissed.

We would make one final comment. It is always of concern to the Board when procedural or technical niceties become the focus of such attention that they threaten to hinder the expeditious disposition of applications which arise in the rapidly changing context of a collective bargaining relationship. It is, of course, important that all parties have adequate information that they can be provided with a fair hearing, and the Board does not shrink from insisting on this when the circumstances warrant. On the other hand, in most cases any serious deficiencies in the information can be rectified or accommodated in the course of a hearing. We would hope that this hearing may now be scheduled so that the matter may be dealt with as soon as possible.

## SASKATCHEWAN GOVERNMENT EMPLOYEES' UNION, Applicant and SERVICE EMPLOYEES INTERNATIONAL UNION, Respondent

LRB File No. 119-97; April 10, 1997
Chairperson, Beth Bilson; Members: Ken Hutchinson and Hugh Wagner

For the Applicant: Pat Gallagher
For the Respondent: Ted F. Koskie

**Unfair labour practice - Union - Interference - Whether newspaper advertisement placed by trade union during campaign prior to vote constitutes unfair labour practice - Board decides that campaign should not be subject to extensive monitoring.**

***The Trade Union Act*, s. 11(2)(a).**

### REASONS FOR DECISION

**Beth Bilson, Chairperson:** The Saskatchewan Government Employees' Union (SGEU) has brought an application alleging that the Service Employees' International Union (SEIU) has committed an unfair labour practice and violation of s. 11(2)(a) of *The Trade Union Act*, R.S.S. 1978, c. T-17, which 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, 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.*

In the application, SGEU alleges that a newspaper advertisement placed by SEIU in the *Melfort Journal* newspaper constitutes an effort to coerce or intimidate employees in connection with an upcoming vote to determine trade union representation in the North Central Health District.

This vote, which is scheduled to be held on April 17, 1997, is one of a series of steps being taken in compliance with *The Health Labour Relations Reorganization (Commissioner) Regulations* (the *Regulations*).

In July of 1996, a Commissioner, Mr. James Dorsey, was appointed to consider certain issues related to the delineation of bargaining units and the allocation of bargaining rights in the health care sector. The rationale for the appointment of the Commission was that new bargaining structures were required to reflect the administrative changes which have taken place in the health care sector, and which have resulted in the replacement of a multiplicity of facility-based health care employers with thirty health care districts.

The results of the deliberations of Mr. Dorsey were enacted in the form of the *Regulations* on January 17, 1997. The overall effect of the *Regulations* is to create three kinds of bargaining units, and to allocate bargaining rights in all but two of these bargaining units. Although the report which accompanied the presentation of the *Regulations* indicates that a number of different options were considered for the delineation of bargaining units in the health care sector, the way in which the bargaining units were ultimately defined was based on groupings of various jobs.

The *Regulations* contemplate that a "nurses unit" will be created in each health district; at the end of a year, all of these units will be merged into one province-wide unit. A province-wide "health support practitioner unit" is to be created, which will include listed paraprofessional and technical classifications. Finally, in each health district, there is a "health services provider unit" which includes the remaining employees. Though particular trade unions were designated under the *Regulations* as the bargaining agents for most of these bargaining units, the Board is required to conduct votes in two instances to determine the representational issue; these votes will take place in the case of the single health support practitioner unit, and in that of the health services provider unit in the North Central Health District.

The two trade unions which are parties to this application are competing for the support of employees in the health services provider unit in the North Central Health District. It is one of the pieces of material published by SEIU in connection with this campaign which has given rise to this application.

At the outset of the hearing, counsel for SEIU made three preliminary objections, and asked the Board not proceed further with the hearing. The Board made oral rulings with respect to these objections, and we wish to confirm those rulings in these written Reasons.

The first objection was based on s. 7(2) of the *Regulations*, which reads as follows:

> *7(2) As soon as possible after the coming into force of these regulations, the board shall conduct representation votes, in accordance with The Trade Union Act, for any appropriate unit that does not have a trade union determined pursuant to subsection (1).*

Counsel argued that the allusion to *The Trade Union Act* in this provision is meant to refer only to the procedure and practices followed by the Board in conducting votes under *The Trade Union Act*, and is not meant to confer upon the Board jurisdiction to consider allegations of unfair labour practices, or to assess conduct in light of the overall scheme of *The Trade Union Act*, and of jurisprudence built up in the context of that *Act*.

We are cognizant of the fact that *The Health Labour Relations Reorganization Act*, S.S. 1996, c. H-0.03, ("*The Health Act*") and the *Regulations* which eventuated from it place significant restrictions on the role of the Board in relation to the definition of bargaining units and the allocation of bargaining rights in the health care sector. Indeed, the role of the Board in these respects has been largely instrumental and administrative.

We do not read either *The Health Act* or the *Regulations*, however, as eliminating the authority of the Board to assess the conduct of any of the parties to collective bargaining in the health care sector in the same way we would assess the conduct of other employees, employers or trade unions covered by *The Trade Union Act*. In our oral ruling, we suggested, as an example, that we would be very reluctant to interpret the *Regulations* as giving an employer *carte blanche* to communicate directly with employees

or to do other things in the course of a campaign connected with one of the two votes under the *Regulations* which would normally be regarded as an unfair labour practice. In our view, the displacement of the normal jurisdiction of the Board is limited to the issues of bargaining structure and bargaining rights which are addressed substantively in the *Regulations*, and does not extend to the ordinary authority of the Board to entertain allegations concerning unfair labour practices or other conduct prohibited under *The Trade Union Act*.

The second objection had to do with the applicability of s. 11(2)(a) of *The Trade Union Act* to these circumstances. Counsel for SEIU argued that the purpose of this provision is to protect employees in situations where they are trying to make a choice as to whether to be represented by a trade union in the first instance - in other words, during an organizing campaign among employees of a non-union employer. In the circumstances presented by this case, which counsel likened to a "raid," the question is not whether employees will choose a trade union at all, but which of two competing unions they will choose.

We do not share the view expressed by counsel for SEIU that s. 11(2)(a) is meant to apply in the limited context he suggests. Leaving aside for the present the question of whether the analogy to a raid paints an accurate picture, there is nothing in this provision which suggests that it is meant to apply only in particular situations. It may be that it is desirable to place limitations upon the application of this provision, and we will comment on that in due course; on the face of the section itself, however, we see nothing which would rule out consideration of any particular set of circumstances as such.

The third objection, which was closely related to the other two, was that SGEU ought to be required to avail themselves of an alternative forum, namely the courts, on the grounds that the application is more properly described as making charges of defamation than as raising issues under either *The Trade Union Act* or the *Regulations*. Given the rulings we made on the first two objections, it will come as no surprise that we do not accept the view that SGEU has no entitlement to have their allegations heard in this forum. Whatever rights they may have in the context of a civil lawsuit or other proceeding, they have, in our view, raised issues in their application which they are entitled to present to the Board.

The advertisement which was the subject of the application appeared as follows in the *Melfort Journal* newspaper:

*AN IMPORTANT MESSAGE FOR WORKERS*
*IN THE NORTH-CENTRAL HEALTH DISTRICT*

***About Long-Term Disability Benefits***

***Long-Term Disability Coverage (LTD) is a serious issue for health-care workers in this District.*** *In choosing which union will represent you, it is important to remember that you will also be choosing which kind of LTD coverage you will eventually received.*

*SEIU has bargained coverage for its members via the SAHO LTD Plan. That coverage is written into our contract.* ***The employers and employees jointly fund the Plan.*** *SEIU--like CUPE and SUN--have representatives on the Board that oversees the SAHO benefits plan.*

*The Government Employees Union runs its own LTD plan. Their contracts do not mention this plan, so the employers pay nothing toward it and have no stake in it. The SGEU says you have to maintain membership in their union in order to have coverage or collect any benefit from it.*

***The SGEU LTD plan is in serious financial difficulty. In fact, the plan has a "deficit" in excess of $6.46 million, and SGEU members are forced to "pay an extra surcharge of .35% per annum of gross income to the fund because of a projected deficit in long term funding as determined by the actuary."***

*This quotation is taken from a letter to SGEU from its lawyer, Mr. Rick Engel, dated October 28, 1996. In describing the deficit, his letter says* ***"there is not enough (money) available to meet our current responsibilities to those who qualify for LTD benefits."***

*Although SGEU representatives including Audrey Yaremy deny these statements, the letter we quote from was filed by SGEU in the Court of Queen's Bench where they are seeking to have the Dorsey Commission Report overturned. Once again, there is a credibility gap between what the SGEU says and what it does.*

*The Service Employees' Union believes that LTD coverage is essential for health care workers. If you vote for us, we will continue to work with the employers to provide a Plan that workers can depend on and which is guaranteed in our Provincial contact. If you vote for the SGEU you will be voting for a financially-challenged plan paid for by SGEU members only.*

***Do you want to pay surcharges for bad financial performance? According to Mr. Engel's letter, the Parkland employees alone stand to pay an extra $64,647 for their LTD coverage, over and above their normal premiums.***

*If you wish to see Mr. Engel's letter for yourself, ask Audrey Yaremy for a copy. If that fails, drop in to our office in the Nu-World Plaza for a copy.*

*If you want a secure LTD Plan in your next contract, vote Service Employees Union.*

*SEIU*

*"Melfort Journal*
*March 11/97"*

The representative of SGEU argued that this advertisement could be expected to have a coercive or intimidating impact on employees who will be casting a vote, because it characterizes SGEU as a bad financial manager and because it undermines confidence in the long-term disability plan (LTD Plan) operated under the auspices of SGEU.

Mr. Bob Gamble, who chairs the supervisory committee which administers the LTD Plan, described the nature and administrative structure of this plan. In the early 1980s, SGEU decided to assume responsibility for LTD benefits for their own members, rather than continuing to participate in a plan to which employers and employees jointly contributed. Bargaining units of employees represented by SGEU were given the option of joining the new plan, which is entirely funded by employee contributions. The LTD Plan is administered by a supervisory committee consisting of elected representatives of the bargaining units which belong to the plan, with the assistance of two SGEU staff members (a benefit plans administrator and a vocational rehabilitation counsellor) and professional advisors, including an actuary, an auditor, a fund administrator and financial advisors.

Ms. Earlia Folbar, the benefit plans administrator for SGEU, gave evidence concerning the recent financial history of the LTD Plan. She said that, in 1993, the professional advisors to the plan suggested to SGEU that the unfunded liability, which was then standing at approximately $15 million, posed something of a threat to the future stability of the LTD Plan. As a consequence of this advice, the supervisory committee drew up a five-year plan, which was aimed at improving the administrative

efficiency of the LTD Plan, and reducing the unfunded liability. In making these changes, the proportion of income which was paid in benefits to claimants under the plan was increased. To finance the financial adjustments to the plan, the membership of SGEU approved what Ms. Folbar referred to as a "special assessment," of .35%, to be paid over the ensuing five years in addition to the .90% contributions which employees in bargaining units participating in the plan were already paying.

Ms. Folbar was asked about her reaction to a letter containing a legal opinion from Mr. Rick Engel, counsel to SGEU, concerning the obligations of SGEU to claimants and contributors under the LTD Plan who would be placed in new bargaining units pursuant to the *Regulations*. It will be noted that certain extracts from this letter formed part of the advertisement placed by SEIU to which SGEU has taken exception. Ms. Folbar said that she disagreed with the way Mr. Engel worded some of his comments about the LTD Plan. She said, for example, that she thought it was not accurate to describe the additional contributions members of the LTD Plan were paying after 1993 as a "surcharge," as she felt this suggested some kind of external imposition. She said the term "special assessment" more accurately captured the nature of this additional cost, which was approved democratically by the SGEU membership at a convention, and which was subject to revision or removal by the same means.

Ms. Folbar also disagreed with the statement by Mr. Engel that "there is not enough available to meet our current responsibilities to those who qualify for LTD benefits," and strongly disagreed with the characterization of the LTD Plan in the advertisement as "financially-challenged" or "in severe financial difficulty."

She said that it is common for a plan such as the LTD Plan operated under the auspices of SGEU to have an unfunded liability on some scale. She further said that the LTD Plan is now in very good financial shape. The retirement of the unfunded liability has proceeded steadily since the special assessment was approved in 1993, and this process is now ahead of schedule. She said that it is anticipated that the unfunded liability will have totally disappeared before the end of the year. The "deficit" figure of $6.4 million used in the advertisement was based on the audited figures at the end of 1995, and does not reflect subsequent progress towards paying down the unfunded liability.

Ms. Folbar was also asked about the genesis of a second document, which bears the heading "Deficit Recovery." She said that she was asked to prepare this document in connection with a brief which was being prepared for presentation to the Dorsey Commission. It was designed to show the share of the cost of the plan which could be attributed to various specific groups of employees, using a formula contained in the LTD Plan text for use when a bargaining unit chooses to sever its connection with the plan. Ms. Folbar said that this formula is not really directly applicable to this situation, as this is not a case where the employees opted out of the plan in the manner which would trigger the use of the formula. She said it was used as the basis of the calculation so that SGEU could demonstrate what sort of cost there would be to the LTD Plan if certain groups of employees were removed from it.

Mr. Greg Trew was called to give evidence on behalf of SEIU concerning the preparation of the advertisement which is the subject of the unfair labour practice allegation. He said that, in preparing the copy, he relied on both the letter from Mr. Engel and the document headed "Deficit Recovery." These documents had been filed in the Court of Queen's Bench for Saskatchewan as part of one exhibit to the Affidavit of Patricia Gallagher in connection with an application from SGEU challenging the validity of the *Regulations*. He said that he had assumed that the "Deficit Recovery" document was an attachment to the letter from Mr. Engel, because it immediately followed the letter, and there was nothing to mark it as a separate document.

Mr. Trew said that he forwarded copies of these two documents, a copy of the proposed advertisement, and a copy of the LTD Plan text, to an actuary in Winnipeg, asking whether the advertisement constituted an improper representation of the material. He said the actuary responded that, although the advertisement was aggressive in tone and slanted in interpretation, he did not think it was an inaccurate representation of the situation as he understood it from the material he had received from Mr. Trew.

Evidence was also given by Ms. Audrey Yaremy, who has undertaken major responsibility for the SGEU campaign leading up to the April 17 vote in the North Central Health District. Ms. Yaremy said that the committee planning the SGEU campaign had consciously decided to establish a positive tone, focusing on the provision of accurate information to employees, rather than attacking SEIU. To this end, for example, her committee had invited representatives of SEIU to take part in an "all candidates" forum, an invitation which was declined by SEIU.

She contrasted this with what she characterized as a "negative" campaign style adopted by SEIU. She said that those involved in the SGEU campaign had placed a high priority on making personal contact with employees on the telephone and by means of home visits. She said that the advertisement placed by SEIU seemed to have been a cause for concern among employees, and they were more reluctant to talk to SGEU organizers after the advertisement appeared in the newspaper.

Under cross-examination, Ms. Yaremy conceded that SGEU had distributed material other than the examples which had been filed with the Board in the course of her examination in chief. She acknowledged a number of newspaper advertisements and other documents as ones which had been circulated to employees as part of the SGEU campaign. Some of the themes which were addressed in these documents related to the "American" origins of SEIU, to the withdrawal of dues from the province for the benefit of the international parent union, and to the financial contributions made by SEIU to the political campaigns of various members of the governing party in the province.

We have noted earlier that counsel for SEIU made the analogy between this situation and a "raid" where one trade union is trying to replace another as the bargaining agent for a group of employees. The representative of SGEU, on the other hand, urged the Board to consider this situation as being equivalent to an organizing campaign in terms of the vulnerability of employees; she argued that the Board should set the same standard for assessing the conduct of a trade union in these circumstances as that which has been imposed on employers in the context of a union organizing campaign.

This is, in fact, an entirely novel situation for both trade unions, one which shares common features with both a raid and an organizing campaign, but which is not exactly like either. Both trade unions are incumbents in bargaining units which include a proportion of the employees who will be casting their votes on April 17 to decide which of the two will become the bargaining agent for the whole group. In addition, the voters include a group of employees who have not previously been represented by any trade union. Thus, each trade union is dealing with three different audiences in this campaign: those employees for whom the trade union has been the bargaining agent, those employees for whom the other trade union has been the bargaining agent, and those employees who have not been represented by a trade union to this point.

This Board has considered the implications of s. 11(2)(a) on very few occasions, and has never commented at any length on the criteria which should be used to assess the conduct of a trade union in the light of this provision.

Comparable statutory provisions have been considered in other jurisdictions, notably in British Columbia. In *Gibralter Mines v. Canadian Association of Industrial, Mechanical and Allied Workers and United Steelworkers of America*, [1975] 2 Can. L.R.B.R. 129, the British Columbia Labour Relations Board considered the possible approaches which might be taken to the assessment of statements and communications made in the course of a representational campaign. In this decision, the Board considered the famous occasion when representatives of one trade union, in the course of a representation campaign, alleged in a radio broadcast that the other trade union had brought some employees to a state of starvation during a strike by granting strike benefits only to employees who were union members.

In this context, the British Columbia Board looked first at some early commentary from the National Labour Relations Board in the United States concerning the appropriate standard which should be set for communications during a period when employees are pondering representational issues. In *General Shoe Corporation* (1948), 77 NLRB 77, the National Labour Relations Board described the appropriate standard in these terms:

> *In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme cases, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.*

The British Columbia Board rejected the clinical approach to representation campaigns which is suggested by this passage, making this comment, at 142:

> *One can hardly argue with the proposition that an employee's vote should be as rational and as informed as possible, and to that end should not be influenced by inaccurate campaign propaganda. But that does not resolve the real issue, which is*

> *whether the Labour Relations Board should police election campaigns to ensure that the literature is accurate and should overturn elections where it is not. There are two major reasons why this Board should not start down the trail which the NLRB has blazed, one of principle and the other practical.*
>
> *Representation elections are similar in many respects to political elections. Employees choose the bargaining agent who will represent them in determining the conditions of their working life. The point of s. 39(2) is to allow employees, already represented by one union, the freedom to select another if they believe this other union can do a better job on their behalf. In political elections, where the campaign between the incumbent and the challenger can become as heated as we have here, it is unheard of for the party which has lost the vote to go into court and have a judge overturn the election verdict on the ground that the other side has misrepresented the loser's policies and performance. The assumption of our political system is that each party must respond to the points made by the other and it is up to the voters to sift through these more or less extravagant claims and decide which candidate they prefer. This does not imply the unrealistic belief that voters are never influenced in their choice by serious misstatements by one side or another. Even when that does occur, it is considered inconsistent with the election process for a court to second-guess the voters and reverse the election returns because of what was said in the campaign. That same principle would appear persuasive for a representation election between one union and another.*

The British Columbia Board went on to discuss the practical difficulties of attempting to assess every piece of campaign literature put out by one of the parties to determine whether it is totally accurate or fair, at 143:

> *There is no explicit warrant in the Code for the Board policing the accuracy of campaign propaganda in representation elections and the positive value of such a Board-adopted policy is debatable. No one could deny that it is a bad thing if employees are misled in the representation campaign and vote for one union rather than the other as a direct result. But we are dubious that the atmosphere of a six-week contest at a mine can be compressed and conveyed at a Board hearing so that we can judge if and when this has occurred. Even when we do sense that campaign misrepresentations have influenced the vote, there is a serious question whether the election verdict should be over-turned in any event.*

In *Canadian Odeon Theatres Ltd. v. Retail Clerks*, 1984 B.C.L.R.B. 240-03 (unreported), the British Columbia Board suggested the appropriate response to misleading or inaccurate communications, at 7:

> *In adopting this policy, we are not condoning conduct leading to confusion among employees or misrepresentations of any kind during organizational campaigns. Instead, we are saying that the appropriate recourse to rectify such situations is not to file a complaint with the Board alleging that any membership cards signed at the time are invalid because of the misrepresentation, but for the union ... to communicate the correct facts to the employees.*

In *Procon Miners Inc. v. Christian Labour Association of Canada et al*, B.C.L.R.B. No. B225/94, the British Columbia Board commented as follows on the approach which should be taken to assessing the conduct of a trade union, at least in the context of a raid campaign, at 18:

> *In raid campaigns, the Board will review whether misrepresentations cross the line from being merely persuasive statements to constituting coercion or intimidation. It will do so where the misrepresentation is so outrageous or inflammatory that it places undue or excessive pressure upon the employees to force them to reject an incumbent union to seek representation from a new union: Service Employees International Union, Local 244, [BCLRB No. B3/93].*
>
> *In order to conclude the statements made by CLAC were in violation of s. 9, I must find that statements were misrepresentations and then find that there was threat on which CLAC had the power to act.*

It should be noted here that, in these decisions, the British Columbia Board introduced into the notions of coercion or intimidation the requirement that the party which is alleged to acted in a threatening manner must have some power to put a threat into effect. In *Christian Labour Association of Canada v. Hotel, Restaurant and Culinary Employees and Bartenders Union*, [1996] 96 C.L.L.C. 220-007, the British Columbia Board made this comment, at 143,086:

> *An incumbent union is entitled to defend itself against a raid and engage in a propaganda campaign designed to persuade employees to remain with the status quo. Further, the incumbent union is entitled to enlist the support of other unions in this campaign. An employer has no similar role in a raid; it has no right to campaign for or against one union or the other. An employer may only exercise its rights under s. 8 of the Code to communicate matters of fact or opinions reasonably held about its business.*

In a decision in *General Teamsters v. Energy and Chemical Workers Union*, [1990] Alta. L.R.B.R. 402, the Alberta Labour Relations Board commented on the general approach which should be taken as follows at 408:

> *The Teamsters also objected to the underlined portion below of the first paragraph of the December 21 letter. They claim it implies that they are not democratic or interested in benefitting all of their members.*
>
> > *The few weeks leading up to our November 30* ***vote*** *for certification were very busy and full of hope for change and improvement. We and your fellow supporters thank you for your faith and trust in the Energy and Chemical Workers Union, and assure you that now and in the future, this Union will work for the democratic benefit of all members.*
>
> *We regard the reference to democracy as a prideful claim by the E.C.W. more than an implied criticism of the Teamsters. However, let us assume that the primary impression it creates is that the Teamsters will not work for the democratic benefit of all members. Is that impression then coercive, threatening, intimidatory or unduly influential contrary to subsection 149(f)? We do not find it so and believe that the employees would classify it as on-going electioneering. Such a statement would attract little attention in an ordinary election* ***campaign****, nor do we believe it would in this inter-union competition.*

The Board has often stated that the reason for scrutinizing closely the communications made by an employer to employees, particularly in the context of union organizing, lies in the inherent power imbalance between an employer and individual employees. Any statement or communication emanating from an employer must be regarded as having the potential to have a coercive impact because of the authority enjoyed by the employer over interests important to employees.

It is clear from the passages we have quoted earlier that the British Columbia Labour Relations Board drew a distinction between the inherently powerful position of an employer *vis à vis* employees, and the position of a trade union seeking to gain or retain the support of employees. We think this is an important distinction, and we do not share the view of the representative of SGEU that the appropriate standard which should be set for assessing the communications which a trade union may make in the course of a representational campaign without running afoul of s. 11(2)(a) is the equivalent of the standard we would impose on an employer.

This is not to say that the Board has ruled out the application of s. 11(2)(a) in circumstances where a trade union is exploiting the power it possesses to bring about adverse consequences for an employee in an effort to influence an employee to a particular course of action. An example of this may be found in the decision of this Board in *Dennis Dombowsky v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers*, [1987] Feb. Sask. Labour Rep. 51, LRB File No. 149-86. In that case, the Board found a trade union to have committed a violation of s. 11(2)(a) when they invoked the union security clause in order to put pressure on the complainant to obey certain directives from another trade union of which he had previously been a member. Though the Board did not comment extensively on the application of s. 11(2)(a) in the *Dombowsky* case, one may infer from the context of the discussion that the basis for finding an unfair labour practice in that case lay in part in the capacity of the trade union to exert pressure on the employee by withholding his membership - and thus raising the possibility that he might lose his employment - a matter which it clearly lay within the power of the union to control; it will be recalled that this was a criterion of importance to the British Columbia Board in the decisions to which we have earlier alluded.

Neither do we wish to make a sweeping proposition to the effect that s. 11(2)(a) could never apply in the context of a representational campaign between two trade unions of the kind which is occurring here. We have concluded, however, that it would be a mistake for the Board to intervene too readily in such a campaign when it is alleged that certain statements or communications are inaccurate or misleading, and that this constitutes coercion or intimidation.

As the passages which we have quoted from other Canadian jurisdictions suggest, the process of gaining support from employees has many of the features of a political campaign. Each of the parties wishing to become the bargaining agent following the vote decides on a promotional strategy designed to appeal to the potential voters. Each of the parties naturally wishes to present a case which is the strongest possible, and it is a common strategy to achieve this by casting aspersions on other parties.

We do not see how it would be feasible for the Board to enter into a program of assessing the accuracy, the politeness or the credibility of every statement made and every communication issued in the course of such a campaign. Although the Board must be vigilant to ensure that no trade union uses whatever influence it may enjoy over employees in a coercive manner, we take the view that a fair degree of

latitude must be granted to the participants to present their case vigorously, with allowances for some hyperbole or exaggeration.

In this case, we can identify nothing which gives either of the trade unions involved any obvious capacity to steer the course of the campaign unfairly. The stakes are high for the two unions, and they have naturally invested much energy in pursuing their respective promotional strategies. Whether or not the original intention of SGEU to conduct a "positive" campaign was a well-chosen strategy, they have to some extent revised that plan, and have answered some of the efforts of SEIU to cast doubt on their competence and reliability with attempts to portray SEIU in an unfavorable light.

The statements which were made in the advertisement which gave rise to this application may well have presented an inaccurate picture of the soundness of the LTD Plan. Mr. Trew said that he prepared the copy used in the advertisement on the basis of a reading of two documents which, according to SGEU, were not meant to be read together, and which had nothing to do with each other. Though it is not necessary to our conclusion, we would observe that we do not think it was unreasonable in the circumstances for Mr. Trew to draw the conclusion from reading the documents that they were related to each other, and we do not find that he intentionally misrepresented this connection.

In some of the decisions to which we have referred, it was suggested that the appropriate remedy for statements which are thought to be misrepresentations made by one party is for the other party to respond with accurate information. The representatives of SGEU have had opportunities to do this; Ms. Yaremy wrote a letter which was published in the *Melfort Journal* newspaper, in which she gave a clear and reasoned explanation of what SGEU thought was incorrect and unfair about the advertisement in which the LTD Plan had been described by SEIU. It may be noted that, in this letter, she used the term "surcharge" which was one of the sources of the objections of Ms. Folbar to the letter written by Mr. Engel which was the basis of the advertisement.

It cannot be said whether the three groups of employees in the North Central Health District who are preparing to vote have found the information provided by the two trade unions helpful or persuasive. SGEU did not call evidence from individual employees to the effect that they had changed their minds

or decided not to vote as a result of the coercive impact of this particular advertisement. In our view, it is not necessary for them to do that. It is possible for the Board to make a finding that an unfair labour practice has been committed on the basis of our assessment of how a particular statement or action by a trade union is likely to affect a ordinary employee.

SGEU may be justified in their concern about what they see as the deterioration of the tone of the campaign. Employees may be finding the volleys of promotional material unedifying or mystifying. We have concluded, however, that the material complained of in the application is not sufficiently objectionable that it would improperly induce the employees to a particular choice when they cast their votes on April 17 and 18.

For the reasons we have given, we have concluded that the application must be dismissed.

**DATED** at Regina, Saskatchewan, this **10th** day of **April, 1997.**

**LABOUR RELATIONS BOARD**

Beth Bilson,
Chairperson

## CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION 395, Applicant and SUMMIT PIPELINE SERVICES LTD., Respondent

LRB File No. 332-96; April 11, 1997
Vice-Chairperson, Gwen Gray; Members: Don Bell and Bruce McDonald

For the Applicant: Ray Gergeley
For the Respondent: Kevin Lang

**Construction - Appropriate bargaining unit - Employees who transport men, material and tools to work sites in pipeline construction fall within jurisdiction of Teamsters Union and constitute appropriate bargaining unit.**

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

### REASONS FOR DECISION

**Gwen Gray, Vice Chairperson:** The Union applied to be certified for employees who fall within its trade jurisdiction who work for Summit Pipelines Services (the "Employer"). The Employer is engaged in pipeline servicing work and supplies men and materials to perform maintenance work on existing pipelines. Employees of Summit also assist research teams who are conducting stress testing on existing pipeline. The current project is spread over approximately 50 different work sites, with approximately 60 employees working in the general areas of Moose Jaw, Regina, Moosomin and Herbert. The employees stay in hotels at the town closest to the work site and travel to the site each morning. The employees of Summit perform excavating, earthmoving and general labour functions. Some tradespeople are engaged in hauling heavy equipment from site to site using large trucks and require air brake endorsements on their drivers licenses.

The Employer is a unionized company. It has agreements with the International Union of Operating Engineers and the Labourers' Union in Saskatchewan. The Employer invited discussions with the Operating Engineers prior to starting the project in Saskatchewan. At the Operating Engineers' Union suggestion, the Labourers' Union was also included in the pre-job conferences.

The Union claims that the Employer employs three employees who fall within its trade jurisdiction. The Employer disputes this claim and alleges that only one employee, Mr. David Hicks, falls within the Union's jurisdiction. Mr. Neil Gillingham, President of the Employer, testified that Mr. Hicks is a float driver and is a direct employee of the Employer. He also testified that the Employer hires a truck and driver from Random Ltd. The driver associated with this vehicle is Mr. Don Smith who is employed and paid directly by Random Ltd., although he is on a day to day basis under the control and direction of the Employer's foreman. Random Ltd. is paid by the Employer on an hourly basis, which covers both the cost of the truck rental and the labour of Mr. Smith. The Employer also engages the service of three other float drivers who are supplied by the owners of float trucks that are also contracted to the Employer, similar to the arrangement with Random Ltd. Mr. Gillingham acknowledged that the work performed by float drivers falls within the jurisdiction of the Teamsters, although he disputes that four of the float drivers are employees of the Employer as they are actually employed by other companies.

In addition to the float drivers, the Employer also employs three employees who perform work that is described by the Employer as "general work i.e. gassing up and moving water pumps, running men and tools, etc. from site to site." These three employees, who for convenience will be described as "runners", are Bruce Cumming, Bryan Schmidt and Clarence Zdunich, all of whom are members of the Teamsters' Union. Mr. Gillingham disputes that these employees fall within the jurisdiction of the Union as they do not move heavy equipment or need special licences to perform the work in question. In fact, the Employer has remitted dues to the Union with respect to these three employees since their hire. This resulted from a picketline that had been set up by the Union at the beginning of the project as a result of the Employer's failure to hire any Union members on the site. After unsuccessful attempts were made to locate companies that could supply Union members as float drivers, along with float trucks, it was settled between Mr. Gergeley for the Union and Mr. Gillingham for the Employer that the Union would be permitted one member per crew. Mr. Gillingham acknowledged in cross-examination that the work performed by these members included work normally provided on job sites of this nature by the Union, that is, the transportation of men, material and tools to work sites. In addition, they also perform work normally assigned to labourers.

Although the jurisdictional lines between construction trade unions are often difficult to discern, especially in project work of the nature being performed in this instance, the primary work of the float

drivers and the "runners" clearly falls within the Teamster jurisdiction as was acknowledged in the testimony of Mr. Gillingham. The Union does not claim that the float drivers who are employed by other companies are employees of the Employer. As a result, of the four employees who are within its jurisdiction, it has the support of majority. Accordingly, a certification Order will be issued.

# REGINA MUSICIANS ASSOCIATION, LOCAL 446 A.F. OF M., Applicant and SASKATCHEWAN GAMING CORPORATION, Respondent

LRB File No. 012-97; April 11, 1997
Chairperson, Beth Bilson; Members: Donna Ottenson and Judy Bell

For the Applicant: Brian Dojack
For the Respondent: Larry LeBlanc, Q.C. and Susan McGillivray

**Employee - Independent contractor - Board decides that musicians booked to perform at Casino Regina are independent contractors.**

**Union - Status - Whether applicant organization has standing to bring application - Board finds applicant organization to be trade union.**

***The Trade Union Act*, ss. 2(f), 2(j), 2(l).**

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** The Regina Musicians Association, Local 446 A.F. of M., has filed an application seeking to be certified as the bargaining agent for members of that association who work for the Saskatchewan Gaming Corporation at Casino Regina.

The Employer opposed this application on two grounds. The first ground for objection was that the Applicant is not a trade union, and does not therefore have standing to apply for certification as a bargaining agent. The second basis for the opposition of the Employer to the application was that the persons on whose behalf the Applicant has applied are not employees of the Employer, but are independent contractors.

Section 2(l) of *The Trade Union Act*, R.S.S. 1978, c. T-17, defines the term "trade union" as follows:

> *2(l) "trade union" means a labour organization that is not a company dominated organization.*

The term "labour organization" is defined as follows in s. 2(j) of the *Act*:

> *2 In this Act:*
>
> *(j) **"labour organization"** means an organization of employees, not necessarily employees of one employer, that has bargaining collectively among its purposes;*

At the hearing, counsel for the Employer referred the Board to the constitution and bylaws of the Applicant, and pointed out that this constitution makes no reference to collective bargaining as one of the objectives of the organization. Subsequent to the hearing, the representative of the Applicant provided the Board with a copy of the constitution of the American Federation of Musicians, the parent body of the Applicant.

Counsel for the Employer submitted a written comment on this document. In that submission, he argued that the constitution of the Applicant does not incorporate the provisions of the constitution of the American Federation of Musicians, and that the latter document is therefore irrelevant to an assessment of whether the Applicant is a trade union within the meaning of *The Act*. Counsel argued that the Applicant is not a trade union, but simply a voluntary organization of musicians who have agreed to establish a common price for which their services should be offered, and who have purported to establish the right to exercise disciplinary authority over members who do not abide by this agreement.

In *Health Sciences Association of Saskatchewan v. University Hospital*, [1965-74] 3 Decisions of Sask. L.R.B. 301 LRB File No. 225-72, the Board commented on this issue in the following terms, at 303:

> *It is clear that an applicant must establish that it has the right to be certified as the representative of a group of employees for the purpose of bargaining collectively. The organization must qualify as a bona fide trade union within the meaning of the Act. The applicant must have an organic structure - it must have such a thing as a constitution containing, among other items, provisions for the election of officers.*

This passage indicates that, in addition to the question of company domination, which is not at issue here, the Board has been concerned to establish both that an organization is dedicated to advancing the

interests of its members by means of bargaining collectively, and that it possesses the hallmarks of organizational legitimacy in terms of its structure.

In *Professional Engineers Employees Association v. Government of Saskatchewan*, [1965-74] 3 Decisions of Sask. L.R.B. 446, LRB File No. 285-73-4, the Board made this observation, at 449:

> *The objectives of the Association are set out in section 3.01 of its Constitution which reads:*
>
> > *The Association is formed with the object to unite all persons so employed in order to advance and safeguard their economic and social welfare. To accomplish this object, the Association pledges itself to the establishment of the following:*
> >
> > *(a) Adequate wage standards and working conditions;*
> >
> > *(b) Reasonable insurance of the certainty of employment;*
> >
> > *(c) To preserve the rights of collective bargaining and to bargain collectively with employers in order to obtain and maintain collective bargaining agreements.*
>
> *While this section of the Constitution does not spell out the purpose of the organization as clearly as might be desirable, the Board is of the opinion that section 3.01(c) setting out an objective as "to preserve the rights of collective bargaining" and more particularly "to bargain collectively with employers in order to obtain and maintain collective bargaining agreements" satisfactorily meets the requirement of "that has bargaining collectively among its purposes" as is required by s. 2(l) of the Act.*

In a more recent decision in *Professional Associations of Internes and Residents of Saskatchewan v. University of Saskatchewan*, [1996] Sask. L.R.B.R. 209, LRB File No. 278-95, the Board made this comment, at 233:

> *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 Act, and that the organization is eligible to bring an application of this kind.*

In the constitution of the Regina Musicians Association, the object of the organization is described as follows:

> *The object of this Association is to unite the instrumental musicians of Regina and vicinity for the protection of their interests, the establishment of a minimum scale of prices for their services, and to enforce fair dealing amongst its members; also between its members and those employing them.*

The objectives of the American Federation of Musicians are described as follows in the constitution of that body:

> *The object of the American Federation of Musicians of the United States and Canada shall be to unite all professional musicians without discrimination, regardless of race, creed, sex, or national origin, through Local Unions into one grand organization for the purpose of:*
>
> *1) Elevating and bettering the economic status, social position, and general welfare of its members;*
>
> *2) Negotiating collective bargaining agreements with employers on behalf of its members;*
>
> *3) Providing assistance in contract administration and enforcement for the protection of its members;*
>
> *4) Resolving grievances, disputes, and controversies among Locals, members, and employers;*
>
> *5) Encouraging and training Local officers in representing their members;*
>
> *6) Advocating the interests of members and Local Unions to the public and governments; and*

> *7) Encouraging, promoting, supporting, and developing audiences for the preservation, enjoyment, and appreciation of performances by professional musicians.*

It is clear from the approach this Board and other labour relations boards have taken to assessing the claims of various organizations to fall within the definition of the term "trade union" that constitutional legitimacy is an important factor.

On the other hand, the Board has also shown itself to be more concerned with the substantive than the formal aspects of the founding documents of a labour organization.

In *Marilyn Coleman et al. and Darlene Rentz and Office and Technical Employees' Union, Local 378*, (1995) C.L.R.B.R. (2d) 1, the British Columbia Labour Relations Board made this comment, at 23:

> *A union's constitution is a vigorous social and political document, drafted by trade unionists themselves. Therefore, the constitution and bylaws ought not to be read (in the words of Laskin J.A., as he then was)" as if it was a common law conveyance. The construction should be liberal, not restrictive": Astgen v. Smith (1969), 7 D.L.R. (3d) 657, at p. 684, [1970] 1 O.R. 129 (C.A.).*

It is certainly the case that there is no explicit provision in the constitution of the Applicant which speaks of incorporating the constitution of the American Federation of Musicians at the local level. On reviewing the local constitution, however, we are persuaded that it is intended to be an adjunct to the constitution of the American Federation of Musicians. The obligations of members, for example, are described in terms of the observance of the standards and rules set by the international body. The following is the affirmation of obligation which is to be binding on members:

> *Obligation for Members*
>
> *I, ..... in the presence of the members here assembled, do solemnly promise and declare that I will support the Constitution and Bylaws of the American Federation of Musicians, and submit to its mandates, and obey all laws emanating therefrom, and the Constitution and Bylaws of Local 446 American Federation of Musicians and that of any Local of which I may hereafter become a member. To all this I pledge my sacred word of honour.*

A similar obligation is set out for officers:

> *Obligation for Officers and Directors*
>
> *I, ..... do hereby solemnly pledge my most sacred honour as a man, that I will faithfully discharge the duties of my office as ..... of this Local during the term for which I have been elected and installed; that I will support the Constitution and Bylaws of the American Federation of Musicians, and the Constitution, Bylaws, Rules and Regulations of Local 446; and that I will enforce the laws thereof to the best of my ability, without prejudice or partiality.*

Note may also be taken of s. 16 of Article VII, which sets out the specific responsibilities of members:

> *Section 16. Nothing in this Constitution and Bylaws shall be construed as to relieve any member of all duties and responsibilities under the Constitution and Bylaws of the American Federation of Musicians of the United States and Canada.*

It is clear from the constitution of the American Federation of Musicians that it is a venerable organization, with a history of international conventions going back to 1896, and that it is a trade union. We are satisfied that the Applicant is a valid local of that organization, and that it is therefore a trade union within the meaning of the *Act*.

The other basis for the opposition of the Employer was the argument that the members of the Applicant who are proposed for inclusion in the bargaining unit are not employees of the Employer, but independent contractors.

Ms. Michelle Hunter, director of player relations for the Employer, gave evidence concerning the nature of the relationship between the musicians covered by the application and the Employer. One of her responsibilities since the opening of the casino in January of 1996 has been to book entertainers. When Ms. Hunter took on her current position, she had no previous experience with the entertainment business, and it was suggested that she obtain some information from Mr. Brian Dojack, Secretary-Treasurer of the Regina Musicians Association, concerning what musical resources would be available in the community.

Initially, it was planned to have regular live performances in two areas in the casino; at the time of the hearing, it had been decided that there should only be one venue for live entertainment. Ms. Hunter said that she originally thought jazz music would be most suitable for the wide range of patrons who would be at the casino, and her request for information from Mr. Dojack reflected this. Since that time, according to Ms. Hunter, there has been some diversification from the jazz theme with special events or promotions directed at different audiences. These have included polka evenings, special performances for Chinese New Year, and frequent appearances by a performer who does a "tribute to Elvis." This latter offering has proved very popular.

When Ms. Hunter first met with Mr. Dojack, she said that she did not realize that he represented a trade union. He told her that he had contacts with many local musicians, as well as with more prominent musicians from elsewhere. Ms. Hunter testified that she thought it was a good idea to give exposure to the talents of local musicians, and she has been happy to make use of the pool of musicians in Regina as the major source for entertainment at the casino. She was thus content to use the list of musicians given to her by Mr. Dojack as the starting point for arranging musical entertainment, and many of the musicians on that list have appeared on frequent occasions.

Ms. Hunter said that she has sometimes contacted the musicians through Mr. Dojack, and other times has dealt with them directly. She said that, although she found the list and schedule worked out by Mr. Dojack a useful instrument in scheduling entertainment, she did not feel bound to follow it. On one occasion, she decided that one of the groups of musicians on the list did not provide suitable entertainment for the patrons of the casino, and she did not rehire them for further appearances. She also said that, as she has become more familiar with the entertainment scene, she has become less dependent on the original list of performers suggested to her by Mr. Dojack.

Mr. Dojack provided her with a standard form contract which was used initially as the contract to be signed by performers. This was adapted into a form making specific reference to the Saskatchewan Gaming Corporation/Casino Regina. In both of these versions, the contract referred to Casino Regina as "the employer" and the musicians as "employees." More recently, Mr. Dojack presented a new version which he suggested for use which referred to "the purchaser" and "musicians." This latter version has not been used to date.

The contracts are normally signed by someone in the human resources department on behalf of the Employer, and by the leader of the musical group on behalf of the musicians in the band. It may be noted that the constitution and bylaws of the Applicant contemplate that a leader will have certain responsibilities in this regard.

At some point, Mr. Dojack presented Ms. Hunter with a draft "Letter of Agreement," which read as follows:

> *This Letter of Agreement between Casino Regina and the Regina Musicians Association is to cover the services of musicians performing at Casino Regina.*
>
> *A) All musicians engaged by Casino Regina shall be members in good standing of the American Federation of Musicians.*
>
> *B) All musicians performing at Casino Regina shall be employed through the Regina Musicians Association.*
>
> *C) Musicians contracts shall be on the standard CA1 contract as supplied by the American Federation of Musicians. Any riders shall be negotiated with the agreement of all parties to the contract.*
>
> *D) All contracts shall be signed and returned to the office of the Regina Musicians Association with 10 days of the contract being received by Casino Regina.*

Ms. Hunter thought this letter had been presented to her in August of 1996. She said that it had not been agreed to by the Employer.

According to the evidence of Ms. Hunter, the musicians who are booked to play in the casino are not subject to the same terms and conditions of employment as other employees there. The amount owed to the musicians under the contract is paid in a lump sum to the leader of the group, and that person is responsible for dividing it among the musicians. The Employer makes no deductions from this sum for income tax, unemployment insurance, workers compensation or pension.

The leader of a group decides which particular musicians are to perform. Ms. Hunter gave examples of circumstances in which one band leader had used different combinations of musicians on several successive nights.

Given the nature of their business, the Employer has formulated detailed and uniform policies regarding various aspects of employee conduct, and enforces these policies fairly strictly. The policies, for example, prohibit employees from smoking, drinking or gambling in the casino. These policies are not applied to the musicians. In addition, the musicians, unlike other employees at the casino, are not subjected to security clearance or required to possess a gaming license.

Though Ms. Hunter acknowledged that she receives play lists from the musicians which show what they intend to play, she said that she makes no attempt to direct the selection of music, or to impose any stylistic requirements. She does not instruct them in how long to play or when to take breaks. She does try to gauge the level of enthusiasm which patrons demonstrate to various groups in order to decide whether they should be booked again.

The musicians are expected to provide their own instruments, sound system and music for their engagements at the casino. The Employer does not supply any of the equipment or instruments which are used.

The term "employee" is defined in s. 2(f) of the *Act* 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;*
>
> *(ii)* ***Repealed.*** *1983, c.81, s.3.*
>
> *(iii) any person designated by the board as an employee for the purpose of this Act notwithstanding that for the purpose of determining whether or not the person to whom he provides his services is vicariously liable for his acts or omissions he may be held to be an independent contractor; and includes a person on strike or locked out in a current 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.*

Over the decades legislatures and labour relations tribunals have been wrestling with the significance of such definitions, both in terms of the policy objectives which are being served by including or excluding certain kinds of relationships from the category of employment, and in terms of the specific criteria which should be used to decide whether any particular individual or group of individuals fall within the scope of the definition. It has long been acknowledged that drawing the boundary around the classes of persons who properly fall within the group defined as "employees" is not an easy matter, and is often complicated by the difficulties of telling form from substance.

In *International Brotherhood of Electrical Workers v. Tesco Electric Ltd.*, [1990] Summer Sask. Labour Rep. 57, LRB File No. 267-89, the Board reviewed the development of criteria in the following comment, at 59-60:

> *Boards have typically based their determination of whether individuals are employees or independent contractors by considering the following factors:*
> *1) the degree of ownership over the method of providing goods and services;*
> *2) ownership of tools; 3) chance of profit; 4) risk of loss; 5) the question of whether a party is carrying on business on his own behalf or for a superior; and, finally,*
> *6) the statutory purpose test.*
>
> *See: Montreal v. Montreal Locomotive Works Ltd., et al, (1947) 1 DLR, 161;*
>
> *Livingston Transportation Ltd., (1972) OLRB Rep., 488*

> *Generally speaking, if the answers to the first five questions point in the direction of the tradesman (whose status is in question) rather than to his employer, then such person will be held to be an independent contractor rather than an employee.*
>
> *With respect to the final consideration: ... the statutory purpose of the 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 the 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 s. 2(f) of the Act and will be so designated by the Board, notwithstanding the form or nomenclature attached to that relationship.*

The Board also commented on this matter in *Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Federated Co-operatives Limited and Sherwood Co-operative Association Ltd.*, [1990] Fall Sask. Labour Rep. 57, LRB File No. 256-88, at 58:

> *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.*

To some commentators, it became clear that there were certain problems associated with posing the issue as a stark choice between "employees" on the one hand, and "independent contractors" on the other. In *Retail Wholesale Canada, a Division of the United Steelworkers of America v. United Cabs Ltd.*, [1996] Sask. L.R.B.R. 337, LRB File No. 115-95, the Board reviewed one of these developments in the following terms, at 347:

> *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 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*

In those jurisdictions, such as Ontario and British Columbia, in which "dependent contractors" were characterized by statutory enactment as being more akin to employees than to independent contractors, the legislation typically also provided labour relations boards with the choice of placing them in a bargaining unit with other employees, or creating a separate unit consisting only of dependent contractors.

In *Pacific Press Ltd. v. Vancouver-New Westminster Newspaper Guild*, [1977] 2 C.L.R.B.R. 343, the British Columbia Labour Relations Board commented on the significance of the creation of the category of dependent contractors in these terms, at 352:

> *We can summarize the state of the law along these lines. The Code starts with the image of an individual who works for an organization, at times and places and under*

> *directions set for him by management, and receives wages and other forms of compensation in return for his services. The statute provides collective bargaining to "such employees" so that they can have meaningful group participation in setting a fair level of compensation and establishing some restraints on the exercise of managerial control. Recently, the law has come to recognize the presence of other individuals - who are not described as employees and do not satisfy several of the traditional indicia of employees - but who earn their living by working for these same organizations, and do so in a manner sufficiently similar to the paradigm employee that they are also allowed to participate in that same collective bargaining regime. This the Code accomplishes by drawing within its orbit the "dependent contractor". But moving along the spectrum, one comes to another distinctive group of individuals, who, while providing a service to the larger organization for a fee, clearly do not do so in a manner analogous to an employee. Perhaps because of their capital investment, their entrepreneurial talents, their own staff organization, and/or their special professional skills, they function on a detached and independent basis. These individuals, classified by the law as "independent contractors", are not entitled to band together and engage in collective bargaining under the Labour Code. Instead, they must function in the free and competitive market envisaged by the federal combines legislation. Needless to say, in the real world, the members of these groups gradually shade one into the other. But this Board is given only three legal categories to work with and it is up to us to decide which fits most comfortably the subjects of our inquiry.*

As the Board pointed out in the *United Cabs* decision, *supra*, the legislature in this province has not elected to include any reference in the *Act* to the notion of dependent contractors as such. In that decision, the Board made the following comment, at 350:

> *The Act has never contained a provision which addresses specifically the position of "dependent contractors." The Board has interpreted s. 2(f)(iii) of the Act, 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 Board went on to say, at 351:

> *The Board is presented by s. 2(f)(iii) of the Act 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.*

Though the Saskatchewan legislature has declined to follow the lead of some other jurisdictions by defining a separate category of dependent contractors under the *Act*, the Board noted in the *United Cabs* case, *supra*, that the concept of economic dependence is a useful standard for assessing whether a particular relationship may more closely resemble an employment relationship than a relationship between independent contracting parties.

The Board has interpreted s. 2(f)(iii) of the *Act* as permitting us considerable flexibility in deciding whether the overall tenor of a relationship signifies that the putative "contractor" should be granted access to collective bargaining. In the *United Cabs* case, *supra*, for example, the Board made this comment, at 358:

> *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.*

Other examples may be found in a recent decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. McGavin Foods Ltd.*, [1997] Sask. L.R.B.R. 210, LRB File No. 173-96, in which the Board found franchise distributors of dairy products to be employees within the meaning of s. 2(f) of the *Act*; and in *United Food and Commercial Workers, Local 1400 v. PADC Holdings Ltd. (Prince Albert Inn)*, [1994] 1st Quarter Sask. Labour Rep. 254, LRB File No. 281-93, where the Board found that karaoke operators in a hotel lounge were employees.

In this case, the Board has been presented with another situation of some novelty. The Applicant operates in a manner, and makes claims, which bear a resemblance to the craft-based trade unions which represent employees in the building trades. The request made by the Applicant in this instance is, in essence, to operate as a hiring hall for musicians, and to negotiate minimum rates for performances by members of the Applicant at Casino Regina.

In *Algonquin Tavern v. Canadian Labour Congress*, [1981] 3 Can. L.R.B.R. 337, the Ontario Labour Relations Board reviewed decisions from a number of jurisdictions which illustrated the many kinds of relationships into which performing artists and entertainers might enter in the course of their work. In the course of the decision, the Ontario Board alluded to an important distinction made by an American appeal court in *Ringling Brothers - Barnum and Bailey Combined Shows v. Higgins* (1951), 189 F. 2d 865, at 353:

> *Thus the plaintiff rightly says: "The performers were an integral part of plaintiff's business of offering entertainment to the public. They were molded into one integrated show, "the circus". It was not a loose collection of individual acts like a vaudeville show. The individuality of the performers was subordinated to the primary purpose of enhancing the reputation of the plaintiff and of producing one integrated show that would entertain the public. One example of this was the fact that, if a performer appeared in more than one act on the program, he would be given a different name by the circus each time he appeared". And elsewhere he points out the power to suggest changes, or improvements to shorten an act, to order objectionable parts deleted, to supervise the moral conduct of the performers, to require that a certain moral standard be maintained.*

In the *Algonquin Tavern* case, *supra*, the Ontario Board summarized the criteria which might be used to indicate whether a performer is or is not an employee as follows, beginning at 360:

1. *The use of, or right to use substitutes.*
...

2. *Ownership of instruments, tools, equipment, appliances, or the supply of materials.*
...

3. *Evidence of entrepreneurial activity.*
...

4. *The selling of one's services to the market generally.*
...

5. *Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes.*
...

6. *Evidence of some variation in the fees charged for the services rendered.*
...

7. *Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become an essential element which has been integrated into the operating organization of the employing unit.*
...

8. *The degree of specialization, skill, expertise or creativity involved.*
...

9. *Control of the manner and means of performing the work - especially if there is active interference with the activity.*
...

10. *The magnitude of the contract amount, terms, and manner of payment.*
...

11. *Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.*
...

The Ontario Board went on to make the following comment, at 364:

> *The dancers are not subordinated or subject to the authority of the hotel management in the way that its other employees are. The dancers owe no duty of allegiance or*

> *fidelity, nor are they subject to managerial direction and control. As we have already mentioned, they can, and do, have their work performed by someone else. The nature of their work is quite different from that of other employees, and they are entirely free to come and go as they please, when they are not actually performing. The hotel prescribes the time and length of shows, but this is the extent of its involvement and it does not improve employee status. Some house rules would be equally applicable whether or not the dancers were self-employed. And how many employees even skilled or professional employees render service over a few days, in 15 minutes segments, being entirely free to do what they wish at other times? (Note: there is no indication of rehearsal, training or preparation time, or the development of an act to the specifications of the clients.) And how many "casual employees" have the range of choice or salary of these dancers?*

The representative of the Applicant referred the Board to several collective agreements which have been concluded by the Applicant on behalf of musicians. Several of these related to performances on the radio and television networks of the Canadian Broadcasting Corporation (CBC), at both national and local levels. Another was an agreement with the Regina Symphony Orchestra. These agreements provide a clear demonstration that, in appropriate circumstances, the interests of the musicians represented by the Applicant can be the subject of viable collective bargaining.

As is the case in the construction industry, the parties involved in bargaining these agreements have had to take into account the specialized characteristics of the work which is being done and the persons doing it. The concept of seniority, for example, is of less significance in this context than is in many collective agreements, and there is an emphasis on spelling out clearly the conditions which apply to engagements of limited length.

It is our view, however, that the relationships which are reflected in the collective agreements filed with the Board can be distinguished from the circumstances described in this case. At the Symphony and the CBC, the relationship between the musicians and the employers is a sustained and regular nature. It is furthermore clear from the collective agreements that the employers exert a significant amount of control over the content, frequency and character of the performances.

In the case before us, we are unable to identify any of the kind of links which would characterize a relationship of employment. The musicians have a fleeting connection with the Employer, and the Employer makes no attempt to direct or control them, other than deciding whether to book them. In this

respect, the situation deviates from that in the construction industry; though workers in the building trades may have a short-term relationship with any particular contractor, there can be little question that while the relationship lasts, it is one of employment, with the contractor directing and controlling the work.

In this case, the musicians are, in our opinion, independent contractors and are not, therefore, entitled to be represented by a trade union according to the *Act*.

There is, of course, a broader question about the general position of performing artists, including musicians, in their dealings with those who make use of their talents. Our conclusion here is that these musicians are not, in this context, employees of Casino Regina, and does not necessarily mean that their position is not one of economic dependence on employers as a group.

The Parliament of Canada, for example, has concluded that there were sufficient inequities in the position of performing artists *vis à vis* federally regulated producers to justify the creation of a mechanism which would allow a form of collective bargaining between groups of artists and groups of producers. This mechanism was outlined in *The Status of the Artist Act*, S.C. 1992, c. 33, and contemplates the formation of a bargaining structure based on groupings of artists and of employers.

Under the *Act*, however, we do not have the capacity to look at the issue on a sectoral or multi-employer basis. We are limited to an examination of the relationship between one employer (or employers so closely associated as to be characterized as related employers), and the employees (or independent contractors) who perform services for them.

On this basis, we have concluded that there is not an employment relationship between the musicians who are engaged to perform at Casino Regina and the Employer. The application for certification must, therefore, be dismissed.

**SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 333, Applicant and CALGARIAN RETIREMENT GROUP LTD. OPERATING THE PRIMROSE CHATEAU RETIREMENT RESIDENCE, Respondent**

LRB File No. 357-96; April 11, 1997
Vice-Chairperson, Gwen Gray; Members: Diane Pitchford and Gordon Hamilton

For the Applicant: Ted Koskie
For the Respondent: Ronald Miller

**Employee - Managerial exclusion - Dietary manager - Board finds that dietary manager does not possess significant degree of decision making authority and is employee.**

***The Trade Union Act*, s. 2(f)(i).**

## REASONS FOR DECISION

**Gwen Gray, Vice Chairperson:** The Union applied to be certified for all employees of Holiday Retirement Corporation operating as Primrose Chateau in Saskatoon, except the co-managers. The parties agreed at the outset of the hearing that the Employer is "Calgarian Retirement Group Ltd." and an amendment to the application to reflect the proper name of the Employer was consented to. In addition, the Union and Employer agreed to the exclusion of managers and co-managers.

The Employer operates a retirement home for seniors who are able to live independently. It contracts the management of the home to a United States based company called Holiday Retirement Corporation. There are 114 apartments at Primrose Chateau and 127 residents. The staff complement includes four co-managers, who live on site, dietary manager, two cooks, two dishwashers, three housekeepers and seven to 15 food serving staff.

The Employer claims that the dietary manager, Mr. Roger Johnson, should be excluded from the bargaining unit as he exercises managerial authority. In this regard, the Board heard evidence from Ms. Sheryl Bauer, Director of Operations for Holiday Retirement Corporation, who testified as to the duties and responsibilities of the dietary manager. Ms. Bauer indicated that the dietary manager oversees the

kitchen staff, including hiring, firing and discipline of the staff. She indicated that he supervises all staff except the housekeeping staff. According to Ms. Bauer, the dietary manager plays a key role in ensuring the happiness of the residents of the Chateau. The job description for the position lists the dietary manager's specific functions as including the following:

1. *Participates in hiring and development of new employees.*

2. *Supervises dietary staff to ensure food preparation, food serving, table setting, dishwashing and kitchen clean-up are satisfactorily completed on a daily basis.*

3. *Evaluate employees' efficiency and productivity, and in the event of a deficiency, take responsibility for proper and efficient follow-up and consultation with the Management Team.*

4. *Assigns tasks as needed in the dietary department.*

5. *Consults weekly with the Management Team.*

6. *Schedules dietary staff, including the dining room staff.*

7. *Ensures Holiday menus and recipes are followed.*

8. *Operates the dietary department within the facility's food and labour budget through careful planning, purchasing of food supplies, inventory control, maintenance of daily log and food costs computation forms.*

9. *Purchase food supplies and plan all food preparation, following the menus and recipes developed by Holiday's Dietary Department.*

10. *Control quality of food and prepare nutritious, appetizing, and attractive meals.*

11. *Responsible for operating a clean and safe kitchen.*

12. *Employs skills and imagination in making meal times enjoyable for residents.*

13. *Directs and assists in the set-up of special functions.*

14. *Instruct employees in sanitary food handling procedures and safe work methods and ensure that these procedures are followed.*

15. *Follows up on complaints by residents/customers.*

16. *Adheres to Holiday philosophy and policies.*

17. *Perform all work assigned for agreed upon monthly wage, accepting no additional payment from residents for services provided.*

18. *Meet the assigned work hour requirements of the facility.*

19. *Other duties as assigned by supervisor.*

Ms. Bauer explained that the dietary manager has little input into policy or procedures used in the home as these are set primarily by the Corporation. In addition, she acknowledged that the dietary manager would have little input into food costs or budgets as those are also set by the Corporation. She did indicate, however, that the local management team, consisting of the co-managers and the dietary manager, would have input into determining the rates of pay for employees at the Chateau. They are expected to provide the Corporation with local information on the competitor wages.

On cross-examination, Ms. Bauer indicated that she did not know if the dietary manager at the Chateau actually performed the duties indicated in the job description as she did not supervise the dietary manager on a daily basis. That information would need to come from the local manager.

Mr. Tony Bosch, who manages the home along with his wife and a second couple, testified as to the job duties of the dietary manager. Unfortunately, during his testimony in chief, Mr. Bosch took ill and was unable to complete his testimony. The Board is left with no choice but to not consider the evidence in chief of Mr. Bosch. No other manager was called to give evidence in his place.

Finally, the Board heard evidence from the dietary manager, Mr. Roger Johnson. Mr. Johnson has been employed as the dietary manager at the home just over one year. He indicated that his primary function as dietary manager is to remain on budget with food costs and inventory. When presented with the document filed earlier as his job description, he indicated that he had not seen that particular document, although he had signed a different one earlier that week.

Mr. Johnson testified that he follows a Food Services Manual in the performance of his work. The Manual is produced by the Corporation and he is expected to follow it without deviation. He does not

have input into the Manual. He reports directly to the managers, Mr. and Mrs. Bosch. He has not been informed that he has the power to hire or fire employees, although on two occasions he has given written warnings to employees. On both occasions he was directed by Mr. Bosch to issue the warning. He does not believe that he has the authority to suspend or discipline employees. He has suggested employees for hiring but does not hire them himself. He indicated that he does not have input into budget issues or labour relations. Similarly, he does not regularly attend meetings of the managers, although he does meet every two or three months with the regional manager of the Corporation.

The definition of employee is contained in s. 2(f)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17, 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.*

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 described the essential qualities that are needed to find that a person does fall within the managerial category, at 59:

> *It is our view that in order to be excluded from the group defined as employees by s. 2(f)(i) of The Act, 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.*

It is our view of the evidence on this application that the dietary manager does not possess a "significant degree of decision making authority" with respect to the employment of other staff to disentitle him to membership in the bargaining unit. Mr. Johnson functions as a supervisor, at best, referring employment related issues to the managers. The bulk of his functions are determined by guidelines set out by the managing corporation. He has no real ability to affect the employment of other employees.

In these circumstances, the Board finds that Mr. Johnson is an employee within the definition of *The Act* and should be included on the Statement of Employment.

As the Union has filed support of a majority of the employees, a certification Order will be issued.

**PRINCE ALBERT POLICE ASSOCIATION, Applicant and PRINCE ALBERT BOARD OF POLICE COMMISSIONERS, Respondent**

LRB File No. 005-97; April 11, 1997
Vice-Chairperson, Gwen Gray; Members: Don Bell and Carolyn Jones

For the Applicant: Rick Elson
For the Respondent: Mitch Holash

**Arbitration - Deferral to - Where parties have referred collective bargaining issue to binding arbitration under *The Police Act*, Board will not hear unfair labour practice complaint relating to alleged agreement where arbitration board remains seized of issue - Board will hear that portion of unfair labour practice complaint that does not relate to matter that was referred to binding arbitration.**

**Evidence - Other proceedings - Section 18 - Board will not permit parties to call as witnesses members of arbitration board established under *The Police Act*.**

***The Trade Union Act*, s. 18 and 40.**

## REASONS FOR DECISION

**Gwen Gray, Vice Chairperson:** The Prince Albert Police Association (the "Association") filed an application for an unfair labour practice against the Prince Albert Board of Police Commissioners (the "Employer") in which the Association alleges that the Employer failed to bargain in good faith in respect of two separate issues. The first issue is called the "indemnification" issue and the second is called the "wellness" issue. Both matters involve a rather complicated factual background that needs to be explained in order to understand the issues raised on the application.

The Association and the Employer are parties to a collective agreement that expired on December 31, 1994. After a period of collective bargaining, the parties agreed to refer certain unresolved issues to binding arbitration in accordance with the provisions contained in s. 84 of *The Police Act*, R.S.S. 1978, c. P-15.01. An arbitration board consisting of Dean Dan Ish, Q.C., chairperson, Ms. Diane Bell, Association nominee, and Mr. Stanley Loewen, Employer nominee, heard submissions in respect to the matters in dispute and issued an award on November 15, 1996. In its award, the arbitration board listed

six items referred by the parties for determination, one of which was "wording of the indemnification clause". This matter refers to the indemnification of members of the Association for expenses incurred in defending civil or criminal proceedings brought against them as a result of matters arising from the performance of their duties as peace officers. In its award, the arbitration board recorded that "the parties requested that we not make a ruling in this award with respect to the "indemnification" clause but that we retain jurisdiction over the matter should a resolution not come to fruition." As a result, the arbitration board expressly reserved jurisdiction with respect to the wording of the "indemnification" clause.

In the present application, the Association claims that, at the suggestion of the chairperson of the arbitration board, the nominees for both parties met with the Association for the purpose of attempting to resolve the "indemnification" issue. During the course of this negotiation/mediation, the Association alleges that an agreement on the wording of the "indemnification" clause was reached between it and the nominee for the Employer, Mr. Loewen. The Association claims that the Employer's nominee had authority to settle the matter for the Employer, subject to ratification by the Employer's board. The Association further complains that the Employer did not submit the agreement to the Board of Commissioners for ratification, and that it has subsequently tendered a position on the wording of the "indemnification" issue that represents a retreat from its earlier position. The Association alleges that this conduct represents a failure on the part of the Employer to bargain in good faith.

The Employer takes issue both on the factual underpinning of the Association's application and the legal consequences. The Employer says that it was not a party to any negotiation of a settlement of the "indemnification" issue, and denies that Mr. Loewen acted as its agent in securing any such agreement.

Further and most relevant to this application, the Employer takes the position that the arbitration board has exclusive jurisdiction to determine the "indemnification" issue, and argues that this Board should refuse to hear the application or should defer to the arbitration board until it has rendered its final decision on the "indemnification" issue. The Employer takes the position that the arbitration board is seized with the identical issue that faces this Board, and that the arbitration board can afford the parties a full and suitably alternative remedy.

The Association takes the position that the issues before the arbitration board and this Board are not identical. It notes that the arbitration board is empowered to determine what the collective agreement "should" be while the Labour Relations Board has a statutory mandate to determine what, if any, agreement exists between the parties and to admonish the party who fails to refer such agreement for ratification or execution. The Association argues that while the arbitration board may take into account the agreement arrived at by the parties with respect to the "indemnification" issue, it is not obligated to include the provision in its award.

It is the consensus of the parties that if the portion of the application relating to the "indemnification" issue were to proceed to this Board, the members of the arbitration board, including the chairperson, would be called as witnesses.

The second issue raised in the application relates to the "wellness" issue. The Association alleges that in its 1993-94, it agreed to include a physical fitness clause in the collective agreement in exchange for a "wellness package." The "wellness package" permits the Association's members to use civic fitness facilities without charge. The Association claims that the "wellness package" was inadvertently omitted from the written version of the 1994 agreement. It requested the inclusion of the provision in the latest collective agreement, but alleges that the Employer refused to incorporate a provision respecting the "wellness package". The Association claims that the Employer's refusal to incorporate the provision constitutes an unfair labour practice.

The Employer takes the position that the "wellness package" was not intended to be part of the collective agreement. It argues further that the inclusion of such provisions were not raised as a bargaining issue by the Association in the 1993-94 round of bargaining, the 1996-97 round of bargaining or the submission to arbitration.

The arbitration award issued on November 15th, 1996 noted under the title "Position of the Employer" that the Employer proposed a wage adjustment which included "the elimination of the `wellness program'." In its final determination of the matters in dispute, the arbitration board did not address this issue or make any ruling with respect to it.

The Employer objects to the Board proceeding with the "wellness" issue if it is not severed from the "indemnification" issue. If it was severed, the Employer is prepared to deal with the issue on its merits.

These Reasons for Decision will only address the issue of whether the Board should defer its jurisdiction to the arbitration board. The reasons for deferring jurisdiction to arbitration was well summarized 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 196-197 as follows:

> *In Canadian Union of Public Employees, Local 59 v. City of Saskatoon, [1990] Fall Sask. Labour Rep 77 (R.H.), 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 this application the Board is being asked to defer its jurisdiction to an interest arbitration board that is given statutory sanction by *The Police Act*. This process was agreed to by both parties to the collective agreement as the mechanism for resolving the outstanding contract issues, including the "wording of the indemnification clause" and was obviously preferred over the option of strike and/or lockout that otherwise would be available to the parties. Although the comments made in the *Western Grocers* case, *supra*, quoted above were directed at grievance or rights arbitration, the same policy considerations apply to a decision to defer jurisdiction where a matter in dispute has also been referred to interest arbitration.

With respect to the "indemnification" issue, it is our view that the Board should defer its jurisdiction to the arbitration board. The matter is clearly within the jurisdiction of the arbitration board to determine as it has reserved its jurisdiction over the issue and can issue a final remedy. Although it may be correct, as counsel for the Association argued, that the question before the arbitration board is different than the question before this Board, both parties acknowledge that the arbitration board can take into consideration the Association's allegation that an agreement was reached on the "indemnification" clause.

In addition, the current dispute between the parties arose from a process encouraged by the chairperson of the arbitration board and, in our view, is a process that properly should be supervised and dealt with in its entirety by that board.

Counsel for the Association expressed concern that the arbitration board did not have jurisdiction to "punish" the Employer if it were to find that an agreement had been reached, and the evidence indicates that the Employer had engaged in bad faith bargaining. In our view, the remedial authority of the arbitration board, which includes the ability to insert the "indemnification" provision that the Association alleges was agreed to by the Employer into the collective agreement, is a "suitable alternative remedy" using the words of Bayda C.J. in *United Food and Commercial Workers, Local 1400 v. Westfair Foods Ltd. and Sask. Labour Relations Board* (1992), 95 D.L.R. (4th) 541, at 548.

Another factor that influences our decision to defer to the arbitration board arises from the prospect of requiring members of another tribunal to testify on the subject of their proceedings before this Board. Section 40 of *The Trade Union Act*, R.S.S. 1978, C. T-17 states:

> *40(1) Information obtained for the purpose of this Act in the course of his duties by:*
>
> . . .
>
> *(d) a conciliation officer of the department over which the minister presides;*
>
> *shall not be open to inspection by any person or by any court.*

> *(2) None of the persons mentioned in subsection (1) shall be required by any court or the board to give evidence about information obtained for the purposes of this Act in the course of his or her duties.*

In *Retail, Wholesale and Department Store Union, Local 955 v. Morris Rod Weeder Co. Ltd. et al.*, [1977] Sept. Sask. Labour Rep. 32, LRB File Nos. 375-77, 451-77, 452-77 & 462-77, at 34, the Board stated as follows:

> *The Board ruled that it would not accept any evidence from Mr. Mitchell with respect to the mediation process in which he participated unless with reference to matters which occurred when representatives of both parties were present. From the evidence given by Mr. Mitchell the Board is satisfied that he was acting as a conciliation officer of the Department of Labour within the meaning of s. 39 [now s. 40] of the Act. Although ss. 39(2) of the Act probably has no application to this situation since the Board is not a Court within the meaning of that section, it is the opinion of the Board that the provisions of ss. 39(1) of the Act apply to the situation under consideration. To require a conciliator to give evidence would be to open to inspection information obtained by that officer in the course of his duties. If the Board is wrong in this conclusion, it would, in any event, have exercised the broad discretion given to it with respect to evidence under s. 18 of the Act and have refused to receive such evidence on the basis of that it would be against the public interest to do so in that it would destroy the usefulness of conciliation officers of the Department of Labour. Parties would obviously refuse to confide confidential information, or make bargaining concessions during the course of conciliation, to a conciliation officer, if they knew that this information could be obtained by the adverse party in proceedings before this Board.*

This view was reinforced in *Retail, Wholesale and Department Store Union v. Westfair Foods Ltd. and its Western Grocers Division*, [1993] 2nd Quarter Sask. Labour Rep. 100, LRB File Nos. 007-93 & 011-93, at 116, where the Board stated:

> *It should be noted that the Board ruled early in the hearing that neither party would be allowed to present evidence concerning the exchanges which took place under the guidance of the mediator who was appointed in early January; nor would either party be open to cross-examination concerning the contents of the report submitted by the mediator at the end of February.*
>
> *In making this ruling, we were cognizant that the inability to rely on anything which occurred during mediation might be something of a handicap to the parties. It seems important, nonetheless, to protect the confidentiality of the mediation process, especially since many of the statements in the report could only be corroborated by the mediator himself. Though the proceedings under the Act which take place before the Board are of great importance, there are occasions when we must defer to other forums. The success of mediation as a process depends heavily on the creation of an*

> *atmosphere of trust and openness between the mediator and the parties. It would be irresponsible, in our opinion, to create the risk to this process which might arise from the prospect of having its contents open to scrutiny by this tribunal.*

It is this Board's view that calling arbitration board members to testify would not be in the public interest even though such arbitrators are not included in the list of protected classes in s. 40 of *The Trade Union Act*. Section 18 of *The Trade Union Act* permits the Board to "receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not". In this regard, the Board would exercise its discretion by refusing to hear evidence from the members of the arbitration board. It would exercise its discretion in this manner to protect the integrity of the arbitration process and to allow it to use whatever techniques may be available to secure a workable collective agreement between the parties. If this Board were to permit the calling of arbitration board members as witnesses in this application, the arbitration board would be rendered ineffective in completing the tasks assigned to it by the parties. The members of the arbitration board would become involved in the collective agreement dispute in a capacity other than their adjudicative role. In our view, requiring members of the arbitration board to appear before this Board as witnesses would harm the arbitration process. For these reasons, this Board defers the "indemnification" issue to the arbitration board convened under s. 84 of *The Police Act*.

The situation respecting the "wellness" issue is different, however, and it is the view of this Board that it can and should hear that portion of the application that relates to this issue. The matter is not one that was referred to the arbitration board and, as a result, there is no concurrent jurisdiction arising with respect to this issue. The Board will therefore reconvene at a further hearing to deal with that portion of the application that relates to the "wellness" issue.

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# SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and REMAI INVESTMENTS CORPORATION, O/A IMPERIAL 400 MOTEL (SWIFT CURRENT), Respondent

LRB File Nos. 014-97 & 019-97; April 15, 1997
Chairperson, Beth Bilson; Members: Don Bell and Donna Ottenson

For the Applicant: Larry Kowalchuk
For the Respondent: Larry Seiferling, Q.C.

**Certification - Membership - Evidence - Board prohibits parties from calling evidence of employee views on representational question.**

**Certification - Membership - Evidence - Privilege - Board states that privilege with respect to representational question accrues to employees.**

**Certification - Membership - Improper organizing tactics - Board decides that objection may be raised to support card evidence on basis of management interference.**

**Certification - Membership - Improper organizing tactics- Board decides that objection cannot be rejected on grounds that no management interference possible when management representative encourages union activity.**

**Certification - Representation vote - Board decides that discretion to order representation vote does not depend on finding of company domination.**

***The Trade Union Act*, ss. 5, 6.**

## EVIDENTIARY RULING: REASONS FOR DECISION

**Beth Bilson, Chairperson:** The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union has filed an application for certification as the bargaining agent for a unit of employees of Remai Investment Corporation at the Imperial 400 Motel in Swift Current. The parties have been unable to come to agreement about whether two positions should be included within the scope of the bargaining unit.

The Employer has filed an application alleging that the Union has committed unfair labour practices and violations of ss. 11(1)(a), 11(1)(g), 11(2)(a) and 12 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;*
>
> ...
>
> > *(g) to interfere with the selection of a trade union as a representative of employees for the purpose of bargaining collectively;*
>
> *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;*
>
> *12 No person shall take part in, aid, abet, counsel or procure any unfair labour practice or any violation of this Act.*

The issue raised by the Employer in the application concerns the role played in the Union organizing campaign by Ms. Cheryl Huber, housekeeping supervisor at the motel, who is the incumbent in one of the positions which is in dispute in connection with the application for certification. The Employer alleges that Ms. Huber was clearly in a management position when the organizing campaign took place, and that her participation casts doubt on the reliability of the support cards filed with the Board as

evidence in relation to the certification application. Though the application itself indicates that the Employer was seeking dismissal of the certification application on these grounds, counsel for the Employer made it clear that the remedy now sought by the Employer is to have the Board direct that a representation vote be held.

The Employer's case commenced with the evidence in chief of Ms. Cherie Emmerson, general manager of the motel. In cross-examination, it became evident that the Union intended to adduce evidence concerning certain conduct on the part of Ms. Emmerson and other managers at the motel as part of a defence to the unfair labour practice application. Counsel for the Employer objected to this on the grounds that he had no prior notice that this conduct would be put in issue. The Board was asked to make a ruling on whether counsel for the Union could proceed to probe these issues in cross-examination.

The Board ruled that the questions posed in the application filed by the Employer were of a limited nature, related to one person, and that they could not have anticipated that the conduct of representatives of the Employer would become an issue in the hearing of the application. The Board indicated that they would be prepared to allow an adjournment to permit the Union to give notice of specific allegations they wished to make against the Employer, and the Employer to prepare to meet those allegations.

Counsel for both parties agreed to use the balance of the scheduled hearing to present argument concerning the evidence which the Board should entertain in relation to the application. The arguments which were presented were wide-ranging, particularly those presented on behalf of the Union. In the course of these arguments, counsel for the Employer queried whether he had presented the matter in an appropriate form. The arguments made on behalf of both parties have allowed the Board to reframe the case in a way which, in our view, will allow us to deal in a fair and expeditious manner with the issues raised in the application.

On the basis of considering the arguments made by counsel, we have concluded that the entire matter raised in the application is essentially evidentiary in nature, and this has implications which we will note in due course.

Counsel for the Employer stated that the sole question which his client wished to have determined by the Board is whether the participation in a union organizing campaign of someone who is a representative of management casts a sufficient doubt on the trustworthiness of the support card evidence, that the alternative of a representation vote should be used as a means of ascertaining the wishes of employees. In this context, he said that the Employer was not making any allegation that the Union had consciously manipulated the influence which might be exercised by the management representative, but simply that the activity of this person had created a doubt about the reliability of the evidence which is usually used by the Board as a basis for certification. He said that the reason for bringing up this issue by way of an unfair labour practice application was that he was not certain of any other way it could be raised before the Board.

Counsel for the Union began by arguing that the Board has no statutory authority to dismiss an application for certification, and that the statutory power conferred on the Board in s. 6 of the *Act*, to order a vote, can only be used in circumstances where a finding is clearly based on some violation of the *Act*.

In *Canadian Union of Public Employees v. Bo-Peep Co-operative Day Care Centre*, [1979] Feb. Sask. Labour Rep. 44, LRB File No. 189-78, the Board considered an allegation that the trade union which had filed an application for certification was "company-dominated" because of the participation of a management representative in the organizing activities. The Board made the following comments, at 47:

> *The evidence before the Board is that Local 1902 of the Union is a composite local and was in existence long before this application came before the Board. The local represents employees in a number of other day care centres in the City of Regina. Since the local was in existence and already functioning, it cannot be said that its formation was dominated or interfered with by Mrs. Carson.*
>
> *There is no evidence of any kind that Mrs. Carson had anything to do, in any way, with the administration of Local 1902.*
>
> *The Board therefore finds that the Applicant is not a company dominated organization with the meaning of s. 2(e) of the Act. If the application had been made by an independent association, the result might have been different. The Board feels entitled*

> *to take into account that the Applicant is the Canadian Union of Public Employees, an organization well known to this Board and across Canada.*
>
> *The Board has also taken into account that the Board of Directors of the Employer had no knowledge of the actions of Mrs. Carson in instigating this application. In the absence of evidence from Mrs. Carson, the Board has no knowledge of her motives in acting as she did, but if her motive was to exert employer influence on the union, that possibility is removed because her employment with the Employer has been terminated.*

In *Saskatchewan Government Employees' Union v. Regina Native Women's Association*, [1986] Mar. Sask. Labour Rep. 19, LRB File No. 307-85, the Board alluded to the *Bo-Peep* decision, *supra*, in the following way, at 20:

> *The Board considered similar facts in Bo-Peep Co-operative Daycare Centre, LRB File No. 189-78, Reasons for Decision dated December 5, 1978. In Bo-Peep the Director was instrumental in the organizing campaign and the allegation resulted that C.U.P.E. was company dominated. Here the allegation is not that the S.G.E.U. is company dominated but that the role and presence of senior management may have influenced the employees. There was no evidence of direct or actual influence nor is there any way to determine to what extent if any the employees felt constrained to follow the Executive Director's lead.*

The Board went on to reach the following conclusion, also at 20:

> *In the present case, the participation of the Executive Director and to a lesser extent two other Directors, has cast a shadow over the union's support. However, the Board is not satisfied that the influence was so serious that the true wishes of the employees could not be ascertained by a representation vote. The Board has therefore decided that a representation vote will be held.*

Counsel for the Union urged us to draw two conclusions from the limited jurisprudence of the Board on the issue before us here. The first, which he bases on a reading of the *Bo-Peep* decision, *supra*, is that the Board was deciding there that, absent a finding of company domination, the Board will not conclude that a certification Order should not be issued on the basis of the support cards filed by a trade union.

The second proposition he made was that, starting with the *Regina Native Women's Association* case, *supra*, the Board, casually and without proper meditation on the consequences, turned its back on this principle. He urged the Board to reverse the results of the latter case, and the subsequent decision in

*International Union of Operating Engineers v. Central Asphalt*, [1987] July Sask. Labour Rep. 37, LRB File No. 216-86, and to reassert the principle that the Board will not resort to the holding of a vote under s. 6 of the *Act* unless there has been a finding of company domination.

It is difficult, in our view, to read into the rather terse comments of the Board in these three cases, the adoption, and then the trashing, of an immutable principle of some kind. It is clear that the Board, in the *Bo-Peep* case, *supra*, was considering an allegation that the trade union was company dominated. Such an allegation is of a sweeping nature. In the context of the *Act*, a finding of company domination does not merely raise evidentiary questions, or even questions related to discrete instances of conduct. The implication of a finding of company domination is that the organization which has claimed recognition has no standing whatever as a trade union, and cannot therefore pursue a certification application.

In *Bo-Peep*, *supra*, the Board concluded that the allegation of company domination was an unfounded one. We do not read in the passage we have quoted above anything to suggest that, having decided this issue, the Board felt they were precluded from proceeding to consider other aspects of the involvement of persons with managerial responsibilities in union organizing activities. The Board made note of the fact that the evidence concerning the status and conduct of the person identified in this connection was limited, and it seems to be on this basis that they were reluctant to enter into any further commentary on this issue. The Board concluded by issuing a warning, in the following terms, at 6:

> *This case should serve as a caution to Union organizers who cast their net too wide and include persons who clearly perform management functions in the proposed unit when they apply for certification. They leave themselves open to accusations that their organization is a company dominated organization as defined by the Act.*

In the *Regina Native Women's Association* decision, *supra*, the Board acknowledged the distinction in the *Bo-Peep* case, *supra*, which arose from the allegation made there of company domination. The Board did not assume that the absence of this factor precluded them from considering a different question. The question was not whether the trade union would lose standing because of company domination, but whether the evidence upon which the Board would ordinarily rely in determining an application for certification - the support cards filed by the union - was suspect because of the possible

influence exerted on employees by management representatives who had been active in the organizing campaign. The Board concluded that this influence was not of such a serious nature that no expression of opinion by the employees could be trusted - a conclusion which would lead, by implication, to the dismissal of the application - but did decide that a representation vote pursuant to s. 6 of the *Act* would be a more reliable way of gauging the wishes of the employees.

These conclusions did not represent, in our opinion, either an about-face in relation to the principles laid out in the *Bo-Peep* case, *supra*, or a decision which lay outside the jurisdiction of the Board.

The process by which the Board assesses whether a trade union enjoys the support of a majority of employees in connection with an application for certification is not dictated by any provision of the *Act*. In the early days of the operation of the Board, we decided on the process which is still followed in nearly all cases to date, that of determining support on the basis of a review of support evidence filed by a trade union, which takes the form of cards signed by individual employees. The evidence concerning support is reviewed through an administrative process of the Board, and is not open to scrutiny by the employer. This is in keeping with the consistent policy of the Board that evidence relating to the opinions of individual employees on the question of trade union representation should be kept confidential.

It would have been open to the Board to adopt, instead, a process in which the vote contemplated in s. 6 of the *Act* was used routinely to determine majority support in every case. It is our view that a determination of whether a trade union is company dominated is not a condition precedent to the exercise of our discretion under s. 6 of the *Act*.

We would further comment that it must surely be the case that the Board always enjoys the discretion to assess the validity or reliability of any evidence which may be advanced in support of any question the Board is asked to decide. Though the evidence provided in the support cards is never the subject of examination or cross-examination in an open hearing, that does not mean that the Board cannot disregard it if there is some reason to hold it suspect. To give an extreme illustration, if the Board were to receive 500 support cards signed in the same handwriting, handwriting which differed from all of the

signatures on the Statement of Employment, the Board would clearly have grounds for questioning whether this constituted reliable evidence of majority support.

In this case, the Employer has raised a question about the reliability of the evidence which is in the possession of the Board on the grounds of management interference in the origin of this evidence. We do not accept that an assessment of the value of this evidence on these grounds, lies outside the jurisdiction of the Board.

A further argument put forward by counsel for the Union was that the involvement of management representatives in union organizing, if proved, would not constitute a basis for questioning the evidence of support filed by the Union. This rested, in part, on the somewhat startling proposition, coming from Union counsel, that employees should not be considered to be susceptible to management influence in making the decision whether to support a trade union, and that it is somehow offensive to suggest that they might be vulnerable in this respect.

The other element of the argument advanced by counsel for the Union rested on a distinction between "positive" and "negative" activity on the part of management in relation to trade union activity. In this connection, counsel suggested that, though it might be objectionable for management to play a role in trying to discourage employees from participating in trade union activity, there is nothing in the *Act* to suggest that representatives of an employer should not be able to play as active a role as they wish in fostering trade union activity among employees.

He suggested that this is the implication of the decision of this Board in *Energy and Chemical Workers v. Remai Investment Corporation (Ramada Renaissance Hotel, Regina) and Saskatchewan Joint Board Retail, Wholesale and Department Store Union*, [1992] 2nd Quarter Sask. Labour Rep. 97, LRB File Nos. 027-92 and 028-92. In that case, the same trade union which has made the application here was objecting to an application filed by a rival trade union on the grounds that the employer had assisted in the organizing drive. The Board dealt with a series of complex issues, and summarized their conclusions as follows, at 111:

> *The Board's first conclusion is that the E.C.W. had every right to organize these employees. The second conclusion is that the many public areas of the employer's premises created organizing possibilities that do not exist at most workplaces. The third conclusion is that the employer may well have lacked the right to prevent the E.C.W. from renting a boardroom and quietly organizing the employees in the public areas of its premises on the employees' own time. This is especially true bearing in mind the E.C.W.'s clear and unequivocal undertaking to carry on its organizing drive with respect for the employer's business interests. Fourthly, considering what has been said about the accommodation that must be made between the union's organizing rights and the employer's property rights, the Board cannot find the arrangement that the E.C.W. and the employer made unlawful, even though the Board might have disposed of the issue differently. The considerations can be different where an employee association is involved as observed in Bo-Peep Co-operative Day Care Centre (supra), however, those concerns do not exist with an organization like the E.C.W. Fifthly, it is doubtful that the employer had the authority to prevent employees from making contact with the E.C.W. on their own time in the rented room and perhaps even in the staff room and other public areas if there was no legitimate reason for objecting. Sixthly, there is nothing wrong with employees taking into consideration the respective styles of two rival unions and their histories with their employer.*

Though the Board acknowledged that the employer in that case had accommodated one trade union in some respects, we do not read the decision as supporting the proposition that employers have the blessing of the Board if they choose to roll up their sleeves and throw themselves into union organizing campaigns. It is clear, even from the brief passage quoted, that the Board was alert to the possibility that an employer might go too far in this respect; indeed, we read the passage as suggesting that "too far" is no long distance at all. The Board seems to have accepted that it is not improper for an employer to refrain from placing obstacles in the path of trade union organizers. On the other hand, the Board sounded a cautionary note to employers who might be tempted to go beyond this, and become more actively involved.

The Board has consistently maintained - nearly always in the context of unfair labour practice applications brought against employers - that there are sound reasons for being concerned about the influence an employer may bring to bear on the decision-making of employees, given the unequal nature of the relationship between them. We have recognized that the very capacity of representatives of an employer to make decisions which directly affect the terms and conditions, or tenure, of employment of employees gives communications emanating from them added weight, and creates the possibility that the decisions made by employees are not made freely and autonomously.

For this reason, the Board has been particularly careful in the context of union organizing to ensure that representatives of an employer keep their distance from the process. We have steadily held to the principle that the decision as to whether or not to select trade union representation as a means of deciding terms and conditions of employment is a decision to be made by the employees alone. The point of keeping a weather eye on the intrusion of the employer into this process is to ensure that there is space and comfort for the employees, so that they, and they alone, may make the decision about trade union representation.

One cannot deny that a positive and co-operative stance on the part of employers with respect to collective bargaining probably does much to advance the achievement of the objectives laid out in the *Act*. This does not mean, in our view, that it is helpful to have management representatives taking an active role in encouraging the employees to make a particular choice. It remains the choice of the employees to make, and they are entitled to make it without influence from the employer.

Counsel for the Union pointed out that there are many cases where it is difficult for employees or for a trade union to identify with certainty those persons who are representatives of management. Certainly, there are many cases where the question of whether someone is an employee or performs managerial functions is one of some complexity, and one cannot expect employees to have an intuitive grasp of the complicated standards which have been used in interpreting the *Act*.

This does not mean that the question of managerial influence on an organizing campaign is not a legitimate one to raise in circumstances like those before us here. There may be questions of the actual status of Ms. Huber, of the centrality of her role in the organizing campaign, and of whether the possibility of improper influence existed; we anticipate that both parties will bring evidence on these points. The mere signing of a card by someone who is later determined by the Board not to be an employee would be highly unlikely to invalidate the evidence resulting from an entire organizing campaign. On the other hand, there may be situations where the Board would have grounds for a greater degree of concern.

Counsel for the Union interpreted the application filed on behalf of the Employer as asking for the application of an objective standard of managerial influence. In other words, the issue would be whether the evidence filed with the Board should be inherently suspect because of the involvement in the organizing campaign of someone whose opinions might carry undue weight with the ordinary employee. In an interesting reversal of the usual roles, he argued that the Union should be permitted to bring evidence related to a subjective assessment, that is to say, evidence from individual employees intended to show whether or not they were influenced or intimidated by the presence of a management representative when they made their choice concerning trade union representation.

He acknowledged that the Board has been careful to protect the privacy and confidential nature of the decisions made by employees with respect to representation, and has not permitted them to be put in situations where this confidentiality is stripped from them. He argued, however, that this is a privilege which accrues not to the Board or to an employer, but to trade unions, and it is open to them to waive it.

We disagree with the position taken by counsel in his argument on several grounds. The first is that we do not see this as a privilege which accrues to trade unions, but to the employees themselves. It is the right of individual employees to make a representational choice which is being protected, not the interests of trade unions as such. There are, of course, often cases in which individuals give up their rights in this respect in order to support allegations or applications being made by a trade union; in more limited circumstances, they sometimes yield their right to privacy in the cause of bringing their own complaints against a trade union.

The Board has also, on occasion, expressed concern about the usefulness of receiving widespread evidence of this kind. When an employee is asked to give evidence about possible intimidation or coercion by representatives of an employer, when representatives of that employer are present, it is somewhat difficult always to be sure how much credence to place in it. In this respect, if an employee is willing to testify that there was employer influence, a degree of willingness to risk censure may be presumed which may entitle the testimony to credibility. It is more difficult to know what weight can be given to the evidence of an employee who denies employer influence or interference.

The third point we would make is that it is in our view unnecessary to contemplate the calling of such evidence in relation to this application. The Board is being asked to decide whether the *possibility* of management influence is, on an objective basis, sufficient to cast doubt on the evidence of support.

If the answer to this question is yes, then it is hard to see how this finding would be displaced by subjective evidence. One of the possible bases of such an objective finding would be that employees might be influenced whether or not they subjectively thought they had been, and we have already noted the difficulties of assessing an employee denial of this. If the answer is no, then, absent some challenge from the employees themselves, the Board would not have any further reason to doubt the validity of the support cards.

The Board has been adamant that the right of employees to make a personal and secret choice with respect to the question of trade union representation should be protected, though it may be waived under certain circumstances. In this case, we do not think there is any purpose to be served by admitting evidence concerning the decisions which individual employees made or their reasons for making them. Both parties apparently contemplate calling evidence from individual employees related to the role played by Ms. Huber during the organizing campaign, and to whether she was perceived as a management representative by employees. We expect counsel to exercise circumspection in adducing such evidence, and not to venture onto the ground we have declared to be off limits.

A further argument which was made by counsel for the Union was that the Employer has no standing to put this issue before the Board, as it does not lie in the mouth of an employer to say that employees have been wrongly influenced, in effect, by that employer. If it is possible for the Employer to make the allegations of unfair labour practices against the Union in this way, the Union should be entitled to present, in defence to the allegations, examples of employer conduct which is not consistent with the obligations set out in the *Act*, and which may help to explain why the Union proceeded in the manner it did when organizing the employees.

At one point in the exchanges which took place before and with the Board, it was suggested by counsel for the Employer that the Union should be required to make unfair labour practice application before

these allegations could be considered. At another point, the Board suggested that it would be possible for the Union to bring forward these allegations as part of a defence to the current application if proper notice were given to the Employer.

In the argument advanced to the Board, counsel for the Employer expressed some doubt whether an unfair labour practice application was the proper way to proceed in order to raise these issues before the Board.

We have concluded that, in these circumstances, the reservations on the part of counsel for the Employer concerning the suitability of the unfair labour practice application as a vehicle for bringing this issue before the Board are well-founded. The issue which the Employer wishes to raise is an evidentiary one, that of whether there are grounds for doubting the reliability of the evidence of support filed in connection with the application. It is not really the conduct of the Union which is in issue, but the extent to which this particular evidence can be trusted in light of the alleged involvement in obtaining that evidence of someone who was a representative of management.

In our view, the Employer is entitled, as any party is, to make an objection to evidence on which the Board is being asked to rely in making a decision. This is a somewhat unusual situation, in that the Employer does not - and will not - have access to the evidence itself. It does not, however, differ in essence from other evidentiary objections which are raised from time to time.

If this is regarded as an objection to evidence rather than as an unfair labour practice, it becomes unnecessary to contemplate a "defence" of the kind which might be appropriate in relation to an allegation that one of the parties has committed an unfair labour practice. The advantage of approaching the matter this way is that it focuses the attention of the parties and the Board on the essential issue raised in this application, and does not require a detour into issues which are really of collateral or peripheral significance in this context.

This application has raised an issue of some importance, and one on which the Board has not had occasion to comment extensively. The convergence of a well-settled practice of the Board in considering applications for certification with a concern on the part of the Board - also well-settled -

that employees are vulnerable to influence by their employers because of the inherent inequity of their situations, creates a significant question. In our view, it is a question which deserves to be the focus of attention in dealing with this application, and it would not serve this purpose to permit the proceeding to be diverted by the inclusion of other issues.

We can summarize as follows our conclusions on the evidentiary issues which were the subject of argument before the Board:

1. We propose to treat this matter as arising from an evidentiary objection, rather than as an unfair labour practice application. This, in our view, obviates the need for the Union to mount a "defence" to unfair labour practices, though it is, of course, anticipated that the Union will oppose the rejection of the support card evidence on the basis suggested by the Employer.

   There was some discussion at the hearing of whether the Union would be required to file an unfair labour practice application to make allegations impugning conduct of representatives of the Employer, or whether it would be sufficient to give notice of such allegations to the Employer prior to the next scheduled phase of the hearing. Given the view we have just expressed of the nature of the issue, allegations concerning conduct on the part of the Employer are not relevant to the evidentiary objection, and they will not be entertained in this connection. It is still open to the Union to file a separate unfair labour practice application to bring these allegations before the Board.

2. We will not permit employees to be questioned about their views concerning the Union; whether or not they signed support cards, or engaged in other activity in support of or in opposition to the application for certification; or whether they were, subjectively speaking, influenced in this respect by the activities of Ms. Huber. Employees may be called, however, to give evidence about the real or perceived status of Ms. Huber, and her role, if any, in the organizing campaign.

3. Counsel for the Union indicated that Ms. Huber wishes to testify concerning her activities in connection with the organizing campaign, and she will be allowed to do this, on the understanding that she may also be cross-examined by counsel for the Employer on these matters. We would also expect Ms. Huber to give evidence concerning the nature of the responsibilities associated with her position as housekeeping supervisor.

## CONSTRUCTION AND GENERAL WORKERS UNION, LOCAL 180, Applicant and GUNNER INDUSTRIES LTD., Respondent

LRB File No. 333-96; April 24, 1997
Chairperson, Beth Bilson; Members: Don Bell and Bruce McDonald

For the Applicant: Bob Lyons
For the Respondent: Dave MacKay

**Practice and procedure - Evidence - Evidence of support or revocation of support - Board reaffirms practice of considering support evidence as of date application is filed.**

**Practice and procedure - Vote - Board decides no vote will be ordered where evidence of majority support in revised bargaining unit.**

***The Trade Union Act*, ss. 5(a), 5(b), 5(c), 6, 10.**

### REASONS FOR DECISION
### REQUEST FOR RECONSIDERATION

**Beth Bilson, Chairperson:** The Construction and General Workers Union, Local 180, filed an application with this Board dated October 22, 1996, in which the Union sought to be designated as the bargaining agent for a unit of employees of Gunner Industries Ltd.

In a hearing before this Board, it became clear that there was disagreement between the parties concerning which employees should be included in the bargaining unit proposed in the application, a standard bargaining unit for the labourer trade in the construction industry, and which employees properly belonged in a unit represented by the International Union of Operating Engineers. There was also some dispute about whether certain employees had been employed as of the date the application was filed.

The hearing was adjourned at the instance of the Board to allow the parties to meet with the Vice-Chairperson to see whether these disagreements could be resolved. As a result of the pre-hearing,

agreement was reached as to which employees should be included on the Statement of Employment. A certification Order, dated January 24, 1997, was subsequently issued.

The Employer has now asked the Board to reconsider the issuing of the certification Order, and has asked the Board to direct that a representation vote be conducted in order to ascertain whether the application for certification enjoys the support of a majority of employees in the bargaining unit now defined.

Counsel for the Employer raised several issues in arguing that the Board should revoke the certification Order and direct a vote. He argued that, since there was some confusion initially about whether certain employees should be included within the scope of the bargaining unit proposed by this Union, or whether they properly belonged in the operating engineer bargaining unit, there were conceivably some employees who had signed membership cards with both trade unions. He argued that the only way to ascertain whether they truly support the Union would be to order a vote.

Counsel further indicated that a number of employees had talked to Mr. Clint Kimery, owner of the company, and stated to him that they wished to revoke their support for the Union but did not know how to go about it. In these circumstances, counsel argued that there should be a vote to ensure that the true wishes of the employees are known.

Finally, counsel for the Employer expressed doubt about whether the support evidence filed by the Union could any longer show that the application enjoyed majority support, given that the names of two employees had been added to the Statement of Employment.

With respect to this latter point, we are of the view that the Employer may be under some misapprehension of the process followed by the Board in issuing the certification Order. The Order was not issued until after the meeting attended by the parties and the Vice-Chairperson at which agreement was reached on the names which should be included on the Statement of Employment. It is true that the revised Statement of Employment included the names of two employees whose inclusion was disputed by the Union. The Board would not, however, have issued a certification Order without ensuring that the application enjoyed the support of a majority of the employees listed on the new Statement of

Employment. The evidence of support in the hands of the Board was reviewed, and it revealed that a majority of the employees on the revised list had signed support cards.

The question is not, therefore, whether the Board should consider ordering a vote in circumstances where the Union has not demonstrated majority support, but whether the Board should direct that a vote be conducted in a situation where the evidence filed by the Union with the application discloses that a majority of the employees supported the application.

It is conceivable that there was some confusion in the minds of employees as a result of the jurisdictional questions which arose between the two trade unions at the time the Union first appeared on the scene. It is also conceivable that there may have been employees who became members of both trade unions. Absent some restrictions arising from the internal rules or practices of the unions themselves, there is nothing about this which would in itself invalidate the evidence of support filed with the Board. The format of the evidence which is required by the Board contains not only an indication of union affiliation or membership, but an explicit expression of support for the certification application.

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, LRB File Nos. 010-95 and 012-95, the Board summarized as follows our process for reviewing evidence of support and the rationale for that process, at 81:

> *This Board has gone to great lengths to ensure that the identity of employees who express views in support of or in opposition to trade union representation is protected from disclosure to either their employer or the trade union involved in an application. To this end, the practice of the Board is to review privately the evidence of support or of revocation which is filed, and this evidence is never subjected to open scrutiny in a hearing. We are satisfied that this process protects the privacy of individual employees as they make their decisions concerning trade union representation, while at the same time ensuring that the orders issued by the Board are supported by evidence. The Board has laid down certain requirements for the evidence which is provided. For example, the signed support cards which are accepted as evidence for the purpose of determining an application for certification must bear on their face a clear indication that this is their purpose, and the signatures of employees are conscientiously compared with the signatures on a Statement of Employment. In order to maintain the*

> *credibility of this process, the Board has decided that evidence of this kind must be original and that photocopies or facsimiles are not acceptable. In this instance, the original letters were never filed, and for this reason, we have decided that the letters purporting to revoke employee support will not be considered in deciding this application.*

Section 10 of *The Trade Union Act*, R.S.S. 1978, c. T-17, 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.*

In keeping with this provision, the Board has consistently refused to consider evidence of support or of revocation of support which originates after the date the application is filed. In *Hotel Employees & Restaurant Employees Union v. Chi Chi's Restaurant Enterprises Ltd.*, [1986] June Sask. Labour Rep. 31, LRB File No. 035-86, the Board summarized this well-entrenched policy in these terms, at 34:

> *The Board has always required an applicant for certification to establish majority support as of the date on which the application is filed, and only if there is a cloud over the union's organizing campaign in the form of coercion, undue influence, or misrepresentation, will the Board order a vote by secret ballot rather than rely on support cards. That policy facilitates the employees' choice of collective bargaining, renders pointless the imposition of sanctions on the employees once the application has been filed, and protects as much as possible the future relationship between the union and employer from the acrimony that often arises during a pre-vote contest between the union and anti-union forces. In this case there are no reasons why the Board should depart from its normal practice by ordering a vote.*

In a more recent decision in *Retail Wholesale Canada, a Division of the United Steelworkers of America v. United Cabs Ltd.*, [1996] Sask. L.R.B.R. 337, LRB File No. 115-95, the Board explained the basis of the policy as follows, at 366:

> *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 was 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.*

We have concluded that there is no reason in this case to depart from our established practice of limiting our assessment of the evidence of support to the date of the application, and to disregard any intimations of a change of heart or disaffection on the part of employees which arises after that date.

We would comment on one additional matter. The argument related to the wish of employees to find some way of revoking an earlier indication of support for the certification application seems to have been based on a discussion between Mr. Kimery and those employees. We accept that it is difficult in some cases for employers to fend off spontaneous expressions of this kind from employees, particularly in a small workplace where managers function in close proximity to the employees. We would point out, however, that representatives of an employer are treading on highly dangerous ground when they become drawn into conversation which may indicate whether employees support or do not support the activity of a trade union. The risk that initiation of or participation in such conversation will constitute an unfair labour practice is high, and employers must be extremely circumspect in their exchanges with employees in this respect.

For the reasons we have given, we have decided that there is no reason to regard as invalid the certification Order issued on January 24, 1997, and the application for reconsideration must be dismissed.

# CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 456, Applicant and CITY OF MELVILLE, Respondent

LRB File No. 356-96; May 7, 1997
Chairperson, Beth Bilson; Members: Don Bell and Donna Ottenson

For the Applicant: Aina Kagis
For the Respondent: Ron Walton

**Bargaining unit - Appropriate bargaining unit - Board decides that special constable can be included in civic outside worker bargaining unit.**

***The Trade Union Act*, s. 5(k).**

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** The Canadian Union of Public Employees, Local 456, represents a bargaining unit of employees of the City of Melville.

The parties recently entered into discussions concerning the amendment of the certification Order relating to this bargaining unit, which was issued by this Board on July 10, 1951, and last amended in 1960. Though they were able to agree on a number of items which should be amended, they were unable to agree on the issue of whether the position of special constable should be included within the scope of the bargaining unit. It was agreed by both parties that the special constable is an employee in the sense that the incumbent in this position neither performs managerial functions nor acts in a confidential capacity.

The position of special constable was created by a municipal bylaw in 1972, and a subsequent bylaw passed in 1982 revised the description of the duties associated with this position so that it reads as follows:

> *To perform the duties of a police officer to enforce compliance with the provisions of the Melville City Traffic Bylaw and its amendments, the Dog Bylaw and other Regulatory Bylaws of the City, with authority to issue tickets to any owner, operator or person in charge of a motor vehicle which is found to be in violation of any of the*

> *provisions of the said Melville Traffic Bylaw, and notices of violation to any owner or user which is found to be in violation of any of the provisions of the said Melville Dog Bylaw or other Regulatory Bylaws of the City.*

Mr. Gordon Hart, current incumbent in the position, gave evidence concerning the duties associated with the position. He indicated that he has an office in City Hall, and that he makes use of this office to prepare and file reports and deal with other paperwork. He has access to the computer system which is used to support the activities of administrative and clerical personnel working for the Employer.

Mr. Hart testified that a significant portion of his day is spent away from this office. He patrols the city monitoring compliance with bylaws. In this respect, he watches for dead or unrestrained animals, inspects property for weeds or debris, and marks vehicles to assess compliance with parking and traffic bylaws. He is also responsible for giving evidence in court on occasion, although he said that this does not occupy much of his time.

The regular working hours for the special constable are 8:00 am to 4:30 pm, Monday through Friday, although he is called out occasionally in emergency or special situations. The benefits which are given to Mr. Hart, such as pension coverage, group insurance and short- and long-term disability benefits, are the same as those for which bargaining unit employees are eligible under the collective agreement. His entitlement to holidays has also been calculated by the same formula as that in the collective agreement.

The employees falling within the category of "city hall office staff" have been excluded from the scope of the bargaining unit as described in the certification Order. The current employees who fall within that grouping are tax/payroll clerk, water utility clerk, accounting clerk, stenographer, council secretary and R.C.M.P. stenographer; all of the employees in this group perform duties which are clerical or administrative in nature. The representative of the Union, Ms. Aina Kagis, noted in her argument that at the time of the exclusion of this group of employees from the bargaining unit in the certification Order, the special constable position had not been devised. Although we heard no evidence concerning the specific duties performed by the employees listed above, the titles of their positions seem to confirm the characterization made by Ms. Kagis. The Employer took no exception to this portrayal of the general nature of their responsibilities.

Mr. Ron Walton, city manager, argued that the special constable position falls within the grouping covered by the exclusion of "city hall office staff" from the bargaining unit. He pointed out that Mr. Hart reports to the office manager-treasurer, Mr. Darrell Webster, as the other office staff do. He stated that Mr. Hart has extensive interaction with the administrative and clerical personnel at City Hall, and that it would not be appropriate to include him in a bargaining unit which is comprised largely of public works and water treatment employees.

Ms. Kagis referred the Board to a job description relating to a new position being created, that of draftsperson/surveyor. This position is to be included within the scope of the bargaining unit. Mr. Walton said that the position is to be a part-time position, with the incumbent performing duties associated with another bargaining unit position for the balance of the time. While performing the responsibilities of a draftsperson/surveyor, the incumbent will work out of an office at City Hall in order to have access to computerized information related to property ownership and use.

In deciding whether proposals put forward for the description of bargaining units should be approved, the Board has commented extensively on the concept of the "appropriate bargaining unit." In a decision 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 gave some insight into the policy considerations which we think are at stake in determining what constitutes an appropriate bargaining unit, at 270:

> *This Board has, from its earliest days, been mindful both of the importance of its responsibilities 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.*

As the Board has often pointed out, there is no mathematical formula which can be consulted to determine whether any specific proposal for the initial delineation or adjustment of a bargaining unit is appropriate. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store v. Regina*

*Exhibition Association Limited*, [1992] 4th Quarter Sask. Labour Rep. 75, LRB File No. 182-92, the Board made this point, 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 a 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.*

The consideration of the shape of a bargaining unit is, of course, particularly critical when a new collective bargaining relationship is being entered into. The Board has thought it important to give careful thought to the viability of any particular configuration, in order that the infant bargaining relationship not be endangered by anomalies or discontinuities in the structure of the bargaining unit. It is at this point that considerations such as the homogeneity or inclusiveness of the bargaining unit may be considered to be of significant weight.

When the relationship has become more mature, and a pattern of successful collective bargaining has been established, the Board may conclude that a bargaining unit which includes within its scope a more diverse group of employees with a greater variation of terms and conditions of employment may not pose the threat it might have during the inaugural period of collective bargaining between the parties.

We have concluded that the inclusion of the special constable position within the scope of the bargaining unit would not threaten the stability or vigour of the collective bargaining relationship. The process of bargaining between the parties has proved able to accommodate the presence within the current bargaining unit of groups of employees performing different kinds of duties, reporting to different administrative supervisors and requiring a range of terms and conditions of employment.

We have also concluded that placing the special constable position within the bargaining unit represented by the Union would not create any administrative difficulties for the Employer. Though the special constable has regular interaction with clerical and administrative personnel working in City Hall, the preponderance of his duties are carried out independently and at a distance from these other employees. This is not a situation where placing the special constable in the bargaining unit would draw a line severing two closely connected functional groups, or where deciding the terms and conditions of employment of the special constable by means of collective bargaining would create severe anomalies between this position and others closely related to it.

Among other things which the Board has considered in assessing the appropriateness of proposed bargaining units is the possibility of extending access to trade union representation in circumstances where employees can make a strong case that collective bargaining would serve their interests. This seems to us a case where this objective can be met with little inconvenience to the Employer and no discernible undermining of the viability of the collective bargaining relationship.

## INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL #1, Applicant and PRO MASONRY CONSTRUCTION LTD., Respondent

LRB File No. 343-96; May 9, 1997
Chairperson, Beth Bilson; Members: Brenda Cuthbert and George Wall

For the Applicant: Rick Engel
For the Respondent: N/A

**Unfair Labour Practice - Union security - Dues check-off - Employer in construction sector found guilty of unfair labour practice for failing to remit union dues and assessments to union and union benefit plans - Board agent appointed to assist parties.**

**Unfair Labour Practice - Remedies - Dues check-off - Board agent appointed to assist parties to calculate dues and assessments owing by employer to union and union benefit plans.**

***The Trade Union Act*, s. 32.**

### REASONS FOR DECISION

**Beth Bilson, Chairperson:** The International Union of Bricklayers and Allied Craftsmen, Local #3, was designated by this Board in a certification Order dated July 23, 1979, as the bargaining agent for a unit of employees of Pro Masonry Construction Ltd. in Prince Albert.

Following a provincial merger, the bargaining rights of Local #3 were assumed by Local #1. This merger took place on April 19, 1996.

Mr. Clarence Medernach, president and secretary-treasurer of the Union, gave evidence that he had informed employers covered by certification Orders that the merger had occurred, and that dues and assessments deducted in relation to employees covered by these certification Orders should be made to Local #1 as of May 1, 1996. Mr. Medernach said that he advised employers that the reorganized Union would not be making efforts to collect any dues which may be outstanding prior to this date.

He testified that he understood there had been a history of problems in the relationship between the Employer and the local Union which had previously represented the employees. The manifestation of these difficulties was that no deductions or assessments had been remitted to the Union on behalf of employees of the Employer for an extensive period of time prior to the merger in April of 1996.

Mr. Medernach said that Mr. Cyril Marion, representative of the Employer, telephoned him after receiving a letter from Mr. Medernach, and had not seemed receptive to the idea of forwarding dues or assessments to the Union. Mr. Medernach arranged a meeting with Mr. Marion, and went to Prince Albert on May 21, 1996 to meet with him.

To ensure that the Union still enjoyed the support of the employees, and that there would be no question as to the authorization of the deduction of dues from their wages as required by s. 32 of *The Trade Union Act*, R.S.S. 1978, c. T-17, Mr. Medernach obtained signed applications for union membership and authorizations for the deduction of dues from six of the eight employees.

He then proceeded to meet with Mr. Marion and to impress upon him the fact that the Union was entitled under the *Act* to receive dues and assessments related to the employees in the bargaining unit. According to Mr. Medernach, Mr. Marion acknowledged this responsibility and agreed to make payments from then onward, including for the month of May.

At the time of this conversation, the terms and conditions of a provincial collective agreement were in effect. That agreement expired on April 30, 1996, and was subsequently replaced by an agreement which expires on April 30, 1999. The latter agreement is retroactive to May 1, 1996.

Mr. Medernach said that Mr. Marion indicated that he wanted to obtain further information, but that he would ensure that money began going to the Union. Mr. Medernach testified that he contacted Mr. Marion on a number of occasions since the meeting; Mr. Marion assured him each time that the money would be forthcoming. Mr. Medernach also contacted the solicitor for the Employer, who also said that the Union would be receiving the money.

In November of 1996, the Union filed this application. Mr. Medernach said he hoped it would signify that the Union was serious, and that it would be possible to reach an agreement with the Employer to obtain the outstanding dues and assessments. In February of 1997, Mr. Medernach met with Mr. Marion, who said that as a sign of the "good faith" of the Employer, he would immediately send the Union a cheque in the amount of $4000.00; he agreed this was not the total amount to which the Union was entitled, but he said they could then work out the details.

This promised cheque never arrived, and at the end of March of 1997, Mr. Medernach sent Mr. Marion a letter to remind him that he had agreed to pay a significant amount towards clearing up the arrears.

The Union continued to check with the administration office of the Union in Edmonton until the Friday before the scheduled hearing, and no money had been received to that date. On that date, as well, Mr. Medernach had a telephone conversation with Mr. Marion, who said that "the cheque was in the mail."

Mr. Medernach testified that he is a member of the pension plan which is jointly administered by the Union and employers. In this capacity, he had received documentation showing that this Employer had not made any contributions to the pension plan as far back as November of 1995, and was included in a list of delinquent employers.

The application filed by the Union alleged that the Employer committed unfair labour practices and violations of s. 32 of the *Act*, which reads as follows:

> *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.*

No one was present to represent the Employer. Counsel for the Union indicated that the Union wanted to have a finding made that the Employer had committed the unfair labour practices alleged in the hope that this finding would convince the Employer to make serious efforts to meet the obligations set out in the relevant collective agreement, in the certification Order, and in the *Act*. He requested that the Board appoint an agent to facilitate negotiations between the Union and the Employer concerning the payment of the amounts now outstanding, and setting up a system to ensure that the required payments are made on a regular basis.

In addition to the failure to remit the appropriate dues and assessments, the Union alleged that the Employer violated s. 32 of the *Act* by failing to provide the Union with the basic information required to permit an accurate calculation of dues and assessments which the Union is entitled. The Union provided the Board with preliminary evidence of the amount of monetary loss up to January 27, 1997, the date on which the new collective agreement was signed, and the date which had been the basis of recent discussions with Mr. Marion. Counsel indicated, however, that the Union wishes to have the Board retain jurisdiction over the monetary loss question so that it may be decided at a future time in the event the efforts of the Board agent are to no avail.

Mr. Medernach referred first to initiation fees, which are set at $60.00 for apprentices and $175.00 for journeymen. Since there are two apprentices and six journeymen in the bargaining unit, this would amount to $1170.00. Conversations between Mr. Medernach and the employees in the bargaining unit suggest that the Employer might in fact have deducted this amount from the wages of the employees, but it has never been remitted to the Union.

Standard union dues are set at $12.00 per month for apprentices, whether they are working or not. When the discussions with Mr. Marion started, the rate for journeymen was $24.00 per month; this was subsequently set at $16.50 per month, retroactive to May of 1996. The amount owing for basic dues is therefore $1188.00.

The working dues are calculated as 3% of the total wage package under the collective agreement. Under the old agreement, this was approximately $.65 per hour for journeymen, and $.36 per hour for apprentices. As of January 28, 1997, this rate went to $.68 per hour for journeymen and $.37 per hour

for apprentices. The amount owing in connection with these dues would obviously depend on the number of hours worked by the employees, and this information had not been forthcoming from the Employer. In the conversation with Mr. Medernach on the Friday before the hearing, Mr. Marion indicated that he was basing his calculations on 6011 hours, but the Union has had no opportunity to verify this number.

The contribution to be made to the jointly administered pension plan was set at $1.00 per hour for all employees; since January 28, 1997, this amount has gone to $1.15 per hour. Mr. Marion indicated to Mr. Medernach that the cheque he had sent included $6011.00 to cover contributions up to January 27, 1997.

Contribution to the health and welfare fund was set at $.85 per hour before January 27, 1997, and $.95 per hour after that. Mr. Marion told Mr. Medernach that he had included $5109.00 for the contributions up to January 27, 1997 on the cheque.

Under the old agreement, contributions to the International Masonry Institute for educational and promotional activities were set at $.05 per hour. No amount has been set for this item under the new agreement.

Once it has been established that a majority of employees in a bargaining unit wish to be represented by a trade union for the purpose of bargaining collectively with their employer concerning the terms and conditions of their employment, and a certification Order has been issued by this Board reflecting that fact, that trade union becomes the exclusive representative of the employees in dealing with the employer. As the provisions of the *Act* indicate, both parties are placed under a number of obligations by the certification Order. In the case of an employer, these obligations include those of providing the trade union with information which will permit the calculation of dues and assessments, and the remission of appropriate dues and assessments.

It cannot be stressed strongly enough that these are obligations of a legal nature. Whatever the nature of the relationship between the employees, the trade union and the employer prior to the issuing of the

certification Order, once that Order has been granted, the obligation to provide the information indicated in s. 32 of the *Act*, and to remit dues and assessments, is legally binding on the employer, and the employer may not simply decide to ignore them, or to comply with them in some less complete form. A failure to comply with these obligations, as well as with the obligations set out in other parts of the *Act*, may ultimately be the subject of a finding by this Board, and an assessment of monetary loss, which can then be enforced by the trade union through the courts.

In our view, the Union made every effort to accommodate the Employer. The Union indicated that they will not pursue dues which were owed in relation to the period prior to May 1, 1996, although there is nothing to prevent them from doing that. They have not, until now, asked the Employer to pay the entire amount at once, and they have been willing to discuss further arrangements which might be in the interest of the Employer.

We have concluded, however, that the Employer made no serious effort to meet the obligations which rest on them under the *Act*, and that the actions of the Employer are in violation of the *Act*. We have also concluded that the remedies sought by the Union are reasonable in the circumstances.

The regular remission of union dues and assessments is clearly of vital interest to a trade union; these sums of money make it possible for the trade union to provide representation to the employees who have chosen to have that bargaining agent. These payments are particularly vital in the construction industry, where they affect not only the vitality of the trade union as an organization, but the integrity and soundness of pension and benefit plans on which employees depend. The interest of trade unions in being able to rely on regular periodic payment of these levies is an interest which the legislature has chosen to protect by the enactment of s. 32 of the *Act*. A trade union is not required to depend on the generosity or whim of an employer, but may insist on receiving this money, and a means has been provided, through the process of this Board, for making and enforcing such claims.

The Union has, in our view, a legitimate concern in recouping the dues and assessments which are now owing to them, and also ensuring that the events which have given rise to this application are not repeated. We will therefore make Orders to the following effect, as requested by the Union:

- That the Employer cease and desist from further violations of the *Act*, and, in particular, that the Employer refrain from any further withholding of dues and assessments to which the Union is entitled.

- That the Employer forthwith provide the Union with the information required to calculate and verify the amount of dues and assessment to which the Union is entitled.

- That Mr. Terry Stevens, Executive Director of the Labour Relations, Conciliation and Mediation Branch, Saskatchewan Labour, or his designate, be appointed as agent of the Board to facilitate discussion between the parties of the amount of monetary loss suffered by the Union as a result of the violations of the *Act* by the Employer, and of the mechanism to be followed by the parties in the future to ensure that no further breaches of s. 32 of the *Act* occur.

- That Mr. Stevens, or his designate, shall report to this Board, within 60 days after the date of these Orders, indicating whether the parties have reached agreement on these matters; in making his report, Mr. Stevens, or his designate, may recommend that the Board issue further Orders or hold further hearings on any point relating to the provision of information by the Employer, or the deduction and remission of dues and assessments under s. 32 of the *Act*, or the payment of dues and assessments owing to the Union at the time of these Orders or at the time of his report.

The Board will remain seized on any issues which are outstanding in relation to this application.

**SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and REMAI INVESTMENTS CORPORATION, OPERATING AS THE IMPERIAL 400 MOTEL (SWIFT CURRENT), Respondent**

LRB File Nos. 014-97 & 019-97; May 14, 1997
Chairperson, Beth Bilson; Members: Don Bell and Donna Ottenson

For the Applicant: Larry Kowalchuk
For the Respondent: Larry Seiferling, Q.C.

**Bargaining unit - Appropriate bargaining unit - Managerial exclusion - Housekeeping and restaurant supervisors at motel do not possess significant degree of managerial authority - Positions are included in bargaining unit.**

***The Trade Union Act*, s. 2(f)(i).**

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union has filed an application seeking designation as the bargaining agent for a unit of employees of the Remai Investment Corporation, operating as the Imperial 400 Motel in Swift Current.

In response to this application, the Employer filed an application alleging that the Union had committed unfair labour practices and violations of certain provisions of *The Trade Union Act*, R.S.S. 1978, c. T-17. These allegations were made in connection with the involvement in the organizing campaign of Ms. Cheryl Huber, housekeeping supervisor. The position taken by the Employer was that she was a manager, and that her activities in relation to the union organizing campaign were in violation of the *Act*.

The Board was asked to make a ruling concerning the evidence the parties would be permitted to present in connection with the applications. In the evidentiary ruling, the Board concluded that the essence of the application made on behalf of the Employer was an objection to the evidence of support which is customarily the basis of a decision to grant a certification application, and proposed to deal

with the matter on this basis rather than on the basis of the allegations of unfair labour practices. In light of this, the Employer withdrew the unfair labour practice application.

There were two issues which remained to be decided: whether the position of housekeeping supervisor, and that of restaurant supervisor, are managerial positions which ought to be excluded from the bargaining unit; and whether, if the position occupied by Ms. Huber is a managerial one, her participation in a union organizing campaign would serve to cast a cloud over the evidence of support which was filed in support of the application for certification. The parties agreed that the Board should rule first on the general question of whether the two positions are out of scope; a negative answer to this question would obviate the need for any further proceedings in relation to the evidentiary objection.

Ms. Cherie Emmerson, general manager of the motel, gave evidence concerning the duties which have been assigned to the two supervisors. According to this evidence, both the housekeeping supervisor, Ms. Huber, and the restaurant supervisor, Ms. Barb McDowell, perform a full range of managerial duties. It is their responsibility to hire staff when they are required, and to discipline employees. According to Ms. Emmerson, both Ms. Huber and Ms. McDowell are expected to operate their departments according to criteria which will maximize the economic benefit to the Employer, and according to the budget set out for them.

The two supervisors permit employees to take time off and schedule their holidays. They assign and direct the duties of employees from day to day, and monitor the quality of the work they do. They evaluate employees, and determine whether they have passed their probation. They have authority to terminate the employment of employees for cause, or to effectively lay them off for lack of work.

The testimony of Ms. Emmerson was that the two supervisors are given free rein to establish their own hours of work, and to take days off and holidays without approval from her or from the assistant manager, Mr. Jonathan Davison.

Counsel for the Employer argued that the duties associated with the supervisor positions clearly placed these positions within the managerial exclusion contemplated in the definition of "employee" in 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.*

On a number of previous occasions, the Board has commented on the rationale, as we understand it, which underlies the distinction made in the *Act* between those who fall within the definition of an "employee" in s. 2(f) of the *Act*, and those who are excluded on the basis that they perform managerial functions on behalf of an employer. The roots of the rationale lie in the right guaranteed under the *Act* for employees to join together to bring their collective power to bear on the determination of their terms and conditions of employment. In the hierarchy of an organization, there are inevitably persons whose role in selecting, directing and evaluating the workforce has a significant impact on those terms and conditions of employment. Legislatures and labour relations boards have concluded that in the construction of collective bargaining relationships, the placing of such persons among the group of employees whose terms and conditions of employment are subject to collective bargaining would create a conflict of interest between their responsibility as a representative of the employer to assist in determining the shape and future of the employee group, and their interest as a member of that group in the exercise of collective influence.

The Board has also pointed out that the determination of whether a particular position belongs on one side of the line or the other may be difficult, and that the Board must be cognizant of a wide variety of factors in assessing whether the position should be treated as out of scope.

In *City of Regina v. Regina Professional Fire Fighters' Association*, [1994] 2nd Quarter Sask. Labour Rep. 73, LRB File Nos. 255-93 & 268-93, the Board made the following comment, at 76:

> *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 s. 2(f) of the Act may unfairly deny them access to union representation and weaken the strength of the bargaining agent.*

In *City of Regina v. Canadian Union of Public Employees and Regina Civic Middle Management Association*, [1995] 3rd Quarter Sask. Labour Rep. 153, LRB File No. 268-94, the Board stated the issue as follows, at 158:

> *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.*

The Board has considered a number of specific factors in making the assessment of whether a position falls within the managerial exclusion. Some of these were described as follows in *United Food and Commercial Workers v. Westfair Foods Ltd. (Supervalu)*, [1981] Feb. Sask. Labour Rep. 66, LRB File 085-80, at 71:

*a. Hiring*

*All of the department heads said that they had power to hire without reference to their supervisors. The store had only opened on March 15, 1980 and most of the department heads were selected from the other Supervalu store prior to that time. The initial staffing for all of the departments was done, generally speaking, by the department heads in consultation with their superiors and consisted mostly of staff from the old Loblaws store on the site or the other Supervalu store in Saskatoon and is therefore not typical of future hiring and firing practices. Since the opening of the store some of the department managers have hired new staff without reference to their superiors, some have done so on consultation with their superiors (as a matter of courtesy) and one or two felt that they had to consult with their superiors. The Board is satisfied that the department heads did in fact have the power to hire new employees without reference to their superior.*

*b. Discipline*

*Only a few persons have been fired since the store opened. It was done in each case by a department head in consultation with a superior although the decision to fire was made by the department head and all department heads felt that they had an independent power to fire. Lesser forms of discipline such as reprimand, are administered by the department heads on a regular basis.*

*c. Promotion and Demotion*

*Although limited by the terms of the collective bargaining agreement, any discretion available to the employer with respect to promotion or demotion is vested in the department head.*

*d. Administration of the Collective Agreement and Grievances*

*Since the opening of the store only one grievance has been filed and it went directly to the divisional office in Winnipeg. The evidence indicates that the company has a group, independent of the store, for handling grievances and collective bargaining generally. Insofar as administering the collective agreement within the store itself, such as answering questions of employees with respect to terms of the agreement, each of the department heads had a copy of the collective agreement and instructions from the employer to deal with any employees questions regarding it.*

*e. Employee Evaluation*

*Since the store had been open a short time there was no formal procedures for evaluation of employees, but all department heads knew that it was their responsibility to regularly evaluate their subordinate.*

*f. Direction of the Work Force*

> *The department heads, within the limits of their budget, and hours of work allotted to their department based on estimated sales by the divisional office schedule shifts (if necessary) for full time employees, determined which part time employees worked and the number of hours which they worked, authorized overtime, approved absence, approved vacation schedules, and dealt with leaves of absence.*

*g. Exercise of Discretion*

> *All department managers exercise a substantial degree of independent discretion in the management of their departments and are responsible for the overall performance of their departments. They must order stock, authorize payment for it, alter prices to meet competition and in order to get rid of dead stock. The divisional office of the employer keeps tight control over all of these matters but the degree of independent discretion exercised is significant.*

This Board, and other labour relations boards, have, however, cautioned that there is no formula or checklist which can be used to predict the outcome in any particular case. In *Saskatchewan Union of Nurses v. Sisters of Charity of Montreal (Grey Nuns) operating St. Joseph's Hospital and Foyer d'Youville*, [1985] April Sask. Labour Rep. 46, LRB File No. 378-84, the Board made the following comment, at 47:

> *The question of whether anyone exercises functions of a managerial character is essentially a factual one. In the final analysis, the Board attempts to determine whether including any individual in the bargaining unit would be incompatible with union membership. To do that, it inquires into the presence or absence of so called "first-line" managerial functions, the degree of independent decision making authority and the nature of decisions actually made, and the extent to which an individual formulates and implements employer policy, administers the business and directs its workforce.*

In the *City of Regina* decision, *supra*, the Board summarized the general nature of the considerations which may be relevant as follows, at 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.*

In another decision, in *Grain Services Union (ILWU Canadian Area) v. AgPro Grain Inc.*, [1995] 1st Quarter Sask. Labour Rep. 243, LRB File No. 257-94, the Board made the following observation, 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.*

It should be clear from the passages which we have quoted that the Board has found it impossible to establish foolproof "tests" for assessing whether a particular position falls outside the parameters of the definition of "employee" or not. In each case, the Board has been sensitive to the factual context in which the issue arises, and has looked beyond titles, position descriptions or formal assignments of duties in an effort to ascertain the true role which the incumbent in a position plays in the organization.

Counsel for the Union argued that, in making this assessment, the Board must take into account the personal views and wishes of the incumbents in disputed positions.

There is no doubt that persons occupying the disputed positions can, as they did in this case, give evidence which is useful to the Board relating to their experience of working in the position, the role they see themselves as playing in the organization, the nature of their relationships with other employees, and their understanding of the authority which has been delegated to them.

The usefulness of this evidence derives from the light it sheds on the nature of the disputed positions seen from the vantage point of the persons who are carrying out the duties associated with the position on a daily basis. Combined with other perspectives such as that provided by representatives of the employer, this evidence can help to create a rounded picture for the Board of the essential characteristics of the position.

We do not think it helpful, on the other hand, to entertain evidence concerning whether or not the individuals in the positions wish to be in scope or not. This is not because we wish to denigrate their right to hold personal opinions concerning the desirability of trade union representation, but because it is irrelevant to deciding whether the position they hold is one which belongs inside the bargaining unit which is to be represented by the trade union. Though, as a matter of policy, the Board may consider whether exclusion from a bargaining unit unnecessarily or unfairly denies an employee or group of employees access to collective bargaining, this is not the same as saying that their personal enthusiasm for or aversion to trade union representation becomes a relevant consideration. In this respect, we share the view expressed by counsel for the Employer that the assessment which must be made by the Board is essentially objective in nature.

We have summarized earlier the evidence of Ms. Emmerson concerning the significance attached by the Employer to these positions, and the independent decision-making authority she ascribed to the two incumbents, Ms. Huber and Ms. McDowell. We accept her evidence that the duties she outlined include a number of functions generally associated with management, and if her description could be taken at face value, we would see little difficulty in concluding that these positions should be out of scope.

The succinct summary given by Ms. Emmerson in her evidence in chief was complicated, however, by other evidence, some of it originating with her and with other representatives of the Employer, and other parts of it emerging in the testimony of Ms. Huber and Ms. McDowell.

In the case of Ms. McDowell, a copy of the position description outlining the elements of the restaurant supervisor position was filed with the Board. That part of the position description relating to her supervisory responsibilities read as follows:

> *HUMAN RESOURCES*
>
> 1. *Responsible for on-going training of restaurant staff and conduct informational meetings to keep staff up-to-date on products, policies and changes.*
>
> 2. *Discipline staff in accordance with written company policy.*
>
> 3. *Conduct interviews and assist General Manager in hiring.*
>
> 4. *Evaluation of staff and recommendation of termination when necessary.*
>
> 5. *Become familiar with Labour Standards Acts, our Group Insurance program, Liquor service laws, etc.*

As we have noted earlier, the Board is concerned to understand the essential nature of disputed positions in a practical sense. We would not regard an employer as bound by the specific words of a position description if it could be shown that the job had evolved in a different direction, or that the incumbent had been assigned additional duties or duties of a different kind.

On the other hand, this position description was corroborated to a large degree by the testimony of Ms. McDowell. She said that, when new employees are hired, they are interviewed or screened initially by Ms. Emmerson, and then she has a further interview with them. Ms. McDowell said that she assumed Ms. Emmerson would not insist on hiring anyone who was not acceptable to Ms. McDowell. On the other hand, she said that she did not think she could hire whoever she liked without consultation with Ms. Emmerson. She acknowledged that she could schedule the hours of employees, direct their work, and indicate improvements which should be made in performance. She said she understood that she had the power to decide that someone should be terminated, although it had never been necessary to consider this; on cross-examination, she said she was not actually sure whether she had the power to hire or fire anyone without the approval of Ms. Emmerson.

The nature of the responsibilities to be performed by Ms. Huber had been the subject of some changes from time to time. In a letter dated September 4, 1996, Ms. Emmerson wrote to Ms. Huber in the following terms:

> *The purpose of this letter is to discuss with you recent concerns in the Housekeeping Department and the appropriate course of action that will be taken.*
>
> *The housekeepers have raised the issue of you not working weekends. An agreement between us was made when you accepted the full-time supervising job; that agreement was you would work weekends to avoid upsetting the housekeeping department by not being fair. You promised you would be fair; and we agreed that meant you work weekends as all other employees do. I am sure you recall a previous supervisor who caused hard feelings by not working weekends. I am sure you do not want this happening now - under your control.*
>
> *We suggest your days off are Sunday and Monday. Holiday weeks your days off would be Sunday, Monday and Tuesday. The Maintenance Supervisor's days off are also Sunday and Monday.*
>
> *Concerns have been raised that you spend several hours each day in the staffroom. In order to free up some time initially spent doing paperwork, you will now be relieved of the duties of any involvement with payroll, interviewing new employees, hiring new employees - as previously spoken to you about last week. This will allow you time to assist in housekeeping. In fact, for Fall and Winter, business is considerably slower; therefore, I suggest you allocate a minimum of 60 percent of your time to performing housekeeping duties.*
>
> *You begin work one hour prior to the housekeepers. This is allowed - as long as that entire time is productive time spent working. I suggest you begin your daily routine as follows: picking up your radio, marking down any check-outs on your paper, and phoning appropriate staff to stay home or calling appropriate staff to work. Immediately this should be followed by getting the housekeepers papers ready for the day. Immediately this should be followed by opening rooms, stripping beds, and cleaning any rooms front desk informs you they need first. Coffee and lunch breaks are to be taken only at the appropriate times with no exceptions unless directed by management. Next, you should begin cleaning rooms in need of cleaning on your own paper. These rooms would comprise of a part of the 60 percent of your time allocated to housekeeping for the whole day.*
>
> *Concerns have been raised that new employees in the housekeeping department have been intimidated and gossiped about by others in the same department. This must come to an end immediately. There shall be absolutely no gossiping or intimidating of other employees tolerated. In the event you hear of any gossiping or intimidating*

*whatsoever, I trust you will report these instances to management immediately. As the housekeeping supervisor, I trust you do not take any part - nor tolerate any gossiping or intimidating whatsoever - no matter who it is pertaining to. I would also like to bring to your attention that employees personal lives are of no concern to other employees - unless it affects the employees' work habits or work ethic.*

*As the housekeeping supervisor, you are a direct reflection of management and your actions and work ethic should reflect this professionalism. At no time should you show resentment or hard feelings toward any employee. You shall strive to get along and work as a team with all employees in the motel. Scheduling is always to be done according to seniority - unless authorized and directed by me. I strongly urge you to lead your department by example. When your department sees you pitching in by stripping beds, making beds, cleaning rooms, helping in janitorial, etc., this clearly shows the department they are all on the same team working together for a common goal. It is only when all employees work together without complaining and feel good about coming to work that everyone can do the best possible job. This should be your goal for your department.*

*I trust you will find the above satisfactory and will guide yourself accordingly.*

According to Ms. Huber, none of the items mentioned in the letter were discussed with her prior to the date of the letter.

It will be noted that this letter speaks of relieving Ms. Huber of any further role in interviewing or hiring new employees. The explanation given by Ms. Emmerson of this statement was that the motel was entering a slow season, and it was not, in any case, going to be necessary to consider doing any hiring for some months. Ms. Emmerson said that the authority to hire new employees had been restored to Ms. Huber some time shortly after Christmas.

It will also be noted that the letter makes reference to an expectation that Ms. Huber would spend "60 percent" of her time performing actual housekeeping duties, as opposed to personnel or supervisory functions. Ms. Emmerson explained that both supervisors are expected to be "working supervisors," and to set an example of efficient work habits for those employees they supervise.

Ms. Huber acknowledged that she commented to employees about their work performance, but she did not think it lay within her power to impose serious discipline such as suspension or termination. She

said that she had been instructed by Ms. Emmerson to "write up" her comments about employees, and she did write some comments to be placed in their personnel files.

Counsel for the Employer referred the Board to one of these notations, which he characterized as establishing that Ms. Huber had suspended an employee from work. Ms. Huber said that this employee had not appeared for her scheduled shift for several days. Ms. Huber was planning to be absent the next day. She had been unable to reach the employee in question and had scheduled another employee to work instead. The notation indicated that if the employee originally scheduled did turn up, she should be told that the hours had been assigned to someone else. She said that she did not regard this as a disciplinary suspension, but simply an attempt to ensure that someone was assigned to do the necessary work.

A series of memoranda from Ms. Emmerson to the housekeeping staff were filed with the Board by counsel for the Union. The first of these, dated November 8, 1996, outlined in detail the procedure which was to be followed in cleaning rooms following an inspection by external inspectors which had revealed certain problems. In two later documents, dated November 22 and November 24, 1996, Ms. Emmerson issued instructions concerning procedures to be followed in dealing with mattresses, and in cleaning the rooms of crews who stayed regularly in the motel. An additional notice, dated January 7, 1997, dealt with the inspection of smoke detectors. These memoranda were all addressed generally to the housekeeping staff.

Ms. Emmerson also sent a memorandum dated January 11, 1997, which was addressed to Ms. Huber and the two assistant supervisors in housekeeping. This memorandum read as follows:

> *Due to the high number of guest complaints I have been receiving regarding rooms not being cleaned properly, I now will be implementing the following procedure for all supervisors to follow:*
>
> *When you receive a comment card with a guest complaint regarding how the room was not cleaned sufficiently, you are to look through your records to see who cleaned the room last. Then you must have a talk with that housekeeper, recording your conversation on plain white paper. Have that housekeeper sign it along with your signature and date you spoke to the housekeeper about the problem.*

> *There have been far too many housekeepers cleaning rooms as though they do not care what shape the rooms are left in. This must stop immediately. As the supervisors, it is your responsibility to make sure rooms are turned in clean and free of any garbage left in the rooms, dirty towels, dust, etc. As supervisors, you must take your position seriously. This is your department and pride must be shown in the cleaning of guest rooms. I have heard from all of you that when you clean rooms, they are left in perfect condition. If this is so, then I suggest you train all housekeeping personnel to clean all rooms this way as well. The time has come to tighten our standards with regards to the way our rooms are cleaned. We wish to project a professional image to our customers. This has not been the case lately, and therefore, it is time to make changes. I trust you all will guide yourselves accordingly and be an excellent example for the entire housekeeping staff to improve our guest rooms immediately.*

The last of the memoranda filed with the Board, which was addressed to all housekeeping staff, and dated January 23, 1997, read as follows:

> *Effective February 1, 1997, all housekeepers will close their own rooms. Each afternoon, the supervisor will choose two rooms at random from each housekeeper's section to inspect. I have full confidence that all housekeepers will meet quality standards and no problems will be encountered. The rooms are looking good. Beginning March 1, 1997, if the supervisor finds anything wrong in a room, she will report her finds to me and have the housekeeper fix her errors. However, until everyone gets used to closing their own rooms, the odd minor error may simply be corrected without reporting it to me. By March 1, however, all rooms should be in excellent shape with very few mistakes being reported. Please keep up the good work and strive for excellence!*

Ms. Emmerson said that she had been concerned about some aspects of the performance of Ms. Huber as a supervisor during this period. She also testified that Ms. Huber preferred to have her issue instructions of this kind to admonish or direct the housekeeping staff.

Ms. Huber said that, although some of these issues had been discussed with her prior to the writing of the memoranda, they were not all written at her behest. Indeed, she said that she disagreed that a number of them were necessary or helpful.

In the case of both Ms. Huber and Ms. McDowell, the evidence established that they were paid by the hour, and that they needed the approval of Ms. Emmerson or Mr. Davison to work beyond their regularly scheduled hours.

The task of the Board in determining whether these positions should be excluded on the grounds that the incumbents perform managerial functions is a particularly difficult one in this case.

It is clear that Ms. McDowell is a competent and experienced supervisor, and that she enjoys the confidence of Ms. Emmerson and Mr. Davison. In this context, she no doubt enjoys considerable latitude to oversee the operations of the restaurant and the kitchen. Ms. Huber as well indicated that under normal circumstances she performs functions which would have to be considered managerial.

On the other hand, both Ms. Huber and Ms. McDowell testified that they were not confident that they had the "final say" or the determinative authority in respect of these managerial functions.

Ms. Emmerson said that the letter which she sent to Ms. Huber in September of 1996, and the memoranda which were subsequently sent to members of the housekeeping staff, represented efforts on her part to rehabilitate a manager who was not performing up to the standards expected of her.

It is difficult to reconcile this suggested characterization with the tone and contents of these documents. In the letter of September 8, 1996, Ms. Emmerson issued direct and explicit instructions to Ms. Huber, not just about how to go about improving her performance as a supervisor, but about what she should do at particular times of the day and how she should perform her own duties.

The memoranda are not, in our view, suggestive of a communications strategy jointly worked out by Ms. Huber and Ms. Emmerson in an attempt to restore the credibility of Ms. Huber as a manager. They are instead indicative of a substitution by Ms. Emmerson of her own authority for that of Ms. Huber.

It is natural that a senior manager would rely on the direct supervisors of employees to provide insight into the daily performance of those employees, or to correct or admonish them in connection with the carrying out of specific duties. We have concluded that the disciplinary authority of the supervisors was limited to this kind of minor corrective discipline. We do not think that the instance characterized by counsel for the Employer as a suspension imposed by Ms. Huber can accurately be seen in that light. In the unexplained and continued absence of an employee, Ms. Huber felt it was necessary to schedule

another employee, and she did not feel she could have both employees working. It was not described in her notation as a suspension, and we do not think there is any basis for supposing it was one.

Ms. Huber gave evidence that at one point, Ms. Emmerson had instructed her to "write up" any deficiencies in performance. Ms. Emmerson had said that once an employee had been written up three times, a suspension would be imposed, and a fourth notation would be grounds for dismissal. Ms. Huber said that this policy had never been discussed with her. She did make a couple of notations in compliance with this policy, but she did not think any action had ever been taken against an employee in accordance with it.

Ms. McDowell testified that she might feel uncomfortable taking part in union activities alongside employees who were subject to her supervision. There can be no doubt that the position of an in-scope supervisor can be unpleasant on occasion. Such a supervisor may be the focus of any dissatisfaction senior management have with employee performance, and of the disenchantment of employees with their work assignment, their fellow employees or their terms and conditions of employment. In the *City of Regina v. Canadian Union of Public Employees* decision, *supra*, the Board addressed this issue, in the following terms, at 151:

> *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 for 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 persons who must direct or admonish their 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.*

It may be that the Employer intended to confer upon the incumbents in these positions a high degree of independent managerial authority, which would result in their operating their departments in an autonomous and self-directed way. It must be conceded that there are signs that this was the expectation of the Employer, particularly insofar as the position of Ms. McDowell is concerned.

The actual experience of Ms. Huber, and to a lesser degree Ms. McDowell, suggests, however, that the real authority lies with Ms. Emmerson and Mr. Davison. Though the performance of supervisory functions by the two supervisors may receive little attention in the normal course of events, the evidence demonstrates that they do not really have a significant degree of authority to make decisions independently. The communications Ms. Emmerson sent to Ms. Huber and the housekeeping staff were not the kind of communications which one might expect from a senior manager interested in showing a junior manager how to use her managerial authority to greater effect. They represented an exercise by Ms. Emmerson of her own managerial authority, over Ms. Huber as well as the other housekeeping staff. Certain characteristics of these communications - the specific nature of the instructions, the fact that they were sent in most cases without prior discussion with Ms. Huber, the peremptory tone - undermine the proposition that these were communications consistent with a relationship between two management representatives.

Other aspects of the experience recounted by Ms. Huber undermine this proposition as well. The disciplinary policy based on "writing up" employees was not only not devised by Ms. Huber, it was not discussed with her. The letter of September 8, 1996 casts serious doubt on the assertion that Ms. Huber had wide discretion to determine her own hours of work and time off.

In short, whatever may have been the intention of the Employer in establishing these positions, we have concluded that they are not of a sufficiently managerial nature that there would be a conflict of interest were the incumbents to be included in the bargaining unit proposed by the Union.

For the reasons we have given, we find that the incumbents in the positions of housekeeping supervisor and restaurant supervisor are employees within the meaning of s. 2(f)(i) of the *Act*, and should be included in the bargaining unit proposed by the Union.

## SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 333, Applicant and CALGARIAN RETIREMENT GROUP LTD., Respondent

LRB File No. 006-97; May 16, 1997
Chairperson, Beth Bilson; Members: Donna Ottenson and Don Bell

For the Applicant: Ted Koskie
For the Respondent: Ron Miller

**Practice and procedure - Particulars - Board orders union to provide further particulars on one point.**

**Practice and procedure - Particulars - Board considers how employer can obtain sufficient information to prepare case when alleged agents of employer in-scope - Board decides to subpoena those employees as Board witnesses.**

***The Trade Union Act*, s. 18.**

### REASONS FOR DECISION

### REQUEST FOR PARTICULARS

**Beth Bilson, Chairperson:** The Service Employees' International Union, Local 333, was certified by this Board on April 11, 1997 as the bargaining agent for a unit of employees of Calgarian Retirement Group Ltd. at Primrose Chateau in Saskatoon. The Union filed an application alleging that the Employer committed a number of unfair labour practices and violations of *The Trade Union Act*, R.S.S. 1978, c. T-17.

In an application dated February 13, 1997, counsel for the Employer requested that the Board direct the Union to provide further particulars with respect to the allegations of unfair labour practices. There was correspondence between the parties relating to the request for particulars, and counsel for the Union did supply some further information. In spite of these exchanges, however, counsel for the Employer ultimately asked the Board to issue an Order directing that the Union supply certain items of information. These Reasons concern only the request for particulars.

In several previous decisions, the Board considered the approach to be taken to requests for particulars in the context of our proceedings. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Companies Inc.*, [1993] 1st Quarter Sask. Labour Rep. 252, LRB File No. 009-93, the Board made the following comments, at 257:

> *To this statement of the Board's long-standing practice on this issue, the Board would like to add that the need for particulars in the originating document is especially important before tribunals like the Labour Relations Board, which employ a summary procedure that does not provide for examinations for discovery or pre-hearing disclosure of documents, and that permits relatively little time to prepare a defence. If the Board's hearings are to be conducted in accordance with the basic requirements of natural justice, a respondent is entitled to, and the Board must require, reasonable clarity and particularity in the originating documents.*
>
> *Failure to provide reasonable particulars in the initial application would justify the Board in dismissing the application, adjourning the application pending the provision of particulars, or proceeding with any part of the application which has been particularized and refusing to proceed with the remainder. It is absolutely no answer for an applicant to argue that the respondent `knows what the case is about.' As part of a fair hearing, the respondent is entitled to have the allegations against it particularized in writing. It should not be forced to guess which of its interactions with the applicant are the subject of the application.*

The Board returned to this issue in *United Food and Commercial Workers, Local 1400 v. P.A. Bottlers Ltd.*, [1997] Sask. L.R.B.R. 249, LRB File No. 017-97. In a ruling on a request for particulars, the Board alluded to the earlier comments in the *WaterGroup* case, *supra*, and placed those comments in the context of other factors which must be considered by the Board, at 251:

> *The Board has thus made it clear that it is necessary for an applicant to state with some precision the nature of the accusations which are being made, both in terms of the specific events or instances of conduct which are considered objectionable, and of the provisions of the Act which have allegedly been violated. The Board has linked this requirement with the capacity to provide a fair hearing to a respondent.*
>
> *On the other hand, the Board must balance the requirement for a fair hearing with other values which are also of pressing importance to the Board, including those of expedition in the hearing of applications, and maintaining relative informality in Board proceedings. Whatever might be the case in a civil court, the nature of the proceedings before this Board cannot accommodate extensive pre-hearing or discovery processes without running the risk that the ability to respond in a flexible*

> *and timely way to issues which arise in the time-sensitive context of industrial relations will be seriously impaired.*
>
> *We do not interpret the requirement for the provision of sufficient particulars, in any case, to contemplate a complete rehearsal of evidence and argument in the exchange between the parties prior to a hearing. What is necessary is that an applicant make it clear what conduct of the respondent is the subject of their complaint, and how this conduct, in the view of the applicant, falls foul of the Act. In assessing the degree to which an applicant has met this requirement, the Board must be guided not only by our desire to ensure a fair hearing, but by the demands placed upon us by the objectives of efficacy and timeliness in our proceedings.*

In this case, the Union made allegations in the application that employees had been told, among other things, that the Employer was opposed to the Union and would make efforts to prevent certification, and that the Employer would assist in the revocation of Union support evidence. It is clear from the interchange of correspondence which took place between counsel for both parties that the Union has supplied the names of two persons who allegedly were involved in these communications with employees as representatives of the Employer.

During a hearing by conference call with counsel for both parties, counsel for the Employer indicated that both of the persons named are within the scope of the bargaining unit represented by the Union. He argued that, whatever the responsibility of an employer to investigate the allegations made in an application filed with this Board, the fact that the putative agents of the Employer in this case are in-scope makes it difficult for the Employer to ascertain what case there is to meet without further particulars. He quite properly pointed out that the Employer cannot engage in interrogation of members of the bargaining unit in these circumstances.

Counsel for the Union argued that his client should not have to provide the Employer with specific times or the names of participants in conversations prior to a hearing before the Board. He pointed out that the Board has never required any party to reveal all of the evidence they might call at a hearing in response to a request for particulars. He argued that there is also some sensitivity about disclosing details which might identify individual employees in a context which might expose them to reprisals.

We accept that the Union has legitimate concerns about protecting the identity of individual employees in circumstances where they are alleging that the Employer has engaged in conduct aimed to frustrate the exercise by employees of their rights under the *Act*.

On the other hand, it is necessary to ensure that the Employer is in possession of sufficient information about the allegations which are being made so they can determine how to meet the case presented against them.

In most cases where there is an allegation that representatives of an employer have engaged in improper conduct, those persons are outside the bargaining unit of employees represented by the trade union, and it can be assumed that it is open to the employer to investigate the allegations without running the risk of committing further unfair labour practices by questioning employees. This case is somewhat unusual in this respect, and the fact that the persons named by the Union as the agents of the Employer are in-scope creates difficulties for the Employer in ascertaining the character of the events which gave rise to the allegations made by the Union.

We have determined that the most efficacious way of dealing with these difficulties is to structure the hearing of the application so that the Employer will have an opportunity to hear the evidence of the two persons identified as agents of the Employer before being required to respond to this evidence. We are, in any case, somewhat concerned that the aspect of the application concerning the allegedly improper termination of the employment of two employees has been delayed as the parties have been dealing with other matters.

What we propose, therefore, is that a date should be set for hearing that part of the application relating to the two dismissed employees. In addition, the two persons named by the Union, Harley Pyper and Frances Wowdga, will be called to give evidence. In order to give counsel for both parties full opportunity to question these two persons, without being concerned about having their evidence as part of a particular "case" the parties wish to present, the Board will subpoena them as witnesses.

The second aspect of the request for particulars which was addressed by counsel for the Employer in the conference call was the allegation made by the Union that "Primrose Chateau has taken keys to the employment premises away from the employees." Counsel for the Employer argued that it is impossible for the Employer to know how to respond to this allegation in this form.

Counsel for the Union resisted the request for further particulars in relation to this allegation. He argued that the question of which employees might have had keys and under what circumstances they might have been removed lies within the knowledge of the Employer and it is not incumbent on the Union to elaborate any further.

The Board has, on many occasions, expressed the view that any assessment of allegations made on behalf of a trade union must take into account the shortcomings of information which is generally available to them in comparison to the information which may be in the possession of the Employer. We have often said that a trade union must be allowed to put allegations before this Board based on incomplete information because they may be unable to obtain all of the information available to the Employer.

This does not mean, however, that a trade union initiating a proceeding before this Board is relieved of the obligation of making clear the nature of the allegations they are making. They must provide at least enough of an indication of what the complaint is that the employer can decide whether the appropriate course is to deny, mitigate or defend the conduct of which they stand accused.

In our view, the allegation concerning the removal of the keys is not clear enough that the Employer can be expected to reply. It is not evident from the bare allegation whether the Union is alleging that there was some general change in policy or whether individual employees were singled out for some reason, to name but two possible scenarios. We therefore direct the Union to state the nature of this allegation with more particularity, and we will issue an Order to that effect.

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## INTERNATIONAL UNION OF OPERATING ENGINEERS, Applicant and QUALITY MOLDED PLASTICS LTD., Respondent

LRB File Nos. 371-96, 372-96 & 373-96; May 16, 1997
Vice-Chairperson, Gwen Gray; Members: Don Bell and Gerry Caudle

For the Applicant: Neil McLeod
For the Respondent: Larry Seiferling, Q.C.

**Unfair labour practice - Dismissal for union activity - Employer's reasons for terminating employment of union organizer lack coherence and credibility - Employer terminated employee for failing probationary period when it was not established that employee was serving probationary period - Board orders reinstatement of employee.**

**Practice and procedure - Choice of forum - Board will not set down rules establishing when union should refer discharge grievance to arbitration under s. 26.2 of the *Act*, as opposed to bringing unfair labour practice alleging discrimination for union activity under s. 11(1)(e) - Union is in best position to assess merits of each forum.**

***The Trade Union Act*, ss. 11(1)(e) and 26.2.**

### REASONS FOR DECISION

**Gwen Gray, Vice-Chairperson:** The Union filed applications for an unfair labour practice, reinstatement and monetary loss relating to the termination of the employment of Raymond Kaufhold. The Union was certified by the Board on August 29, 1996. There is no collective agreement in effect between the Union and the Employer.

The Employer produces plastic products and employs approximately 12 to 15 employees. Each shift consists of four employees and shifts start at 6 am and 2 pm. Shifts are scheduled to cover a period of 8.5 hours with one half hour overlap between the two shifts. Employees are provided two 15 minute coffee breaks and one half hour of paid lunch break. Employees are required to perform some work during their lunch break thus they are unable to leave the premises during that time. Each shift has a shift leader and a leadhand assigned to it.

**The Union's Evidence**

Mr. Kaufhold was hired on December 5, 1995 as a production worker with a starting wage of $7.00 per hour which was increased to $7.50 per hour after four weeks. Mr. Kaufhold worked as leadhand but he was actively seeking a promotion to shift leader. In late April, 1996, Mr. Kaufhold was unsuccessful in obtaining a position as shift leader and, being somewhat angry because the Employer overlooked him for the position, he took two days off work and looked for other employment. Mr. Kaufhold returned to work on May 2, 1996 after contacting Mr. Robert McCaffrey, Production Leader, to see if the company would take him back. The Employer did. Mr. Kaufhold returned to work at the same job and at the same rate of pay. According to Mr. Kaufhold, there was no mention of a probationary period or other conditions when he returned to work.

Mr. Kaufhold was a key contact with the Union in its organizing drive at Quality Molded Plastics. He had prior experience as a member of the Union and, as a result, when employees started to talk about joining a union, he contacted Mr. Ed Cowley, Business Manager of the Union, to arrange a meeting for employees to discuss joining the Union. Cards were signed at the meeting and an application for certification was filed June 3, 1996.

On June 14, 1996 employees, including Mr. Kaufhold, were advised that they would be laid off effective June 21, 1996. Mr. Kaufhold suspected that the layoff was related to the application for certification and he was of the view that the layoff was not caused by lack of work. Prior to his layoff, he requested and received a letter of reference, the body of which reads as follows:

> *Due to a work shortage we were forced to issue a number of layoffs at Quality Molded Plastics Ltd.*
>
> *Raymond began work on December 4, 1995, left our employ and returned on May 3, 1996 on the production floor as a Rotational Mold Oven Helper. Raymond worked within a team of five. Raymond carried out his work as directed quickly and with minimal supervision. The work included heavy lifting.*
>
> *Raymond's work was under the direction of the Production Team Leader, Robert McCaffrey.*

> *We sincerely appreciated all of Raymond's efforts here at Quality Molded Plastics Ltd. and would recommend him for any similar tasking job.*

Although other employees were recalled on earlier dates, Mr. Kaufhold was contacted by Betty Gauthier, Business Management Assistant, on September 23, 1996 and was asked to return to work on a casual basis at $7 per hour. Mr. Kaufhold was offered a position cutting up plastic. Mr. Kaufhold told Ms. Gauthier that he needed full-time work at his old rate of $7.50 per hour. Ms. Gauthier advised that she would mark him down as refusing to return. Subsequently, the Union filed an unfair labour practice relating to the lay-off of Mr. Kaufhold and negotiated his return to work with the Employer effective October 21, 1996.

Upon Mr. Kaufhold's return to work, the Union notified the Employer by letter that Mr. Kaufhold was assigned the task of getting employee input into the Union's collective bargaining proposals using rest breaks and after work hours to accomplish the same. The letter stated as follows:

> *Please be advised that pursuant to the provisions of The Trade Union Act and The Labour Standards Act and Regulations thereto, Brother Raymond Kaufhold has been designated by my office to distribute information written or oral to the designated bargaining unit employees of Quality Molded Plastics Ltd. Such information will be restricted to gathering input from such employees to formulate the proposed collective agreement. Brother Kaufhold has been instructed not to interfere with the work of the employees and shall perform his duties during rest breaks or after working hours.*

Mr. Kaufhold proceeded to distribute a draft collective agreement to employees during coffee and lunch breaks. He testified that he did not approach people while they worked on the production line. He also noted that, prior to the certification application, there were no workplace rules limiting what could be discussed at coffee breaks or lunch breaks.

Two days after returning to work, Mr. Kaufhold received a letter of warning from Ms. Gauthier which stated as follows:

> *As outlined by the I.U.O.E. fax (where you were named as designate to distribute information etc.) you were coached by your union of the rules.*

> *As indicated in the written and posted policy, it is very clear about discussions during company time and you have blatantly refused to comply to the policy as well as the outline of your union.*
>
> *You were verbally warned on October 22, regarding this policy by Lionel Wourms, Director of Manufacturing. You have since been reported by fellow employees and seen by management as to not complying to these requests.*
>
> *Unfortunately we are forced to issue this written warning that will go officially onto your file. Simply put, Raymond, if you fail to comply to these policies and other reasonable rules of the workplace our next step will be to suspend you for three (3) days without pay.*

Mr. Kaufhold indicated that he was called to a meeting with Ms. Gauthier around 10:00 am on October 24, 1996 where he was presented with the warning letter. He told Ms. Gauthier that Mr. Wourms had not given him a verbal warning contrary to what was stated in the warning letter. Mr. Kaufhold testified that prior to receiving the written warning, he was unaware of any employer policy restricting discussion of union matters on coffee or lunch breaks. He indicated that between 1 pm and 2 pm on October 24, 1996, some time after his meeting with Ms. Gauthier, a notice was posted on the Employer's letterhead that stated as follows:

> *Notice to all Employees*
>
> *Policy*
>
> *Activities, discussions, meetings regarding union business, whether for or against, will not be tolerated on company time.*
>
> *Take note that this policy will be strictly enforced.*

After Mr. Kaufhold had been issued the written warning Mr. Cowley wrote the Employer to warn that the Union considered the written warning to be improper under s. 11(1)(a) and (e) of *The Trade Union Act*, R.S.S. 1978, c. T-17 as "Brother Kaufhold was acting on my request to distribute that material during unpaid lunch breaks and at coffee time." Mr. Cowley was unaware that employees were paid for their lunch breaks. He indicated that the purpose of having Mr. Kaufhold contact employees was to distribute the proposed agreement that the Union wanted to take to negotiations. The Union did not

want to proceed to negotiations without input from all employees. Mr. Cowley indicated that the Union's ability to communicate with employees was hindered by the intimidation of Mr. Kaufhold.

The Employer responded to Mr. Cowley's letter as follows:

> *In reply to your faxed letter of today's date, please allow me to make the following points.*
>
> 1. *It is by no means our intention to circumvent the rights of any or all our employees as provided by the Trade Union Act or the basic charter of rights and freedoms. We have not done so in the past and will not in the future.*
>
> 2. *We are not aware of any laws stating that our company must provide time for the information distribution you refer to. All lunch and rest breaks are paid breaks. There are no unpaid breaks during working hours. We might suggest leaving information packages with other employees before or after shift times.*
>
> 3. *Our reason for limiting the discussions on union matters during paid times relates to ensuring productivity and an efficient workplace. We are not concerned about whether people support or don't support the union. However, where time is taken from time for which we pay to deal with the pros and cons of the union and their proposals for their contract, it becomes our concern. In short, while they are paid by us, we require all people to carry out their responsibility in the workplace without arguments, debates or other discussions among themselves that cause disruptions to our productivity. We therefore feel that the distribution and discussion of the issues you raise should be carried on away from the workplace on the employees' own time.*
>
> 4. *It is our understanding that the reason for the rule has already manifested itself. There have been discussions and allegations with employees approaching us to complain about unsolicited and persistent comments from Mr. Kaufhold. Still others have said Mr. Kaufhold is not distributing information to all employees. In an attempt to maintain a cordial, productive and efficient working atmosphere at QMP, we feel that all solicitation for or against any aspect of the union should cease immediately and the employees get to the point of carrying out the work they are paid to perform.*
>
> *In conclusion, it is in our interest to proceed with matters leading to negotiations. If you feel that your ability to distribute required information cannot be done under our necessary restrictions, we would be pleased to discuss this matter further.*

Mr. Cowley noted that the policy posted by the Employer with respect to discussion of union business was later amended to prohibit any discussion of union business on company property as well as on company time. After October 24, 1996, Mr. Kaufhold called employees at home to discuss the Union's collective bargaining proposals.

Subsequent to this exchange of correspondence between the Union and the Employer, Ms. Gauthier wrote Mr. Cowley the following letter:

> *I have been asked by our employee Roseanna Fedato to return these items to you on her behalf. She relates she is not interested in anything to do with this "union business."*
>
> *She has also related to us that Ray Kaufhold has been persistent with approaching her and phoning her at home and she wants this to stop.*
>
> *We are simply relating this information to you as per her request. We would add that if Ms. Fedato is being intimidated by Mr. Kaufhold we would hope you could ask him not to continue this work for you, in this manner, as a matter of common courtesy.*
>
> *We respect the significance of the Certification Order and will pursue the negotiation of the Collective Agreement in good faith. To this end we will and at the same time expect you to act in a professional manner by not conducting union business on company time or company property.*

The material returned with the letter was the draft collective agreement which Mr. Kaufhold had left with the employee in question, Ms. Fedato.

On November 7, 1996, Mr. Kaufhold was given a three day suspension for changing a shift with his sister, Julia Kaufhold, without obtaining permission from Lionel Wourms, Director of Manufacturing. Mr. Kaufhold had asked his sister to change shifts so that he could attend an appointment away from work. He talked to the shift leader, Warren Currie, who told him the change was fine. He had been told by the other shift leader, Mike Walston, to check with Mr. Wourms but he neglected to do so before the end of his shift. Mr. Kaufhold testified that prior to the certification employees were able to switch shifts without receiving permission from Mr. Wourms. He did acknowledge that, during the disciplinary meeting relating to this suspension from work, Ms. Gauthier did point out the consequences that could flow under *The Labour Standards Act*, R.S.S. 1978, c. L-1, should a shift change result in an

employee having a rest period of less than eight hours between shifts. He indicated, however, that he was unaware of this requirement prior to the meeting.

On November 21, 1996, Mr. Kaufhold was terminated from his employment. The termination letter stated as follows:

> *We have reviewed your records this week as you are approaching your three month probation period that ends on November 29, 1996.*
>
> *We have determined that you do not meet the requirements for this position and therefore are issuing your termination effective immediately.*

Mr. Kaufhold was off work on November 22, 1996 in order to obtain medial attention for an injury to his ribs which he had injured at work on November 20, 1996. Mr. Kaufhold had advised Mr. Walston by telephone that he would be unable to attend work because he needed to get his ribs checked by a doctor. Later that day Mr. Kaufhold received a phone message from Ms. Gauthier asking him to call her at work. When he did reach her on the telephone, she advised him to pick up his separation papers as he was no longer working for Quality Molded Plastics. Ms. Gauthier told Mr. Kaufhold that he had not passed his probationary period. Mr. Kaufhold testified that he was surprised at this reason as he was unaware that he was on probation. Mr. Kaufhold attended the office on the following Monday to receive his termination documents and to deliver his sick slip from the doctor.

**The Employer's Evidence**

Mr. Wilf Wilger, President and General Manager, discussed the termination of Mr. Kaufhold with Ms. Gauthier and Mr. Wourms. Mr. Wilger indicated that there were two complaints made by Mr. Kaufhold's co-workers to management respecting Mr. Kaufhold's work performance. One employee complained that Mr. Kaufhold did not assist the employee in performing trim work and spent his time talking with the leadhand. The second employee complained of a similar problem and indicated to Mr. Wilger and Ms. Gauthier that a morale problem was developing within Mr. Kaufhold's shift crew. Mr. Wilger relied on these two complaints as providing sufficient reason to terminate Mr. Kaufhold for failing to pass his 90 day probationary period. Mr. Wilger did not seek the input of Mr. Kaufhold's

leadhand or shift leader prior to terminating Mr. Kaufhold, nor did he discuss the complaints with Mr. Kaufhold prior to terminating his employment.

Ms. Gauthier testified that on Mr. Kaufhold's return to work on October 21, 1996, she pointed out to him that he would be on probation for 90 days effective from June 21, 1996, the date of Mr. Kaufhold's layoff. It is unclear from the evidence of Ms. Gauthier why this date was selected as the start of Mr. Kaufhold's probationary period.

Ms. Gauthier also indicated that the policy prohibiting discussion of union matters on company time or property came into existence after Mr. Kaufhold returned to work on October 21, 1996. Mr. Wourms reported to Ms. Gauthier and Mr. Wilger on October 22, 1996 that there had been a lot of discussion about the union the day before. In response to this information, Mr. Wilger instructed Ms. Gauthier to check with legal counsel on the Employer's rights to restrict such discussions. Ms. Gauthier testified that the purpose of the policy was to prevent disruptions to productivity. She indicated that Mr. Kaufhold was issued a letter of warning under the policy because employees had complained to her that he continued to discuss union matters and because she witnessed him carry papers and talking to another employee while the employee was working. Ms. Gauthier testified that there was a lot of opposition to the Union among employees and she wanted to prevent possible problems like sabotage from occurring.

Ms. Gauthier confirmed the details of the shift change incident where Mr. Kaufhold was given a three day suspension for changing shifts with his sister, Julia Kaufhold. She indicated that Mr. Wourms' permission was required to change a shift and that Mr. Kaufhold acknowledged that he had been told by his shift leader to obtain Mr. Wourms' permission.

Ms. Gauthier explained that she wrote Mr. Cowley the letter concerning Ms. Fedato after Ms. Fedato complained to her that Mr. Kaufhold had pursued Ms. Fedato in the parking lot to give her information related to the Union. On behalf of Ms. Fedato, Ms. Gauthier wrote Mr. Cowley to discourage Mr. Kaufhold's perceived persistent attempts to provide employees with copies of the draft or proposed collective agreement, union pin and stickers.

With respect to the reasons for terminating Mr. Kaufhold's employment, Ms. Gauthier indicated that she was approached by an employee on the shop floor who requested to speak to her regarding Mr. Kaufhold. Ms. Gauthier asked the employee to attend her office during a break. At that time, the employee is reported to have told Ms. Gauthier that Mr. Kaufhold would leave the work area and not assist employees in recharging the shuttle machines when the immediate supervisor was absent from the work station. Ms. Gauthier indicated that this complaint was received around November 14, 1996. This complaint came from Ms. Fedato, on whose behalf Ms. Gauthier had intervened with the Union. Ms. Fedato was hired in the period that Mr. Kaufhold was on lay-off.

The next day Ms. Gauthier had scheduled an interview with another new employee as part of the probationary assessment. During the interview, the employee made a complaint about Mr. Kaufhold that was similar to the one described above. This employee had also been hired by the employer during the lay-off period. The employee in question related that Mr. Kaufhold had told the crew that he did not need to perform certain tasks because he had more seniority than other employees. As a result, Ms. Gauthier interviewed the remaining crew member and received similar complaints about Mr. Kaufhold and subsequently, the decision was made to terminate Mr. Kaufhold for failing to pass his probationary period.

This decision was communicated to Mr. Kaufhold by telephone by Ms. Gauthier on November 22, 1996. Ms. Gauthier also thought that Mr. Kaufhold was not being upfront with her about his injury as he had not reported it at the time it had occurred, nor had he filled out an accident claim. This ground however was not relied upon by the Employer in its decision to terminate Mr. Kaufhold.

On cross-examination of Ms Gauthier, counsel for the Union suggested to her that Mr. Kaufhold's probationary period should have been calculated, at the latest, from May 3, 1996, the date on which Mr. Kaufhold returned to work after he had quit over not being appointed shift leader. Ms. Gauthier stated that when Mr. Kaufhold returned to work on May 3, 1996, he was not advised that he was subject to a 90 day probationary period. She testified that Mr. Kaufhold's return to work came before the Employer was actually imposing probationary periods. She further indicated that although she has implemented an informal performance meeting with new employees after 30 days of work, she did not conduct such

an interview with Mr. Kaufhold. This testimony conflicted somewhat with the impression she had left on examination in chief, which indicated that she had told Mr. Kaufhold on his return to work in October that he was on probation effective from June 21, 1996. She indicated that the Employer's policy was to require all new employees to serve a 90 day probationary period, with an informal probationary meeting occurring at the 30 day stage and the final evaluation occurring one week before the end of the 90 day period.

Ms. Gauthier recalled that the notice with respect to the prohibition on union talk was posted on either October 22 or 23, 1996, the precise date of which she did not know. She also testified that Mr. Kaufhold was given a verbal warning about the Employer's policy prohibiting discussion of Union matters on work time on October 22, 1996 by Mr. Wourms. Ms. Gauthier justified the policy as being necessary because of the amount of talk about the Union that occurred after Mr. Kaufhold's return to work. At the same time, she acknowledged that "there had been several complaints from employees who were not informed about union meetings or the union's certification application". Ms. Gauthier was concerned that the workplace was "volatile" as a result of the union campaign. Ms. Gauthier acknowledged that Mr. Kaufhold did obey the policy once it was brought to his attention.

With respect to the three day suspension imposed on Mr. Kaufhold for switching shifts, Ms. Gauthier acknowledged that the Employer had no written or posted policy requiring employees to obtain the permission of management prior to switching shifts. The Employer had not informed employees of the overtime problems that could attend the Employer on a voluntary change of shifts that resulted in the employees resting less than eight hours between shifts. Ms. Gauthier suggested that the employees could glean the rule from *The Labour Standards Act* that was posted in the workplace, but she acknowledged that the rule was not specifically brought to the attention of the employees.

On cross-examination, Ms. Gauthier also indicated that she had spoken with Mr. Kaufhold's shift leader, Mr. Currie, and asked his opinion of Mr. Kaufhold. According to Ms. Gauthier's evidence, he indicated that his whole team was not productive and that he was having problems with absenteeism, lateness and cooperation among team members. He did not single out Mr. Kaufhold as the sole problem.

Finally, Ms. Gauthier indicated that she and the Employer made the decision to terminate Mr. Kaufhold's employment prior to discussing his performance problems with him.

**Union's Rebuttal Evidence**

The Union called Ms. Kaufhold as a rebuttal witness. Ms. Kaufhold testified that she was hired on January 2, 1996 after being told about a possible job opening by her brother. She worked part-time to start and was laid off with others on June 21, 1996. In mid-August she was recalled to Mr. Currie's crew. Previously she had worked on Mr. Walston's crew. She was never informed that she was required to serve a probationary period and she had no discussions with the Employer concerning a probationary period. After two months on the job, her hourly wage was increased from $7.00 per hour to $7.50 per hour.

With respect to her changing shifts with Mr. Kaufhold, Ms. Kaufhold testified that she and Mr. Kaufhold had previously exchanged shifts. On that occasion, she had asked Mr. Wourms if the change was approved. He indicated to her at that time that "it was never a problem with you switching". She understood Mr. Wourms to be approving in a general way of her and her brother exchanging shifts when required.

**Employer's Argument**

Mr. Seiferling, counsel for the Employer, argued that the application should have been brought as a grievance under s. 26.2 of the *Act* which permits the arbitration of termination grievances in the time frame between the certification of the Union and the conclusion of the first collective agreement on the grounds of just cause.

Mr. Seiferling pointed out to the Board that the Employer was trying to grapple with changes to various pieces of labour legislation while working within the confines of the *Act*. It had to adapt to changes in *The Labour Standards Act*, RSS 1978, c. L-1 and *The Occupational Health and Safety Act*, R.S.S. 1978,

c. O-1.1. The changes that occurred in the workplace rules could be traced to the legislative changes or the Employer's new awareness of the legislative requirements.

Mr. Seiferling also argued that the Employer did not demonstrate an anti-union attitude. He referred the Board to the efforts that the Employer made to contact the Union regarding the deduction of union dues and the hiring by the Employer of a private investigator to investigate a suspected theft operation. Mr. Seiferling asked the Board to conclude from these efforts of management to communicate with the Union that it did not possess an "anti-union" animus.

He drew similar conclusions from the correspondence that was exchanged between the Union and the Employer with respect to the Employer's policy of prohibiting discussion of Union matters on work time and on work premises, which correspondence is quoted above. Mr. Seiferling argued that the Employer's request for the Union to identify other means for the Employer to assist with the distribution of Union information was a clear attempt to reach a workable solution to the workplace problem.

Counsel referred to the evidence which demonstrated that pro-union/anti-union camps in the workplace were causing productivity problems. In this context, he argued that the discipline imposed on Mr. Kaufhold was justified as necessary to restore productivity in the workplace. He argued that the Union's direction to Mr. Kaufhold to restrict his circulation of material and discussions to non-work time was an acknowledgement of the legitimacy of the Employer's rules.

In this regard, Mr. Seiferling argued that the breach by Mr. Kaufhold of two neutral rules, being the breach of policy prohibiting discussion of union matters on work time and the breach of rule requiring Mr. Wourms' permission before changing shifts, constituted sufficient cause for the discipline then imposed on Mr. Kaufhold and neither constituted discrimination on the basis of union activity. With respect to culminating incident, Mr. Seiferling argued that the Employer had a fair view that Mr. Kaufhold was still on probation, in part because Mr. Kaufhold did not contradict Ms. Gauthier's assertion that he was on probation when he was informed of his termination. As a result, the senior manager was justified in assuming that Mr. Kaufhold was "on probation" and was terminated accordingly for unsatisfactory performance.

Counsel also filed with the Board a number of authorities to the effect that an employee on probation can be terminated on a very subjective evaluation of his or her performance, such as attitude, demeanor, unsuitability and the like. From the Employer's point of view, Mr. Kaufhold was the type of employee who was resistant to rules and to change and, as a result, was a problem employee who had to be dealt with even in the context of a union organizing campaign.

**Union's Argument**

Mr. McLeod, counsel for the Union, argued that s. 26.2 of the *Act*, the provision allowing arbitration of dismissal cases before the conclusion of a first collective agreement, does not supplant s. 11(1)(e) of the *Act* which contains a reverse onus provision requiring an employer to prove that an employee who was engaged in union activity and who was discharged by the employer was discharged for "good and sufficient reason". In this regard, Mr. McLeod referred the Board to its decision 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 & 163-92 where the Board observed that it is not sufficient for an employer to show that there is a plausible reason for the termination if the reasons are tainted by any considerations indicating anti-union animus.

Mr. McLeod asked the Board to conclude that the Employer had not met either aspect of the test applied under s. 11(1)(e) of the *Act*. He indicated that Mr. Wilger testified that the sole reason for terminating Mr. Kaufhold was the complaints received from two employees. He noted that the Employer tried to suggest that Mr. Kaufhold had committed Workers' Compensation Board fraud by claiming Workers' Compensation Board benefits relating to the injuries suffered by him during his final week at work. The Union noted that the Employer had not relied on this reason in its decision to terminate Mr. Kaufhold.

In addition, Mr. McLeod pointed out that there was no formal policy or practice set out for employees relating to changing shifts, and he noted that the Employer had not brought *The Labour Standards Act* requirement to the attention of the employees.

Mr. McLeod asked the Board to conclude that the probationary period was pulled out of the air as Ms. Gauthier did not know if probation was calculated on a work day basis or a calendar basis and had provided the Board with contradictory statements relating to the imposition of probationary periods.

In evaluating the plausibility of the reasons for termination, Mr. McLeod observed that the Employer based its decision on the complaints of two employees without putting the complaints to Mr. Kaufhold for explanation or comment, and without corroborating the complaints with the supervisor. He noted that the shift supervisor indicated to management that all of the employees on the shift had slacked off but he did not specifically single out Mr. Kaufhold. Mr. McLeod also argued that the prior suspension of Mr. Kaufhold for switching shifts with his sister was a significant overkill.

Mr. McLeod referred the Board to various incidents that he argued tend to demonstrate the Employer's negative attitude toward the Union. The first incident was a memo dated August 26, 19996 which was tendered as an exhibit through Mr. Kaufhold. The memorandum was circulated at the plant the day before the Labour Relations Board hearing of the Union's certification application. The memorandum read in part as follows:

> *The purpose of this letter is for you to question if you decide to sign a union card based on information provided to you which was either blatantly false or neglected to give you important facts. If you feel that you were misled, you have the right to attend the above hearing, state your case, and ask to have your card withdrawn. We are not implying that misleading information was given to you, nor are we encouraging anyone to change his/her mind. We simply want to make sure that you feel you made a properly informed decision.*

Mr. McLeod also referred to the manner in which the Employer dealt with discussion of union matters on work time. He questioned if the Employer had any real indicators that productivity was decreased as a result of the discussions and questioned if there would be any difference between discussion of Union matters or discussion of the Superbowl. He argued that the Employer's policy was designed to muzzle the Union.

**Reasons**

The relevant provision of s. 11(1)(e) of the *Act* is 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 Board considered the interface of s. 11(1)(e) of the *Act* with s. 26.2 of the *Act* which was added to the *Act* in the amendments made by chapter 47 of the *Statutes of Saskatchewan, 1994*, s. 15 in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Courtyard Inns Ltd.*, [1996] Sask. L.R.B.R. 719, LRB File Nos. 154-96, 155-96 & 156-96 where it stated as follows, at 728-729:

> *In our view, the purpose of just cause provisions under collective agreements is to construct a mechanism for the scrutiny of the grounds advanced for the termination of the employment of a unionized employee, or for other disciplinary action, against the template of a disciplinary regime which can be objectively regarded as reasonable. By adding s. 26.2, the legislature seems to have signified that, at least in the instances of suspension and dismissal, employees who are represented by a certified bargaining*

> *agent - and who can be confident that protection will be afforded by just cause provisions in the normal course of events -are granted such protection from the inception of the collective bargaining relationship.*
>
> *The focus of s. 11(1)(e) of the Act is somewhat different, in that what is prohibited under the section is discrimination on the basis of involvement in trade union activity. Indeed, if the Board were to read into this section a mandate to make a definitive assessment of the sufficiency of the cause which has been given for the termination of the employment of an employee, it is difficult to see what purpose would be served by s. 26.2 of the Act - or indeed, why just cause provisions in collective agreements would be regarded as so essential. We are not inclined to alter the approach, which we have often described, of reviewing the grounds proffered as the basis for a dismissal to see whether they are sufficiently plausible, coherent and credible to lend support to the proposition that they are the sole and exclusive reasons for the dismissal.*

We note that s. 26.2(1)(d) of the *Act* does not permit the arbitration of a termination grievance if the termination is subject to an application alleging a breach of s. 11(1)(e) of the *Act*. In our view, it is the trade union who decides whether the application should be brought under s. 11(1)(e) of the *Act* or s. 26.2 of the *Act* based on their assessment of the evidence. In selecting the vehicle of an unfair labour practice application over grievance arbitration, the Union may be running the risk that an employee loses the right to arbitrate the dismissal should the Labour Relations Board dismiss the unfair labour practice application. The Board is of the opinion that this risk is one that the Union is in the best position to assess and that it would not assist the parties for the Board to develop guidelines or make any suggestions as to when s. 26.2 of the *Act* should be selected over an unfair labour practice application under s. 11(1)(e) of the *Act*.

In this instance, the Board is asked to determine if the decision to terminate Mr. Kaufhold's employment was made for the purpose of discouraging activity in support of the Union. The importance of this determination, and the Board's approach to it, was recently summarized in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Moose Jaw Exhibition Co. Ltd.*, [1996] Sask. L.R.B.R. 575, LRB File Nos. 131-96, 132-96 & 133-96 as follows, at 583 to 585:

> *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 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 Files*

*No. 144-94, 159-94 and 160-94, the Board commented on this matter as follows, at 123:*

> *It is clear from the terms of Section 11(1)(e) of the 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 Section 11(1)(e) of the Act in The Newspaper Guild v. The Leader-Post, [1994] 1st Quarter Sask. Labour Rep. 242, LRB Files No. 251-93, 252-93 and 254-93, at 244:*

> *The rationale for the shifting to an employer of the burden of proof under Section 11(1)(e) of the Act 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 Section 11(1)(e) of the Act 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 Files No. 161-92, 162-92 and 163-92, the Board made the following observation in this connection, at 139:*

> *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) of the Act 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) of the Act 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:*

> *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 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) of the Act 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 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 present application, the Union applied for certification on June 3, 1996 and was certified by the Board on August 29, 1996. Mr. Kaufhold was the key organizer for the Union. The Employer's attitude toward the organizing drive was demonstrated in its memorandum dated August 26, 1996 quoted above which expressed the Employer's opposition to the Union's campaign.

On June 21, 1996, subsequent to the filing of the certification, employees were laid off, including Mr. Kaufhold. At the time of lay-off, the Employer provided Mr. Kaufhold with a letter of reference signed by Ms. Gauthier that recommended him for any similar position and that complemented his ability to work quickly and with minimal supervision. Although other staff were recalled to work, Mr. Kaufhold remained off work until he was called on September 23, 1996 to work on an on-call basis. Through negotiations with the Union, the Employer reinstated Mr. Kaufhold on October 21, 1996. The Employer hired new employees during the period of Mr. Kaufhold's lay-off and suggested that Mr. Kaufhold's recall was delayed because he was not as qualified as other employees. There was no serious attempt by the Employer to explain its apparent change in its assessment of Mr. Kaufhold's abilities over the period from the date of lay-off to the date of recall.

On Mr. Kaufhold's return to work, the Union notified the Employer that Mr. Kaufhold would be distributing information to employees related to the collective agreement proposal. The letter indicated that Mr. Kaufhold would perform this task during work breaks or after work hours. Although the Employer was formally notified of the role of Mr. Kaufhold in distributing this material, it dealt with Mr. Kaufhold's activity on behalf of the Union in a rather high handed and immature fashion by

disciplining Mr. Kaufhold for discussing Union business on work time. The letter of warning dated October 24, 1996 referred to the written and posted policy concerning such discussions and an earlier verbal warning issued to Mr. Kaufhold by Mr. Wourms. Mr. Wourms failed to testify and the Board draws an inference from the failure that no verbal warning was issued to Mr. Kaufhold. In addition, it was not established by the Employer's witnesses that the policy was posted prior to the imposition of the discipline on Mr. Kaufhold.

In any event, it appears to the Board from the speed with which the Employer moved to formally discipline Mr. Kaufhold, the failure of the Employer to discuss the implementation of the new policy against discussing union matters on work time with Mr. Cowley or the employees, and the justifications given to the Union for imposing the rule and the discipline, that the Employer's primary goal was to quickly get rid of Mr. Kaufhold. Although the Employer framed the rule against the solicitation of support for or against the Union, it seemed particularly attentive to the complaints that employees made against the Union and Mr. Kaufhold, which was demonstrated both in its August 29, 1996 letter to Mr. Cowley quoted above and Ms. Gauthier's assistance to Ms. Fedato in returning the material given to her by Mr. Kaufhold to the Union.

Shortly on the heels of the letter of warning came the three day suspension of Mr. Kaufhold on November 7, 1996 for switching shifts without permission. It is evident in this instance as well that employer policy relating to the shift changes was poorly communicated to employees. Ms. Kaufhold testified that she had blanket approval from Mr. Wourms to change shifts with her brother. As indicated above, Mr. Wourms did not testify. Again, the Board is of the view that the imposition of discipline in this instance was directed more at building the "record" against Mr. Kaufhold in order to justify his termination than at making any reasonable attempt to correct errant work behaviour. The indicators include the absence of discussions with employees about the policy, the lack of a written or posted policy, and the imposition of discipline in circumstances that had been permitted in the past.

The termination of Mr. Kaufhold's employment occurred one month after his return to work from lay-off. Although Mr. Kaufhold had worked at Quality Molded Plastics for five months prior to his "quitting" in May, 1996, he was terminated for failing his probationary period. The Board agrees with Mr. McLeod's characterization of the probationary period as being "pulled out of the air." There was no

evidence established that Mr. Kaufhold was told that he was a probationary employee. In addition, the complaints relied on to establish unsuitability were not confirmed by the shift leader, nor were they put to Mr. Kaufhold for explanation. One complaint came from an employee whose views opposing the Union were known to the Employer (Ms. Fedato). The shift leader indicated that he had problems with all staff on his shift and did not single out Mr. Kaufhold as a particular problem.

As indicated in the quotation cited above from the *Moose Jaw Exhibition* case, *supra*, in assessing the reasons for termination, the Board is not embarking on a process to determine if Mr. Kaufhold was terminated for "just cause." The Board is attempting to assess the coherence and credibility of the reasons for dismissal in the context of the employee's activities in support of the trade union, the timing of the termination, the stage of collective bargaining and the likely impact of the termination on the employees in the bargaining unit.

In the present case, the Board finds that the Employer's reasons for terminating Mr. Kaufhold lack coherence and credibility. The disciplinary actions of the Employer were hugely out of proportion to the incidents relied on as justification for the discipline. The events giving rise to the discipline occurred at the outset of the collective bargaining relationship before the employees had the security and protection of a collective agreement. In addition, the employee selected for discipline was the Union's chief organizer. Although the Board is of the view that the evidence demonstrates anti-union animus on the part of the Employer, it is not necessary to our findings as the Employer has not met the basic test of establishing good and sufficient reasons for the discipline and termination as those terms are used in s. 11(1)(e) of the *Act*.

The Board therefore finds that the Employer has committed an unfair labour practice within the meaning of s. 11(1)(e) of the *Act* and orders the reinstatement of Mr. Kaufhold within 10 days of the date of receiving the Order. The Board will reserve its jurisdiction to make an Order with respect to the application for monetary loss. If the parties are unable to agree on the sum payable to Mr. Kaufhold, the matter may be referred by either party to the Board for determination.

# HEALTH LABOUR RELATIONS REORGANIZATION (COMMISSIONER) REGULATIONS - INTERPRETIVE RULING #4

LRB File No. 114-97; May 16, 1997
Chairperson, Beth Bilson; Members: Gloria Cymbalisty and Don Bell

For Saskatchewan Association of Health Organizations: Bonnie Reid
For Health Sciences Association of Saskatchewan: Alice Robert
For Saskatchewan Union of Nurses: Cathy Zuck
For Saskatchewan Government Employees' Union: Betty Pickering
For Canadian Union of Public Employees: John Elder
For Regina Ambulance Paramedics Association: Collin Hartness

**Health care - Health support practitioner bargaining unit - Scope - Board takes functional approach to scope of occupations falling within health support practitioner unit that do not require as a minimum qualification registration under professional statute - Board holds that person whose primary obligation is to perform duties of such occupation falls within health support practitioner bargaining unit, regardless of qualifications set by employer for position.**

**Health care - Health support practitioner bargaining unit - Scope - Employees primarily performing health services provider unit work and, as needed, emergency medical technician work are assigned to health services provider bargaining unit - Work cannot be easily divided between two bargaining units.**

***The Health Labour Relations Reorganization (Commissioner) Regulations*, ss. 2(h) and 4.**

## INTERPRETIVE RULING #4

**Beth Bilson, Chairperson:** *The Health Labour Relations Reorganization (Commissioner) Regulations* (the *Regulations*), which came into force on January 17, 1997, contemplated the delineation of a new bargaining structure in the health care sector to reflect administrative changes which have occurred since 1992. The *Regulations* provided three basic kinds of bargaining units. One of these is a province-wide "health support practitioner" unit consisting of employees in occupations listed in Table C to the *Regulations*.

In the course of discussions relating to the compilation of a Statement of Employment for this bargaining unit, the parties encountered problems in understanding the proper parameters of some of the classifications listed in Table C. They have asked the Board to make a ruling clarifying the criteria which should be used to decide whether particular positions belong within this unit or not.

The positions for which the Board has been asked to provide guidance are those of assessor/co-ordinator, health educator, infection control officer, emergency medical technician and mental health therapist. Submissions concerning one or more of these positions were made by representatives of Saskatchewan Union of Nurses (SUN), Canadian Union of Public Employees (CUPE), Saskatchewan Government Employees' Union (SGEU), Health Sciences Association of Saskatchewan (HSAS), Regina Ambulance and Paramedics Association (RAPA) and Saskatchewan Association of Health Organizations (SAHO).

The Board also heard arguments concerning the position of recreation therapist; subsequently, the parties had further discussions on the issues they intend to raise, and it may be necessary to hold an additional hearing on this matter. The Board will therefore not comment further on this position at this time.

The general character of the health support practitioner unit was described as follows in the *Report of the Health Labour Relations Reorganization Commission* (the Dorsey Report), at 66:

> *This is a unit of specifically named occupations that have been accepted for exclusion from the all employee unit since the 1970's. The list includes some additional occupations that expand its reach across the spectrum of services from acute care to prevention. This gives the members of the unit and its bargaining agent an interest in, and a need to be sensitive to, the full range of health services. Some of the listed community based occupations may require further definition. In the absence of party agreements, the Labour Relations Board can give the precise definition.*

The Dorsey Report went on to make the following comment, at 67:

> *Employees in the listed occupations are included in the unit if they are employed and function in one of the listed occupations. They are also included if they are employed in another position, regardless of its title, for which the employer requires, as a*

> *minimum, registration pursuant to an Act giving the exclusive right to use a title or description of a listed occupation. This will not encompass all of the listed occupations. Some of them do not have protection of title under a statute. It does not encompass any occupation that may have statutory protection of title if it is not a listed occupation.*

The distinction drawn in this passage between those employees who are included within the unit on the basis of their employment in one of the listed occupations, and those who are included by virtue of the fact that their position requires registration under a statute governing one of the occupations listed in Table C, is reflected in the wording of the definition of "health support practitioner" in the *Regulations*, which reads as follows:

> *2(h) **"health support practitioner"** means an employee of a health sector employer who:*
>
> > *(i) is functioning in one of the occupations listed in Table C; or*
> >
> > *(ii) is in a position that requires, as a minimum, registration pursuant to an Act giving the exclusive right to use a title or description of an occupation listed in Table C;*
>
> *but does not include a student of one of the occupations listed in Table C, or an intern or an assistant to an employee described in subclause (i) or (ii).*

The expansion of the listed classifications in Table C beyond a group which could be defined in terms of a statutory license to include a number of other occupations has naturally caused a certain amount of confusion. According to the representations made to the Board, the titles of assessor/co-ordinator, health educator and infection control officer were derived from classifications represented by SGEU in the public service prior to devolution. The representatives of SAHO stated that their review of the positions associated with these titles, and of positions with similar functions, disclosed that a variety of titles had been used in different employment relationships. This review also revealed that the duties associated with these positions might be combined with other duties in a variety of ways, and that educational requirements or qualifications have been described in different ways.

Counsel for SUN expressed a general concern on behalf of their union that the general nature of these job titles should not be a means of placing in this unit employees who properly belong in a SUN bargaining unit. She acknowledged that in some cases the advertisements or postings relating to these positions have indicated that other educational or professional requirements than a nursing degree or registration are acceptable. She said that SUN has made no claim that these positions should be in SUN bargaining units. Where, however, the requirement is for nursing qualifications, these employees should be treated as nurses and placed in a SUN bargaining unit.

The duties associated with the assessor/co-ordinator classification were described by counsel for SAHO as including screening of clients, assessment of their needs for care, formulation of a care plan, and coordination of services to meet the care requirements. Not all of the assessor/co-ordinators perform all of these functions, but a combination of these duties characterizes each position. Counsel indicated that most of those recruited as assessor/co-ordinators have a nursing background, although she said that in some cases alternative related fields, such as social work, are regarded as a satisfactory foundation for working in this position.

She said that it is possible to distinguish four groups performing these functions. The first are those who work exclusively as assessor/co-ordinators; most of these are in the larger urban health districts. The second group are those who work primarily as assessor/co-ordinators, but may spend some portion of their time functioning as nurses; the example she used was of circumstances where a shortage of nurses would necessitate the inclusion on an on-call roster of someone who functions mainly as an assessor/co-ordinator.

The third group are persons whose duties are mainly primary client care, but who carry out some assessment or coordination of other health care services. In rural areas, for example, a home care nurse may, in the course of providing nursing care, decide that other services are required. The fourth group are those who perform managerial functions in relation to assessment of clients and coordination of the provision of health care services.

Counsel for HSAS pointed out that the *Regulations* do not suggest that there should be any distinction made on the basis of educational requirements for the occupations listed in Table C. She said that there is no suggestion of any conditions attached to these classifications. She argued that the clear intention of the *Regulations* is to create a province-wide unit which will allow the development of uniform terms and conditions of employment for employees in these classifications; this objective could not be met if the Board were to accept that employees performing the same work should be placed in different classifications according to whether or not they have a nursing qualification.

The focus of the language used in s. 2(h)(i) of the *Regulations* is, in our view, on occupational groupings, and on functions connected with those occupations. This seems to be supported by the following comment in the Dorsey Report, at 69:

> *All of the possible indicia for bargaining unit distinction are fertile ground for ongoing debate. Job content, task performance, training requirements, prestige, socio-economic status, expertise, specialization, credentialization, commitment, ethics, standards, autonomy, organizational affiliation, importance to the public welfare, special relationship with fellow members of the occupation and the public interest and other factors simply serve to create degrees of differences. They do not meaningfully define predictable categories of occupations.*

In this context, we have concluded that drawing the dividing line for this classification according to the educational requirements specified would defeat the objective of establishing province-wide terms and conditions of employment for this classification of employees. Whether or not an employer regards education in nursing as the qualification most relevant to the performance of the functions associated with the position of assessor/co-ordinator, the person whose primary obligation is to perform those duties is, in our opinion, "functioning in the occupation" of assessor/co-ordinator, and not "employed and functioning" as a nurse.

The representatives of SAHO seemed sanguine about their ability to distinguish between the groups described earlier in these Reasons, for the purpose of deciding who should be included in the health support practitioner unit. It would be those who function exclusively or primarily as assessor/co-ordinators who would be included in the unit. Those who are primarily involved in the provision of

hands-on nursing care, and who perform some incidental assessment or co-ordinating role, would still be included within the scope of a bargaining unit represented by SUN.

The representatives of SAHO described the responsibilities of those in health educator positions as conducting promotional and educational activities for clients or patients and the residents of the community at large. Mr. Brian Morgan, Vice-Present of SAHO, acknowledged that there may be occasions when health educators conduct in-service training events for staff as well. He said, however, there is a clear distinction between the health educator group, whose duties are mainly focused on the public and on users of health services, and those primarily responsible for training and development of health care employees. As in the case of the assessor/co-ordinators, the positions associated with the duties just described bear a number of different titles, and the qualifications required vary widely, although many of the positions have required training or registration as a nurse.

In our view, the comments which were made about the assessor/co-ordinator positions apply to the classification of health educator as well. The line which distinguishes those in the health practitioner unit from others whose duties may include what may be roughly described as "health education" must be drawn where health educator functions cease to be the primary focus of the position. Where a nurse or other employee performs these functions incidentally, it is not necessary to place that employee in this unit. Where, however, the duties performed by the incumbent are primarily those of a health educator, regardless of whether their training is in nursing, adult education, physical therapy or other disciplines, the employee will be included in the health support practitioner unit.

The same approach is applicable to the position of infection control officer. The use of this particular label appears to have caused some further confusion, because the term "infection control officer" as such has been used to refer to physicians with particular responsibilities for infection control. Mr. Morgan suggested that the group who should properly be included within the scope of the health support practitioner unit have the title "infection control practitioner." We accept that this use of the term in the *Regulations* was based on a misapprehension of its significance in connection with the two groups, and we will direct that it be replaced when the certification Order is issued for this unit with the term "infection control practitioner."

The representatives of SAHO indicated that this title applies to a small and easily identifiable group of employees. Though most of them have a nursing background, they also have additional training in infection control. It is again our view that, whatever the educational qualifications they possess, even if those have been required for appointment to the position, this group as a whole should be included in the health support practitioner unit. It is likely, though it was not pressed as strongly by SUN in connection with these employees, that there are some nurses who perform infection control duties as a peripheral aspect of the nursing care they provide, and these employees will continue to be included in SUN bargaining units.

The issue raised by SUN in connection with the mental health therapists was a concern that certain registered psychiatric nurses have been listed as being part of this classification. Mr. Morgan indicated that these employees had been included inadvertently, and that SAHO was aware of a clear distinction between mental health therapists and registered psychiatric nurses. At the hearing, SUN apparently accepted this reassurance, and we see no need to make further observations concerning this classification.

The final classification which the Board was asked to consider was that of emergency medical technician (EMT). Counsel for CUPE drew attention to a specific issue connected with this classification. It goes without saying that persons who are employed full-time as EMTs would be included within the health support practitioner unit. Counsel said that his client also accepted that employees who are in positions which may be accurately described as part-time or casual may also belong within that unit.

The problem arises in those special cases, of which there are a number in rural areas, where a person with qualifications as an EMT is recruited to a position, typically one which would now be included in a health services provider bargaining unit, with an expectation that this employee will also respond to emergency calls as needed. The representatives of SAHO described this as a scenario which represents an effort to make it possible to retain qualified EMTs in rural areas by assuring them of full-time employment.

Counsel for HSAS argued that it should be possible to draw a clear line between the duties performed by such a person in a position included in the health services provider unit, and those duties performed as an EMT. She suggested that it would be perfectly appropriate to assign the employee to the health support practitioner unit in respect of that portion of their job which is devoted to EMT duties.

The representative of SGEU concurred with this suggestion; she argued that any difficulties which might arise from having one person covered by more than one collective agreement could be worked out by negotiations between the trade unions and the employers.

There is, of course, nothing to suggest that a single person cannot be in more than one bargaining unit, or be represented by more than one trade union. In cases where an employee has more than one distinguishable "job," this may be the result. As the representative of SGEU suggested, this may lead to some complex issues of contract administration, but it is not conceptually difficult to grasp that one person is, in effect, more than one "employee" for the purposes of collective bargaining. In the context of health care services in rural areas of the province, holding more than one part-time job may be the only means by which some individual employees are able to maintain viable employment. Indeed, counsel for CUPE appeared to concede this in the case of those EMTs who are holding a part-time position as an EMT along with a different part-time job as something else.

The positions which are under consideration here differ somewhat from that description, however. In these cases, the employee is given a full-time position within the health services provider bargaining unit in order that the employer will have someone available on the relatively rare occasions when an emergency call occurs. Counsel for SAHO suggested that this might be as infrequently as ten or a dozen times per year. No specific hours are allocated to the EMT duties. The position in the bargaining unit is set aside for someone with EMT qualifications and not filled according to the ordinary procedure for filling vacancies. For 80% or 90% of the time, the employee performs duties which are indistinguishable from other members of the health services provider bargaining unit.

In these circumstances, it is exceedingly difficult to split the position occupied by the employee into two constituent parts on any rational basis. As we see it, this difficulty goes beyond issues which might

be described as contract administration. The determination of the terms and conditions of employment for such an employee must be dealt with as a whole, in our opinion, as the several aspects of the position are entangled with each other. For this reason, we have concluded that the inclusion of these employees in the health services provider units represents the most viable and holistic way of dealing with their terms and conditions of employment.

As several of those who made submissions at the hearing pointed out, one of the factors which speaks against the allocation of employees to bargaining units on the basis of the preponderance of their duties is that the proportions of functions associated with their positions may change over time. We acknowledge that this is a possibility, and accept that the line we have drawn may give rise to some differences of opinion in the future over the status of particular employees.

We commented at the hearing that the approach taken in the past to the creation of bargaining units in the health care sector has largely shielded the parties and the Board from the necessity of dealing with jurisdictional disputes of the kind which we have been addressing here. The choice made in the Dorsey Report to delineate the health support practitioner bargaining unit, at least in part, on the basis of occupational groupings rather than professional affiliation or educational qualification, has rendered it somewhat difficult to define clear boundaries for the unit in the case of these classifications. Similar issues may perhaps arise in connection with other Table C classifications in the future.

In our ruling, we have accepted the premise that each title in Table C corresponds to an identifiable occupation, and our ruling represents an effort to include within the bargaining unit those who can accurately be described as engaged in that occupation. Duties associated with those occupations may be performed on an incidental basis by others, and we have accepted that these employees remain outside this bargaining unit. Any significant change in the connection of employees with these occupations may be reflected in future transfers in and out of this unit. It may be anticipated that, over time, the occupations within this unit will become more susceptible to uniform definition, and the terms and conditions of employment of those engaged in these occupations will be rendered more consistent.

# HEALTH LABOUR RELATIONS REORGANIZATION (COMMISSIONER) REGULATIONS - INTERPRETIVE RULING #5

LRB File No. 129-97; May 28, 1997.
Chairperson, Beth Bilson; Members: Hugh Wagner and Ken Hutchinson

For Saskatchewan Association of Health Organizations: Bonnie Reid
For Saskatchewan Union of Nurses: Bev Crossman
For Canadian Union of Public Employees: Andrew Huculak
For Service Employees' International Union: George Wall
For Saskatchewan Government Employee's Union: Rick Engel

**Health care - Transition of LTD plan - Board orders implementation of LTD plan on terms developed by Board agents for former members of SGEU who were transferred to other unions under *The Health Labour Relations Reorganization (Commissioner) Regulations* - Board reserves issue of manner of payment to hear further argument from parties.**

***The Health Labour Relations Reorganization Act*, s. 10.**

## INTERIM ORDER AND INTERPRETIVE RULING #5

**Beth Bilson, Chairperson:** In accordance with *The Health Labour Relations Reorganization (Commissioner) Regulations* (the *Regulations*) this Board held a hearing on March 14, 1997 for the purpose of issuing certification Orders in relation to a number of bargaining units defined in the *Regulations*. In the course of that hearing, counsel for the Saskatchewan Government Employees' Union (SGEU) raised the question of how employees who were previously represented by SGEU and covered by the long-term disability (LTD) plan operated by that trade union would be affected in this respect once they were placed in new bargaining units. He pointed out certain transitional problems which might arise from the unique nature of the SGEU plan, which is administered by the trade union and funded exclusively from employee contributions.

Counsel for SGEU said that his client was prepared to continue providing coverage for the affected employees for a period of 60 days. The parties at the hearing agreed with the proposal that the Board should appoint an agent to assist the parties during that 60 day period in an effort to see whether some

agreement could be reached between SGEU, the employers represented by the Saskatchewan Association of Health Organizations (SAHO), and the trade unions who represented bargaining units into which employees formerly represented by SGEU would be placed; these trade unions included Canadian Union of Public Employees (CUPE), Service Employees' International Union (SEIU) and Saskatchewan Union of Nurses (SUN).

The Board appointed Mr. Hugh Wagner and Mr. Ken Hutchinson as agents to embark on these discussions. In a letter dated May 15, 1997, Mr. Wagner and Mr. Hutchinson submitted their recommendations to the Board. These recommendations are as follows:

*1. EMPLOYEES AFFECTED*

*1.1 Those employees who as at March 13, 1997, and up to and including May 31, 1997, were members of the SGEU long term disability income plan; and*

*1.2 Were not in receipt of benefits from the SGEU long term disability income plan or did not have a date of disability at May 31, 1997; and*

*1.3 Were "health service providers" as defined by the Dorsey Regulations and who were transferred to the jurisdiction of Canadian Union of Public Employees (CUPE) or Service Employees International Union (SEIU) by the Labour Relations Board Order of March 14, 1997; or*

*1.4 Were nurses who were transferred to the jurisdiction of Saskatchewan Union of Nurses by the Labour Relations Board Order of March 14, 1997.*

*2. MOVEMENT TO SAHO ADMINISTERED GENERAL LONG TERM DISABILITY INCOME PLAN*

*2.1 Effective the first day following the end of the last pay period in May of 1997, those employees referenced in section 1 above will be admitted into membership in the SAHO general long term disability income plan under the following stipulations:*

*2.1.1 That they will contribute to SAHO the same monthly premium in percentage terms as are contributed by other members of the general long term disability income plan. The contribution shall be by payroll deduction; and*

*2.1.2 That the time period the employee has been a member of the SGEU long term disability income plan will count toward the one-year pre-existing medical clause of the SAHO general long term disability income plan; and*

*2.1.3 That all active employees transferring, as identified in section 1 above, who met the eligibility criteria under the SGEU long term disability income plan will be deemed to meet those conditions under the SAHO general long term disability income plan; and*

*2.1.4 That if a member of the SGEU long term disability income plan transferred to the SAHO general long term disability income plan becomes disabled within six (6) months from the date the employee (member) recommences employment and the disability is from the same or directly related cause, the SGEU long term disability income plan will retain responsibility for payment of benefits; and*

*2.1.5 That newly hired employees in transferred positions or new employees in those programs covered by the SGEU long term disability income plan will be subject to the terms and conditions of the SAHO general long term disability income plan; and*

*2.1.6 That the Plan Administrator of the SGEU long term disability income plan must transfer to her counterpart at SAHO, upon request, relevant documentation and information regarding the employees who are transferred.*

*3. SUMMARY DESCRIPTION OF SAHO GENERAL LONG TERM DISABILITY INCOME PLAN*

*3.1 Monthly benefits equal to 75 per cent of the employee's regular gross monthly earnings;*

*3.2 Benefits while totally disabled from the employee's own occupation and after 24 months, if totally disabled from any occupation;*

*3.3 Rehabilitation services are available to assist employees to return to the active workforce;*

*3.4 Eligibility will be as determined by the plan text;*

*3.5 During the first 119 calendar days of total disability (the qualifying period), the employee must use sick leave credits available and payable to him/her through the employer's sick leave plan;*

*3.6 "Regular earnings" are defined as the employee's regular hourly rate of pay excluding any premium pay such as overtime, shift differential, call back, standby, etcetera.*

*4. **Continuation***

*The forgoing arrangement shall continue until such time as the recipient unions and SAHO have each collectively bargained alternative measures or until such time as recipient unions have made their own arrangements, if any, for disability insurance coverage.*

We hereby order that these recommendations be implemented, with one caveat. We understand that the agents of the Board were unable to obtain agreement between the parties concerning the implementation of s. 2.1.1 of the recommendations, which reads as follows:

*2.1.1 That they will contribute to SAHO the same monthly premium in percentage terms as are contributed by other members of the plan. The contribution shall be by payroll deduction;*

The current premium structure of the SGEU LTD plan requires employees to contribute 1.25 per cent of their wages. The cost of the coverage with which the employees would be provided under these recommendations would be approximately .88 per cent. As we understand it, SAHO takes the view that, during the transitional phase, these premiums should be paid by employee contribution, as they were under the SGEU plan. Any agreement contemplating the payment of a share of these contributions by the employers would come about as the result of bargaining between the parties.

At least one of the trade unions, on the other hand, takes the position that these employees should immediately be put on the same footing as all other employees in the new bargaining units, which would mean that the cost of the premiums would be borne equally by the employers and the employees.

It is, in our view, necessary to permit the parties to make representations to the Board on this issue before reaching a final determination. In the interim, our primary concern is that adequate LTD coverage should be available to this group of employees. We therefore order that the employees be placed under LTD coverage in accordance with the recommendations made by the Board agents, and that the employees bear the cost of the premiums during the span of this interim Order. In the event the Board comes to the conclusion that there is some cost to be borne by the employers, the interim contributions made by the employees would be taken into account in reaching a final disposition of the matter.

A hearing will be scheduled to allow the parties to make representations concerning this point.

# INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 529, Applicant and PYRAMID ELECTRIC CORPORATION, Respondent

LRB File No. 376-96; June 3, 1997
Chairperson, Beth Bilson; Members: Brenda Cuthbert and Diane Pitchford

For the Applicant: Drew Plaxton
For the Respondent: Brian Kenny

**Successorship - Jurisdiction of Board - Extra-territorial sale of business - Board delays application for production of documents pending determination of issue of Board's jurisdiction to apply successorship provisions where sale of business took place outside Province - Board invites parties to address jurisdictional issue.**

***The Trade Union Act*, s. 37.**

## REASONS FOR DECISION

## PROCEDURAL RULING

**Beth Bilson, Chairperson:** The International Brotherhood of Electrical Workers, Local 529, has brought an application alleging that Pyramid Electric Corporation has committed an unfair labour practice by declining to recognize the Union pursuant to s. 36 of *The Trade Union Act*, R.S.S. 1978, c. T-17. In seeking to be recognized as the bargaining agent for certain employees, the Union claimed that this company is a successor employer to Sparrow Electric Ltd., an employer named in a certification Order issued by this Board on November 2, 1993. At the time the certification Order was issued, the company was in receivership, with the firm of Coopers & Lybrand acting as receiver.

Pyramid Electric Corporation is based in Alberta and involved in construction projects in a number of provinces, including Saskatchewan.

Counsel for the Union made a request for particulars and the production of documents in connection with the application, in which they asked for a wide range of documentation relating to the business activities of the Employer, and in particular relating to whatever disposition there may have been transferring any part of the business of Sparrow Electric Ltd. to the Employer.

In responding to the request for particulars and documents, counsel for the Employer provided the Union with certain information related to business activities carried on in this province, but denied any of the operations of the Employer in Alberta are relevant to these proceedings. Counsel for the Union then requested a hearing so that the Board could rule on whether further particulars should be provided.

At the hearing, counsel for both parties addressed a number of aspects of the request for particulars. Counsel for the Employer elaborated further on his position that the Union is not entitled to any information about the business activities of the Employer in Alberta. The essence of his argument is that, if the Board were to order the production of documents relating to these activities and were to take them into account in considering the application, this would give s. 37 of the *Act* an extra-territorial effect. He argued that the Board does not have jurisdiction to apply the *Act* in this way.

This argument raised a novel point, and neither party has been able to find any cases in this, or other jurisdictions that have dealt with this issue. Counsel for both the Union and the Employer stated that they would like an opportunity to present more expansive argument on this issue at a future hearing.

We have concluded that the jurisdictional issue is of considerable significance in the context of this application, and we agree that it would not be fair to the parties to determine this issue without allowing them to present further argument on the matter. We have also decided that making any orders for the production of documents prior to determining that issue would be putting the cart before the horse. We therefore propose to invite the parties to present additional arguments concerning the jurisdiction of the Board to make orders relating to the information which the Employer has objected to producing. Following the determination of that issue, we would then be in a position to make orders concerning particulars and the production of documents.

**REGINA EXHIBITION ASSOCIATION LIMITED, Applicant and SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Respondent**

LRB File No. 165-97; June 3, 1997
Vice-Chairperson, Gwen Gray; Members: Bruce McDonald and Judy Bell

For the Applicant: Paul Malone
For the Respondent: Larry Kowalchuk

**Remedy - Injunction - Board refuses to grant interim relief where employer's application does not disclose a probable remedy under *The Trade Union Act* and where balance of labour relations harm does not support issuing of order.**

***The Trade Union Act*, ss. 5.3 and 42.**

## REASONS FOR DECISION

**Gwen Gray, Vice-Chairperson:** Regina Exhibition Association Limited, brought an application for an interlocutory injunction under ss. 5.3 and 42 of *The Trade Union Act*, R.S.S. 1978, c. T-17 seeking to enjoin the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union from declaring, authorizing or taking part in a strike against the Employer until the hearing of the Employer's unfair labour practice application brought in this matter.

The Union is certified to represent a number of different bargaining units, some of which are located at the Employer's place of business at the Regina Exhibition Park. The Board has certified the Union to represent employees employed in the Silver Sage casino (LRB File No. 182-92); in the operations department and box office (LRB File Nos. 202-93 & 212-93); in the finance and administration, agriculture and marketing departments (LRB File No. 058-94); in the racing department (LRB File No. 096-94); in the casino bank department (LRB File No. 168-94); and in the food services department (LRB File No. 118-97).

The Employer acknowledged that it is engaged in collective bargaining with the Union in respect to those employees who are covered by the following certification Orders: LRB File Nos. 168-94, 182-

94, 058-94, and 202-93 and 212-93. In the course of the collective bargaining, the Union served notice to strike with respect to both the casino employees and the operations and administration employees. The Employer countered by serving lock-out notices for both groups and locking out employees who are employed in the events, facilities, security, paid parking, box office and janitorial departments on May 28, 1997. In response, employees in the agridome and administration departments commenced a strike. The lock-out and strike actions were made pursuant to the strike notices served in the units where collective bargaining is being conducted.

There is a dispute between the parties as to whether or not the racing department employees are covered by the collective agreement related to operations and administration employees which the Board is not required to comment on in this application.

Food service employees were certified by the Board on April 24, 1997. They work in three lounges and a restaurant that are operated by the Employer at the Park and they provide the catering staff for special functions held at the Park. The material filed by the Employer indicates that no notice to bargain has been served on the Employer by the Union with respect to those employees covered by the certification Order LRB File No. 118-97.

The Union posted a notice of meeting during the week of May 12, 1997 at the workplace which indicated that a meeting of food services staff would take place on May 15, 1997 to elect shop stewards and a bargaining committee, and to conduct a strike vote. A strike vote was taken at the meeting, subsequent to which the Union served on the Employer a notice of strike on May 16, 1997 which read as follows:

> *This is written notice in compliance with Section 11(6) of the Trade Union Act on behalf of all employees of the Food Services Department, Regina Exhibition Association Limited, in Regina, Saskatchewan, that a strike will commence on Sunday, May 18, 1997 at 12 noon. It shall include, without limiting the generality of the foregoing, activities such as work to rule, slowdown, study sessions, overtime bans and any other combination thereof and will include all reasonable definitions of the term "strike".*

The Employer alleges in its application for an unfair labour practice that the strike vote and notice of strike are null and void as no bargaining has taken place as required by s. 11(2)(d) of the *Act*. In this application, the Employer seeks an interim order to restrain strike action until a full hearing of the unfair labour practice. No strike action is alleged to have been taken by the food services bargaining unit.

The Union argues that the employees are entitled to serve strike notice and to engage in strike activity without serving notice to bargain or engaging in collective bargaining because they are "affected by the collective bargaining" within the meaning of s. 11(2)(d) of the *Act* because the Employer has acknowledged to the Union that it is concerned that a settlement of the agreements currently in dispute will affect the outcome of negotiations with the remaining bargaining units.

The relevant provisions of *The Trade Union Act* are as follows:

> *2(j.2) **"lock-out"** means one or more of the following actions taken by an employer for the purpose of compelling employees to agree to terms and conditions of employment:*
>
> > *(i) the closing of all or part of a place of employment;*
> > *(ii) a suspension of work;*
> > *(iii) a refusal to continue to employ employees;*
>
> *2(k.1) **"strike"** means any of the following actions taken by employees:*
>
> > *(i) a cessation of work or a refusal to work or to continue to work by employees acting in combination or in concert or in accordance with a common understanding; or*
> > *(ii) other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output or the effective delivery of services;*
>
> *11(2) It shall be an unfair labour practice for any employee, trade union or any other person:*
>
> > *(d) to declare, authorize or take part in a strike unless a strike vote is taken by secret ballot among the employees who are:*
> >
> > > *(i) in the appropriate unit concerned; and*
> > > *(ii) affected by the collective bargaining;*

> *and unless a majority of the employees voting vote in favour of a strike, but no strike vote by secret ballot need be taken among employees in an appropriate unit consisting of two employees or fewer;*

On an application for an interlocutory order, the Board is not asked to determine the final outcome of the unfair labour application and it should be cautious not to assume that the evidence or legal arguments have been fully and completely presented in the course of the very brief hearing.

The Board's task essentially is to determine if the applicant has satisfied the Board in its materials that its assertions, if true, would arguably entitle it to a remedy before the Board and if the applicant has satisfied the Board that the balance of labour relations harm favours granting the application.

In this instance, the Board finds that the Employer has not satisfied the Board that the taking of a strike vote and serving of strike notice prior to the commencement of collective bargaining is on its face likely to result in a remedy before this Board.

The *Act*, unlike labour relations legislation in other Canadian provinces, places few restrictions on the right to strike. Section 11(2)(d) of the *Act* requires a union to conduct a strike vote prior to commencing a strike. Section 11(6) of the *Act* requires the union to provide the employer and the Minister of Labour with 48 hours advance notice of strike action. Section 44(1) of the *Act*, which was added to the Act by the amendments contained in the *Statutes of Saskatchewan, 1983*, c. 81, s.14, prohibits strikes during the term of a collective agreement. Until the addition of s. 44 of the *Act*, strikes were permitted in Saskatchewan during the term of a collective agreement provided, of course, that no other contractual ban on strikes existed. There are no provisions in the *Act* requiring the parties to a collective agreement to submit their collective agreement disputes to conciliation or mediation or to obtain government permission in any form prior to commencing strike action. Compared with other jurisdictions, the use of the economic weapon of strike or lock-out under the regime established by the *Act* is relatively unregulated.

In this context, the decision by a trade union to request a strike vote from its members and the serving of strike notice prior to engaging in collective bargaining is not an obvious violation of s. 11(2)(d) of

the *Act*. The provision requires that a strike vote be taken prior to commencing strike activity but does not make the taking of a strike vote itself or the serving of notice of strike a violation of the *Act*. The Board does not interpret s. 11(2)(d) of the *Act* as setting any limits on when a union can conduct a strike vote, except that it must provide notice to its members of the date and time of the meeting at which the strike vote will be taken in accordance with s. 36.1(2) of the *Act*.

Counsel for the Employer referred to two previous decisions of the Board to support the view that collective bargaining was a prerequisite to conducting a strike vote and serving notice of strike. In *Retail, Wholesale and Department Store Union, Local 454 and Bi-Rite Drugs Ltd. et al.*, [1987] Mar. Sask. Labour Rep. 35, LRB File Nos. 293-86 & 294-86, the Board held as follows, at 43:

> *Although there are various references in the Act to "strike" and "lock-out", nothing in the Act and certainly nothing in Section 11, subsections (6) and (7), constitute each concerted employee action a separate strike or each employer response a separate lock-out. The Act as a whole contemplates the following sequence of steps to be taken by unions:*
>
> *(1) to bargain collectively i.e. to negotiate in good faith.*
>
> *(2) to conduct a strike vote by secret ballot in accordance with Section 11(2)(d).*
>
> *(3) to notify the employer of the date and time of an intended strike.*
>
> *(4) a 48 hour waiting period; and*
>
> *(5) strike activity.*

The same quotation was repeated in *Holiday Inn Ltd. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1989] Spring Sask. Labour Rep. 41; LRB File Nos. 179-88 & 180-88. In the *Bi-Rite Drugs* case, *supra*, the issue before the Board was whether the Union was required to provide the Employer with notice in accordance with s. 11(6) of the *Act* on each occasion that its members engaged in concerted activity. In the *Holiday Inn Ltd.* case, *supra*, the Board addressed the issue of the validity of a strike notice that had been given some one year after the taking of a strike vote. In that instance the Board referred to the quotation cited above from the *Bi-Rite Drugs* case, *supra*, and

placed the comments in somewhat stronger terms than they were originally stated. Prior to referring to the quotation from the *Bi-Rite Drugs* case, *supra*, the Board stated, at 43:

> *The Trade Union Act now requires a fairly straight forward series of steps to be taken prior to strike action. In Bi-Rite Drugs Ltd., LRB File No. 293-86, the Board described the sequence as follows:*
> ...

However, the Board was not required in either case to determine if a strike vote can be conducted and notice of strike served prior to engaging in collective bargaining. The Board was outlining in a general way the progress of bargaining from the commencement of negotiations to the service of strike notice. The conduct of the Union in this case may place the Employer at a distinct disadvantage in entering into negotiations with the Union with respect to this bargaining unit. The Union's tactics may be designed to increase the pressure on the Employer to settle the contract quickly; they may be designed to test the membership strength for the Union; they may, as likely is the case in this instance, be designed to show solidarity with other employees who are in a lock-out and strike position. However, it is not obvious that such conduct constitutes a violation of s. 11(2)(d) of the *Act*.

The Board's findings in this regard do not address the question of whether the Union's conduct constitutes a possible failure to bargain in good faith as that matter is not before the Board on this application.

The second aspect of the Board's evaluation of an application for an interim order involves the question of the balance of labour relations harm. In this case, even if we had found that the conduct complained of was likely to entitle the Employer to a remedy under the *Act*, the Board is of the view that the balance of labour relations harm does not support the issuing of an interim restraining order. The vote was conducted on May 15, 1997 with notice provided to the Employer on May 16, 1997. No strike activity has been engaged in by the food service staff. Although they have not engaged in direct collective bargaining with the Employer, it would be naive to think that the food service employees did not have an interest in the outcome of the bargaining that is currently being carried on with respect to the other bargaining units. The Union may well be using the strike vote in the food services bargaining unit as a method of putting additional pressure on the Employer with respect to the bargaining in other

units. This pressure is part of the expected give and take of bargaining in a multi-unit bargaining structure involving one employer and one union. In this context, the Board does not view the Union's tactics as causing the degree of harm that would require the Board to restrain on an interim basis any strike activity, especially since there has been no strike activity undertaken to date.

The Board dismisses the application for an interim order. The main application will be scheduled for hearing on June 10, 1997 in conjunction with LRB File No. 149-97.

**UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant and PEAK MANUFACTURING INC., Respondent**

LRB File No. 002-97; June 19, 1997
Chairperson, Beth Bilson; Members: Bruce McDonald and Judy Bell

For the Applicant: Drew Plaxton
For the Respondent: Bill Turnbull

**Unfair labour practice - Interference - Communication - Board decides that statements made at bargaining table did not constitute improper communication.**

**Unfair labour practice - Duty to bargain in good faith - Board decides that employer has not failed or refused to bargain.**

***The Trade Union Act*, ss. 11(1)(a), 11(1)(c).**

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** The United Food and Commercial Workers, Local 1400, was designated by this Board in a certification Order dated April 2, 1996 as the bargaining agent for a unit of employees of Peak Manufacturing Ltd. The Union has filed an application alleging that the Employer has committed unfair labour practices and violations of ss. 11(1)(a) and 11(1)(c) 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;*
> >
> > ...
> >
> > *(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 allegations made in the application have their source in events which took place during the course of negotiations between the parties. The most important allegation is that the Employer has failed or refused to bargain within the meaning of s. 11(1)(c) of the *Act*. It should be noted that "bargaining collectively" is defined as follows in s. 2(b) of the *Act*:

> *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;*

The additional allegations concern certain statements and actions of the Employer during the time negotiations took place.

The Employer operates a plant in North Battleford for the manufacture of recreational vehicles.

The certification Order was initially issued on or about March 28, 1996, and was issued with a correction on April 2, 1996. Shortly after this, the Union sent the Employer a request for observance of the union security provision set out in s. 36(1) of the *Act*. The parties also began to discuss potential meeting dates so that they could commence the negotiation of a first agreement.

The bargaining committees held their first meeting on May 23, 1996. The representatives of the Union were Mr. Don Logan, a staff representative who has acted as chief spokesperson throughout the negotiations; Mr. Glenn Stewart, another staff representative with responsibilities for servicing this unit; and several employees elected by members of the bargaining unit. The Employer was represented by Mr. Gordon Bothner, personnel director, and Mr. Michael Necula, a labour relations consultant whose headquarters is in Edmonton.

The composition of the bargaining teams has remained quite stable, with the exception of one or two changes among the elected employee representatives.

At the bargaining meeting of May 23, 1996, the parties exchanged their respective proposals. According to Mr. Logan, it was evident from the outset that the Union and the Employer were taking very different positions on major issues. Of these, the issues of seniority and wage rates are the most significant.

Mr. Logan acknowledged that the Union does not represent employees in other enterprises exactly like this one. He said that the proposals put forward by the Union were drawn from a number of sources, and contained many provisions common to other kinds of industrial operations.

Mr. Necula and Mr. Bothner testified that they had hoped to set the bargaining process on a constructive and positive course, avoiding both acrimony at the bargaining table and misunderstanding when the agreement was ultimately in place. Mr. Necula said that he has become very committed to the "interest-based" bargaining approach, which he understood to mean an effort by each of the parties to identify and understand the interests and goals which are important to the other. Bargaining is then directed towards maximizing the achievement of the goals of both sides, rather than the defence of particular positions. Mr. Bothner spoke of wishing to foster a bargaining environment directed at the solving of problems.

In describing the nature of their proposals in evidence, Mr. Bothner and Mr. Necula said that the Employer was concerned with maintaining an ability to compete successfully in a difficult market. To this end, what they proposed was a system of compensation, advancement and tenure of employment based to a larger degree on merit than on traditional criteria favoured by trade unions such as uniformity and seniority.

At this first meeting, the representatives of the Employer outlined the business environment in which the enterprise was operating. They alluded to a story in the local newspaper, which they said had vastly overstated the volume of orders for the products manufactured at the plant.

They also expressed concern about the makeup of the Union bargaining committee. The explanation given for this concern by Mr. Necula and Mr. Bothner was that nearly all of the elected employee representatives were from one area of the plant, and they feared having all of these employees absent for meetings would have a negative effect on production. Mr. Logan said that he had not really understood the reason for the objections raised by the Employer; he said that on this and several other occasions when the issue came up, he responded that the employees had a right to choose who represented them at the bargaining table.

The bargaining teams spent some time going through their respective packages and clarifying what was meant by the language of the proposals.

In the course of the meeting, Mr. Logan said that the Union requested certain information from the Employer. This request was confirmed in a letter dated May 24, 1996, which read as follows:

> *As indicated at our meeting of May 23, 1996, the Union requires certain information from the Employer.*
>
> 1. *We have requested that the Employer provide us with each employee's name, job title or classification (whatever describes what work they do), hire date and wage rate.*
>
> 2. *We have requested that the Employer provide us with a list of each employee and their current address and phone number.*
>
> *Also, it appears that the Employer is not complying with our Union Security request, as no new cards have been sent to our Saskatoon office. We are well aware that there has been numerous recent hirings.*
>
> *Trusting all of the above will be forthwith remedied.*

It will be noted that one of the items mentioned in the letter is the alleged non-compliance by the Employer with the union security request made in April of 1996. Mr. Bothner testified that he checked on this, and discovered that, although the Employer had been forwarding signed cards to the Union as requested, some administrative difficulty in the Union office had prevented them being recorded. Mr. Logan conceded that the matter had been cleared up to the satisfaction of the Union, but both he and

Mr. Bothner said that the controversy struck an unfortunate note at the commencement of the bargaining relationship.

In an attachment to a letter dated June 3, 1996, Mr. Bothner provided a list containing the names of employees, their date of hire and current wage rates. He made the following remark in connection with the request for the addresses and telephone numbers of employees:

> *Home addresses and telephone numbers cannot be provided without the individual employee's authorization.*

The parties met again on June 3 and 4, 1996. Mr. Logan said that the Union asked why they were not being provided with the addresses and telephone numbers of employees. Mr. Bothner said that he explained that he understood the wage rates were necessary for proceeding at the bargaining table, and that he thought the Union already had employee addresses on the signed membership cards which had been sent to the Union. He resisted supplying employee telephone numbers without the permission of the individual employees. Mr. Bothner also testified that he understood the Union to be withdrawing the request for any further information about addresses and telephone numbers.

In preparation for these meetings, the Union prepared a "merged document" to show both sets of proposals. At the request of the Employer, the numbering scheme used in the Employer proposals was utilized in the merged document. The parties continued to discuss the proposals, and reached agreement on some items, such as the union security clause, the non-discrimination clause, and some parts of the grievance procedure.

It was clear at these meetings that the parties were taking fundamentally different approaches to the question of seniority. The representatives of the Employer continued to press the concept of merit as the primary standard for advancement and tenure of employment. Mr. Necula said that he saw a seniority system of the kind being proposed by the Union as something which would have to be achieved over many years of bargaining, and not something which a trade union should expect to obtain in the first agreement. According to Mr. Logan, Mr. Necula insisted that many collective agreements

do not have seniority as the basis for personnel decisions, but he refused to produce any actual examples for review by the Union.

In his evidence, Mr. Necula maintained his position that collective agreements which do not use seniority as the basis for decision-making are common. In cross-examination, he conceded that most of the agreements of this kind which he had seen were in the construction industry.

Mr. Logan said that he outlined a variety of models for seniority provisions, but the representatives of the Employer continued to resist the inclusion of provisions which would place importance on seniority as a factor in the making of decisions.

Discussions continued on June 4, 1996, and witnesses for both parties said that agreement had been reached on certain minor items.

On June 5, 1996, Mr. Bothner wrote to Mr. Logan complaining that one of the elected employee representatives on the bargaining committee, Mr. Brad Marchycha, had been sharing information about employee wage rates broadly among employees. Mr. Bothner said that it was company policy to regard wage rates for individual employees as confidential, and that the Employer expected the Union to respect this policy.

Mr. Logan testified that the Union did not think that Mr. Marchycha had done anything improper. He said that the Union did not view wage rates as being confidential, and that it was necessary to confirm with employees that the information provided to the Union concerning wage rates was accurate. He denied that the Union had done this in a way which would constitute an unnecessary breach of privacy.

The bargaining teams met again in the afternoon of June 18, 1996. The representatives of the Union spent some time prior to the meeting formulating their initial wage package, which they conveyed to the Employer negotiators. The meeting recessed in order to allow the representatives of the Employer to respond to this proposal. When the parties met again, the representatives of the Employer rejected the Union wage proposal, and presented a new position of their own. At this time, they removed the wage grid component of their previous position, and proposed that all increments above the start rate be based

on productivity. The Union stated their view that this was, in fact, a move backwards from the previous Employer offer.

The parties also returned to the seniority issue. According to Mr. Logan, Mr. Necula expressed particular concern at the absence of reference to "skill" as a factor in the proposals from the Union.

The discussions continued on June 19, 1996, and the issues of wages and seniority were once more the focus of the discussion. Mr. Logan testified that the Union representatives felt that no progress was being made on these issues, and they did not see any means of moving the discussions forward. Therefore, they proposed that the parties request the assistance of a conciliator.

The Employer rejected this suggestion. In his own evidence, Mr. Necula, who had some experience as a conciliation officer in Alberta, said that he felt an approach to a conciliator would be premature, and would merely have the effect of freezing the bargaining process. He said it would be difficult for a conciliator to gain an understanding of the bargaining positions of the parties without considerable delay. His experience suggested to him that the most effective use of conciliation could be made at a later stage of the bargaining sequence.

Mr. Bruce Craig, company controller, was present later in the meeting to provide information about some of the cost issues related to bargaining. Mr. Logan testified that the Union presented a new version of a seniority provision, which included reference to "skill and ability," in an effort to move toward the company position; this provision was rejected by the Employer.

Mr. Logan also testified that the Union should remember that they were operating from a position of "50\50" support. Apparently this was a reference to information concerning the level of support which had been the basis for the certification of the Union; this information had been provided to the Employer, in error, by the Union at an earlier time.

Taking into account various holiday periods and the plant shutdown, the parties were unable to identify meeting dates before September of 1996. They did continue to exchange correspondence on certain

items. In a letter dated June 21, 1996, Mr. Bothner, among other things, requested written confirmation from the Union that the Employer had been in compliance with the demand for the implementation of the union security provision under the *Act*. He renewed this request on July 12, 1996.

In a letter dated July 15, 1996, Mr. Logan responded in the following terms:

> *You have indicated that you wish written confirmation that the Union Security (Maintenance of Membership) is being properly complied with.*
>
> *We can confirm that we have received some cards, but cannot confirm accuracy as you have refused to provide the complete name, address, hire date list of each employee as we requested.*

Mr. Bothner replied in a letter dated July 16, 1996, in the following language:

> *I just received your fax in response to my letter of July 12. I was encouraged by your prompt reply, but somewhat discouraged by the contents of the reply. I believe a clarification is in order.*
>
> *The complete list of staff including date of hire and current wage rate was hand delivered to you on the afternoon of June 3, 1996 during the course of contract negotiations. As you will recall we indicated that employee addresses and phone numbers would not be provided as part of this package for the following reasons:*
>
> 1. *Employee addresses and phone numbers are not relevant to these contract negotiations.*
>
> 2. *Addresses are provided on the membership applications which have been promptly submitted according to the Union Security Request.*
>
> 3. *Employee phone numbers are confidential and are not relevant to these contract negotiations.*
>
> *We have promptly complied with your every request in this matter and will continue to do so in the spirit of cooperation, professionalism and maturity. However, I find your attempts to discredit us in the matter of "Union Security" by creating a paper trail based on misinformation immature, unprofessional and counter productive.*
>
> *I understand the origins of Union Management relations are rooted somewhat in the adversarial, confrontational approach. However, taking this approach on absolutely every issue and applying it to every aspect of the relationship contributes nothing to the development of mutual trust and cooperation that is necessary for positive management and Staff/Union Relations.*

> *I trust that we might begin to conduct ourselves in a manner resembling mutual trust and cooperation problem solving. If we don't, I can see this becoming a very trying and tedious relationship for however long that it may last.*

In his testimony before this Board, Mr. Bothner said that the last sentence of this letter was an allusion to his own plan at the time to seek employment with another firm in Alberta. He said he had no intention to suggest that there was any prospect of the disappearance of the Union from the scene, or that this was a development wished for by the Employer.

After some rescheduling, the parties eventually met on September 19, 1996. At this meeting, the Employer raised the issue of a productivity-based wage system. There was some discussion of other issues, and further along in the meeting, the Employer proposed the formation of a joint labour-management committee to devise a productivity bonus system.

Mr. Bothner and Mr. Necula said that what they had in mind was a joint committee which would do a thorough review of the workplace in order to devise standards which could then be the basis for a productivity-based wage system. These standards would be devised in close consultation with employees in order that it would be accepted and workable. They said that they realized it was necessary to foster a sense of "ownership" among employees in order to make such a system work. The involvement of the Union at every stage of the planning would ensure that employee views were taken into account, and that the basis for the productivity criteria was well understood.

Mr. Logan said that, from the viewpoint of the Union, participation in this joint committee would signify that they were agreeing that productivity should be the foundation of the wage system, and they were not prepared to accept this. Though they did not seriously oppose the establishment of a joint mechanism for dealing with some residual issues, the Union was not willing, in the words of Mr. Logan, "to help the Employer draw up their wage proposal." They felt this would compromise their ability to adhere to a fundamentally different position, namely that wages should be based largely on a standard wage grid. Mr. Logan said that the Union committee told the Employer representatives that

they were willing to consider productivity as a secondary element in the establishment of a wage system, but they could not agree to having it as the major factor.

Later in the meeting, the Employer representatives said that it would be necessary to have an interval of four to six weeks before the next meeting so that they could prepare a comprehensive proposal concerning a system of productivity-based compensation. The Union eventually agreed to this, although Mr. Logan said that the Union representatives would have preferred to go back to the discussion of other issues.

Mr. Logan said that he also made it clear to Mr. Bothner and Mr. Necula that, though the Union had no objection to the Employer working on a proposal for a productivity bonus system, they would not be able to contact employees directly about it. Any exchange involving the employees would have to take place at the bargaining table.

Mr. Logan also said that there was some further discussion of the seniority issue, in the course of which Mr. Bothner said he did not really understand what the Union meant by seniority.

According to Mr. Logan, both sides got "pretty angry" during the course of this meeting, and it was difficult to resume any kind of rational discussion.

The next meeting took place on November 4, 1996. The Employer representatives presented their proposal concerning the productivity system. It is obvious from the testimony of witnesses for both parties that this event, and the discussion afterward, was a source of frustration for both sides. Mr. Logan said that the Union expressed plainly the view that the productivity bonus was not a key to an eventual settlement. They wanted to focus the bargaining process on different issues.

From the point of view of Mr. Bothner and Mr. Necula, on the other hand, the development of the productivity bonus proposal represented the result of a significant amount of investigation and discussion on their part. It also represented a proposal which had been ultimately accepted by management at all levels. In this respect, Mr. Bothner and Mr. Necula thought it would be difficult to persuade management to accept any proposal which would require significant changes, or a different set

of assumptions. Mr. Bothner said that they were not prepared for the dismissive response which the proposal received from the Union.

Mr. Logan said that he formed the view that nothing was being accomplished at the meeting. He again suggested the possibility of conciliation, which he said was not rejected outright by the Employer representatives, though they were not, he acknowledged, positively disposed to the idea.

The next day, Mr. Logan wrote a letter to Mr. Terry Stevens, Executive Director, Labour Relations Mediation and Conciliation Branch, Saskatchewan Labour, requesting the assistance of a conciliator. In a letter dated November 7, 1996, Mr. Bothner expressed surprise at this request, but suggested that the parties go ahead with the meeting they had set for November 29, 1996.

After a further exchange of correspondence, the parties agreed to go ahead with their meeting, which was rescheduled to December 5, 1996.

When the parties convened on December 5, 1996, Mr. Necula had been detained and was not present for the first part of the meeting. Mr. Bothner proposed that they proceed, in the absence of Mr. Necula, by going through the outstanding proposals, thus ensuring that both sides had an opportunity to clarify their respective positions.

Mr. Bothner said in his evidence that this approach had disappointing results. The morning session did not provide the opportunity he wished for the review and clarification of positions. Instead, the representatives of the Union kept pressing him for agreement on certain issues, which he felt he did not have authority to give.

Mr. Logan described the session as a frustrating one because Mr. Bothner became evasive whenever the Union asked whether the Employer was ready to agree to a particular item, or what might be required to obtain agreement. He said that there was some further discussion after Mr. Necula arrived in the afternoon, and this was somewhat more satisfactory. The overall assessment of Mr. Logan, however, was that nothing was being accomplished.

Mr. Bothner recalled that there had been further discussion of the seniority issue on the afternoon of December 5, 1996. He said that the representatives of the Employer had been pressing the Union to provide particular examples which might explain why they thought seniority was of such critical importance. He denied that the Employer asked for examples which would identify individual employees, but said they wanted to gain some understanding of the kinds of problems which a seniority provision was intended to address.

He said that the Employer did mention the seniority system in place at Travelaire, a competitor company based in Alberta. At that plant, according to Mr. Bothner, accrual of seniority and entitlement to benefits begins after employees have been working for 34 consecutive weeks. Because of the seasonal nature of the business, many employees are laid off for significant periods and few employees ever qualify for seniority or benefits under this system. He said that he wished to contrast this with the approach preferred by the Employer, which is to provide employment year round. Nonetheless, he said the Union seemed to be interested in this model, and it was taken into account in formulating further proposals.

The talks adjourned, with January 29, 1997, being set for the next meeting. It was agreed that the parties should continue exchanging correspondence in an effort to see whether they could agree to any items in the interim.

On December 19, 1996, Mr. Logan forwarded to Mr. Necula a document in which he summarized the position of the Union on all issues, including those on which agreement had been reached. This document clearly indicated that the Union was rejecting the productivity incentive plan advanced by the Employer.

In giving evidence, Mr. Logan stated that by this time the Union had concluded that the Employer was not really interested in reaching a collective agreement, and they filed this application on January 10, 1997. Mr. Bothner and Mr. Necula testified that there had been no forewarning of this development, which came to their notice on January 14 or 15, 1997.

In any case, on January 14, 1997, Mr. Necula sent a letter to Mr. Logan asking for clarification of some of the items in the letter dated December 19, 1996, outlining the Union bargaining position. The final paragraph of the letter read as follows:

> *Peak Manufacturing Inc. is very disappointed with the lack of meaningful changes in UFCW's position on any of the substantive issues which remain to be negotiated! The preparation of a reasonable counter proposal by the Employer to UFCW's December 19th modified positions document, is highly dependent on progressive positions being received from your Union, at this stage in negotiations.*

Mr. Logan replied in a letter dated January 15, 1997 which provided some of the clarification requested by Mr. Necula.

In a letter dated January 28, 1997, Mr. Bothner wrote to Mr. Logan as follows:

> *As we are concerned that going to Court over this issue may be detrimental to Union/Management relations, and that it has the potential to both contaminate and prolong the bargaining process, I would offer the following proposal:*
>
> *1. We continue to bargain within the context of a common interest problem solving format.*
>
> *2. If significant progress is not made during our next two sessions (including January 29 session) of bargaining, the Employer will agree to conciliation.*
>
> *3. The Union agrees to withdraw the Unfair Labour Practice referred to above.*
>
> *I feel that this proposal will contribute greatly to the continuance of positive bargaining and the reaching of a mutually beneficial agreement while maintaining positive Union/Management relations.*

Mr. Logan said that he did not think he had received this letter until January 29, 1997, when it was read to him over the telephone by a secretary at the Union office. This, he recalled, was shortly before the parties met to bargain.

Both parties agreed that modest progress had been made at the meeting on January 29, 1997. Mr. Bothner said that he felt the negotiations were "back on track." There was useful discussion of a number of issues, and some agreed upon.

On January 29, 1997, Mr. Logan gave Mr. Bothner a handwritten letter responding to the letter dated January 28, 1997. This letter was in the following terms:

> *The Union does not agree to your letter. We will not agree to have the Company set the agenda for negotiations.*
>
> *We feel that this is simply another method to drag out the bargaining process. We believe we are now past the point of conciliation, and will be seeking an agent appointed by the board under section 42 of The Trade Union Act. This does not mean that we will not co-operate by having a conciliator, however, this alone does not solve the problem.*
>
> *We gave you our last position, in writing, on December 19, 1996. Here we are, five weeks later, and you are only now considering our December 19, 1996 position.*
>
> *We are not withdrawing our U.L.P. However, if a first contract were reached prior to the hearing, we may reconsider our position.*

In response, Mr. Bothner sent a letter dated January 30, 1997, which read as follows:

> *As has become almost a regular occurrence, I must make a clarifying response to your letter of January 30, 1997.*
>
> 1. *We were not attempting to "Set the Agenda for Negotiations." In fact, we were presenting a possible alternative solution to a concern you have expressed regarding the progress of negotiations.*
>
> 2. *You mentioned that "This is Simply Another Method to Drag Out the Bargaining Process." On the contrary, we saw acceptance of our proposal as a method of expediting the bargaining process, by removing a possible distraction to productive negotiations.*
>
> 3. *Your comment "5 Weeks later, and You Are Only Now Considering Our December 19, 1996 Position" needs clarification. On December 5, 1996 it was agreed that our next bargaining session would be January 29, 1997, and in the interim further negotiating would be conducted by fax. This was done via your fax of December 19, 1996, stating your position on all items, Michael Necula's fax requesting clarification on January 14, 1997 and your response to him on January 15, 1997.*
>
> *At the start of bargaining on January 29, 1997, we requested further clarification of your position on five separate items. The clarification that you provided at that time allowed us to provide a proper response.*

> *I felt very positive about the progress of negotiations yesterday. We settled a number of outstanding items, clarified positions on others, and clarified other problems that I am sure mutually agreeable solutions can be found.*
>
> *We look forward to continuing with meaningful negotiations.*
>
> *I would also urge that we try to resolve the Unfair Labour Practice Allegation at the earliest possible date.*

Mr. Logan sent a further letter the same day, which read as follows:

> *We do not agree to the contents of your letter of earlier this afternoon (January 30, 1997).*
>
> *Perhaps we could divert our respective energies into negotiating a Collective Agreement, rather than sending fax missiles at each other with what will likely be an unimpressed audience.*

Early in March of 1996, the parties agreed to the selection of a conciliator, Ms. Michaela Keet, and a first meeting had been set with her for March 27, 1997, some time after this hearing.

The story, as we have just outlined it, does not, of course, do justice to all of the elements and nuances of the dealings between the parties up to this point. We are satisfied, however, that it serves to convey the flavour of the negotiations, and to identify the issues which were of most significance in the context of the bargaining.

This Board has often commented on the significance of the obligation to bargain collectively in the context of the statutory scheme set out in the *Act*. In a decision in *Saskatchewan Government Employees' Union v. Government of Saskatchewan*, [1993] 1st Quarter Sask. Labour Rep. 261, LRB File No. 264-92, the Board made this comment, at 267:

> *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.*

The Board went on to describe what it understood to be its role in policing the observance of this duty by the parties to collective bargaining relationships, at 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.*

The Ontario Labour Relations Board commented on this point as follows in *Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers v. Canada Trustco Mortgage Company*, [1984] O.L.R.B. Rep. Oct. 1356, at 1364:

> *One cannot quarrel with the proposition that the "duty to bargain in good faith" must encompass an obligation to engage in informed and rational discussion, and in exceptional circumstances an employer's position at the bargaining table may be so patently unreasonable or devoid of apparent business justification as to evidence a desire to avoid any collective agreement altogether. So may an unexplained retreat from a previous agreed position, or the untimely insertion of new issues into the bargaining process. However, the Board must be careful that in adjudicating disputes and giving a reasoned elaboration for its decisions, it does not impose its own model of decision-making as the normative standard for the collective bargaining process. Collective bargaining is not simply a matter of presenting proofs and reasoned arguments in an effort to achieve a favourable outcome, nor is that outcome necessarily arrived at, or explained, by a logical development from given and accepted premises. It is a process in which reason plays a part - but not the only part. There may be a range of potential outcomes or solutions and the ultimate result may have more to do with economic strength than abstract logic. In particular collective bargaining situations there simply may not be any commonly accepted principles or criteria and, in consequence, no objective basis for distinguishing a "claim of right" from a "naked demand". Reason and self-interest are inextricably intertwined. Ultimately the parties may reach agreement only because of a realistic appraisal of the value of their objectives in relation to their ability to obtain them, including the costs they are able to inflict on one another. It may have little to do with what some outsider might consider a "fair" settlement, or a just allocation of rewards to capital and labour.*

In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Ltd.*, [1993] 3rd Quarter Sask. Labour Rep. 162, LRB File No. 157-93, the Board made the following observation, at 173:

> *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.*

The Board went on to say, at 174:

> *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 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.*

That case involved a particularly difficult set of negotiations, aggravated by the decision of that employer to close the enterprise which was the subject of bargaining. The Board summarized their conclusions in this way, at 177:

> *It is beyond question that the process of bargaining which took place between these parties was protracted, difficult and, to date, fruitless. The degree and quality of communication between them, especially since the beginning of 1993, has been dismal; they have latterly almost ceased to communicate with each other directly at all. The approach taken by both sides to the bargaining of this agreement is not of a kind which would be used as an example in a manual on negotiating. In addition to their unsatisfying interchange at the bargaining table, the parties have carried various issues to the courts, to this Board, to a mediator and to others in an attempt to have*

> *their rights established and their differences solved, all, it must be said, to little avail. The bargaining power of the parties has been altered significantly over time, and this has played a part in the confusion and mistrust which has arisen.*
>
> *In the face of all of this, the Board cannot find that the Employer should bear exclusive responsibility for the inconclusiveness of the negotiations. We are not persuaded that the Employer should alone shoulder the blame for the bleakness of the current situation. We cannot conclude that the Employer has tried to avoid reaching an agreement or to evade its bargaining obligations, however forcefully it has deployed its undoubted bargaining power. We must therefore dismiss the application brought under s. 11(1)(c) of the Act.*

We might allude to numerous other instances in which the Board has expressed views on the nature and scope of the duty to bargain collectively. It should be clear from the passages to which we have just referred, however, that the Board attaches great significance to this obligation as a key element of the scheme outlined in the *Act*. It should also be clear that we are reluctant to be drawn into monitoring the performance of this obligation in a way which would intrude into the bargaining relationship between the parties, or which would affect the substantive outcome of the bargaining process.

In *University of Saskatchewan Faculty Association v. University of Saskatchewan*, [1989] Fall Sask. Labour Rep. 52, LRB File No. 254-88, the Board expressed this reluctance clearly, at 57:

> *It is not the Board's role to attempt to determine whether any particular demand by either party is reasonable. So long as it is not designed to ensure failure and can be lawfully agreed upon, the "reasonableness" of any demand is for the parties to assess in the context of collective bargaining. No matter how strained the relationship between the parties may be, no matter how difficult the communications, and no matter which party bears the most responsibility for the problem, the only place a settlement can be achieved will be at the bargaining table.*

The Board has, of course, acknowledged that the inauguration of a new collective bargaining relationship creates a special situation. In *United Food and Commercial Workers v. Madison Development Group Inc.*, [1996] Sask. L.R.B.R. 75, LRB File No. 131-95, the Board made the following comment, at 106:

> *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.*

On the other hand, as this quotation itself intimates, the Board remains cautious about heavy-handed intrusion into the bargaining process even in the circumstance where a first agreement is being negotiated.

Counsel for the Union argued that there is a close comparison between the circumstances which resulted in a finding in the *Madison Development Group* case, *supra*, that the employer had failed to bargain collectively and the situation before us here. He drew attention to such common features as a resistance on the part of both employers to the involvement of a conciliator, and periods of delay between bargaining sessions.

In that case, the Board made the following comment, at 106:

> *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.*

Although there are certainly parallels which can be drawn between the bargaining and the parties in the *Madison Development Group* case, *supra*, and that which has taken place here, we do not see the situations as having sufficient similarity as to justify a finding of failure to bargain in this instance.

It certainly cannot be said that bargaining has gone well in this case. Indeed, one has some sympathy for the disappointment and frustration on both sides with the relatively slow progress towards a collective agreement.

The Union has followed a fairly conventional approach in making their proposals and in responding to the overtures made by the Employer. They put forward an initial package of proposals, following the format of a draft collective agreement, and they anticipated that bargaining would unfold in a way with which they were familiar. They expected that the Employer would put forward a set of proposals, and that they would eventually move towards an agreement acceptable to both sides.

The Employer chose to adopt a somewhat different approach, which they have characterized as "interest-based" bargaining. It is not altogether clear how they envisioned this process. In much discussion of interest-based bargaining, emphasis is placed on the desirability of engaging in a free-ranging and broadly-based discussion of the priorities and objectives of the parties before they make any specific proposals. In this case, the parties both presented sets of proposals at the initial meeting and, in that respect, they did not have an opportunity to address the question of interests independent of the positions they adopted on particular bargaining issues.

As far as several major issues were concerned, the Employer formulated proposals which represented a departure from the kind of terms and conditions of employment with which the Union was familiar. Indeed, it seems safe to say that proposals for a system of personnel decision-making based on something other than seniority, and a system of compensation based on something other than a standard wage grid, would represent a departure from the majority of collective agreements which have been concluded in this province.

With respect to the question of seniority, the exception to this proposition is, of course, in the construction sector. Because of the transient nature of most employment in construction, seniority is

not a particularly useful criteria for trade unions wishing to provide a uniform basis for the hiring, layoff and advancement of their members; instead, they have generally relied on a hiring hall system. It is possible that the experience of Mr. Necula in the construction industry made it difficult for him to appreciate the significance which the Union attached to seniority as a crucial element which they wished to have enshrined in the collective agreement.

We cannot find, however, that the aspiration of the Employer to include novel or unfamiliar components in the collective agreement is necessarily a sign that they were not bargaining in good faith, or that they wished to undermine the influence of the Union.

Unlike the *Madison Development Group* case, *supra*, we do not view the efforts made by the Employer as insincere or derisive. When they met with the Union, we are persuaded that the discussions, though the results were disappointing to both parties, represented a real effort to make progress towards a collective agreement. There was no attempt to truncate the meetings which were held, or to cut off what discussion was taking place. Though there were some lengthy intervals between meetings, these delays cannot be laid exclusively at the door of the Employer.

Each party took positions which seem to have been mysterious to the other, and they do not seem to have been successful in finding a way of preventing misunderstandings. To Mr. Bothner and Mr. Necula, the dismissive attitude of the Union to the approach taken in the Employer proposals represented rigidity and a lack of willingness to adopt a problem-solving approach. To the representatives of the Union, it seemed necessary to reject the approach taken by the Employer wholesale or they would risk giving up values which they considered important. They further found inexplicable the inability of the Employer to understand why they considered seniority and a standard pattern of wages to be vital to setting the collective bargaining relationship on a sound footing.

Given the communications gulf which has separated the parties, it is not too surprising that their efforts to conclude a collective agreement have been frustrating and painful. We do not find that the Employer has acted in a way which suggests that they have as one of their objectives the weakening of the Union

or a repudiation of their obligation to bargain. Neither do we find that the Employer has been so handicapped by inexperience or incompetence that they have failed to bargain.

We have concluded that the Employer was sincere, though perhaps somewhat naive, in attempting to put bargaining on a footing which they hoped would be innovative and more constructive than "normal" bargaining. In contrast to the findings of the Board in the *Madison Development Group* case, *supra*, we do not think this is a case where the Employer was intending to delay or frustrate the bargaining process.

For example, the Union cited the refusal of the Employer to provide the addresses and telephone numbers of employees, an issue on which the Board made the following comment in the *Madison Development Group* decision, *supra*, at 112:

> *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.*

Given the observations we have made, it is possible that this is an issue which will have to be sorted out between the parties over time. When one examines the evidence concerning the course taken by the discussions on this issue, it does not seem to us that the responses of the Employer were unreasonable or surprising. The issue was first raised in combination with the request made by Mr. Logan for information about wage rates. It may be recalled that at the time this matter was raised, there was also some confusion as to whether the Employer was complying with the union security request made by the Union.

The Employer supplied information concerning the wage rates for individual employees, along with their names and dates of hire. Mr. Bothner testified that he thought this was the information which was required to permit the parties to embark on bargaining concerning compensation. He said he also thought the solution of the confusion about whether the Employer had been sending in signed union cards had met the concern underlying the request for addresses and telephone numbers; he said that the provision of signed union cards for employees would make available to the Union the addresses of employees.

The evidence of Mr. Logan suggested that he had renewed his request for addresses and telephone numbers on one or two occasions at the bargaining table. Mr. Bothner acknowledged that he had expressed the reluctance of the Employer to supply telephone numbers without the permission of individual employees. He said, however, that he thought the resolution of the union security issue, and the provision of the wage information, cleared up the most pressing aspects of the matter.

He further said that he interpreted the Union proposal concerning the maintenance of a seniority list as signifying that the Union had retreated from their insistence on the telephone numbers. This proposed provision read as follows:

> *The Employer shall maintain a seniority list showing the name, classification, address, phone number and date of hire on which each employee's service began. An up to date seniority list shall be supplied to the Union and posted on the bulletin board in January and July of each year. The list that is posted will not contain home addresses and phone numbers.*

Mr. Bothner said he read this clause as contemplating that the Employer would maintain a seniority list recording a number of items of information, including employee addresses and telephone numbers. This would be distinct from the version of the list which would be supplied to the Union, and also posted in the workplace; this version would not contain the addresses and telephone numbers.

Whether or not this would constitute a definitive reading of the clause, and whether or not it was what the Union had in mind, it cannot be said that this was an unreasonable interpretation of the provision.

The context and substance of the references to employee addresses and telephone numbers changed in focus over time, and we do not think the reaction of the Employer was indicative of a desire to undermine the Union. Rather, the Employer was making efforts to arrive at a resolution of several different kinds of issues with the Union. Indeed, Mr. Bothner said that he had not thought of the question of employee addresses and telephone numbers in the way put to him at the hearing, and he did not rule out further consideration by the Employer of their position in this light.

Another parallel which was drawn by counsel for the Union with the *Madison Development Group* decision, *supra*, concerned the question raised by the representatives of the Employer about the composition of the Union bargaining committee. Certainly, we stated in that case that the choice by employees of who is to represent them at the bargaining table is not a decision in which the Employer can expect to play a role.

In this case, however, the question raised by the Employer arose from a specific and legitimate concern about the effect on production in the plant of the withdrawal of a disproportionate number of employees from one area. The Employer asked for co-operation from the Union on this issue, but did not press the point when the Union reiterated their intention to include on the bargaining committee those employees - whatever area of the plant they came from - who had been elected by the employees to represent them. Again, we do not think this was suggestive of a desire on the part of the Employer to repudiate their obligation to bargain or to undermine the Union as the bargaining agent for the employees.

For the reasons we have given, we have concluded that the application insofar as it is based on an allegation of violations of s. 11(1)(c) of the *Act*, must be dismissed.

The Union has also alleged that certain statements made by the Employer were in violation of s. 11(1)(a) of the *Act*. Counsel for the Union did not catalogue specific statements in this connection. From the comments he made in support of this point, we gather that he was referring to the allusion by Mr. Necula to the fact that the Union enjoyed only "fifty-fifty" support, to the heated reaction of the Employer to the discussion of the wage rate information among employees, and possibly to the references by Mr. Necula to Alberta labour legislation. Counsel argued that these statements constituted interference in the exercise by employees of their rights under the *Act*.

It is clear that communications between the parties have not been easy, and that the discussion of certain issues has been productive of offence and misunderstanding. As we noted earlier, the reference to the "fifty-fifty" support position came about because the Union had transmitted information concerning the level of employee support to the Employer in error. Thus, though such an allusion might ordinarily be regarded by this Board as suspect, we did not read anything sinister into it in this context.

It must also be remembered that the statements of which the Union has complained were made by representatives of the Employer at the bargaining table, and not communicated to individual employees. It is our view that representatives of the parties must be given some latitude in expressing themselves when negotiating teams meet for the purpose of bargaining. The escalation of tension, the utterance of ill-considered, hostile or downright offensive remarks, and the ready response in kind, are not uncommon features of bargaining discussions. If these characterize a bargaining relationship to too large an extent, the parties may pay some price in terms of their ability to make effective progress towards reaching an agreement. Sustained and overt hostility expressed by one party towards the other may, on occasion, be a clue which the Board may do well to consider in deciding whether the offending party is bargaining in good faith, but we do not think any purpose would be served by monitoring too closely or censoring too harshly the exchanges which take place between parties at the bargaining table.

We have therefore decided that the allegation of violations of s. 11(1)(a) of the *Act* must also be dismissed.

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

LRB File No. 053-96; June 27, 1997
Chairperson: Beth Bilson; Members: Bob Cunningham and Hugh Wagner

For the Applicant: Drew Plaxton
For the Respondent: Kevin Wilson

**Arbitration - First collective agreement - Board reiterates position that Board should not intervene on all issues which were covered in recommendations of Board agent.**

**Reconsideration - Policy - Board dismisses application for reconsideration of earlier decision identifying issues on which Board will intervene in first contract arbitration application.**

***The Trade Union Act*, s. 26.5.**

### REASONS FOR DECISION

### APPLICATION FOR RECONSIDERATION

**Beth Bilson, Chairperson:** The United Food and Commercial Workers, Local 1400, has been designated in a certification Order as the bargaining agent for a unit of employees of Madison Development Group Inc. at the Madison Inn. On March 11, 1996, the Union filed an application seeking the assistance of the Board in the conclusion of a first collective agreement pursuant to s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17.

Shortly after receiving the application, the Board appointed an agent, Mr. Fred Cuddington, whose mandate was to assist the parties in attempting to conclude a collective agreement and, failing that, to make recommendations to the Board. Mr. Cuddington submitted a report to the Board on September 10, 1996.

The Employer raised a series of preliminary objections related to the status of the recommendations and the commentary made by Mr. Cuddington in his report. It is not necessary here to review the course of

those proceedings as they are described in a decision of the Board reported at [1996] Sask. L.R.B.R. 777.

At a hearing on December 19, 1996, the Board heard representations from the parties concerning their respective positions on the wisdom, legitimacy and potential scope of intervention by the Board under s. 26.5 of the *Act*. In a decision dated January 22, 1997, which was reported at [1997] Sask. L.R.B.R. 68, the Board stated the basis for further intervention in the conclusion of a first collective agreement. The Board enumerated a number of issues for further consideration and, in addition, articulated several specific terms which would be included in the collective agreement.

The Union has now asked the Board to reconsider this decision, and these Reasons deal with that request.

The Board outlined the basis for reconsideration of Board rulings or decisions in *Remai Investment Corporation 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. In that case, the Board made the following comment, at 106:

> *In spite of 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 s. 21of 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 *Sharon Ruff* decision, *supra*, the Board pointed to the criteria developed by 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, as being helpful in assessing the circumstances in which reconsideration of a decision is appropriate. In this case, counsel for the Union suggested that two of these criteria are relevant. These criteria were stated as follows in the *Overwaitea Foods* decision, *supra*, at 14,417:

> *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;...*
>
> *6. if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon or change.*

Counsel for the Union argued that the January 22, 1997 decision of the Board should be reconsidered on the grounds that it represented an important policy choice on the part of the Board in formulating an approach to applications under s. 26.5 of the *Act*; he said that the Board should revisit the decision because the choice made by the Board not to address all of the issues canvassed in the report of Mr. Cuddington is inconsistent with earlier observations made by the Board and with sound collective bargaining policy. By failing to include all of the items referred to in the recommendations of the Board agent in a final collective agreement, the Board would create a collective agreement which was incomplete, and in which a number of issues would "fall through the cracks."

He further argued that the decision had unanticipated consequences. In this respect, he said, the Union had been caught off guard by the decision of the Board not to address all the issues contained in the draft terms proposed by Mr. Cuddington. This robbed the Union of an opportunity to make appropriate representations concerning all of the issues outstanding between the parties; the Union had assumed that the recommendations in the report of the Board agent might be considered the default position for the conclusion of the final agreement.

Counsel for the Union referred the Board to the comments made in our decision of January 22, 1997, at 74:

> *In [Yarrow Lodge ltd. v. Hospital Employees' Union; Bevan Lodge Corporation v. Hospital Employees' Union; Louisiana-Pacific Canada Ltd. v. Communications, Energy and Paperworkers Union of Canada, (1993), 21 C.L.R.B.R. (2d) 1], the British Columbia Labour Relations Board concluded, on the basis of their review of jurisprudence and commentary related to first contract arbitration, that their approach to intervention in first contracts should be guided by two basic considerations. The first of these was what they termed "replication theory," the idea that a labour relations board should be trying to simulate what the parties themselves might have achieved had they reached a collective agreement through normal collective bargaining.*

> *The second consideration the British Columbia Board termed "what is fair and reasonable in the circumstances." Though they did not articulate it in quite these terms, it is our view that the inclusion of this criterion in approaching the imposition of a first collective agreement represents an acknowledgement that third party intervention in the conclusion of a first agreement is a deviation from normal practice. It is unrealistic to suppose that a labour relations board, a mediator or an interest arbitrator will be able to reproduce exactly what might hypothetically have resulted from the give and take, the wear and tear of the bargaining process. Since the foundation for first contract arbitration is a relationship in which it has proven impossible for some reason to reach agreement by the usual means, it stands to reason that a third party must have standards for deciding what should be included in an imposed agreement in addition to speculation about what bargain the parties themselves might have struck.*

Counsel for the Union argued that it would replicate the collective bargaining process most closely for the Board to produce what he referred to as a "complete" agreement, and that this would also comply most fully with the requisites for what is "fair and reasonable."

Counsel for the Union is certainly correct when he points out that this is the first application of this kind which has proceeded to this stage of proceedings under s. 26.5 of the *Act*, and in that sense the rulings and conclusions of the Board on the issues connected with this application have precedential significance. Since the amendment of the *Act* in 1994 to include this provision, the Board has made efforts to formulate principles and procedures to ensure that applications under this section are dealt with in a way which is consonant with the statutory objectives underlying this new remedial instrument.

In response to one of the first applications to be brought under s. 26.5 of the *Act*, the Board issued some general guidelines to assist those in the labour relations community to understand the overall approach the Board proposed to adopt for determining applications for first contract assistance. 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 reviewed the legislative provisions and labour board jurisprudence from a number of jurisdictions. One of the comments made by the Board was in the following terms, at 49:

> *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.*

In our decision of January 22, 1997 in connection with this application the Board made a similar comment, at 72:

> *In the earlier comments made by the Board, we made it clear that we do not view first contract arbitration as a mechanism to provide a means of escape from the difficulties of vigorous collective bargaining, or a means of achieving a level of terms and conditions in a first contract which exceeds what one might expect as the result of bargaining in a new relationship. We have stated that we see first contract arbitration as a way of supporting collective bargaining between the parties, not replacing it. In this respect, we have also said that we would be more likely to intervene in connection with the kinds of issues which are tied directly to the strength of the collective bargaining relationship and the capacity of a trade union to function effectively as the representative of employees in this relationship.*

Several themes emerged in the discussion of first contract intervention in our earlier decisions. Two are particularly significant for our purposes here. To begin with, it should be clear from our comments that the Board is inclined to be selective about the specific issues which would be the subject matter of our intervention. The issues in which the parties themselves may have an interest are wide-ranging, and the menu of items about which they may choose to bargain is affected by the particular environment in which their collective bargaining relationship develops.

The interests of this Board are not, however, identical to the interests of the parties, and we think it is sufficiently clear from our earlier remarks on this point that the questions which will engage the Board are those related to strengthening a continuing bargaining relationship.

The other related theme is that an applicant for assistance in the conclusion of a first collective agreement cannot look to the Board to advance their interest in these issues beyond a reasonably basic

level. The first agreement which results from this process has been described in other jurisdictions variously as a "bare-bones" agreement, a "framework" agreement, and a "lean" agreement. The items which the Board may decide are essential to establishing a foundation for the evolution of a sound bargaining relationship may not, as in this case, include all of those issues which one might normally see in a collective agreement which has been formulated through the natural working of the bargaining process.

In our view, this does not mean, as counsel for the Union suggested, that the agreement is "incomplete." It is true that there will be no provisions in the collective agreement spelling out the rights and obligations of the parties with respect to a number of issues. As an aside, this is true to a greater or lesser extent of all collective agreements, even those which have been negotiated and revised a number of times.

In this case, we have indicated that the terms and conditions of employment which apply in relation to these issues may be defined in one of several ways. In some cases, these terms and conditions will be defined by the current practice established in the workplace. In others, they will be contained in the provisions of *The Labour Standards Act*, RSS 1978, c. L-1 or other relevant legislation which sets out threshold standards for employment. In formulating Article 17.02 for the agreement, the Board has indicated that the question of whether established practice or legislative provisions will define a specific term, and disputes over what constitutes existing practice, may be submitted through the grievance and arbitration procedure laid out in the collective agreement for resolution.

In addition, our decision of January 22, 1997 says that the Union has an opportunity to accept the final offer made by the Employer on specific clauses in the event the Union views any of the proposals made by the Employer to date as more advantageous than either past practice or legislative standards. Should the Union identify any of these proposals, they would be included in the collective agreement in the language last used by the Employer.

In several questions raised in the letter requesting reconsideration, the Union had asked whether specific language would be formulated to cover the items governed by past practice or legislation. Our intention

in formulating Article 17.02 was to render this unnecessary. The status quo as governed by established practice and legislation would continue in whatever form it now exists. The relationship to the collective agreement is that these issues are, in a sense, incorporated by reference through Article 17.02, and made amenable to the grievance and arbitration procedure.

If there cannot be said to be terms and conditions of employment, whether established by past practice or through legislation, about particular items then those issues would not be included in the final collective agreement and must await future rounds of bargaining for resolution.

As we have noted above, this is the first application for assistance in the conclusion of a first collective agreement which has reached this stage. The Board has been cognizant of the need to signal what general approach we would take, and to deal as directly as possible with the questions which have come up in the course of implementing this approach. As counsel for the Employer pointed out, both of the parties in this process have been faced with the unexpected or, in some cases, the unwanted, as the procedure winds its way towards a conclusion in the form of a collective agreement. It might be added that the Board has also had to be ready to accommodate new developments and to respond to the concerns raised by the parties at successive stages.

Though we accept that the process may not have gone entirely as the Union anticipated or produced particular results they were hoping for, we are not persuaded that the concerns they raised in connection with their current request would justify a reconsideration of our decision of January 22, 1997. We do not think it can be said that the selection by the Board of particular issues on which we propose to intervene should have come as a surprise, given the comments we had made prior to December of 1996. Nor do we think that the Union was denied a full and expansive opportunity to address all of the issues covered in that decision.

For these reasons, we have concluded that the request for reconsideration should be dismissed.

At the hearing, counsel for both parties indicated that they had reached agreement on a process to be followed in preparation for their representations on the issue of wages at the upcoming hearing on the issues identified by the Board. They have agreed that the parties will exchange blind final offers on

Monday, July 7, 1997. These proposals will then be forwarded to the Board as the basis for the final offer selection aspect of the determination of the outstanding issues. This process is a reasonable one, and the Board is happy to approve it.

The parties have also agreed that the hearing scheduled for four days in July will take the usual form of an interest arbitration, with a concentration on filing written material and making oral argument based on that material, rather than on the presentation of *viva voce* evidence. This accords with our expectation of the format of this hearing, and we anticipate that the parties will proceed in accordance with the understanding they had reached at the time of this hearing on June 26, 1997.

# SASKATCHEWAN JOINT BOARD RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and PEPSI-COLA CANADA BEVERAGES (WEST) LTD., Respondent

LRB File Nos. 166-97 & 172-97 to 187-97; July 7, 1997
Chairperson: Beth Bilson; Members: Don Bell and Carolyn Jones

For the Applicant: Larry Kowalchuk and Deb Hopkins
For the Respondent: Melissa Brunsdon, Jean Torrens and Kurt Wintermute

**Remedy - Interim order - Whether employees terminated in course of labour dispute should be reinstated on interim basis - Board decides that employees will not be reinstated on interim basis.**

**Remedy - Interim order - Board decides that lock-out does not meet requirements of definition in *Act* and orders that lock-out be discontinued.**

***The Trade Union Act*, ss. 2(j.2), 2(k.1), 11(1)(e), 11(7).**

## REASONS FOR DECISION

## INTERIM ORDERS

**Beth Bilson, Chairperson:** The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union was designated by this Board in a certification Order dated April 22, 1994, as the bargaining agent for a unit of employees of Pepsi-Cola Canada Beverages (West) Ltd.

The parties began negotiations towards a revised collective agreement in April of 1997. On May 13, 1997, the Union served the Employer with a strike notice. The Employer responded by serving a notice of lock-out.

On May 15, 1997, the Union commenced industrial action in the form of a work slowdown and study session on the premises of the warehouse operated by the Employer. According to the material filed by the Employer, representatives of the Employer requested the employees to leave the premises a number of times, and ultimately circulated a written notice asking employees to depart. A number of

employees occupied the warehouse, and were successful in persuading management representatives and security personnel to leave the building.

On May 16, 1997, the Employer obtained a temporary injunction in the Court of Queen's Bench for Saskatchewan, directing the employees to vacate the building.

Following this, the employees engaged in a variety of other activities, including picketing at the warehouse and other locations. On May 22, 1997, the Employer sought further injunctive relief from the Court of Queen's Bench, and obtained orders restraining employees from certain conduct. The conduct which was prohibited included picketing at locations other than the warehouse, picketing on the premises of the Employer, obstructing entrance or egress from the premises, watching and besetting, and harassment or intimidation of employees of the company.

On May 26, 1997, the Employer terminated the employment of five employees who they described as the "ringleaders" of activity which was regarded by the Employer as illegal and as providing grounds for dismissal.

On June 23, 1997, the parties appeared once more in the Court of Queen's Bench to make representations respecting an application for a contempt order by the Employer. In their application, the Employer alleged that certain employees continued to act in violation of the earlier injunctive order. The parties consented to the issuing of an order restraining the conduct of a list of named employees.

The Union has filed an application, designated as LRB File No. 166-97, asking the Board to declare that the lock-out imposed by the Employer is illegal under *The Trade Union Act*, R.S.S. 1978, c. T-17. In addition, the Union has filed applications alleging that the dismissal of the five employees was contrary to s. 11(1)(e) of the *Act*.

In the application related to the legality of the lock-out, as well as in the applications related to the dismissals, the Union has sought interim orders from the Board, and these Reasons for Decisions relate to the request for interim relief.

At the outset of the hearing, counsel for the Employer raised an objection to the inclusion of the lock-out question among the matters which would be considered by the Board at this point. She argued that the material served on the Employer in relation to the hearing concerned only the issue of the dismissals.

The Board ruled that the lock-out issue would be considered at the hearing. It was clear from the application that the Union was seeking interim relief, and the reply filed by the Employer acknowledged this issue. It was our view that there was no prejudice to the Employer in the Board hearing representations on this matter.

Counsel for the Employer raised two further preliminary objections. In relation to the legality of the lock-out, she stated that this question had been argued before the Court of Queen's Bench when the application of the Employer for the second injunctive order was heard. She pointed out that the order issued by the court on May 23, 1997, and that issued on June 23, 1997, are the subject of a notice of appeal filed by the Union. She argued that Barclay J. had implicitly accepted that the lock-out was proper in making his orders. She further argued that the Board should defer the question of the legality of the lock-out to the courts, and particularly to the Court of Appeal, which will be hearing the appeal in due course.

We have concluded that this preliminary objection must be rejected. There is no indication in the written reasons provided by Barclay J. when the injunctive orders were issued that he reached a conclusion on the question of the legality of the lock-out. His natural preoccupation, given the nature of the application of the Employer, was the legitimacy of the conduct of the employees who were involved in industrial action.

In any event, it is our view that this Board is charged with the task of arriving at definitive interpretations of the *Act*, and that we cannot yield up this responsibility to the courts. Deference to the courts in this sense would not be consistent with our obligation to monitor the development of labour relations policy in the context of the statutory scheme which we supervise.

Counsel for the Employer referred us to a recent decision of this Board in *Health Sciences Association of Saskatchewan v. Government of Saskatchewan et al*, [1997] Sask. L.R.B.R. 117, LRB File No. 022-97. In that case, the Board concluded that we should entertain no further representations in connection with an application challenging the constitutionality of *The Health Labour Relations Reorganization (Commissioner) Regulations*. All of the parties appearing before the Board had also appeared before the Court of Queen's Bench for Saskatchewan to address an application made by a second trade union, which also raised the issue of the constitutionality of these regulations.

It is important to note that the issue raised before the Board in that case would have involved the interpretation of the *Charter* and of human rights legislation. Though the Board concluded that it is, on occasion, appropriate and useful to provide our views on the application of such legislation in the collective bargaining context, the Board must meet a standard of correctness in the construction of statutes other than those which are specifically confided to us to interpret. In these circumstances, the Board held that it would not be useful to involve the parties in a second set of proceedings, when the jurisdiction of the courts had already been invoked by one of the participants.

In this case the circumstances before us are quite different. Provisions of the *Act* are raised directly by these applications, and it is our view that the Board has a responsibility to provide an interpretation of those provisions.

Counsel for the Employer also raised an objection to proceeding with a hearing of the applications concerning the dismissals on the grounds that the Board should defer to the grievance and arbitration procedure under the collective agreement.

This Board has often expressed the view that it is appropriate in many circumstances to defer an issue for determination through the mechanism which the parties to a collective bargaining relationship have devised for the resolution of disputes between them. In *United Food and Commercial Workers v. Western Grocers*, [1993] 1st Quarter Sask. Labour Rep. 195, LRB File No. 010-93, the Board made this comment, at 196:

> *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 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 *United Food and Commercial Workers, Local 1400 v. Saskatchewan (Labour Relations Board) and Westfair Foods* (1992), 95 D.L.R. (4th) 541 (Sask. C.A.), the Saskatchewan Court of Appeal provided three principles for the guidance of the Board in deciding whether deference to arbitration is appropriate, 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 issues surrounding the dismissal of employees are unusual in the context of the overall question of whether or not this Board should defer to the grievance and arbitration procedure. Generally speaking, a collective agreement and the *Act* provide two different frameworks for the consideration of whether a dismissal is a wrongful one. In the collective agreement, the emphasis is on whether an employer can establish that there is reasonable justification for dismissal; such justification, usually referred to as "just," "sufficient" or "proper" cause, focuses on considerations which are relevant to employment, such as competence or misconduct. Under the *Act*, the issue becomes one of whether the dismissal

represents an attack on the exercise by employees of statutory rights, an attack which wears the disguise of a legitimate exercise of the authority of the employer to direct, manage, and set standards for the workforce.

In *United Food and Commercial Workers v. Valdi Inc.*, [1980] 80 C.L.L.C. ¶16,046, the Ontario Labour Relations Board made the following comment, at 734:

> *On a review of the Act, it is difficult to conclude that grievance arbitration is simply a private process and that it is any less important than the Ontario Labour Relations Board in fostering industrial peace and facilitating co-operation between employees and employers. ... Viewed in this light, a policy aimed at integrating their responsibilities and dealing with concurrent jurisdiction problems is not as troublesome as it is in those situations where grievance arbitration shoulders a responsibility under a different or extrinsic statute. ... Some perspective can be gained on the issue by looking at it from grievance arbitration's viewpoint and asking whether the express statutory policy of encouraging the practice and procedure of collective bargaining would be effectuated if this Board was to police all collective agreements to decide if disputes over the meaning of these documents also constituted a violation of the Act? ...*

We are in general agreement with the proposition that, in the ordinary course of events, the arbitration process can provide an adequate remedy for all of the issues surrounding the dismissal of an employee. On the other hand, we have concluded that there are circumstances in which the questions raised in an unfair labour practice application are more easily distinguishable from those arising out of the collective agreement, circumstances in which the statutory scheme set out in the *Act* assumes a greater role. Among these, in our view, are the circumstances surrounding an industrial dispute.

We are therefore of the opinion that the Union is entitled to have a determination by this Board of the applications concerning the dismissals and to have an adjudication of the issue of whether the decision to terminate the employment of these five employees was improperly actuated by anti-union sentiment on the part of the Employer.

There has been relatively little discussion in the jurisprudence of this Board of the nature and significance of a lock-out, and there has been no comment by the Board since the addition to the *Act* in

1994 of definitions of the terms "strike" and "lock-out." These definitions are provided in ss. 2(j.2) and 2(k.1) of the *Act*, and read as follows:

> *2(j.2) "lock-out" means one or more of the following actions taken by an employer for the purpose of compelling employees to agree to terms and conditions of employment:*
>
> *(i) the closing of all or part of a place of employment;*
>
> *(ii) a suspension of work;*
>
> *(iii) a refusal to continue to employ employees.*
>
> *2(k.1) "strike" means any of the following actions taken by employees:*
>
> *(i) a cessation of work or a refusal to work or to continue to work by employees acting in combination or in concert or in accordance with a common understanding;*
>
> *(ii) other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output or the effective delivery of services.*

The lock-out notice sent to the Union by the Employer on May 13, 1997 read as follows:

> *In accordance with Section 11(7) of The Trade Union Act, this notice will advise you that all employees covered by the Collective Agreement between Pepsi-Cola Canada Beverages (West) Ltd. and Retail, Wholesale and Department Store Union, Local 588, dated July 25, 1994 will be locked out effective Thursday, May 15, 1997, at 2:30 p.m. (time).*
>
> *Pepsi may lock-out in any manner permitted by law, but not limited to the closing of all or part of its place of employment, suspension of work, or a refusal to continue to employ employees.*
>
> *The lock-out will remain in effect until we provide you with written notice that the lock-out has ceased.*

There seems to be little dispute about the facts concerning the form this lock-out has taken. The Union was advised on May 15, 1997, that all employees in the bargaining unit would be locked out. The Employer has subsequently made use of the services of members of management, employees from

other plants operated by the Employer, and employees hired since the lock-out began to carry on production at the warehouse in Saskatoon.

Counsel for the Union alluded to the decision of the Board in *Retail, Wholesale and Department Store Union v. Bi-Rite Drugs*, [1987] Mar. Sask. Labour Rep. 35, LRB File Nos. 293-86 & 294-86, in which the Board addressed the options open to an employer in employing the lock-out weapon. The decision included this comment, at 41:

> *Section 11(7) of the Act applies to a lock-out, which may be defined as the suspension of work by an employer or the refusal to employ a group of employees for the purpose of compelling a union as their bargaining representative to agree to terms and conditions of employment. Such action must take place during an industrial dispute. Just as a strike may take different forms, a lock-out need not necessarily be a complete closure of the entire workplace or a continuing refusal to permit all of the employees to work. It may legitimately include, for example, the suspension of only some work, the reduction of hours of some employees, or a refusal to permit a particular group of employees to work overtime. In addition to its right to lock-out employees, an employer is free to take measures designed to limit the disruptive effect of strike activity such as the increased use of managerial personnel and non-striking employees.*

Counsel argued that the definition articulated in s. 2(j.2) of the *Act* was a direct response by the legislature to the definition contained in the passage just quoted. He argued that the legislature chose to limit the form a lock-out may take and that, in particular, if an employer chooses the options contained in ss. 2(j.2)(ii) or 2(j.2)(iii) of the *Act*, the implication of the new definition is that the employer must cease to do all of the work ordinarily done.

Counsel for the Employer argued that to accept the argument put forward by counsel for the Union would be to give a substantive effect to the definition in the *Act*, and that this places an unacceptable burden on this provision.

The use of industrial action by the parties to a collective bargaining relationship has been placed under a number of restrictions by collective bargaining legislation, and the *Act* now requires that the use of such weapons be limited to times outside the term of a collective agreement.

In *Regina Board of Police Commissioners v. Regina Police Association*, [1994] 3rd Quarter Sask. Labour Rep. 235, LRB File No. 250-93, the Board addressed the legality of certain forms of industrial action adopted by a trade union. The Board stated that the concept of a strike has both a procedural and a substantive aspect. In order to be permitted under the *Act*, a strike must conform to certain procedural requirements, notably the holding of a strike vote and the giving of notice. In addition, the Board held that the form of strike action taken must be of a lawful kind, and concluded that industrial action which took the form of withdrawing from the enforcement of certain by-laws and statutory enactments was not lawful.

We are of the view that the same kind of analysis may be applied to industrial action in the form of a lock-out. Industrial action - either a strike or a lock-out - must bring itself within certain legal parameters in order to be legal. One set of parameters which is now relevant in this respect are the definitions of strike and lock-out in s. 2 of the *Act*. It is not a matter of giving substantive weight to the definition, but of assessing whether the conduct of the Employer conforms to a definition which will make that conduct a lock-out and thus bring it under the protection of the *Act*.

Counsel for the Union has not persuaded us that the definition contained in s. 2(j.2) of the *Act* represented a direct overturning of the comments made by the Board in the *Bi-Rite Drugs* case, *supra*. We are not convinced that the options open to an employer who elects to use the lock-out weapon are as limited as was suggested in his argument, though we concede that not all of the possibilities mentioned in the passage quoted above from *Bi-Rite Drugs*, *supra*, may fall within the categories permitted in the definition in s. 2(j.2) of the *Act*.

We do think, however, that the definition places greater restrictions on the use of this weapon than may have been in place in the past.

The Board has accepted that the activities legitimately associated with a strike may take many forms, including rotating strikes, selective strikes, work to rule and other things. We agree with counsel for the Union that the definition of strike now included in the *Act* appears to support this.

This does not mean, of course, that any conduct of employees engaged in a strike is automatically lawful. The general principles of tort law and criminal law continue to apply, as do certain aspects of the rights and obligations accruing to the employment relationship.

Among the characteristics of a lawful strike is the requirement that it be supported by the majority of employees voting in favour of a strike. It seems likely that the reason underlying this requirement is that the decision to strike imposes financial hardship on employees, and exposes them to disciplinary penalties if they do not comply with the decision of the majority of their colleagues.

Under the legislation currently in place there is a wide range of instruments available to an employer who is responding to the decision of employees to take strike action. An employer is entitled to make every effort to withstand the strike, and to frustrate the hope of the trade union to inflict an economic blow which will persuade the employer to accede to whatever objectives the union is trying to achieve. Under the current legislative regime, for example, there is nothing to prevent an employer from using replacement workers to assist in maintaining production or providing services. Just as the trade union has wide scope to pursue a strike, an employer has wide scope to take the strike.

It is our view that what is permitted in the context of a lock-out is somewhat different. We would begin with the proposition that, just as a trade union which calls employees out on strike - and the employees who support the strike - must be prepared to incur a financial cost for choosing industrial action as a means of exerting pressure on an employer, an employer who chooses lock-out as an instrument for exerting pressure on the trade union must be prepared to incur a cost of some kind.

We are of the opinion that within the categories of action available to an employer under the definition of a lock-out contained in s. 2(j.2) of the *Act*, there exist a range of options. These include the closure of all or part of the enterprise, the suspension of all work or the suspension of some of the work and the refusal to continue to employ some employees or all employees in the bargaining unit. The employer may choose any or all of these options in a rotating or periodic form. As the Board indicated in the *Bi-Rite Drugs* decision, *supra*, the giving of a single lock-out notice gives the employer an opportunity to pursue one or more of these options without declaring a new lock-out.

In our view, however, the employer must be able to point to some part of the workplace, the work or the workforce that they are planning to do without. It is this abstention from the operation of some or all of the activities which are ordinarily carried out, or the choice to attempt to carry out production without some or all of the employees, which exacts the price which an employer who chooses this form of industrial action must incur.

We do not interpret s. 2(j.2)(iii) of the *Act* as requiring that the employer must refuse to continue to employ all employees, and an employer may identify a limited number or identifiable group of employees to be locked out. In this context, employees are not being locked out as individuals but simply as part of a group, though single positions may have to be named in order to make the intentions of the employer clear. One of the implications of this, in our view, is that if an employer chooses to "refuse to continue to employ employees," those employees cannot be replaced by other employees.

Another implication of our analysis is that, if an employer chooses the option in s. 2(j.2)(iii) of the *Act* of refusing to continue to employ some or all employees, they are not necessarily choosing to suspend all or part of the work as contemplated in s. 2(j.2)(ii) of the *Act*. Though it is not open to the employer to replace the group of employees who have been selected for lock-out, it is open to them to have members of management (who are not, by definition, employees) continue to do the work.

The alternative to these requirements we have outlined would be, in effect, to permit an employer to impose a full or partial withdrawal of labour on employees, and to control the course of events without incurring any cost other than what can be achieved through whatever picketing or related activity the trade union may decide to engage in. The risk of accepting this view of the lock-out weapon is that it would permit employers overly easy access to an instrument of serious significance, without the kinds of inherent disincentives which - to refer again to the parallel aspects of strikes - cause trade unions to think seriously before they deploy the strike strategy.

The Board has had a number of occasions to consider and articulate principles for addressing applications for interim relief. 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 set out a list of basic principles, 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 P.C.S. v. Todd.*

In a decision in *International Brotherhood of Electrical Workers v. Saskatchewan Power Corporation*, [1996] Sask. L.R.B.R. 243, LRB File No. 069-96, the Board commented on these principles in the following terms, at 256:

> *It will be noted that the principles formulated in the WaterGroup 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 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, supra, as a composite criterion. In the decision of the Supreme Court of Canada in RJR-MacDonald Inc. v. Attorney-General of Canada (unreported judgment dated March 3, 1994), 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, *supra*, the Board made the following comment, at 151:

> *There is certainly some distinction between the concepts of "interlocutory" and "interim" relief. Interlocutory orders are intended to provide some relief to an applicant pending the determination of an allegation or complaint on its merits at some future time. The category of interim orders, on the other hand, takes in a broader and more disparate range of relief. They may, for example, be granted following a full hearing on the evidence as a temporary means of providing relief until other steps can be taken or other relief put in place. They may include directions for positive action rather than simply enjoining certain conduct. In our view, the classification "interim relief" may include a number of different kinds of remedies. Some of them may in fact be of an interlocutory nature, that is, those remedies which expire upon the determination of the merits of the case, and the issuing of remedial orders on that basis. It does not seem to us that any one set of criteria or procedural requirements would be appropriate to cover all of the circumstances in which interim relief might be sought.*

In other words, though the distinction between the tests requiring the establishment of a "strong *prima facie* case" and a "serious issue to be tried" have become blurred, it is incumbent upon the Board to take into account in all circumstances whether or not an interim order should be regarded as an interlocutory step.

In this case, the arguments which were aired concerning the request of the Union for an interim order concerned almost exclusively the status of the lock-out in relation to the definition in the *Act*. This brings the question somewhat closer than is usually the case to the second kind of circumstance mentioned by the Supreme Court in the passage from the *RJR-MacDonald* case, *supra*, which was quoted above - a determination on the basis of a "pure question of law."

We made it clear at the hearing that the parties would be entitled to make further representations on all of the issues raised in connection with the application for interim relief, and in this sense the

proceedings may be seen as interlocutory. On the other hand, we have entertained fairly extensive legal argument on this issue, and have given that argument more careful scrutiny than might be the case if the basis of the application were strictly factual.

It may be clear from the comments we have made that we are persuaded that the Union has met the standard of establishing a "strong *prima facie* case" in connection with the proper interpretation of s. 2(j.2) of the *Act*.

We should comment, in this connection, that we are still of the view, given the relative speed and flexibility of the proceedings of this Board, that the criteria of irreparable harm and the balance of convenience are of more significance in our consideration of requests for interim relief.

We have concluded that the Union has shown that irreparable harm will occur if an interim order is not issued. In an industrial dispute, the parties pit their respective resources against each other in a volatile and shifting environment. If one party loses ground or is deprived of an opportunity to exert the maximum economic power it can properly muster, it is difficult to see how the effects of this can be rectified at a later time. If, as we have found, the lock-out announced and implemented by the Employer has been improper, we think that immediate action is necessary in order to minimize the effect this will have on the potential of the Union to influence the course of the labour dispute.

Against this, we do not think the Employer is able to demonstrate comparable prejudice. Counsel for the Union conceded that the Employer would be able to reinstate a proper lock-out in very short order, and we take this to be a statement that the Union waives any possible right to allege that a reinstituted lock-out would constitute an unfair labour practice under s. 11(1)(j) of the *Act*. We wish to make it clear that we regard this as an undertaking which has affected our view of the matter, and that we see it as precluding the Union from bringing any such application. In these circumstances, all that the interim order would do would be to require that the Employer reframe the lock-out in accordance with the interpretation we have given to s. 2(j.2) of the *Act*.

We should make one comment concerning what we view as a defect in the lock-out notice which was given, although we do not think that it had the effect of actually misleading the Union. In the notice, the Employer made the following statement:

> *Pepsi may lock-out in any manner permitted by law, but not limited to closing all or part of its place of employment, suspension of work or a refusal to continue to employ employees.*

As we indicated earlier, we think the Employer *is* limited by law to lock-out activity which falls within one of the three categories contained in the definition, although there are a number of specific forms of activity which fall within these classes. We will therefore order that, if the Employer wishes to resume the lock-out, they must issue a new lock-out notice which does not convey the message that there are additional unspecified options.

The Union has also requested interim reinstatement of the five employees whose employment was terminated.

The Board has repeatedly stressed the significance of the question of improper dismissal in the context of industrial relations. In *Saskatchewan Government Employees' Union v. Regina Native Youth and Community Services Inc.*, [1995] 1st Quarter Sask. Labour Rep., LRB File Nos. 144-94, 159-94 & 160-94, the Board made the following comment, at 123:

> *It is clear from the terms of s. 11(1)(e) of the 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 a further comment on this issue in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Acme Video Inc.*, [1995] 4th Quarter Sask. Labour Rep. 134, LRB File Nos. 179-95, 180-95, 181-95 & 182-95, at 153:

> *As counsel for the Union rightly pointed out, it is not necessary, in order to establish that an unfair labour practice has occurred under s. 11(1)(e) of the Act, to show that the union activity which an employer is trying to discourage was actually carried out by the employees whose employment has been terminated. Though the singling out of union activists for punishment by terminating their employment is one way in which employers have signalled their displeasure at the arrival of a trade union, an equally effective message could no doubt be conveyed by choosing for termination ordinary employees whose views concerning the union are not particularly well known.*

We have commented earlier on the criteria which have evolved in considering applications for interim relief, and it is not necessary to repeat those comments in relation to the applications concerning the dismissals. In this case, the ultimate determination of the legitimacy of the dismissals in the light of s. 11(1)(e) of the *Act* is not embodied in the interim orders, and therefore the standard of a serious issue to be tried suggests the general test which must be met by the Union. We are satisfied that they have met this test. Although the Employer denies the claim of the Union that the five employees were known union activists and were singled out on that basis, this does not affect our conclusion that the dismissal of five employees in the course of a labour dispute raises an issue which is more than frivolous.

We have concluded, however, that the Union has not shown that they will suffer irreparable harm if the disposition of this issue has to await the outcome of a full hearing. Counsel for the Union argued that the employees themselves, and their families, will suffer stress and anxiety if the decision is deferred pending a final hearing. It must be remembered, however, that these dismissals occurred against the backdrop of a labour dispute. Though one must have sympathy for the personal turmoil of the employees, their situation is not entirely distinct in this respect from the situation of the other employees who are also suffering financial deprivation and uncertainty.

No serious argument was made at this juncture that the dismissals have affected or are likely to affect the balance of power between the parties to the labour dispute. Nothing has prevented the five employees from continuing to play a role in the support and direction of the picketing activities carried out by the Union. Certain restrictions have been placed on these employees, among others, under the injunctive orders issued by the Court of Queen's Bench, but these restrictions would not be affected by interim orders related to the dismissals.

We have therefore concluded that the application for interim reinstatement must be dismissed.

We will issue orders to the following effect:

- that the Employer terminate the current lock-out forthwith.

- that, in the event the Employer chooses to institute a further lock-out, that lock-out must conform with the definition contained in the *Act*, and a new notice of intention to lock-out must be given in accordance with s. 11(7) of the *Act*.

- that the application for interim reinstatement of five employees be dismissed.

## GORDON W. JOHNSON, Applicant and AMALGAMATED TRANSIT UNION, LOCAL 588, Respondent and CITY OF REGINA, Employer

LRB File No. 091-96; July 8, 1997
Chairperson, Beth Bilson; Members: Brenda Cuthbert and Bruce McDonald

For the Applicant: Cam McCannell and Michael Walker
For the Respondent: Neil McLeod and Angela Zborosky
For the Intervenor: Jim McLellan

**Reconsideration - Where Board has found one voting mechanism followed by union to violate duty of fair representation, Board declines to speculate about what other mechanisms might be acceptable.**

***The Trade Union Act*, s. 25.1.**

### REASONS FOR DECISION
### REQUEST FOR RECONSIDERATION

**Beth Bilson, Chairperson:** In a decision dated January 14, 1997, this Board found that Amalgamated Transit Union had breached the duty of fair representation in respect of the termination of Mr. Gordon Johnson.

A number of complex arguments were presented in connection with this application, and we do not propose to repeat them here. After reviewing the decision to terminate Mr. Johnson, the executive of the Union formed the opinion that there were grounds for a grievance. In accordance with the procedure followed by the Union in processing grievances, the question of whether this grievance should be pursued to arbitration was ultimately submitted to a secret ballot vote among all of the members of the bargaining unit.

The essential finding of the Board was stated as follows, in *Gordon W. Johnson v. Amalgamated Transit Union, Local 588 and City of Regina*, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96, at 44:

> *Mr. McCormick and the other members of the executive took what steps they could to ensure that the members of the bargaining unit were properly briefed prior to the vote, and that they understood that the executive was in favour of proceeding to arbitration. The mechanism of the vote among the entire group of employees, many of whom had not participated in the discussion at the membership meeting, and some of whom may not have been in possession of any information beyond what was on the notice, was, in our opinion, inherently arbitrary as a means of making a decision about the fate of an individual employee, however useful it might be as a means of obtaining direction about issues of more general significance.*

The Union filed an application requesting the Board to reconsider our earlier decision and, in particular, to answer two questions which were framed in the following terms:

> *Was the voting mechanism found to be arbitrary because many of the members who voted in the referendum vote had not participated in the discussion at the membership meeting and may not have been in possession of any information beyond what was on the notice?*
>
> *Was the voting mechanism found to be arbitrary because it permitted a majority of the membership to decide whether the grievance should be referred to arbitration, that is, any voting mechanism would be considered arbitrary for the purpose of deciding whether the grievance should be referred to arbitration?*

The parties participated in a pre-hearing with the Vice-Chairperson of the Board, and it was agreed that the request for reconsideration would be determined on the basis of written submissions. We have now reviewed these submissions, and have concluded that the application for reconsideration should be dismissed.

In a written submission, counsel for the Union referred us to a decision of the Canada Labour Relations Board in *Gilles Charlebois v. Amalgamated Transit Union* (1994), 91 di 14. In that case, the Canada Board made the following comment, at 22:

> *Most unions give the authority to an individual or a group of individuals in a grievance committee or on an executive board to make a decision about taking a grievance to arbitration. The decision-makers can be identified and their rationale for dropping a grievance can more readily be explored and identified, both by a complainant in respect of deciding to make a complaint and bringing evidence before the Board and by the Board in determining whether the complaint has validity.*

> *Here, it is impossible for a complainant or the Board to have anything more than the most impressionistic understanding of what may have motivated people to vote in the way they did. In this case, Mr. Charlebois is really trying to have the Board conclude that largely because the union membership voted against him, in the face of an opinion by legal counsel that his dismissal grievance would have a good chance at arbitration, then ergo there is a violation of section 37 and the Board must overturn the union's decision. He has surrounded this contention with a few "facts" which he hopes will convince the Board that on a balance of probabilities the union's decision in this case was a failure to represent him fairly.*
>
> *It has been suggested that a decision-making system such as that adopted and employed by Local 279 is in itself wrong and almost automatically and inevitably leads to miscarriages of justice in respect of the handling of grievances. Moreover, it has been argued that when the Board faces a situation where the union is unable to explain, in the final analysis, as is the case here, why a particular decision was taken, then that decision must be presumed to be in violation of section 37. Both notions rest on very unsound premises.*
>
> *It is the right of a union up to a point to choose its own decision-making machinery. That point would, of course, be irrationally exceeded if it chose to flip coins or to examine the entrails of rabbits in order to reach conclusions about whether grievances should go to arbitration; this and any board would find that that kind of system was arbitrary by definition.*

The submission on behalf of the Union also alluded to a number of decisions of this Board in which we had accepted decisions concerning grievances made by means of votes among union membership as being consistent with the duty of fair representation.

Counsel for the Union argued in her submission that the Board should answer the questions posed in the application for reconsideration in order to clarify the position of the Board in relation to membership votes as a means of making decisions concerning grievances.

As the passage from the *Charlebois* decision, *supra*, which we have quoted suggests, there are a wide range of mechanisms which may be used for the making of decisions of this kind. The spectrum described in this passage goes from confiding the authority to make these decisions to an identifiable group of officials at one end, to flipping a coin at the other.

In our original decision concerning the grievance of the Union on behalf of Mr. Johnson, this Board found that the holding of a "referendum" vote among all members of the bargaining unit was inconsistent with the duty to fairly represent Mr. Johnson, and we described our reasons for coming to this conclusion.

The questions posed by the Union go beyond asking for clarification of this finding. The Union asks the Board to comment on whether we would rule out the submission of such decisions to all kinds of votes held among members, or whether our conclusion in this respect would be limited to the "referendum" type vote.

In our decision, we dealt, naturally, with the circumstances before us in this case, and our findings must be read in that light. We cannot speculate on what determination we might make in different circumstances, nor do we think we can set out fixed criteria for the holding of votes or the conduct of meetings. As the Canada Board suggested in *Charlebois* decision, *supra*, the range between decisions made by consulting the entrails of rabbits and decisions made as a result of the deliberations of an experienced and accountable individual or group of union officials admits of many gradations. In our decision, we found that the mechanism used to make this decision was at an unacceptable point on the scale in terms of compliance with the duty of fair representation. We do not think it is possible, however, to state in the abstract the point at which our decision might be different.

# SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and YORKTON CREDIT UNION LIMITED, Respondent

LRB File No. 090-96; July 8, 1997
Chairperson, Beth Bilson; Members: Carolyn Jones and Gordon Hamilton

For the Applicant: Larry Kowalchuk
For the Respondent: Bob Watson

**Unfair labour practice - Duty to bargain in good faith - Failure to provide information - Board dismisses union's application as evidence was inconclusive on alleged failure to provide information.**

**Unfair labour practice - Communication - Misinformation in employer communication to employees during course of collective bargaining represents interference in relationship between employees and union.**

***The Trade Union Act*, ss. 11(1)(a), 11(1)(e).**

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union is the certified bargaining agent for a unit of employees of Yorkton Credit Union Limited. The Union has filed an application alleging that the Employer has committed unfair labour practices and violations of ss. 11(1)(a) and 11(1)(e) 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;*
> >
> > *(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 previous collective agreement between the parties expired at the end of 1994, and the parties commenced negotiating a new agreement early in 1995. According to the evidence of Mr. Brian Deutscher, Manager of Personnel and Marketing, there were several major issues on which the parties proved unable to reach agreement; these included hours of work, a proposal put forward by the Employer for sharing the premium costs for dental and medical coverage, and the compensation package to be included in the agreement.

At some point in the negotiations, a conciliator was appointed to assist the parties with bargaining, and this third party facilitation has continued to be an element of the bargaining until the time of the hearing.

The allegations made by the Union focus on two aspects of the conduct of the Employer. The first of these concerned the alleged lack of response by the Employer to a request made by the Union for information which they considered necessary to conduct further bargaining. The general nature of the information which the Union alleged the Employer failed to provide was described as follows in a letter from Mr. Paul Guillet, chief spokesperson for the Union at the bargaining table, dated June 7, 1995:

> *From the beginning of this set of negotiations, the management bargaining committee has regularly mentioned the "competition" in and around the City of Yorkton. The Union is at a disadvantage to approach this subject inasmuch as we do not have and cannot get any documents or material. The Union believes you may be able to assist it*

*in gathering this information. Please provide whatever you can that was used by the Credit Union in its assertion that it is at a competitive disadvantage with the industry. It would be appreciated if this material was forwarded to the Regina Union Office well in advance of our next meeting on June 26, 1996.*

The second instance of Employer conduct to which the Union made objection was a communication issued to all employees bearing the date of April 10, 1996. This memorandum is as follows:

*At the meeting held November 23, the Credit Union made an offer which the Union (your representatives) asked for time to consider and discuss with you. On February 7, 1996 the conciliator set April 4 for further discussion. On April 4th, the Union's response to the Credit Union's November 23 offer was to restate the same position that the Union tabled on November 23.*

*On April 4, 1996 in an effort to move negotiations to a settlement, the Credit Union offered the following package position:*

*1. A three year Collective Agreement - January 1, 1995 - December 31, 1997*

*2. 13.01 Reword as follows:*

*The basic work week for full-time employees shall be:*

*1. thirty-six and three quarters (36 3/4) hours per week effective November 4, 1996*

*2. thirty-seven and one half (37 1/2) hours per week effective February 3, 1997*

*not to exceed eight (8) hours per day, five (5) days a week. The Employer guarantees two (2) consecutive days off per week unless otherwise mutually agreed.*

*ARTICLE 15 - EMPLOYEE BENEFITS*

*15.03 d, e*

*Amend so that the sharing of the cost of premiums for extended health care are phased in between May 15, 1996 and January 3, 1997 as follows: 10% effective May 10, 1996; 10% effective July 5, 1996; 10 % effective August 30, 1996; 10% effective October 25, 1996; 10% effective January 3, 1997.*

*Amend so that sharing of the cost of premiums for dental are phased in between February 28, 1997 and October 24, 1997 as follows: 10% effective February 28,*

*1997; 10% effective April 25, 1997; 10% effective June 20, 1997; 10% effective August 29, 1997; 10% effective October 24, 1997.*

3. *Full time employees:* *a cash lump sum of $1,500 to those who are employed with the Credit Union at the date of signing of the revised Collective Agreement.*

*Part time employees:* *A cash lump sum to those who are employed with the Credit Union at the date of signing of the revised Collective Agreement. The amount payable is based on the percentage of hours a part time employee worked from January 1, 1995 to December 31, 195 compared to the hours of a full time employee for same period (for example, if an employee worked 70% of the hours of a full time employee in that period .70 X $1,500.00 = $1,050.00.*

*These amounts are payable in the first pay period after the signing of the revised Collective Agreement.*

4. *Effective November 4, 1996 - 2% wage increase on all steps in all wage ranges.*

*This is a good offer. This was made after considering our employee compensation versus that of our competitors, the present general economic environment, our ability to pay and the 1995 Credit Union financial results. The Union has not accepted it yet; however, the Credit Union offer remains open.*

*We are regulated by the CREDIT UNION ACT as well as financial standards and sound business practices set by the CUDGC pursuant to the Act. The financial results of the Credit Union (including profit as a % of assets) must be with in standards set by CUDGC. The Board's responsibility in the circumstances is to do whatever is necessary to achieve financial results required to meet CUDGC standards. The Board's offer in these negotiations is in compliance with the Board's responsibilities.*

*Our total personnel costs was 2.2% of assets for the 1995 year. We are much higher than other Credit Union's and must move toward similar costs of operations. For example other Credit Union's personnel costs as a percentage of assets are: Canora 1.5%, Estevan 1.7%, Saskatoon 1.8%, Battlefords 1.7% and Sherwood 1.7%.*

*The Credit Union's offer is designed to bring us in a more competitive position in the marketplace. The financial services industry in which we compete in the Yorkton market has a standard of a 37 1/2 hours per week, for full time employees. We understand it is often in excess of this. Employees of the Credit Union have many benefits in their employment such as the loan benefit program, vacations, paid*

> *holidays, paid sick time, four group insurance benefits, and many others listed in the contract. The Credit Union's proposal on benefits is that the employees pay a portion of the cost of only two of the many benefits that you have.*
>
> *We ask that you consider the Credit Union's offer very carefully and provide your comments to your negotiating committee in time for the next meeting set for April 19, 1996 at 10:00 am.*
>
> *The Board of Directors feels that this is a good offer which we expect will move negotiations to a settlement.*

With respect to the first of these allegations, the Board has in some cases found that an employer has committed an unfair labour practice by failing to disclose significant information to the trade union representing employees. The basis for such a finding, which has generally been made in relation to the obligation to bargain collectively laid out in s. 11(1)(c) of the *Act*, is that the obligation to bargain in good faith includes a responsibility to provide the trade union with sufficient information to permit both the formulation of a rational and comprehensive union bargaining position, and a realistic assessment of the proposals made by the employer.

In responding to the argument made by counsel for the Union in this connection, counsel for the Employer argued that the Union had failed to show that the Employer had refused to provide the information requested by the Union. A letter filed with the Board showed that a representative of the Employer had responded to the letter from Mr. Guillet by asking that Mr. Guillet elaborate further concerning the kind of information required. Ms. Donna Wagner, member of the Union negotiating committee, said in her evidence that she had not seen this letter, and was not aware of any further interchange between the Union and the Employer on this issue.

Counsel for the Employer also addressed a ruling made by the Board which precluded the submission of evidence concerning any communications made by the parties with the conciliator or to each other through the conciliator. He argued that it was unfair to limit the ability of his client to defend their actions without being able to explore this evidence.

We have concluded that this aspect of the unfair labour practice application must be dismissed. The evidence presented which was independent of the conciliation process was inconclusive. Since a significant proportion of the bargaining which has taken place has been conducted under the auspices of a conciliator, it is impossible for us to reach a conclusion concerning any information which may have been exchanged by this means, or to assess the impact of the absence of particular information on the bargaining process.

The question of the lawfulness of particular communications made by an employer to employees has been commented on a number of occasions by this Board. This issue has usually been assessed in relation to s. 11(1)(a) of the *Act*, which was quoted earlier.

It may be noted that the application of the Union also invokes s. 11(1)(e) of the *Act*. In an exchange between counsel concerning a request for further particulars made by counsel for the Employer, counsel for the Union intimated that he proposed to rely on the following part of s. 11(1)(e) of the *Act*:

> *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 use coercion or intimidation of any kind ... 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 ...*

He did not in the end focus any of his argument before the Board on this provision, so any comment we make on this aspect of the application should be taken as related to the application of s. 11(1)(a) of the *Act* to the Employer communication impugned by the Union.

Prior to the enactment of s. 11(1)(a) of the *Act* in its current form in 1994, the provision 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) to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating with his employees;*

The general approach adopted by this Board in interpreting that version of the provision was described as follows in a decision in *Retail, Wholesale and Department Store Union v. Canadian Linen Supply Limited*, [1991] 1st Quarter Sask. Labour Rep. 63, LRB File No. 029-90, at 67:

> *It is settled law in this Province that an employer is entitled to communicate with its employees, even with respect to matters that are the subject of collective bargaining negotiations, so long as the communication:*
>
> *(a) does not amount to an attempt to bargain directly with the employees and circumvent the union as the exclusive bargaining agent;*
>
> *(b) does not amount to an attempt to undermine the union's ability to properly represent the employees; and*
>
> *(c) does not interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any rights conferred by the Act.*
>
> *The determination of whether, in the particular circumstances, a communication has interfered with, coerced, intimidated, threatened or restrained an employee in the exercise of a right conferred by the Act is an objective one. The Board's approach in such cases is to ascertain the likely effect of the communication on an employee of average intelligence and fortitude.*
>
> *An employer is not considered to have bargained directly with his employees, or failed to have negotiated in good faith with the union by fairly and accurately informing employees of its version of the negotiations taking place ...*

A somewhat similar approach is reflected in the following comment of the Ontario Labour Relations Board in *Forintek Canada Corp. v. Public Service Alliance of Canada*, [1986] OLRB Rep. April 453, at 474:

> *In assessing whether employer communications during or in relation to collective bargaining go beyond the bounds of permitted speech into the realm of prohibited interference, the Board has considered whether they reflect an attempt to explain the position the employer has taken at the bargaining table or, rather, an attempt to disparage the union or its proposals. The Boards looks at the context, content, accuracy and timing of employer communications in discerning their purpose and effect. Communications made after good faith bargaining has reached an impasse are less suspect that those made during early stages of bargaining, accurate statements are less suspect that inaccurate ones and, in any event, communications of explanations or positions not first fully aired at the bargaining table are highly suspect.*

In considering the significance of the amended wording of s. 11(1)(a) of the *Act*, the Board made the following comment 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 & 012-95, at 85:

> *The proviso which was included in the previous version of s. 11(1)(a) of the Act 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.*

The Board went on to say, also at 85:

> *It is our view that the new wording in s. 11(1)(a) of the Act 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.*

In arriving at this interpretation, the Board rejected the argument that the amendment to s. 11(1)(a) of the *Act* was meant to prohibit all communication by an employer to employees concerning matters which are the subject of bargaining. The Board accepted, as we had in the past, that not all communications are precluded.

On the other hand, the Board has repeatedly cautioned employers that a decision to communicate with employees concerning matters which are the subject of bargaining with the trade union represents a risky strategy, and that an employer can easily go too far in such communications. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Limited*, [1995] 2nd

Quarter Sask. Labour Rep.234, LRB File Nos. 246-94 & 291-94, the Board sounded a warning note in these terms, at 259:

> *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 condition or employment may depend on the character of their relationship with the employer. In some situations, as the Board suggested in the United Food and Commercial Workers v. F.W. Woolworth Co. Ltd. [1993] 1st Quarter Sask. Labour Rep. 62, LRB File No. 148-93 decision, there may be no room for any communication from the employer which does not have a coercive implication.*

It may be noted that in the circumstances of the case before us, the Employer made a number of communications to employees which contained various versions of bargaining proposals, statements of the Employer objective of achieving a competitive position, references to the wages paid elsewhere and to the financial restrictions placed on the Employer by their regulatory body, and other such items. The Union did not formally object to communications of this nature.

The complaint of the Union centres on the memorandum dated April 10, 1996, which was reproduced earlier in these Reasons. Their objection is that the statements in the first paragraph of this memorandum significantly misrepresent the conduct of the Union negotiating committee, and that this constitutes interference with the relationship between the employees and their bargaining representatives.

According to the evidence of Mr. Deutscher, the Employer placed an offer before the Union on or about November 21, 1995. This offer, which included proposals on all of the troublesome issues alluded to earlier, was open for acceptance until December 31, 1995. Mr. Deutscher said that he did not understand that there had been any response by the Union to all aspects of this proposal. He did

concede that the Union had proposed that the employee share of the insurance plan premiums should be taken out of the proposed lump sum payment of $1000.00 which was also contained in the offer advanced by the Employer. Mr. Deutscher said he did not regard this as a legitimate counter-proposal because it did not address the question of how the insurance premiums would be paid in the long term.

The next bargaining meeting was on April 4, 1996. Although much of the session was conducted through the conciliator, there were three brief face-to-face meetings between the parties at the end of the day. When they met at approximately 3:30 pm, the Employer tabled a new proposal which included five basic elements: the suggestion that the agreement be for a three-year term; a proposal for a staged transition to a work week of 37 1/2 hours; a proposal for a move to equal sharing of the cost of insurance premiums; the offer of a lump sum payment of $1500.00 at the execution of the agreement; and the offer of a wage increase of 2% effective November 4, 1996.

According to Mr. Deutscher, the parties recessed for approximately half an hour. When they met again face-to-face, the Union responded to the Employer proposal. Mr. Deutscher testified that the new Union offer was made "without prejudice." They indicated that they were willing to accept the three-year term. They also indicated that they were willing to accept the longer work week, but would demand some compensation to employees for this change. They rejected the proposal for equal sharing of the insurance premiums. They stated that they would accept the lump sum payment, and the November wage increase, but put forward a proposal for an additional wage increment at a later date.

The parties adjourned again for a short period, and met for a few moments at about 4:15 pm. What Mr. Deutscher and Ms. Wagner remembered of this exchange differed somewhat, though they both recalled that it was a brief meeting. Mr. Deutscher said that Mr. Robert Watson, chief spokesperson for the Employer, stated clearly that the Union proposal made shortly before was unacceptable. Mr. Deutscher recalled that Mr. Watson also said that the Employer would comment on the proposal in more detail at the next meeting, but was unable to make any further response at that time because the meeting was drawing to a close and it was necessary to set a date for their next bargaining session.

Mr. Deutscher also said that the representatives of the Employer had made it clear that their own earlier proposal tabled on April 4, 1996 was still open for acceptance by the Union.

The recollection of Ms. Wagner was that Mr. Watson said that the Employer needed time to think about the position the Union had put forward in response to the written proposal tabled by the Employer at 3:30 pm on April 4, 1996. She said that she had understood the Employer would be making a response at the next meeting, which was set for April 23, 1996.

As we have seen, the Employer issued the memorandum dated April 10, 1996 in the interval before the next bargaining session, and the Union filed this application on April 19, 1996. Mr. Deutscher said that, when the parties met face-to-face on April 23, 1996, he could not recall that the Employer had made any specific response to the position the Union had taken on April 4, 1996.

The Employer defended the legality of the memorandum of April 10, 1996 in a variety of ways. In his testimony, Mr. Deutscher alluded to a number of communications emanating from the Union. He pointed, for example, to a notice dated March of 1996 which was being distributed to members of the Credit Union. He said that certain statements in this notice were inaccurate, such as the statement that "the Credit Union Movement is enjoying one record year after another," and the reference to a "2 year wage freeze" as representing the position of the Employer on compensation.

Though he did not focus on this point explicitly in his final argument, counsel for the Employer suggested in his opening statement that it constitutes a defence for an employer accused of communicating improperly with employees that the intention is to correct manifest inaccuracies or misrepresentations being circulated by the trade union. We do not quarrel with this as a general proposition, though such a defence cannot be regarded as completely unqualified by circumstances.

It cannot be said, however, that anything in the memorandum of April 10, 1996 addressed the inaccuracies identified by Mr. Deutscher in the notice circulated by the Union in March of 1996. It would seem to us reasonable, if the grounds given by the Employer for issuing a communication are that it is imperative to correct misinformation being circulated by the Union, that the communication address those inaccuracies, which is not the case here.

A second line of defence put forward by the Employer was based on the understanding that the position which the Union took in the meeting of April 4, 1996 was "without prejudice." The significance of this, according to Mr. Deutscher was that, once the Employer had rejected that proposal, it was a nullity, and the only thing which remained on the table was the Employer position tabled earlier in that meeting. The statement made in the opening paragraph of the memorandum of April 10, 1996 that the Union had restated their position of November 23, 1995 was an accurate description of events according to this view.

It is difficult to know how the Employer could draw a distinction between the proposal made by the Union late on April 4, 1996, and the position stated by the Union in November of 1995, on this basis. All collective bargaining proposals are "without prejudice" in the sense that they represent an effort to move the process forward by revising former proposals, conceding elements of the proposals of the other party, putting forward new components, or recombining proposals in a new package. No proposal can be considered unequivocal or irrevocable until an agreement has eventually been reached.

Under cross-examination, Mr. Deutscher conceded that the position which the Union took just before the end of the meeting on April 4, 1996, differed from the position they had taken in November of 1995. Yet this is certainly not the impression which would be conveyed to any reasonable person reading the first two paragraphs of the memorandum of April 10, 1996. The scenario painted by the Employer there is of a Union negotiating committee which throughout the meeting of April 4, 1996 did not deviate from the position taken in November of 1995. In an attempt "to move negotiations to a settlement," the Employer then put forward the proposal summarized in the next paragraphs. There is no mention that the Union adjusted their position on several issues described by the Employer as important, including the hours of work and the compensation package. The impression conveyed by the description given by the Employer is that the Employer alone had modified their position.

We have said earlier that an employer who chooses to communicate with employees concerning issues which are the subject of bargaining with the trade union representing those employees must be exceedingly careful in framing those communications. We have stated our view that, in assessing such communications, the question is not whether the communication is a legitimate exercise of freedom of expression, but whether there is anything about the communication which may have a coercive impact

on employees or interfere with their ability to exercise their rights under this *Act*, taking into account the imbalance of power between employees and their employer.

In this connection, we do not think it is necessary that the Union adduce evidence to show that individual employees have, in fact, suffered coercion or intimidation resulting from the communications. As we have pointed out in the past, the assessment of the effect of the communications is generally an objective one, and does not depend on the ability of the complainant to produce evidence of a subjective impact on employees. In any case, the essence of the Union complaint in this case is not that the communication was of a coercive nature, though this is the character of the allegations made in many cases of this kind. The allegation in this instance is that the misinformation in the first paragraph of the memorandum constituted interference in the relationship between the employees and their bargaining agent, because it cast doubt on the strategy being followed by the Union at the bargaining table.

We have concluded that this complaint is well-founded. The evidence of Mr. Deutscher failed to provide a convincing explanation as to why the memorandum characterized the position taken by the Union as unchanged since November of 1995, and this was, in our view, a misleading description of what the situation actually was as of April 10, 1996. This may or may not have undermined the Union in the eyes of the members of the bargaining unit, but it is not open to an employer to engage in conduct which poses a significant threat to the strength of the bond between employees and the trade union representing them.

The Employer may take the view that the modifications put forward by the Union on April 4, 1996 are unacceptable and do not represent the basis for an agreement. It may be that they attempted to reject this position categorically at the end of the meeting, though, given the view we have taken of this, it is not necessary for us to come to a conclusion on that point. We do not think this means they were permitted to convey the impression that the Union had not altered their position on bargaining issues in any way since November of 1995.

We should note that we have drawn this conclusion on the basis of the contents of the memorandum, combined with the evidence given by Ms. Wagner and Mr. Deutscher of the conversations the parties had on April 4, 1996, and the concession by Mr. Deutscher that he recognized that there had been a change in the position expressed by the Union between November 23, 1995 and the end of the April 4, 1996 meeting. It does not depend on any exchanges which may have taken place through the medium of the conciliator, and is not therefore open to the objection of unfairness raised by counsel for the Employer in connection with the other aspect of the application.

For the reasons we have given, we find that the Employer did commit an unfair labour practice and a violation of s. 11(1)(a) of the *Act*.

## DISSENT AND REASONS

**Gordon Hamilton, Employer Representative:** I have had the opportunity to read the reasons of Chairperson Bilson. With respect, I find I must disagree with her findings and the reasons for her decision.

I do not disagree with the findings of fact. It is true there was a series of communications from the Yorkton Credit Union to its employees on several occasions. As suggested by the Union, I find it inconsistent with previous decisions of this Board to adopt the position that *any* employer communication is tainted and automatically a breach of the *Act*.

### A PURPOSIVE APPROACH - RESPECTING THE PROCESS

The Union's counsel, Mr. Kowalchuk, argued that employees have a "right to bargain collectively through a union of their own choosing" and that the purpose of section 3 of the *Act* is to respect that right. He also referred the Board to s. 2(b) of the *Act* where the obligations to bargain in good faith are a requirement in moving towards a collective agreement. He suggested that any interference in that free collective bargaining through direct employer communication to its employees was contrary to the purpose of this legislation and ought to be stopped. Mr. Kowalchuk indicated that employees should

not have their loyalty to their boss and loyalty to their union become mutually exclusive of each other through a competition.

It is inevitable that on selected issues, an employee may find that he or she must decide where their greatest loyalty lies - with their employer or their union. Every time the union asks for a strike vote from its members, that is what the union is asking. This Board ought not find an employer guilty of an unfair labour practice simply because an employee is asked by an employer to choose. If so, then ostensibly the union would be equally guilty if it posed such normal questions as it does where the interests of the workers and the interests of the employer may be in conflict.

I am more concerned about the interpretation to be given to the general provisions of ss. 2(b) and 3 of the *Act* that was an integral part of the Union's presentation, particularly in light of the unique facts of this case and Mr. Kowalchuk's demand that the Employer respect the process set out in the *Act*. As Mr. Kowalchuk stated, it is an issue of *respect*.

I have little doubt that the communication from the Employer to the employees was intended to influence them. Why else would an employer wish to "set the record straight" by outlining the Credit Union's last offer and indicate how little progress had been made toward reaching an agreement. Every time an employer communicates with its employees to explain the "facts", it does so to influence its employees. This Board has on numerous occasions not found such communications to be coercive, threatening or improper (see *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 558 v. Canadian Linen Supply Company Limited*, [1991] 1st Quarter Sask. Labour Rep. 63, LRB File No. 029-90). It is only where there is a misrepresentation of the "facts" or where blatant or subtle threats are included in the communication that the Board has intervened.

The issue before this Board is whether this communication was sufficiently interfering to constitute an unfair labour practice under s. 11(1) of the *Act*, keeping in mind the purposive provisions of ss. 2(b) and 3 of the *Act*.

I believe that the Credit Union was accurate (in a very strict and literal sense) when it stated there had been no change in position by the Union. In reality, the Union had attempted compromise to reach an agreement, but when its compromises were rejected by the Employer, it retreated to the security and safety of its original position. That is a normal and cautious approach to collective bargaining which cannot be faulted, especially when bargaining in a very hostile and untrusting bargaining climate that appears to be present here.

It is also appropriate to recognize the practical reality of what was a very unwise piece of communication by the Employer. By conveying the "strict" interpretation of the Union's position, any concerned employee would go to the Union and be told that the Employer's explanation was inaccurate, likely with accompanying documentary proof. Any staged contest for the loyalty of an employee, between an employer who would be perceived to be lying to its employees, and a union that would be presumably telling the truth, would result in capitulation to the union ranks.

The facts leading up to this communication are very important. On at least two previous occasions, the Employer had communicated directly and in writing with its employees about collective bargaining. No complaint has been made to this Board about those previous communications. The Union had also taken several steps to circumvent the normal face-to-face collective bargaining process. One step is available to any union - publish an article in the local newspaper condemning the stance taken by the employer in collective bargaining. This is obviously designed to influence the employer through its customers or clients who hopefully have read the article and respond in some fashion in support of the union and its members. The newspaper article appeared prior to the April 10th memorandum which is the subject of scrutiny by this Board.

The second step used by the Union in this case is unique to this type of organization. Credit Unions are co-operatives, with its member-shareholders electing its Board of Directors. Each individual member-shareholder may only hold one share unit and thereby gets only one vote at any annual meeting. It is a very democratic organization, with many parallels in its structure to unions. In this case, the Union chose to influence the Employer's bargaining committee through an attempt to communicate directly with the Directors of the Credit Union, being the elected representatives of the credit union membership. It is recognized that this attempted circumvention of the face-to-face collective

bargaining process by the Union occurred after (and likely in response to) the April 10th memorandum from the Credit Union.

ASSESSMENT OF THE COMPLAINT

This Board has been asked to find the Employer guilty of a very serious offence. What is very clear is that both parties, at some point prior to the April 10th memorandum, chose to abandon a mature and controlled bargaining process in favour of the use of blunt instruments of power manipulation. Once parties venture into this territory, it is quite common for those instruments and tools to be inaccurate and unfocused in their effect. Where both parties engage in these tactics, it is inappropriate to find one party responsible for a breach of the *Act* except in the most extreme of circumstances involving threats, coercion or intimidation. I do not find such circumstances present here.

The decision of Chairperson Bilson based its finds of a breach of the *Act* on the presence of inaccuracies contained within the Employer's April 10th memorandum with respect to the union's bargaining position. As previously indicated, no inaccuracies were present from a *literal* reading of the text of the memorandum in question when considered in light of the evidence of the negotiation positioning by the Union. There was sufficient evidence to find similar inaccuracies both in number and degree in the newspaper article previously published by the Union bargaining committee. While no direct nexus between the two communications was provable, in that no reference to the inaccuracies presented by the Union was directly rebutted by the Employer in its memorandum, I find it readily inferable on the evidence and my understanding of the practice of labour relations generally, that the Employer's communication of April 10th was partially in response to the Union's newspaper article. It is plain, I believe, that the Credit Union circumvented the bargaining process to the same extent that the Union circumvented it through its newspaper publication. I do not agree that it is proper to find a breach of s. 11(1) of the *Act* here on the basis of a technical reading of a document or a statement given in evidence without regarding the whole of the collective bargaining dynamics.

In turning to the basis of this complaint, namely, that the Employer must "respect the process" set out in ss. 2(b) and 3 of the *Act*, the evidence is clear that neither party respected that process. It is seldom

helpful to attempt to identify which party first acted in a manner disrespectful of the process, as it often, as here, is a matter of degree graduating over time and circumstance. In my opinion, both parties showed little respect for the process of free collective bargaining, once bargaining got tougher. As of the date of the alleged breach of s. 11(1) of the *Act*, neither party deserved the protection afforded by a finding of guilty against the other party concerning an unfair labour practice, as both were guilty of disrespecting the purposive provisions of the *Act*.

Should either party continue to engage in such ineffective and blunt methodology to achieve their bargaining objectives, I am certain that some future sanction will be required. Both parties seem bent on pushing the limits of the legislation designed to oversee free collective bargaining. At this state, I would simply encourage both parties to get back to the more important business of direct collective bargaining, in the hopes that more reasonable and productive direction will be given from advisers on both sides.

## SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and CANADA SAFEWAY LIMITED AND LOU HOGAN, Respondents

LRB File No. 143-97; July 8, 1997
Vice-Chairperson, Gwen Gray; Members: Ken Hutchinson and Donna Ottenson

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

**Practice and procedure - Application - Board dismisses successorship application where issue raised is whether predecessor employer is required to provide union with information concerning existence and identity of possible successors and same issue has been raised in previous application.**

***The Trade Union Act*, s. 37.**

### REASONS FOR DECISION

**Gwen Gray, Vice Chairperson:** This application arises out of the closure of the Employer's Regina warehouse on June 14, 1997. The closure has been the subject of two other applications before this Board, LRB File Nos. 131-97 and 132-97, both of which were adjourned while the parties engaged in the negotiation of a workplace adjustment plan.

In the application designated as LRB File No. 131-97, the Union alleged that the Employer committed an unfair labour practice, in part, by refusing to provide the Union with information requested in a notice to bargain technological change. In the notice to bargain, which was attached to the Union's application, the Union requested the Employer to provide it with "all tender letters and/or correspondence to and from Canada Safeway Limited related to the technological change including but not limited to . . . warehousing companies, trucking and transportation companies, distribution warehouses and companies during the period January 1, 1995 to June 1, 1997" and "all contracts, memorandums of understanding, and correspondence with any and all persons, organizations and

companies to whom any and all of the work presently being done by anyone at the Regina warehouse is being transferred, leased, contracted, assigned and/or given."

In the present application, the Union makes the following allegations:

> *The Employer and its agents, including but not limited to Lou Hogan, have engaged in conduct which constitutes a violation of s. 37(1) under The Trade Union Act by reasons of the following:*
>
> *(a) The Employer has contracted with various trucking companies including Great West to perform work which was formerly done by the Applicant's members in Regina at the Macdonalds Consolidated warehouse; and*
>
> *(b) The Employer has contracted with various trucking companies including Great West to perform work which was formerly done and which is presently being done by the Applicant's members in Regina at the Macdonalds Consolidated warehouse; and*
>
> *(c) The Employer has "otherwise disposed of" part and/or all of the business and/or intends to "otherwise dispose of" part and/or all of the business of the Macdonalds Consolidated warehouse in Regina through the selling/sale, leasing/lease, and/or transfer of the work formerly done by the Applicant to companies including Great West Trucking;*
>
> *(d) Great West Trucking refuses to acknowledge that it is bound by any of the Board's certification orders and any of the terms of the collective agreement between the Applicant and the Employer;*
>
> *(e) The Employer is engaging in these transactions and activities for anti-union reasons; and*
>
> *(f) The Employer has served notice of its intention to close the Macdonalds Consolidated warehouse in Regina and to continue to provide the same services provided by the Applicant's members but through other Employers.*

Particulars of these allegations were requested by the Employer and in relation to the Union's allegation that the Employer has violated s. 37 of *The Trade Union Act*, R.S.S. 1978, c. T-17, counsel for the Union in a letter to counsel for the Employer set out the following particulars:

> *Finally, with respect to section 37, your client has informed the Union at the bargaining table that a significant portion of the work formerly done by RWDSU members will be done by other employers. Your client has not identified who that work*

> *is going to, how much is going to be done by them and at what cost. Your client has identified Great West and others as potential employers who might be given this work.*
>
> *As indicated to you, it was our expectation that our various applications to the Board would yield this information. To date, that has yet to occur. My clients are primarily interested in preserving their jobs and in the alternative, being given the jobs created as a result of your client's decision to give their work to someone else. Your client has been totally unco-operative in this regard for no stated or apparent reason other than it is cheaper to operate without the union contract.*

At the outset of the hearing counsel for the Employer requested that the Union's application be dismissed without a hearing on the grounds that the application discloses no violation of the *Act* and amounts essentially to a fishing expedition. Counsel argued that the allegations in paragraphs (a), (b), (c), (d) and (f) quoted above do not disclose any possible violation of the *Act* by the Employer and paragraph (e) of the application is unsubstantiated by any particulars that would provide the Employer with sufficient information to enable it to respond to the allegation.

Counsel for the Union responded to this argument by pointing out to the Board the difficulty the Union has had in obtaining information pertaining to the closure of the warehouse and the new arrangements the Employer has entered into with trucking companies. The Union viewed this application as a place to start in order to obtain the information it required to determine whether or not any of the work was disposed of to another Employer.

Section 37(1) of the *Act* provides as follows:

> *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.*

Normally, an application is made under s. 37 of the *Act* by a trade union is against the successor employer requiring the employer to comply with any existing certification orders and collective agreements that applied to the predecessor employer. The predecessor employer may be a party to the application; however, the focus of the Board's attention generally is on the successor and any orders that issue are directed toward the successor employer.

In the present case, the Union's primary complaint under s. 37 of the *Act* is that it does not know if any of the work previously performed by its members at the Regina warehouse has been transferred to a successor employer, and if so, it does not know the identity of the successor employer. The Union argued before us that the Employer is obligated to supply the Union with this information. It also acknowledged that the Employer's failure to provide the Union with details on the transfer of work is part of its complaints in the application identified as LRB File No. 131-97 as we have outlined earlier.

In our view, the Board is best able to deal with the Union's request for information pertaining to any successorship relationships that may have come into existence as a result of the closure in the context of deciding the Union's application in LRB File No. 131-97. While we are hesitant to dismiss any application that comes before this Board on what might be considered technical grounds, we are of the view that the Union's present application is not framed in a manner that would permit the Board to make any decision that would resolve the Union's central dilemma, that is, the existence and identity of a successor employer or employers. As this issue is raised in the context of LRB File No. 131-97 and there is no prejudice to the Union's ability to bring an application under s. 37(2) of the *Act* should it identify a successor employer, the Board will dismiss the present application.

## K. H. Applicant and COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION, LOCAL 1-S AND SASKTEL, Respondent

LRB File No. 015-97; July 9, 1997
Chairperson, Beth Bilson; Members: Gerry Caudle and Judy Bell

For the Applicant: K. H.
For the Respondent: Angela Zborosky
For the Employer: Leanne Bellegarde

**Duty of fair representation - Discrimination - Board decides that union discriminated against employee with mental disorder.**

**Duty of fair representation - Duty to accommodate - Board decides duty to accommodate a relevant consideration in assessing duty of fair representation.**

***The Trade Union Act*, ss. 25.1, 36.1.**

### REASONS FOR DECISION

**Beth Bilson, Chairperson:** The Communications, Energy and Paperworkers Union of Canada, Local 1-S has been designated by this Board as the bargaining agent for a unit of employees of SaskTel. K.H., a member of that bargaining unit, filed this application alleging that the Union is in breach of the duty to represent him fairly articulated in s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17. In the application, he has also alleged that the Union violated s. 36.1 of the *Act*. These provisions read 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.*
>
> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
>
> *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*

*(3) No employee shall unreasonably be denied membership in a trade union.*

The allegations made in this application are related to the conduct of the Union in handling a series of grievances filed on behalf of K.H., including a grievance related to the termination of his employment on January 30, 1996.

K.H. was employed as a draughting technician by the Employer in October of 1993. In his evidence, K.H. said that he consulted a physician in May of 1995 as a result of escalating interpersonal problems with his colleagues in the workplace. Though he did not describe these problems in detail, he did give one example of the deteriorating relationship. He said that he had responded to instructions from his superiors to keep careful track of his time by recording his schedule on a white board; he said this board was repeatedly erased by someone in his work group.

The difficulties which K.H. had in his relationships with his fellow employees are also illustrated in the written warning which was issued to him on June 7, 1995:

> *On November 16, 1994, I met with you to discuss your behaviour at a staff meeting on October 26, 1994. At this meeting I gave you a verbal warning regarding your conduct of using a loud tone of voice at the staff meeting, calling the group underachievers, calling Marilyn Boyd an unskilled facilitator and giving the group the perception that they were physically at risk.*
>
> *On Thursday May 11, 1995 you demonstrated a similar outburst towards a fellow employee. You left the work area and returned with two other SaskTel employees, one of whom was Rolf Schnetzer a CEP representative. At this time you continued speaking very loudly and pointing your finger in a threatening manner at Marilyn Boyd. Subsequently, you left the floor with the two employees.*
>
> *On Thursday, May 18, 1995 during a telephone conversation with Nancy Dodds, you used profane language which upset this employee.*
>
> *This letter serves as a written warning that your continued use of loud and abusive language to co-workers and threatening behaviour is unacceptable. So there be no misunderstanding, any further behaviour of this nature will result in further disciplinary action up to and including termination.*

Dr. Ron Katz, the family physician who saw K.H., said that the initial request made by K.H. was for medication to help him sleep, which he thought somewhat unusual. After examining K.H., Dr. Katz testified that he concluded that K.H. was suffering from "reactive depression"; he explained that this term is used to refer to a condition which is produced by external stressors. His response was to request that K.H. be given two weeks time off work, which he thought would be a useful way to begin to address the condition.

He forwarded the request for time off to the Employer, who required that K.H. be assessed by a second physician, Dr. B.G. Barootes, a medical consultant who performed contract services for SaskTel. Dr. Barootes agreed with the diagnosis that K.H. was suffering from a reactive depression; he disagreed, however, with the solution suggested by Dr. Katz to allow K.H. time off work. According to Dr. Katz, in a telephone conversation Dr. Barootes described the condition of K.H. as being "reactive depression without consequence."

Dr. Katz testified that he had known Dr. Barootes for some years, and their relationship was somewhat tense. In an exchange of correspondence and telephone calls over the summer of 1995, the two physicians continued to express their disagreement over the proper resolution of the medical problems faced by K.H. Dr. Katz felt so strongly about the position taken by Dr. Barootes that he accused him of medical malpractice.

He also suggested to K.H. that he should file a complaint with the College of Physicians and Surgeons concerning the role played by Dr. Barootes in the denial of time off work. K.H. did place his situation before the College. The response he received was that, in the case of a disagreement of this kind between two physicians, he might be well advised to get an independent assessment. In a letter dated September 4, 1995, the registrar, Dr. Lowell Loewen, indicated that the College of Physicians and Surgeons would be willing to supply the name of a physician qualified to carry out this assessment.

The alternative, they suggested, would be for him to file a disciplinary complaint against Dr. Barootes; K.H. did file such a complaint which had not been determined at the time his employment was

terminated. Though it was not entirely clear from the evidence at the hearing whether the complaint was ultimately withdrawn, it does not appear to have been decided to date.

When it became evident at an early point in their exchanges in the summer of 1995 that the two physicians were unlikely to resolve their disagreement, Dr. Barootes suggested that K.H. submit to an independent medical examination by a psychiatrist in order to obtain a definitive assessment of his condition.

Since the suggestion that a third party medical examination be carried out played a central role in the events concerning K.H. which led to the filing of this application, it is worth commenting on some aspects of the discussion connected with this matter at this early stage.

K.H. acknowledged that he was very resistant to undergo an examination by a psychiatrist. In this connection, he had extremely strong concerns about the degree of privacy he would be able to maintain in relation to his previous medical history. In 1993, K.H. had encountered serious emotional problems related to events in his personal life, and had been hospitalized briefly as a result. He was concerned both about the possibility of a repetition of that experience, and also about the impact a revelation of this earlier history might have on his employment situation.

In a letter dated July 4, 1995, Dr. Barootes referred to a conversation with K.H. and a representative of the Union on June 15, 1995. At that time, according to Dr. Barootes, K.H. had indicated that he might be amenable to a psychiatric examination if it was necessary to resolve the situation. Dr. Barootes stated in the letter that K.H. said he had seen a psychiatrist on an earlier occasion, and might be willing to see that person again. Notwithstanding this apparent acquiescence, it is clear from the testimony of both K.H. and Dr. Katz that K.H. continued to have serious reservations about the wisdom of submitting to such an examination.

Dr. Katz testified that he felt K.H. was entitled to protect the confidentiality of information about his previous problems, and did not see them as relevant to the question then at issue of whether K.H. should be granted time off because of his current medical condition. He also stated that he understood the

apprehension attached by K.H. to the prospect of a psychiatric examination, and respected his wish to avoid that eventuality.

In addition, the tone of the letters sent by Dr. Katz to Dr. Barootes suggested that he viewed the diagnosis made by Dr. Barootes as so superficial as not to constitute the basis for a legitimate professional difference of opinion. For example, in a letter dated August 20, 1995, Dr. Katz made the following comment:

> *If I am wrong in this point you should have no difficulty finding a psychiatrist to support your view that "depression without consequence" is a clinical entity that has been described in the medical literature. Once you have provided proof in the literature that your position can be supported I would then offer you my most sincere apologies and agree to a psychiatric assessment for K.H.*

As part of his response to the situation, Dr. Barootes recommended that K.H. be transferred to a different work environment, and the Employer moved him to a different unit. Initially, this appears to have had a positive effect, and K.H. said that he was optimistic that this would make it possible for him to function effectively. Though he raised with Dr. Barootes the question of why this transfer had only been recommended on a temporary basis, Dr. Katz too felt that the transfer was having a beneficial effect. Indeed, he suggested at first that the positive nature of the change rendered a psychiatric examination unnecessary.

K.H. testified that the positive effects of the transfer to a new work group lasted only a short time. He attributed this to what he referred to as "cross-contact" between his new colleagues and members of his previous work team. He said he began to experience pressure similar to that which had led him to request medical leave in May of 1995.

According to K.H., it was in response to this pressure that he began to conduct himself in a way which resulted in a series of disciplinary actions taken against him by the Employer. On October 23, 1995, he was sent a letter imposing a one-day suspension without pay. This letter read as follows:

> *You received a warning from Jacky Hoffert on June 7, 1995 regarding attending unauthorized meetings on Company time. On your temporary relocation to the 9th*

> *floor, you again attended an unauthorized meeting and the policy was again reviewed and reinforced by Dick Hegion. On Wednesday, October 18, 1995 you attended an unauthorized meeting with Ken Zabiaka on Company time.*
>
> *You also received a warning from Jacky Hoffert on April 28, 1995 regarding the proper procedure to follow when reporting any absence from work. On Thursday, October 19, 1995 you were absent from work but you did not report this absence until 11:30 am which is not in accordance with proper reporting procedures.*
>
> *You are hereby suspended from work due to continual unacceptable behaviour as demonstrated by the above two incidents. Your suspension will be for one day, without pay, commencing at 12:00 pm, October 23, 1995 and concluding at 12:00 pm, October 24, 1995. You are required to recommence work at 1:00 pm October 24, 1995.*
>
> *To ensure that there is no misunderstanding concerning the Company's position, this letter serves as official notice that any further disregard of Company policies and procedures or departmental rules will result in further disciplinary action up to and including termination.*

K.H. said that his failure to report his absence from work at the appropriate time arose from his difficulty sleeping. He said that, although he understood the procedure for reporting absence, he had not fallen asleep until early morning, and had slept until 11:30 am. With respect to the allegedly improper meeting, he said that he had consulted Mr. Zabiaka as a representative of the Union, wishing to get advice about his difficulty obtaining time off work, and understood that Mr. Zabiaka would not see him except during working hours.

On October 25, 1995, K.H. received a letter imposing a further three-day suspension without pay. This letter read as follows:

> *Further to our meeting of October 24, 1995, we have concluded our investigation with respect to your weekly work report.*
>
> *Your work report for the week ending October 14, 1995 does not reflect the work performed. More specifically, there is time allocated to job numbers and in actuality no work was performed on these jobs. This constitutes a falsification of your work report. This action is unacceptable as you have failed to comply with policies, procedures and rules.*
>
> *Based on your continued disregard for Company and departmental policies, procedures and rules, you are hereby suspended for three working days, commencing*

> *at 12:00 pm on October 25, 1995 and concluding at 12:00 pm on October 30, 1995. You are required to recommence work at 1:00 pm on October 30, 1995.*
>
> *To ensure that there is no misunderstanding concerning the Company's position, this letter serves as official notice that any further disregard of Company or departmental policies, procedures and rules will result in further disciplinary action up to and including termination of employment.*

Grievances were filed in connection with both of the suspensions on October 30, 1995, and another was filed in connection with the written warning on November 9, 1995. In addition, several other grievances were filed on behalf of K.H. One of these related to the outcome of a written warning issued to K.H. on June 7, 1995, which referred to his presence in unauthorized areas of the premises of the Employer after hours, as well as to the presence of an unauthorized person who had accompanied him. As a result of this disciplinary action, he had been denied access to the building after hours. He had, therefore, been unable to complete a computer course which he was taking with the approval of the Employer. Though no grievance had been filed in connection with the written warning itself, a grievance was filed on October 31, 1995, complaining that the Employer refused reimbursement to K.H. for the cost of the uncompleted course.

In November of 1995, a grievance was filed alleging that the Employer had improperly denied sick leave benefits to K.H. for the absence connected with the diagnosis provided by Dr. Katz in May of 1995.

On November 21, 1995, a grievance was also filed complaining that the Employer had refused to permit K.H. to place a document containing his response to the written warning issued to him on June 7, 1995 on his personnel file.

As we have seen, there was ongoing discussion of the possibility of an independent medical examination by a psychiatrist, commencing shortly after the disagreement arose between Dr. Katz and Dr. Barootes over the appropriate response to the diagnosis of reactive depression. In January of 1996, Dr. Katz obtained a letter from a Regina psychiatrist, Dr. Kamla Verma, which read as follows:

> *This is in response to our conversation that adjustment disorder is a reaction to a clearly identifiable event or events or adverse circumstances. This can be manifested with depressed mood, anxious mood, mixed emotional features or with disturbance of conduct. The disorder is expected to remit eventually, after the stressor disappears or a new level of adaptation is attained.*
>
> *If you need further information, I can provide that on request.*

Dr. Verma did not see K.H., but had a conversation with Dr. Katz about the implications of a diagnosis of reactive depression, which she referred to in her letter as "adjustment disorder." Dr. Katz viewed the letter as supporting his position that K.H. should be removed from the workplace, and forwarded the letter to the Employer. He indicated to K.H. that he felt this letter should satisfy the requirement for a third party medical assessment, and he stated this position to Dr. Barootes as well.

According to Mr. Doug Seal, who was president of the local Union during this period, K.H. did not agree to submit to an independent medical examination, although the representatives of the Union were advising him to co-operate with this measure. In the view of Mr. Seal, the independent medical examination would resolve or clarify a number of issues, including whether the Employer had been right in denying sick leave benefits to K.H.

The testimony of K.H. was that he never categorically refused to take part in a third party medical examination, though he acknowledged that he had strong reservations about it. He said that he accepted the view of Dr. Katz that the Employer should be prepared to accept the letter from Dr. Verma as satisfying their requirement for a third party assessment. In addition, over the summer of 1995, he had been pursuing his inquiries with the College of Physicians and Surgeons, which he hoped, on the basis of the assurances of Dr. Katz, would show that Dr. Barootes was incorrect in his initial response to the request for sick leave. In their testimony, both he and Dr. Katz indicated that they were somewhat concerned about the suggestion that the independent medical examination should take place through the office of Dr. Barootes, rather than under the auspices of Dr. Katz himself.

K.H. said that he also raised the question of how the notion of a third party medical examination was consistent with the provisions in the collective agreement, which did not make reference to such a mechanism.

Mr. Seal said that the Union gave a considerable amount of latitude to K.H. before they began to press him about the independent medical examination, though the Employer was becoming more insistent about this issue as time went on. In addition, according to a letter sent to Dr. Katz dated January 11, 1996, Dr. Barootes had received a letter from the College of Physicians and Surgeons suggesting that an independent medical examination should be arranged.

On January 17, 1996, K.H. received the following letter sent on behalf of the Employer:

> *Despite attempts to resolve the difference of medical opinions, a mutually agreed upon third party medical assessment has not been completed.*
>
> *You are asked to provide a written list of psychiatrists to our Medical Department by February 1, 1996. SaskTel's Medical Department will review the list and attempt to identify a mutually agreeable psychiatrist.*
>
> *An appointment will be scheduled with this psychiatrist by SaskTel's Medical Department by February 15, 1996. You will then be required to attend the appointment as scheduled.*
>
> *Failure to comply with this procedure in its entirety will result in disciplinary action up to and including termination of employment.*

On the same day, a meeting was arranged between representatives of the Union and the Employer about the third party medical examination. K.H. was present, and asked that Dr. Katz be joined to the meeting by telephone. Dr. Katz was asked whether K.H. was capable of making the decision with respect to the independent examination, and he answered that K.H. was "the quarterback of his own destiny." He also said that any psychiatrist in Regina would be qualified to carry out such an examination.

Mr. Seal confirmed the results of this meeting in a letter dated January 18, 1996, in the following terms:

> *Further to our meeting of January 17, 1996 I am writing to you today to indicate to you that K.H. has selected Dr. Messer as the doctor to perform the third party medical assessment. As I am sure you are aware Dr. Messer was put forward by the SaskTel medical department as an acceptable choice, in an exchange between Dr. Barootes and Dr. Katz. Therefore we have mutual agreement on Dr. Messer to perform the third party medical assessment and we should proceed to an appointment.*

> *K.H. has indicated to me that he agrees to this third party medical under protest and only at the threat of losing his job at SaskTel.*
>
> *Thank you for your time in regards to this matter.*

In a letter dated January 23, 1996, Dr. Barootes informed K.H. of the arrangements which had been made for the third party medical examination:

> *An Independent Medical Examination has been arranged for you. The following are the details:*
>
> > *Dr. Charles Messer*
> > *1957 Elphinstone Street*
> > *Regina, SK*
> > *Phone: 352-4674*
> > *Appointment: Saturday, January 27, 1996 10:30 am*
>
> *Dr. Messer advised me that the examination would take between two and three hours and once he has had an opportunity to review all the information he will offer his recommendations in a letter to myself. I have asked that he send a copy to Dr. Katz.*
>
> *If for any reason you can not make this appointment, please contact Dr. Messer's office directly and also notify myself or Darlene Black in the Health Services Department (777-2033).*
>
> *If you have any questions, please do not hesitate to contact me.*

It will be noted that the date scheduled for the examination was January 27, 1996. K.H. testified that he was taken by surprise by the speed with which the examination had been arranged. He said that he had hoped to have an opportunity to discuss the matter with Dr. Katz, and with a lawyer, before he went to the consultation with the psychiatrist. He said that he panicked, and decided not to go to the appointment which had been arranged. He said that he read the letter from Dr. Barootes as indicating that he would be able to reschedule the appointment. He testified that he did call the office of Dr. Messer and tried to reschedule the appointment, but was unable to reach anyone other than an answering service. In any case, K.H. said that he had independently arranged an appointment with Dr. Messer, which was scheduled for a date in March of 1996, and he thought he could avail himself of that date if no earlier time could be arranged.

Dr. Barootes sent a memorandum to the Employer dated January 30, 1996, which reads as follows:

> *I was informed by Dr. Messer's office on January 30, 1996 that K.H. had contacted his office on January 26 informing him that he was cancelling his appointment and that he would reschedule it. I would be happy to assist further but I will await your direction.*

Also on January 30, 1996, a letter was delivered to K.H. terminating his employment. This letter read as follows:

> *On several occasions in the past you have demonstrated a lack of respect for Company policy, practice and direction. Despite attempts to work with you to obtain an independent medical examination you continue to be non-compliant.*
>
> *As a result of your continued failure to comply with Company policy, practices and direction, you leave me no alternative but to terminate your services effective immediately.*
>
> *Two weeks pay in lieu of notice will be forwarded to your home address.*

In a document provided to the Board by the Union, Mr. Fred Strelieff, one of the group representatives for the Union, described the circumstances in which K.H. was informed of his termination. Mr. Dennis Casper, network provisioning manager for the Employer, asked to meet with K.H. and Mr. Strelieff. Mr. Strelieff said that Mr. Casper refused to say whether it would be a disciplinary meeting, and also refused permission to K.H. to call his lawyer. Eventually, Mr. Casper informed them that the employment of K.H. was being terminated immediately.

A grievance was filed in connection with the termination on February 5, 1996.

Mr. Rolf Schnetzer was a Union shop steward throughout this period. It seems apparent from the evidence that Mr. Schnetzer had the closest contact with K.H. about his problems in the workplace and the progress of the grievances. In his testimony, Mr. Schnetzer said that it seemed to him in May of 1995 that K.H. was close to a "nervous breakdown." He said it was clear K.H. was under considerable stress, and that he was experiencing difficulties in his relationships with his fellow employees. K.H. told Mr. Schnetzer of the diagnosis given by Dr. Katz, and about his request for sick leave. He also

gave Mr. Schnetzer copies of much of the correspondence between Dr. Katz and Dr. Barootes related to their disagreement over the proper course to follow, although Mr. Schnetzer did not think he had been provided with a copy of the letter from Dr. Verma.

Mr. Schnetzer said he felt from the beginning that the medical condition of K.H. was the underlying cause of the problems he was facing. In his role as shop steward, he discussed this on a number of occasions with the supervisors of K.H., and said that he made the point repeatedly. He was present at the meeting on June 7, 1995 when K.H. was given the written warning concerning his unauthorized absences from his work station, and his intemperate dealings with other employees. Mr. Schnetzer said that, at this meeting, the supervisors placed severe restrictions on the ability of K.H. to move around. Mr. Schnetzer said he thought this placed K.H. in a "pressure cooker."

Mr. Schnetzer said that he played some part in convincing Dr. Barootes that K.H. should be transferred to a different work group. He said that K.H. reacted very enthusiastically to this move, and was optimistic that he would be able to function better in the new environment. Mr. Schnetzer described K.H. as being very "keen" about doing a good job and demonstrating that he could co-operate with the Employer.

When it became clear that the transfer to the new work location was not going to effect a permanent resolution in the problems of K.H., Mr. Schnetzer said that he telephoned the Union headquarters to inquire whether it was possible to obtain a legal opinion about K.H.'s situation. He was informed that the Union only sought the advice of counsel for specific problems, and they did not think it necessary in this instance. Mr. Schnetzer was not certain who spoke to him on this occasion.

In any event, K.H. sought legal advice himself in November of 1995, and brought Mr. Schnetzer a copy of the letter he had received from Mr. John Williams, a solicitor. The letter, dated November 9, 1995, read as follows:

> *We are the solicitors for K.H. in connection with the difficulties he has been incurring regarding his employment at SaskTel. I write to you in your capacity as Steward for the CEP Union to confirm our telephone conversation of November 8, 1995, regarding the difficulties K.H. has encountered and the proposed Union response.*

*As discussed, I had an opportunity to review the proposed grievance relating to the safety and health and sick leave issues. I was concerned that the disciplinary matters were not included in this grievance. I understand from you that these matters are being examined and that, in your opinion, if they are grieved - they should be grieved separately. As you know, our concern is that the last two disciplinary matters seem to grow out of the problems that K.H. was experiencing over the sick leave issue, as well as other problems he was having with management. We are concerned that if the matters are dealt with separately, the "big picture" might be lost.*

*In any event, I confirm your advice that there is no time limitation for the bringing of these grievances and that they will be reviewed further with a view to grieving them separately.*

*I also wish to confirm our discussion regarding the specifics of the disciplinary issues. With respect to the one day suspension, the reasons offered by the company were that K.H. was attending unauthorized meetings on company time and that he failed to timely report an absence from work. The first reason, if it relates to Union meetings, would appear to be contrary to s. 11 of The Trade Union Act. If that is the case, would the second reason (failing to report) be sufficient in and of itself to justify a one day suspension? (I should indicate that our client is of the view that he reported his absence at the first opportunity to do so.)*

*We are also concerned about the process regarding the three day suspension. This suspension followed immediately on the heels of the one day suspension, yet it related to conduct that occurred before the one day suspension. This appears to be unfair discipline. In our view, the company should have dealt with the work report issue when they dealt with the unauthorized meetings and failing to report matters.*

*Thank you again for the opportunity to discuss these matters with you and I look forward to a positive resolution of these matters on K.H.'s behalf.*

Mr. Schnetzer said he did not think this letter was circulated to anyone else in the Union, although he kept a copy of it in his files.

Mr. Schnetzer testified that he did not have any formal role in the processing of the grievances filed on behalf of K.H. other than to make representations on his behalf to his immediate supervisors. He said that he had not sent the medical information given to him by K.H. to anyone else; he understood K.H. wanted this information to remain confidential. On the other hand, he said that he told people repeatedly that the medical problems were at the root of the disciplinary action taken against K.H.

In his testimony, Mr. Schnetzer said that no one approached him to ask about K.H. until about a year after his employment had been terminated. At that time, which was after this application had been filed, Ms. Rhoda Cossar, the new president of the local Union, asked him for any information in his possession concerning K.H. He gave her the file he had maintained which included the letters between Dr. Katz and Dr. Barootes.

Mr. Seal and Mr. Dave Durning, national representative for the Union, gave evidence concerning the workings of the grievance procedure under the collective agreement. An employee wishing to file a grievance would initially approach a shop steward. The first step of the grievance procedure contemplates an attempt to resolve the issue by discussion between the shop steward and the first level of representatives of management. It will be recalled that Mr. Schnetzer described having such discussions in connection with the grievances filed on behalf of K.H.

If no resolution can be achieved at the first step, responsibility for proceeding to the second step falls on the group representative, an elected Union official who represents a number of employees served by several shop stewards. At the second step, there is further discussion of the grievance between the group representative and a second level of management representatives.

Should attempts to resolve the grievance at the second step prove unsuccessful, the grievance is forwarded to the local Union. At the third step, the vice-president of the Union meets with a general manager. The Employer provides a written response to the grievance at this step.

After the written response of the Employer is received, the executive of the Union considers whether to proceed to the fourth step of the grievance procedure. This executive committee consists of four table officers and approximately 15 group representatives from across the local. If the decision is made to proceed to the fourth step, the matter is turned over to the national representative, who has the responsibility of making the presentation at a fourth step meeting, which may be attended by a number of management representatives.

Depending on the outcome of the fourth step meeting, the executive committee discusses whether to proceed to arbitration. Mr. Seal said that the executive considers a variety of factors in making this

determination; these factors include the significance of the issue raised by the grievance, the possible cost of proceeding to arbitration, and the likelihood of a positive outcome. If a recommendation is made to pursue the matter to arbitration, the national representative assumes the responsibility for the arbitration phase.

A grievance log is maintained to record the progress of the grievance once it has come into the hands of the executive committee of the local Union, which is after the second step. The Union filed with the Board a considerable amount of material concerning the grievances filed on behalf of K.H. which had been available to officers at successive steps in the grievance procedure.

Mr. Seal testified that the local Union is usually dealing with approximately 40 active grievances. At the regular monthly meetings of the executive committee, he said that they would typically discuss between two and ten grievances.

In his evidence, Mr. Seal described the process which had been followed in connection with the successive grievances filed on behalf of K.H. In the case of the grievance which was filed in connection with the written warning K.H. had received on June 7, 1995, Mr. Seal said he began by investigating both events which led to the discipline which was the subject of the grievance, and those events which had led to the earlier verbal warning referred to in the written warning. In the course of his investigation, Mr. Seal spoke to several of the employees who had been present on occasions when K.H. allegedly used obscene or threatening language. He talked to a witness to these events suggested by Mr. Schnetzer. He also discussed the matter with K.H.

As a result of his investigation, Mr. Seal concluded that the allegations made by the Employer in the written warning were founded in fact. He reported this conclusion to the executive committee, which decided that the grievance should be withdrawn. K.H. was advised that he could appeal this decision to a meeting of the general membership; this appeal occurred on January 22, 1996, and was denied.

At the same meeting, the membership denied an appeal concerning the withdrawal of the grievance which had been filed on behalf of K.H. protesting that his response to the written warning he had

received had been removed from his personnel file. Mr. Seal said that when the executive committee considered the grievance, they decided that there was no language in the collective agreement which would allow them to demand that the Employer permit the inclusion of such a document in the personnel file. Mr. Seal had talked to persons in the human resources department, and had been given this explanation for the denial of the request made by K.H.

The grievance concerning the one-day suspension imposed on K.H. was filed on October 30, 1995. The grounds given for the suspension were that K.H. had not properly reported an absence from work, and that he had an unauthorized meeting during working hours. Mr. Seal said that he investigated this situation as well. After talking to K.H., he was satisfied that K.H. was aware of the proper procedure for reporting an absence. He also concluded that K.H. had been warned about taking time away from his desk on previous occasions, and that he understood he was not supposed to meet with other employees during working hours.

At the same time, the Union was handling the grievance related to the three-day suspension which was imposed on K.H. for improper recording of his work activities. Mr. Seal said that he had access to notes kept by one of the shop stewards who had discussed the matter with K.H. He also talked to K.H. himself. The explanation given by K.H. for the inaccuracies in reporting was that he was still under pressure and found it difficult to deal with interruptions. He had, therefore, filled out reports for work he had not yet completed in the expectation that he would complete the work within the proper time.

When grievances are filed concerning suspensions or dismissal, Mr. Seal explained, the third step of the grievance procedure is passed over and a meeting is held at the fourth step. At this meeting, Mr. Seal said that the representatives of the Union argued that the suspension was an unreasonably harsh penalty, and that the actions of K.H. were connected with his illness. K.H. was present at this meeting. They also argued that the denial of sick leave to K.H. was linked to all of the subsequent grievances.

Both grievances were denied by the Employer following this meeting. After some discussion of the response given by the Employer, the executive committee decided that the grievances should be withdrawn. K.H. did not appeal this decision.

The grievance filed on behalf of K.H. in connection with the refusal of the Employer to reimburse him for the costs associated with his computer course was pursued to the third step of the grievance procedure. Mr. Seal said that, after talking to K.H., he was satisfied that K.H. understood the policy of the Employer not to reimburse employees unless the approved educational courses were completed. He did not view as relevant the explanation of K.H. that the Employer had rendered it impossible for him to complete the course by denying him access to the building after hours. The grievance was withdrawn in February of 1996, and K.H., whose employment had by this time been terminated, did not appeal the decision.

With respect to the grievance filed in November of 1995 complaining of the denial of sick leave benefits to K.H., Mr. Seal said that the handling of this grievance was tied up with the discussions of the possibility of a third party medical examination. Though K.H. was given some extra time to comply with the request for an independent examination, the grievance was ultimately withdrawn when he did not provide additional information from this source.

As we have seen, a grievance was filed in February of 1996 after the employment of K.H. was terminated. Mr. Durning said that he met with K.H. in March of 1996 to discuss the grievance. Mr. Durning testified that he tried to persuade K.H. that a third party medical examination would be the only thing which would satisfy the Employer in the long run, and asked if he was willing to co-operate in such an examination. They also discussed the approach which the Union should take in dealing with the grievance at a fourth step meeting with management. Mr. Durning proposed to emphasize the medical issue, and K.H. was in agreement with this.

Some months elapsed, and K.H. had still not provided medical evidence to the Union. When the fourth step meeting was held in November of 1996, according to Mr. Durning and Ms. Cossar, who was now involved in grievance handling for the local Union, the Union had decided to take a slightly different tack. They adopted this approach after consultation with K.H. They proposed to the Employer that K.H. be reinstated to his employment without any compensation for lost income; they presented this to the management representatives as an opportunity for an entirely new start for K.H. in the workplace.

The management representatives present at the meeting undertook to consider this suggestion, although they did not hold out much hope that it would be acceptable to the Employer. The grievance was subsequently denied by the Employer. At a meeting in December of 1996, the executive committee decided that the grievance should be withdrawn.

K.H. decided to appeal this decision, and his appeal was heard at a general membership meeting on January 27, 1997. At the meeting, Ms. Cossar outlined the issues as seen by the executive. K.H. was given an opportunity to state his version of the termination. According to the evidence of K.H., it was a very stressful occasion for him and he was aware it was not going well. He recalled that one member asked him repeatedly whether he was willing to have a third party medical examination, and he did not feel able to give a direct answer. As he remembered it, the essence of the message conveyed to the membership by Ms. Cossar was that the Employer and the Union were in agreement that K.H. should receive a psychiatric evaluation, and that he was not willing to do this. K.H. said that he was asked to leave the meeting before the vote was taken on his appeal; Ms. Cossar said that no one requested that K.H. leave, though he did absent himself for the last part of the meeting. The appeal was rejected by the majority of those voting at the meeting.

We should perhaps say at this point that we do not think it necessary to consider further the aspect of the application alleging violations of s. 36.1 of the *Act*. K.H. did not press this issue strongly in his argument, other than to say he felt he should have been invited to all meetings at which his grievances were being discussed. This seems to rest on a misapprehension of the nature of the obligations resting on trade unions to comply with the demands of the rules of natural justice. These rules do not require, in our view, that individual union members be present on all occasions when there is some discussion of their grievances. It is open to union officers to engage in discussion among themselves, and with representatives of an employer, in the absence of a grievor.

The major element of the application filed by K.H. is, in any case, the allegation that the Union was in breach of the duty to fairly represent him.

In a decision in *Gilbert Radke v. Canadian Paperworkers Union*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, this Board described as follows the genesis of the duty of fair representation, 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.*

The basic principles which have governed the duty of fair representation in this and other jurisdictions were enunciated by the Supreme Court of Canada in *Canadian Merchant Services Guild v. Gagnon*, [1984] 84 C.L.L.C. 14,043, at 12,188:

> *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 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 employee.*

As this and other labour relations boards have often remarked, whatever obligations are imposed upon a trade union by the duty of fair representation must leave considerable latitude for the kind of decision-making which is peculiar to the collective bargaining context. On the one hand, the duty of fair representation has its roots in a recognition that, since trade unions are granted exclusive authority to represent employees in respect of their vital workplace interests - and employees have no recourse other than the trade union for the representation of these interests - there must be some vehicle for assuring that employees are represented even-handedly and conscientiously by their trade unions.

On the other hand, trade unions function in a complex environment in which they must attempt to reconcile interests which are not always compatible, estimate what gains can be made through collective bargaining, pit their strength against that of their employer, and administer their resources in an effective way. In assessing the manner in which they carry out these functions, it must be remembered that trade unions are democratic organizations, and organizations in which elected representatives may play an important role.

Given these characteristics of trade union representation, labour relations boards have concluded that it would be unreasonable to impose upon trade unions a standard analogous to that expected of the professions, or to second-guess excessively the multi-polar decision-making in which they must engage.

In *Brenda Haley v. Canadian Airline Employees' Association*, [1981] 81 C.L.L.C. 16,096, the Canada Labour Relations Board described the duty in these terms, at 614:

> *It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or*

> *group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.*

In the *Gilbert Radke* decision, *supra*, this Board made this comment about the obligations resting on a trade union, at 64:

> *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.*

The Board also made this comment in a decision in *John Robert Chrispen v. International Association of Fire Fighters*, [1992] 4th Quarter Sask. Labour Rep. 133, LRB File No. 003-92, at 150:

> *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 (in Saskatchewan see Doris Simpson, 1980 (July), Sask. Labour Report, Vol. 31, No. 7, p. 43), 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.*

There has been considerable discussion of the significance of the terms "arbitrary," "discriminatory" and "in bad faith" which have been used, at common law and in legislation, to define the nature of the obligation which is imposed on trade unions with respect to the representation they provide for employees. It is not necessary, in our view, to examine what is meant by "arbitrary" or "in bad faith," as we do not see the concepts attached to these words as raised directly by the allegations in the application filed by K.H.

The significant question in relation to this application is whether the Union behaved towards K.H. in a way which was discriminatory, and it is necessary to consider the implications of this term.

The charge that a trade union has discriminated against an individual employee or group of employees has rarely arisen, though it is a charge which has sometimes been made in connection with instances in which favouritism or adherence to political factions within a trade union has played a role in the making of decisions. It must be remembered, however, that the duty of fair representation was initially rooted in a concern about discrimination based on race, and in those early cases, the term discrimination was used in the sense in which current discussion arising out of human rights legislation is framed.

A significant amount of the discussion of discrimination in the workplace has been devoted to a consideration of whether particular workplace rules or policies have a disadvantageous impact on persons or groups who can be identified in terms of one of the categories protected from discrimination under human rights legislation. The scrutiny of workplace practices or policies to identify instances of discrimination has, inevitably, implicated collective agreements, which are one of the sources of guidelines or rules which govern the expectations and requirements for employees.

The role which trade unions play in the production, enforcement and interpretation of these rules has also been subjected to examination in the context of the discourse concerning discrimination. This has been evident in the discussion of the nature and extent of the "duty to accommodate." This phrase has for some time been used to refer to the obligation of an employer, or of someone else charged with

responsibilities according to human rights legislation, to make adjustments which will permit a person or group who would otherwise be subject to discrimination to participate in a particular situation on an equal footing.

In *Central Okanagan School District v. Renaud* (1993), 95 D.L.R. (4th) 577 (S.C.C.), the Supreme Court of Canada made it clear that, in a unionized workplace, the trade union representing employees is bound by the duty to accommodate. In that case, which dealt with the relationship between provisions in a collective agreement concerning scheduling of work, and the situation of an employee whose religious convictions prevented her from working on Friday nights, the Court held that a trade union could become a party to discrimination, either by collaborating in the institution of a rule or policy having an adverse impact of a discriminatory nature, or by taking a position which would constitute a barrier to efforts by the employer to ameliorate a discriminatory practice. The Court made this comment, at 591:

> *While the general definition of the duty to accommodate is the same irrespective of which of the two ways it arises, the application of the duty will vary. A union which is liable as a co-discriminator with the employer shares a joint responsibility with the employer to seek to accommodate the employee. If nothing is done both are equally liable. Nevertheless, account must be taken of the fact that ordinarily the employer, who has charge of the workplace, will be in the better position to formulate accommodations. The employer, therefore, can be expected to initiate the process. The employer must take steps that are reasonable. If the proposed measure is one that is least expensive or disruptive to the employer but disruptive of the collective agreement or otherwise affects the rights of other employees, then this will usually result in a finding that the employer failed to take reasonable measures to accommodate and the union did not act unreasonably in refusing to consent. This assumes, of course, that other reasonable accommodating measures were available which either did not involve the collective agreement or were less disruptive of it. In such circumstances, the union may not be absolved of its duty if it failed to put forward alternative measures that were available which are less onerous from its point of view. I would not be prepared to say that in every instance the employer must exhaust all the avenues which do not involve the collective agreement before involving the union. A proposed measure may be the most sensible one notwithstanding that it requires a change to the agreement and others do not. This does not mean that the union's duty to accommodate does not arise until it is called on by the employer. When it is a co-discriminator with the employer, it shares the obligation to take reasonable steps to remove or alleviate the source of the discriminatory effect.*

In the *Renaud* decision, *supra*, the Supreme Court of Canada made the following statement about the genesis of the duty to accommodate, at 589:

> *The duty to accommodate developed as a means of limiting the liability of an employer who was found to have discriminated by the bona fide adoption of a work rule without any intention to discriminate. It enabled the employer to justify adverse effect discrimination and thus avoid absolute liability for consequences that were not intended.*

In other words, the duty to accommodate was conceived as providing a means of addressing the situation of particular employees without having to strike down all rules or policies which have an unexpected discriminatory impact. Instead of having to forego the beneficial effects of these general policies, the employer could explore the possibility of making adjustments in the circumstances of the person or group who would be disadvantaged in order to compensate for the negative impact. In *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 D.L.R. (4th) 417 (S.C.C.), the majority judgment of the Supreme Court of Canada put in these terms, at 436:

> *... where a rule has an adverse discriminatory effect, the appropriate response is to uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship.*

In many of the cases such as *Renaud, supra*, which have dealt with the duty to accommodate, the focus has been on particular rules or policies followed by an employer, whether in accordance with a collective agreement or otherwise, and on the question of whether, to the extent these rules or policies constitute a term of employment, they represent a "*bona fide* occupational requirement or qualification" (BFORQ). It has been considered a defence to a charge of discrimination that a rule or policy constitutes a requirement or qualification which is legitimately based on essential demands of the enterprise in which the employer is engaged. Much of the academic and judicial discussion of the issue has centred around the implications of this concept.

We do not read these cases to mean that the duty to accommodate is a relevant consideration only in cases where a putative BFORQ is at issue. The idea of the duty to accommodate itself seems to us of more general application. Though the scope of the duty may change according to the context in which the issue arises, the idea that an employer - or a trade union - should be expected to take reasonable

steps which would relieve the discriminatory impact of a particular situation seems to us to be of broad relevance.

Under *The Saskatchewan Human Rights Code*, R.S.S. 1978, c. S-24.1, an employer is entitled to impose legitimate occupational requirements. Section 16(7) of the *Code* reads as follows:

> *The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on sex, disability or age do not apply where sex, ability or age is a reasonable occupational qualification and requirement for the position or employment.*

In Saskatchewan, then, an employer is clearly entitled to characterize a rule or policy as a BFORQ as a defence to an allegation of discrimination, and cases such as *Renaud, supra*, make it clear that a trade union may be considered a party to such discrimination in appropriate cases.

Section 18 of the *Code*, however, imposes on trade unions a separate obligation not to discriminate against members:

> *No trade union shall exclude any person from full membership or expel, suspend or otherwise discriminate against any of its members, or discriminate against any person in regard to employment by any employer, because of the race, creed, religion, colour, sex, sexual orientation, family status, marital status, disability, age, nationality, ancestry or place of origin of that person or member or the receipt of public assistance by that person or member.*

Though this provision is part of a statutory scheme which contemplates the adjudication of complaints by boards of inquiry under the auspices of the Saskatchewan Human Rights Commission, it is our view that the notion of discrimination connected with the duty of fair representation must comprehend discrimination in the sense intended in the *Code*.

If this is the case, then the duty to accommodate may be relevant in determining whether there is an expectation that a trade union will make adjustments in procedures or policies normally followed in order to prevent the discriminatory impact which their typical operation would have on members of classes enumerated in the *Code*. The question in this connection is not whether there is something the

union could or should have done to prevent discriminatory action on the part of the employer - though this might be a relevant question in a different context - but whether the union is required to adopt a differential approach to some employees in order to avoid discriminating against them.

It has been pointed out that implicating trade unions in the duty to accommodate as it may apply in the workplace may place an unfair burden on them. In an essay entitled "Unions and the Duty to Accommodate," (1993) 1 Can. Lab. L. J. 239, Michael Lynk and Richard Ellis argue that the imposition of a duty to accommodate in the terms set out in *Renaud, supra*, and similar cases is based on drawing a false parallel between the ability of a trade union to influence the terms and conditions of employment and that of an employer.

Certainly, we accept that one must be cautious about attributing to a trade union more authority than they possess to alter the terms and conditions which have a discriminatory impact of the kind prohibited in human rights legislation. Though trade unions have a role in the production of collective agreements which set out the general terms and conditions of employment for the employees they represent, unions generally play a reactive rather than an initiating role in the making of specific decisions.

In our view, this does not mean that a trade union is relieved of the obligation of minimizing the opportunities for discrimination pursuant to the collective agreement or other workplace policies in the administration of which the union plays a role. In any case, as we have said earlier, the question of whether a trade union has been a participant in the creation of a discriminatory rule, or has failed to get out of the way of efforts to remove the discriminatory circumstances - which was the subject of discussion in *Renaud, supra* - is not the essential issue in this case.

In this case the issue is a less contingent one, and arises from the direct obligation of a trade union to deal with members in a non-discriminatory way. This issue is whether the policies and practices followed by the Union in dealing with the circumstances of K.H. were discriminatory, and whether their discriminatory effect could have been lessened by taking reasonable measures.

There were differences of opinion about many things in this case, but there was never a disagreement over the basic fact that K.H. was suffering from a mental disorder at the time he requested time off from work in May of 1995.

As we have seen, the Union responded to the difficulties in which K.H. found himself by filing a series of grievances on his behalf. The process followed by the Union in handling these grievances was characterized by a high degree of structure, extensive discussion by Union officers and representatives at different levels, careful record-keeping, and the opportunity for appeal of unfavourable decisions to a meeting of Union members. Mr. Schnetzer, Mr. Strelieff, Mr. Seal and Mr. Durning, all of whom dealt with some or all of the grievances at various stages, were experienced and well-trained representatives of their members, who approached their tasks in a conscientious manner, and in accordance with well-established Union policies. In their discussions of the grievances, these officers and other members of the local executive took into account a range of factors, and investigated the facts before coming to a decision.

Among the factors which they considered, and which they raised when the grievances were being discussed with representatives of the Employer, were the medical problems which were faced by K.H. In our view, however, they failed to make allowance for the fact that K.H. was a disabled person. In this respect, though the process they followed might have been more than sufficient to satisfy their duty to represent employees fairly, it was inadequate to address the particular situation of K.H., and had a differential impact on him which must be considered to constitute discrimination.

K.H. was subjected to a rapid and escalating sequence of disciplinary actions against him, culminating in his termination. Representatives of the Union investigated the events which had led to each of these instances of discipline, and in each case found K.H. to have conducted himself in the way alleged by the Employer. Indeed, he never denied having carried out these actions. Though the grievances were on occasion dealt with in combination, as when there was discussion of the two suspension grievances at the same fourth step meeting, the general approach was to regard them as discrete and separate issues, rather than as an interrelated series of events which must be viewed against the backdrop of the disability suffered by K.H.

In addressing the difficulties which K.H. was having in his relationship with the Employer, the Union appears to have accepted the legitimacy of the insistence by the Employer on a third party medical examination. It was not clear from the evidence at the hearing how the Union formed the opinion that the Employer was entitled to insist on such an examination. To begin with, it is not clear whether any distinction was made between "casual" and "extended" sick leave in the context of the collective agreement. On the face of it, it appears that, under the agreement, it is only in connection with the latter that the Employer is entitled to ask that an employee be assessed by the company physician. It is difficult to see, in this context, how the original request for ten days off work would invoke this provision.

In addition, there was in the agreement at that time no mention of an independent medical examination of the kind which became the focus of attention, and the grounds for the ultimate termination of the employment of K.H. This must be contrasted with the new agreement which was signed near the end of 1996. The new agreement provides for consideration of requests for extended sick leave by a medical tribunal consisting of three physicians, one named by the Employer, one named by the Union, and one named by agreement of both parties.

K.H. asked repeatedly for an explanation of how an independent medical examination was sanctioned under the collective agreement, and, in our view, he was never provided with a satisfactory explanation by the Union.

This is not to say that the Employer is not entitled to insist on some firm medical information as a basis for action in the long run, or that the Union is not entitled to agree to undertake that such information will be provided. If the parties to collective bargaining are bound to accommodate persons with disabilities to a reasonable extent, they are certainly entitled to be provided with sufficient reliable medical information upon which an assessment can be made.

In this case, however, the Union seems to have bought into the notion of the third party medical examination required by the Employer without adequate attention to the possible legitimacy of the reservations expressed by K.H. and by Dr. Katz, and without articulating the rationale for acceding to this requirement.

The Union also seems to have accepted that the paradigm of "progressive discipline" which provided the framework for the actions taken against K.H. constituted an acceptable way of addressing his conduct. They did not raise the question of whether this whole framework was irrelevant to someone with a mental disability of the kind suffered by K.H.

The exception to this seems to have been Mr. Schnetzer, who clearly understood the situation of K.H. in a different way than other Union representatives. This was perhaps, in part, because he was privy to information which he apparently did not feel free to share with other Union officials. Mr. Schnetzer and K.H. clearly had a warm relationship, and Mr. Schnetzer saw the mental state of K.H. as the key to the conduct which was the subject of discipline by the Employer.

It is not clear why he could not more forcefully have represented the situation of K.H. to senior Union representatives in this light. He did convey documents necessary for the grievance procedure to the Union headquarters, but he does not seem to have been particularly insistent that the local or Mr. Durning should consider the medical aspect of the case more seriously. Even if he felt that the particular medical correspondence confided to him by K.H. should not be forwarded to others, he might have made more strongly the general point that the grievances involving K.H. should be placed in a context of mental illness.

For their part, Mr. Seal and Mr. Durning do not seem to have approached Mr. Schnetzer to ascertain his views on the situation, although as the shop steward involved at the outset of the grievances, he might be supposed to have views on the matter.

In formulating and defining the nature of the obligations imposed by the duty of fair representation, labour relations boards have acknowledged that trade unions have limited resources, that they are largely dependent on the services of volunteers, and that they are entitled to place the rights or claims of individual employees in the balance with the overall good of the bargaining unit. We do not think it is unreasonable, however, to expect trade unions, like other organizations and institutions, to come to terms with the concepts of discrimination which have come to the fore in Canadian society as a result of

the passage of human rights legislation, as they carry out their responsibilities to the employees who rely on them.

There was no evidence to suggest that the representatives of the Union sought to involve Dr. Katz in any consultation about the nature and scope of the medical problems experienced by K.H., other than during the telephone conversation in January of 1996 in which the discussion was devoted to the third party medical assessment.

The Union may have handled the grievances diligently from the point of view of the normal operation of the grievance procedure. An ordinary employee might have little to complain of. Nonetheless, by limiting the scope of the grievance process to the normal sequence of investigation and discussion, by accepting the framework of progressive discipline, by, in effect, allowing the medical opinion of Dr. Barootes to govern what happened to K.H., the Union used the grievance procedure in a way which had a discriminatory effect on K.H. because of his mental disability.

As a number of witnesses called on behalf of the Union observed, a trade union is not required to pursue all grievances to arbitration. They may take into account the best use of their resources, and the results of their investigation of the facts. Neither are they required, however, to withdraw all grievances at the earliest opportunity, and it would not, in our view, impose an unreasonable burden on the Union to have expected them to keep the grievances in existence, and to insist on a consideration of the case of K.H. as a whole.

We would not claim that it is an easy task for trade unions to find ways of ensuring that policies and practices they have devised - which may serve fairly and adequately the legitimate expectations of ordinary employees - are applied with sufficient flexibility that these policies will not have a discriminatory effect on individuals or groups within a bargaining unit. It is likely that none of these challenges are more difficult than those related to mental disabilities. K.H. himself acknowledged that his disability made it difficult for him to respond rationally, consistently, or co-operatively in all of his dealings with the Union or other employees. His mental condition made it difficult for him to assess his own situation, to articulate his concerns, or to deal effectively with the representatives of the Union who

were responsible for overseeing his grievances. It was, in our view, particularly difficult for him to gain any benefit from the appeal mechanism available to him.

One must have some sympathy for the representatives of the Union who were responsible for dealing with the grievances filed on behalf of K.H. They approached their tasks in good faith, and reasonably conscientiously, and were no doubt frustrated by the difficulties and delays which occurred. Nonetheless, it is our view that overall the Union failed to take sufficient account of the disability experienced by K.H., and that they therefore discriminated against him in handling his grievances.

For the reasons we have given, we find that the application must be allowed. The parties agreed to reserve the question of remedy for determination at a future date, and the Board will remain seized of the matter pending such determination.

## AMALGAMATED TRANSIT UNION, LOCAL 588, Applicant and WAYNE BUS LTD., Respondent

LRB File Nos. 130-97 & 163-97; July 14, 1997
Chairperson, Beth Bilson; Members: Donna Ottenson and Terry Verbeke

For the Applicant: Randy Graham
For the Respondent: Robert Watson

**Arbitration - First collective agreement - Board agent - Board decides that it is within jurisdiction to appoint Board agent, and that appointment of Board agent will not prejudice position of employer.**

**Arbitration - First collective agreement - Board reviews respective functions of Board and Board agent in first contract arbitration.**

***The Trade Union Act*, ss. 18, 26.5, 42.**

### REASONS FOR DECISION

### PRELIMINARY OBJECTIONS

### APPOINTMENT OF BOARD AGENT: TERMS OF REFERENCE

**Beth Bilson, Chairperson:** The Amalgamated Transit Union, Local 588, has been designated by this Board in a certification Order dated February 8, 1996, as the bargaining agent for a unit of employees of Wayne Bus Ltd.

In April of 1997, the Union signified to the Board an intention to request the assistance of the Board, pursuant to s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17, in concluding a first collective agreement with the Employer. The Union filed material with the Board which purported to show the range of issues which had been the subject of collective bargaining between the parties, and which indicated the items agreed to. Supplementary material was filed in early May of 1997.

On May 23, 1997, the Employer filed a reply. The Employer also filed an application, designated as LRB File No. 163-97, alleging that the Union failed or refused to bargain collectively in violation of s.

11(2)(c) of the *Act*. Counsel for the Employer requested that the two applications be heard at the same time.

A hearing was scheduled for June 17, 1997. On June 16, 1997, counsel for the Employer advised the Board that he would be seeking an adjournment, and that he was not prepared to proceed on the date scheduled. When the hearing convened, counsel outlined his reasons for requesting an adjournment. He also raised a number of preliminary objections in connection with the application.

In an oral ruling, the Board agreed to grant the adjournment. We accept that there was some misunderstanding about the selection of dates for the hearing, and that it would be unfair to the Employer to require them to proceed with the hearing on June 17, 1997. More generally, we commented on the practice of the Board in relation to applications for first contract arbitration under s. 26.5 of the *Act*.

Section 26.5 of the *Act* 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), if:*
>
> > *(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).*

*(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.*

This provision was included in the *Act* as part of a series of amendments which were proclaimed on October 28, 1994. The Board, therefore, has had relatively little experience with applications arising under this section. We have, however, commented several times on the development of an approach which we think useful. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech*, [1996] Sask. L.R.B.R. 36, LRB File No. 201-95, the Board issued a summary of general principles which would indicate the direction we proposed to take with respect to the interpretation and application of s. 26.5 of the *Act*.

The Board has subsequently elaborated these principles in other cases, notably in *United Food and Commercial Workers v. Madison Development Group Inc.*, [1996] Sask. L.R.B.R. 469, LRB File No. 053-96.

Section 26.5(6) of the *Act* indicates that, should the Board decide to undertake the imposition of terms of a collective agreement, it is anticipated that the Board, or an interest arbitrator appointed by the Board, should do so within 45 days. Given the time pressure this creates, the Board, from the beginning, thought it useful to structure a procedure which would permit a number of steps to occur prior to the Board undertaking what might be called the "interest arbitration phase" of the process.

To this end, we have adopted the practice of appointing a Board agent to perform certain tasks before the Board embarks on considering whether to intervene. Though the terms of reference for the

appointed Board agent vary according to the circumstances of the case, the mandate of the Board agent consists essentially of two aspects.

The first task assigned to the Board agent is to explore, with the parties, the possibility of achieving agreement on any or all of the issues outstanding as part of the bargaining process. In the majority of cases we have had to date, the Board agent has been successful in bringing the parties to the conclusion of a complete collective agreement, and no further proceedings have occurred.

The other responsibility of the Board agent arises in the event that the parties do not reach agreement on all items. In this circumstance, the Board agent is asked to provide to the Board a report in which the Board agent makes recommendations as to which issues the Board should consider in the course of the interest arbitration process. The agent is not expected to recommend a final outcome on the full range of items which might be included in a complete collective agreement; rather, the agent is expected to point the Board to those outstanding issues which may fall within the criteria the Board has indicated in earlier cases to be the basis for intervention in the collective bargaining process.

Once the Board agent has provided a report to the Board, the Board would, in most cases, anticipate that a hearing would be held to permit the parties to respond to the suggestions made concerning which items should be the subject of arbitration by the Board, or by an arbitrator appointed under s. 26.5(6) of the *Act*. This hearing would be the basis of a decision by the Board as to the specific issues which would be the subject of arbitration.

The final phase of the process is the interest arbitration itself, which would concern the limited range of items selected by the Board for consideration.

At the hearing, the Board indicated our intention to proceed in accordance with the practice we have adopted, and to appoint a Board agent to assist the Board in preparing to embark on consideration of the application for first contract arbitration filed by the Union.

Counsel for the Employer raised a number of objections to the manner of proceeding outlined by the Board. One objection raised in his letter to the Board dated June 16, 1997, was that the Union has not filed a proper application which would satisfy the requirements listed in s. 26.5(3) of the *Act*.

There is no specific form contained in the regulations under the *Act* which must be used in making an application of this kind. As we indicate in our oral ruling, it is difficult to believe that after more than a year of bargaining the parties do not have a fairly complete understanding of their respective positions on the issues outstanding between them. On the other hand, as we intimated to the Union at the hearing, it would be useful for the guidance of the Board, and the Board agent we propose to appoint, to have the Union provide a succinct summary of their current position on each of the issues on which agreement has not been reached. We suggested they might wish to use the form adopted by the Employer in the reply as a model, although they are free to express themselves on these issues in whatever way they deem appropriate. We will direct them to supply this document within ten days of receiving the Orders connected with this decision.

In addition, counsel for the Employer pointed out that the Union has not yet filed a reply to the application alleging an unfair labour practice. We would expect the Union to provide a reply within a reasonable time.

Counsel for the Employer raised an objection to the jurisdiction of the Board to take any steps in relation to the application without hearing the unfair labour practice application. He argued that s. 26.5(1)(b) of the *Act* requires that the employer and the trade union have "bargained collectively" as a prerequisite to the application of this provision, and that this is the essence of the application alleging failure to bargain on the part of the Union.

He further argued that the section does not confer upon the Board the authority to appoint a Board agent in any case.

It is true that there is no specific reference to Board agents in s. 26.5 of the *Act*. On the other hand, we are confident that the Board has general authority to adopt various means, including the designation of Board agents, to assist us with various aspects of our work. Section 42 of the *Act* 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.*

The appointment of Board agents is, furthermore, contemplated in another general provision, s. 18 of the *Act*:

> *18. The board and each member thereof and its duly appointed agents have the power of a commissioner under The Public Inquiries Act and may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not.*

Counsel for the Employer signified his intention to raise a further objection related to previous comments made by this Board concerning the issue of whether the Board agent would be amenable to examination or cross-examination as a witness in subsequent proceedings. In proceedings leading up to the decision in *United Food and Commercial Workers v. Madison Development Group Inc.*, [1996] Sask. L.R.B.R. 777, LRB File No. 053-96, the Board rejected the proposal that a Board agent should be subject to cross-examination by the parties. In a number of other cases, the Board has reiterated the view that interactions between the parties and conciliators, the Board vice-chairperson or others exploring the option of settlement or agreement should be regarded as privileged for the purpose of our proceedings.

We would reaffirm that position in this circumstance. The *Act* creates a unique set of entitlements and obligations. These have relatively little meaning seen in isolation. They must be seen as part of a scheme which is designed to foster, strengthen and make accessible collective bargaining as a means of determining the terms and conditions of employment for groups of employees who wish to avail themselves of this mechanism.

When employers and trade unions, or the employees represented by trade unions, experience difficulties in the context of their collective bargaining relationship, adjudication by the Board is one possible means of resolving this difficulty. The efforts of a conciliator, a Board vice-chairperson or Board agent offer other possible ways of resolving these differences or disputes, and in many cases these vehicles provide more flexible options, options which the parties themselves have a more direct role in constructing than is often possible in the adjudicative context.

The Board has viewed these non-adjudicative activities, generally speaking, as taking place without prejudice to the availability of adjudication of the issues should these facilitative processes not bear fruit. On the other hand, we are firmly of the view that the strength of the non-adjudicative process lies in the candour and openness which can be fostered in an environment which encourages the free exchange of ideas and compromises. This environment would no longer continue to exist if the discussions which occur in that setting were open to scrutiny and challenge in an adjudicative proceeding.

In the *Madison Development Group* decision, *supra*, we commented that the tasks of the Board agent are not adjudicative ones, and we do not think there is any benefit to be gained by opening to scrutiny the exchanges which have occurred between the Board agent and the parties. The report of the Board agent is not binding upon the Board, and it is open to the parties to make representations to the Board urging the exclusion of items the Board agent recommended for consideration, or the inclusion of others.

Section 26.5(7) of the *Act* is of a permissive nature. Thus, it leaves the Board open to the option of deciding to proceed to the imposition of terms of a collective agreement without any adjudicative proceeding at all.

In devising a process which will implement the remedy provided by this section most effectively, the Board has included an adjudicative stage. Indeed, our procedure to date has contemplated two such stages, one in which the parties make representations on the general nature and scope of the arbitration, and the other in which the parties are heard on the specific terms which may or may not be imposed.

In deciding how best to support the objectives of the *Act*, it is our view that the Board must not be dazzled by the possibilities of the adjudicative paradigm. We are conscious of our responsibility to be fair to the parties, and we believe that the procedures we follow provide adequate opportunities for the parties to express their views and respond to the issues which may determine the outcome of a first contract arbitration.

It must always be remembered, however, that the overarching objective of the Board is to support, strengthen and encourage collective bargaining between the parties. Though we are aware of our obligation to provide opportunity for a fair hearing, we must never lose sight of the fact that the backdrop against which this adjudication occurs - the collective bargaining relationship - is a volatile scene in which change occurs rapidly, and the bargaining strength and aspirations of the parties shift constantly. This is particularly true in the early days of the relationship, before an initial agreement has been put in place. We cannot permit the legitimate objectives of the parties to collective bargaining to be frustrated by a process which becomes so technical, legalistic or punctilious that it is impossible to provide answers to the essential issues which come before us in a timely fashion.

We are satisfied that the process we have adopted for the handling of applications for first contract arbitration provides adequately for a fair hearing of the respective positions of the parties. It provides them as well with further opportunity to fashion their own collective agreement with the assistance of a Board agent. When a hearing is eventually held, the Employer is free to raise the question of whether the prerequisites for Board intervention have been met. In the meantime, the parties are engaged by the Board agent in an effort to resolve their differences by bargaining, albeit with third party assistance; it is, after all, the process of collective bargaining which is the focus of the legislative scheme under which these applications have arisen.

We will therefore proceed with the appointment of a Board agent, who in this case will be Mr. Walter Matkowski. The terms of reference for Mr. Matkowski will be as follows:

- Mr. Matkowski will be appointed as an agent of the Board for the purpose of assisting in the resolution of the application for first contract arbitration pursuant to s. 26.5 of the *Act* filed by the Amalgamated Transit Union, Local 588.

- Mr. Matkowski is appointed for a term of 60 days from the date of the Orders which will be issued by the Board in connection with this decision. The Board may approve one or more extensions of this term at the request of Mr. Matkowski.

- Mr. Matkowski will assist the parties in attempting to conclude a collective agreement. In addition, he may assist them in delineating or enumerating issues which they are unable to resolve. At or before the expiry of his appointment, he will report to the Board and will make recommendations concerning the issues on which the Board should or should not consider intervening by means of first contract arbitration.

## SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and LORAAS DISPOSAL SERVICES LTD. AND IN PARTICULAR CARMAN LORAAS AND BILL HUMENY, Respondents

LRB File Nos. 208-97, 209-97, 211-97, 212-97, 214-97, 215-97, 217-97, 218-97, 220-97, 221-97, 223-97, 224-97, 226-97, 227-97, 234-97, 235-97, 236-97, 237-97, 238-97 & 239-97; July 15, 1997
Vice-Chairperson, Gwen Gray; Members: Carolyn Jones and Don Bell

For the Applicant: Larry Kowalchuk
For the Respondent: Noel Sandomirsky, Q.C.

**Remedy - Interim order - Unfair labour practice - Board grants interim order to restore status quo as best as possible pending hearing of final applications.**

**Remedy - Interim order - Unfair labour practice - Unilateral change - Board requires employer to disclose to union details of closure and sale of portion of work - Board prohibits employer from unilateral introduction of further change pending hearing of final application.**

**Remedy - Interim order - Unfair labour practice - Refusal to bargain in good faith - Board requires employer to bargain with union with respect to laid-off employees and to continue bargaining first collective agreement - Board permits union to unilaterally request conciliation.**

**Remedy - Interim order - Unfair labour practice - Dismissal for union activity - Board orders terminated employees to be reinstated as laid-off employees and continuation of union's representation rights respecting laid-off employees pending final hearing.**

**Remedy - Interim order - Unfair labour practice - Board requires employer to permit reasons and order to be posted at workplace.**

**Practice and procedure - Interim order - Evidence - Affidavit material filed on interim order should be based on deponent's personal knowledge - Board does not permit cross-examination of deponent.**

***The Trade Union Act*, ss. 5.3, 11(1)(a), (c), (e), (m), 42 & 43.**

## REASONS FOR DECISION

**Gwen Gray, Vice Chairperson:** The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union was certified by the Board on March 25, 1997 for an "all employee" bargaining unit at Loraas Disposal Services Ltd. Loraas operates a solid and liquid waste disposal business.

On June 23, 1997 the Union filed applications for monetary loss and reinstatement for Henry Frank, Steve Mayer, Robin Melnyk, Kevin Wood, Rick Lissel, Pat Quartly and Les Carroll. These employees worked as vacuum truck drivers until their employment was terminated on June 14, 1997.

On July 7, 1997 the Union filed similar applications on behalf of two office workers, Elaine James and Karen Hassmen, both of whom had their employment terminated on July 4, 1997.

On July 4, 1997 the Union filed two unfair labour practice applications against the Employer. In the first unfair labour practice application, designated as LRB File No. 238-97, the Union alleged that the Employer violated ss. 11(1)(a), 11(1)(c), 11(1)(e), 11(1)(m) and 43 of *The Trade Union Act*, R.S.S. 1978, c. T-17 as follows:

> *The Employer and its agents have been engaged in violations of The Trade Union Act by reason of the following:*
>
> *a) the Employer has continued to change its method of operation and to transfer work out of the bargaining unit by removing and/or relocating the following work:*
>
> - *all work formerly done by Les Carroll, Henry Franke, Rick Lissel, Steve Mayer, Rob Melnyk, Pat Quartly, Kevin Wood and Shanna Lyons;*
>
> - *all work that has been done by members of the bargaining unit including vacuum truck work, dispatching of vacuum truck work, pick-up of recycled paper, building of bins, yard care work, truck maintenance, cleaning of coffee room, back office, drivers room and change room;*

*b) the Employer has been informing our former customers and potential customers that prices are going up because of our decision to unionize;*

*c) the Employer has been refusing to do work that was always done by members of the bargaining unit;*

*d) the Employer has been contracting out work that was and always has been done by members of the bargaining unit to Powers Transport (used oil pick-up); Go-For Used Oil Ltd. (used oil pick-up); Acme (liquid waste disposal); Canadian Waste (solid waste disposal) and Zipper Courier (pick-up of recycled paper).*

In the second unfair labour practice application, designated as LRB File No. 239-97, the Union alleged that the Employer committed violations of ss. 11(1)(a), 11(1)(e) and 43 of the *Act* by reason of the following facts:

*a) On January 23, 1997, the Union filed an application for certification of Loraas Disposal Services Ltd. in Regina.*

*b) On March 25, 1997, the Saskatchewan Labour Relations Board granted a certification order to the Union for Loraas Disposal Services Ltd. in Regina.*

*c) On June 2, 1997, the Company and the Union commenced negotiations. At no time was there a suggestion of the Company's intention to shut down its vacuum trucks.*

*d) On June 12, 1997, the Union conducted a strike vote and received a positive strike mandate from its members at Loraas.*

*e) On Saturday, June 14, 1997, vacuum truck drivers were called to meet with Carman Loraas and told they were terminated as of June 13, 1997.*

*f) The terminations of the vacuum truck drivers have caused other employees to question their job security and the effectiveness of the Union.*

*g) The Employer has affected approximately 32 percent of its workforce by its decision to remove part of its business.*

*h) The Employer has failed and/or refused to give notice of technological change as required by The Trade Union Act.*

As well, the Union filed an application seeking interim or injunctive relief which was supported by the affidavits of Brian Haughey, Union representative, and Elaine James, an accounts receivable clerk and member of the Union's negotiating committee. This application was filed on July 4, 1997.

The affidavit of Mr. Haughey states that the Union was certified on March 25, 1997, that notice to bargain was served by the Union on the Employer April 28, 1997 and bargaining commenced on June 2, 1997. Mr. Haughey indicated that the Union conducted a strike vote on June 12, 1997. The vacuum truck drivers were laid off on June 14, 1997.

These basic facts were undisputed by the Employer's evidence contained in an affidavit filed by Carman Loraas, the secretary-treasurer, a shareholder and director of the Employer.

In addition, Mr. Haughey's affidavit asserted that employee confidence in the Union's ability to negotiate a collective agreement and to conduct strike activity was being eroded.

The affidavit of Ms. James states in part the following:

> *That the employer has:*
>
> - *transferred or contracted out all vacuum truck work and terminated seven bargaining unit members due to this change;*
> - *raised rates substantially on disposing of solid and liquid waste and blames the Union for the increases;*
> - *contracted the pick-up of recycled paper to Zipper Courier;*
> - *transferred or contracted out the pick-up of used oil to Go-For Used Oil Ltd. and Powers Transport;*
> - *told the Co-op Refinery that the reason the vacuum trucks were gone was because they were going on strike;*
> - *transferred or contracted the solid waste disposal of CFB Moose Jaw to Canadian Waste;*
> - *contracted out the yard care since being organized;*

- *contracted out the cleaning of the coffee room, back office, drivers room and change room;*

Although the affidavit of Ms. James purports to be based on personal knowledge, Counsel for the Union acknowledged in argument the statement that referred to what the Employer told Co-op Refinery was based on hearsay.

Ms. James also alluded to the erosion of her confidence in the Union's ability to negotiate a collective agreement in light of the Employer's actions.

The affidavit of Mr. Loraas, in addition to confirming the basic factual matters established in Mr. Haughey's affidavit as outlined above, also explained that the decision to close the vacuum truck service division of the company was made in 1996, and the asset sale was completed to an undisclosed buyer on June 13, 1997. The reasons provided for the decision included the desire of management to reduce the work load for management, and to focus management attention on the aspects of the business that were operating at a loss or marginally profitable as the target of closure. The affidavit states that the sale of assets of this division on June 13, 1997 was coincidental in timing with the taking of the strike vote.

Mr. Loraas also acknowledged the truthfulness of Ms. Jame's statement that the Employer had raised its rates but he denied that the Employer blamed the Union for the increase. He also confirmed that changes were introduced with respect to the pick-up of recycled paper and used oil.

In addition, Mr. Loraas's affidavit confirms the allegation made by the Union in its unfair labour practice that the Employer had not disclosed the closure of the division to the Union or employees prior to June 14, 1997. The affidavit explains that disclosure of the closure and sale of assets was withheld because the Employer feared that the assets would be jeopardized by vandalism. Further, the affidavit indicates that the Employer is solvent and able to comply with an order the Board may make with respect to monetary loss affecting the employees who are the subject of the monetary loss and reinstatement applications filed with the Board.

These reasons deal only with the application for interim or injunctive relief. This Board considered the grounds on which injunctive relief will be issued in a number of decisions and the criteria can be summarized as requiring the following elements:

(1) the applicant must demonstrate that there is a serious issue to be decided;

See: *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311 (S.C.C.), at 314.

*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.

(2) the applicant must demonstrate that an injunction order is necessary to protect it against irreparable harm. In the labour relations setting, the Board will be particularly concerned with harm to the collective bargaining relationship;

See: *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 at 77.

(3) where any doubt exists on points (1) and (2), the Board will determine the application based on the balance of convenience, particularly the balance of the respective labour relations harm to the parties.

See: *WaterGroup Companies Inc., supra*, at 78.

*Regina Exhibition Association Limited and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1997] Sask. L.R.B.R. 393; LRB File No. 165-97, at 398.

A procedural issue was raised by counsel for the Employer with respect to the sufficiency of the affidavits filed by the Union. It has been the practice of this Board to require that affidavits filed in an application for interim relief be based on personal knowledge. The Board does not permit cross-examination of witnesses on their affidavits as there is not sufficient time on an interim application to hear *vice voce* evidence. If *viva voce* evidence is necessary, the applicant or respondent should request an expedited hearing, which the Board can generally accommodate. In this instance, the Board finds that the essential evidentiary claims made by the Union were confirmed by the affidavit filed on behalf of the Employer. As such, it is not necessary for the Board to review the sufficiency of the Union's affidavit or to make any rulings with respect to the credibility of the deponents.

The relevant provisions of the *Act* are 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;*
> >
> > ...
> >
> > *(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;*
>
> ...
>
> *(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;*
>
> *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.*
>
> *43(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.*

In this instance there is little doubt that the Union established that there is a serious issue to be determined on the applications filed. The parties are in the process of negotiating a first collective agreement and are subject to the requirement contained in s. 11(1)(c) of the *Act* to bargain in good faith. This requirement would ordinarily require disclosure by the Employer to the Union during bargaining of any decisions it has already made that will affect the work of bargaining unit members. In

*Saskatchewan Government Employees' Union v. Government of Saskatchewan*, [1989] Winter Sask. Labour Rep. 52; LRB File Nos. 245-87 & 246-87, the disclosure rule was summarized as follows, at 58-59:

> *... That duty is imposed by s. 11(1)(c) of the 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 addition, during the negotiation of a first agreement the employer's right to alter terms and conditions of employment is limited by the freeze provision contained in s. 11(1)(m) of the *Act*. This provision is designed to maintain stability in the employment conditions pending the negotiation of a first collective agreement. It does not require a total freeze of all terms and conditions of work, but does not permit the employer to introduce changes that had not been part of the "business as before" mode of operating. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Canada Ltd.*, [1993] 1st Quarter Sask. Labour Rep. 111; LRB File No. 197-92, the requirement was expressed as follows, at 114-115:

> *For these reasons, the Canada Labour Relations Board and other boards have adopted the "status quo" or "business as before" test as the standard by which an employer's*

*conduct during the period after certification should be assessed. The basic effect of this approach was described by the Ontario Labour Relations Board in Spar Aerospace Products Limited, [1978] OLRB Rep. Sept. 859:*

> *The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is, simply, that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.*

*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.*

Also, the Union established a serious issue to be determined with respect to the alleged dismissal of the employees for anti-union reasons. Under s. 11(1)(e) of the *Act* the Employer bears the onus of establishing that such terminations were not motivated by anti-union animus.

Finally, the technological change provisions may also apply to the present situation but their relevance is less critical because the Union and the Employer are in an "open period" and are required by the *Act* to bargain in good faith for the resolution of a first collective agreement. There may be some dispute as to whether or not the technological change provisions apply as an earlier decision of the Board required

an employer to negotiate a permanent removal of work from a bargaining unit with the union in accordance with s. 43 of the *Act*. This decision, *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Acme Video*, [1995] 4th Quarter Sask. Labour Rep. 134; LRB File Nos. 179-95, 180-95, 181-95 & 182-95, was quashed on judicial review to the Court of Queen's Bench; see: [1996] Sask. L.R.B.R. c-26 ( Sask. Q.B.) and is under appeal to the Court of Appeal. Nevertheless, the Union still made out an arguable case under s. 43 of the *Act* and raised a serious issue to be tried.

In the present case, the harm to the individual employees, which is the loss of their employment and subsequent loss of income, is a serious harm. The unilateral decision to implement the lay-offs also prevented the Union from negotiating the manner of lay-off, the order of lay-off, the termination benefits, if any, retraining and the like. In this sense, the employees have also been harmed in a labour relations sense by the lost opportunity to be represented by the Union.

From the Board's point of view the more serious labour relations harm that results from unilateral employer action during the negotiation of a first agreement is the harm to the union's ability to represent employees. The Union has been rendered impotent with respect to ensuring better working conditions and job security for its members by the closure of the vacuum truck division. The Union alleged that this action was a deliberate attempt to undermine the Union's strength in the bargaining unit. Through many provisions, not the least of which are the unfair labour practices prohibiting employer interference in the union's organizing campaign, the freeze provision and the first collective agreement provisions, the *Act* is designed to minimize the vulnerability of a union in the period of organizing up to the point that a first collective agreement is achieved. The goal of the *Act* is to get the collective bargaining relationship on firm ground which is generally achieved by the signing of a collective agreement.

In the present situation, the Employer's actions can have a chilling effect on the individual employees' support for, and confidence in, the Union, as was attested to by Ms. James. In these circumstances, union members might conclude that signing a union card has made matters worse and they may question their judgment in signing a union card. They must also question the ability of the Union and the law in general to protect their statutory right to join a trade union of their own choosing.

We find that the loss of a bargaining opportunity with respect to the lay-offs and the erosion of confidence in the Union represents irreparable labour relations harm that cannot be readily fixed at a later date. There is some inconvenience that will be imposed on the Employer as a result of the issuing of an interim order, but this inconvenience does not outweigh the harm to the Union and its members. In these circumstances, the Union is entitled to obtain interim relief from this Board.

The Employer's actions of unilaterally closing the vacuum truck service division, selling off the assets of the division, terminating the customer contracts and terminating the employment of the vacuum truck drivers and two clerical workers without notice to the employees or the Union makes the normal order to reinstate pending the outcome of the hearing an impossibility. This is a case where the Board cannot recreate the status quo because of the Employer's actions. However, there are a number of orders that the Board will issue to return as much of the status quo as can be possible:

1. within 24 hours of receiving this Order, the Employer is ordered to provide the Union with true copies of all legal documents and agreements related to the sale of the business or assets of the vacuum truck service division. If the disclosure of these documents leads the Union to the conclusion that the sale did not take place to a person or corporation at arms length to the Employer and that the trucks remain under the control of the Employer, the Union may reapply to the Board for an amended interim order;

2. the employees who are the subject of the applications for monetary loss and reinstatement are reinstated as employees of the Employer in the status of laid-off employees. Within 24 hours of receiving this Order, the Employer shall arrange to meet with the Union to bargain with respect to the laid-off employees. The Union will continue to represent the employees and bargain collectively on their behalf until all issues related to their lay-off are resolved or the hearing of the final applications, whichever occurs first;

3. the Employer shall arrange to meet and shall meet with the Union to continue bargaining collectively for a first collective agreement on four (4) days between the date of this Order and the hearing of the final applications. The Union shall be entitled to unilaterally request the assistance of the conciliation services of the Labour Relations, Conciliation and Mediation Division, Saskatchewan Labour in the bargaining meetings;

4. the Employer is prohibited from making any further unilateral changes to existing terms and conditions of work, or to the manner in which work is carried on, and is prohibited from taking any further steps to remove or relocate the work of the bargaining unit without obtaining the consent of the Union from the date of this Order to the hearing of the final applications;

5. the Employer will permit a Board officer to post copies of these Reasons for Decision and the Order in the workplace where they can be seen and read by employees.

**PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, Applicant and EXECUTIVE BRANCH OF THE GOVERNMENT OF SASKATCHEWAN, Respondent and SASKATCHEWAN GOVERNMENT EMPLOYEES' UNION, Intervenor**

LRB File No. 018-97; July 15, 1997
Chairperson, Beth Bilson; Members: Gloria Cymbalisty and Terry Verbeke

For the Applicant: Kevin Wilson
For the Respondent: Darryl Bogdasavich, Q.C.
For the Intervenor: Rick Engel

**Bargaining unit - Appropriate bargaining unit - Board decides that "middle management" bargaining unit is appropriate.**

***The Trade Union Act*, s. 5(a).**

## REASONS FOR DECISION

## PRELIMINARY ISSUE

**Beth Bilson, Chairperson:** The Professional Institute of the Public Service of Canada (PIPSC) has filed an application seeking designation as the bargaining agent for a unit of employees of the Government of Saskatchewan. The Saskatchewan Government Employees' Union (SGEU) was granted status as an Intervenor to oppose the application.

In the application, the proposed bargaining unit is described as follows:

> *All employees of the executive branch of the Government of Saskatchewan in positions classified as Management Level One through Nine, and Professional Level One through Nine, except those excluded by The Trade Union Act.*

The bargaining unit which PIPSC is applying to represent is generally referred to as a "middle management unit." Though there are a number of complex issues associated with the application, the parties agreed in the first instance to ask the Board to rule on the general question of whether a middle management unit is an appropriate bargaining unit. These Reasons for Decision address that issue

alone. It should be noted that although the Employer provided the Board with certain specific information, they did not take a position on this issue and did not present evidence or make argument at the hearing.

The "public service/government employment" (PS/GE) bargaining unit represented by SGEU is the largest bargaining unit in the province, and the first to be certified following the passage of *The Trade Union Act* in 1944. Since the new legislation did not place any restrictions on the rights of public servants to organize and to choose to engage in collective bargaining, this trade union took advantage of the opportunity to seek certification as the bargaining agent for employees in the public service. A number of historical documents which were filed with the Board indicate that, from the beginning, SGEU supported a broad-based and comprehensive bargaining unit as the best way to achieve the bargaining objectives of this group of employees.

These documents also revealed that SGEU has consistently identified the interests of the employees it represented with the principles incorporated in *The Public Service Act*, R.S.S. 1978, c. P-42. These principles included a commitment to the development of a standard classification plan to define the duties and responsibilities of positions in the public service; reliance on the criteria of "seniority, fitness and merit" for purposes of appointment and advancement; the rejection of political partisanship as a legitimate factor in the selection or promotion of public servants; and the establishment of a "career civil service" as the goal of government personnel policies.

In the certification Order issued by this Board on March 19, 1945, the bargaining unit represented by the Saskatchewan Civil Service Association, the predecessor of SGEU, 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 12th day of February, 1945, constitute an appropriate unit of employees for the purpose of bargaining collectively.*

The following exclusions of a managerial and confidential nature were specified:

> *(i) heads of departments as defined by paragraph 3 of section 2 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;*

The Order as well excluded the employees in the Department of Telephones, and employees in the two mental hospitals at Weyburn and North Battleford. These two groups were represented by different bargaining agents at the time this Order was issued, and their relationship with those trade unions was permitted to continue.

In subsequent years, up until the most recent amendment in October of 1987, the wording of the certification Order has been modified on a number of occasions, and there has been a notable increase in the number and specificity of listed exclusions from the unit. A review of the current version of the Order would show that these listed exclusions now run to a number of pages.

According to counsel for SGEU and several of the witnesses who gave evidence at the hearing, SGEU and the Employer have made considerable efforts to resolve issues related to inclusion or exclusion of particular positions or groups of positions from the scope of the bargaining unit without reference to this Board. In 1981, those parties agreed to enter into a general review of positions at the "top end" of the bargaining unit, that is, those positions which were excluded because of their managerial or confidential character. They reiterated their commitment to this review in a number of successive collective agreements, but no steps were taken to initiate such a process until 1994.

A committee composed of representatives of SGEU and the Employer engaged in a considerable amount of discussion in an effort to formulate a detailed questionnaire which would be used to determine the nature of a large number of positions in the professional and managerial level (ML and PL) series of classifications. On two occasions, the committee sought input from the Board concerning criteria used by the Board in assessing scope questions. The information generated by the questionnaire was to be submitted to another joint committee which would designate the positions to be in or out of scope.

In the course of this process, a number of difficult issues arose. One of the issues was terms on which those persons who were determined to be in scope would be moved into the bargaining unit. Some resistance was expressed by bargaining unit employees to recognizing the seniority which had been accrued by these persons as employees outside the scope of the unit.

A group of persons in middle management positions centered in the corrections division of the Department of Justice, who were potentially affected by the review, saw the need for some organizational mechanism to bring forward for consideration the interests of middle managers. They formed an organization which they called the Saskatchewan Government Managers' Association (SGMA). According to several witnesses who had been involved in setting up SGMA, the focus was initially on the protection of seniority and job security as they moved into the unit represented by SGEU, though they supported the basic concept of inclusion in that bargaining unit.

Other persons in similar classifications were invited to join the group, and it would appear that the temper of the organization gradually changed as the membership broadened. According to two witnesses called on behalf of PIPSC, a large number of members questioned whether seniority should be the central concern of the organization. Those of this view wished to emphasize the integrity of individual positions and the importance of merit as a criterion for the making of personnel decisions. They also began to have reservations about the ability of SGEU to represent their interests adequately, given the controversy which had arisen within SGEU over the terms on which they should be received into the bargaining unit.

In November of 1996, a SGMA members meeting was held, and both SGEU and PIPSC were invited to send representatives to outline their views of the options facing this group. The majority of those present at the meeting voted to pursue the option of applying for certification as a separate bargaining unit represented by PIPSC. This application was filed on February 7, 1996. This development was disappointing to those present at the meeting who had supported the SGEU alternative, and some of them, at least, withdrew from SGMA and continued to campaign in favour of inclusion in the SGEU bargaining unit.

Counsel for SGEU stated a number of grounds for the opposition of his client to the application. In large part, he argued, the opposition of SGEU is grounded in the historical evolution of the large public service bargaining unit represented by that union, and of the collective bargaining relationship between SGEU and the Employer.

It is perhaps worth summarizing the version of this history which counsel for SGEU urged us to accept. In 1945, he argued, this Board accepted the proposition that a single bargaining unit inclusive of all "employees" was the appropriate basis for collective bargaining in the public service. He noted that the only exceptions made at the time were two groups of employees who already had established collective bargaining relationships, and who were permitted to retain those.

He drew our attention to the comments made by the Board in a decision in *United Civil Servants of Canada v. Department of Municipal Affairs and Saskatchewan Civil Service Association* (1945), 1 Decisions of Sask. L.R.B. 20. That case concerned an application made by a second trade union to represent employees in the Department of Municipal Affairs. These employees had already been included, by implication, within the scope of the bargaining unit described in the certification Order issued March 19, 1945. The Board made the following comment, at 26:

> *Clause (a) of s. 5 of the Act gives the Board power to make orders "determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit", and it is obvious from this that the possibility is envisaged of a unit smaller than an employer unit being considered to be appropriate. The Act, however, lays down no rules as to when a unit smaller than an employer unit should be determined as appropriate, and whenever cases of this kind have arisen the Board has attempted to make its decision in the manner which seems to accord best with the circumstances of the individual case. One important principle which the Board has applied is that if the nature of the operations performed by a particular group of employees is sufficiently distinct that the wages, hours and other working conditions of these employees must necessarily be determined on a different basis than the wages, etc. of other employees of the same employer, then those employees may be regarded as a distinct unit for the purpose of bargaining collectively if they so desire.*

The Board went on to conclude that the duties performed by the employees in the Department of Municipal Affairs were not sufficiently distinct that they set a natural boundary between that

department and the rest of the public service. The Board as well stated that the apparent wish of many of the employees in that department to be represented by a different bargaining agent was not a persuasive consideration, in the following terms, at 27:

> *Moreover, it would negate the principle of majority rule which not merely is clearly enunciated in s. 3 of the Act but is an accepted democratic principle. It is very rarely indeed that a group of employees are 100 percent in agreement as to the trade union, if any, which will represent them for the purpose of bargaining collectively. It is almost inevitable that there will be one or more groups - or perhaps merely one or more individuals - within the larger group, who will have ideas of their own. The mere fact that the employees of the small group wish to have a union of their own is not, in the opinion of the Board, sufficient reason in itself for constituting that group as a separate appropriate unit of employees for the purpose of bargaining collectively. There must be some reason to believe that collective bargaining can feasibly be carried on between the employer and that particular group, i.e., it must be shown that the conditions of work to be established for that group must necessarily be different in important particulars from the conditions to be established for other employees of the same employer.*

Counsel for SGEU argued that the subsequent evolution of the bargaining unit after this represented a process of consolidation and refinement of the original SGEU claim to represent all of the employees in the public service.

He did concede that certain exceptions could be found. One of these was the exclusion from the bargaining unit of professional engineers, who had previously been included. The grounds for this stated by the Board in a decision in *Burnett C. Laws and Ronald Earl Pelkey v. Saskatchewan Civil Service Association* (1957), 2 Decisions of Sask. L.R.B. 20. The reasons given by the Board for the removal of the engineers from the bargaining unit included difficulties in recruitment, their status as a "fringe" group and the fact that engineers were not unionized in other jurisdictions. In a subsequent decision, in *Professional Engineers Employees Association v. Government of Saskatchewan and Saskatchewan Government Employees' Union* (1974), 3 Decisions of Sask. L.R.B. 446, the Board held that the engineers alone did not constitute an appropriate bargaining unit.

Other professional groups - land surveyors, veterinarians and physical therapists - were subsequently excluded from the bargaining unit as well. In those cases, the Board did not provide any explanation comparable to that given in the case of the engineers.

Counsel for SGEU also alluded to a number of decisions in which the Board addressed the efforts of groups of employees to obtain exclusion from the large bargaining unit represented by SGEU. Examples of these decisions are those in *Robert Donald v. Government of Saskatchewan and Saskatchewan Government Employees' Union*, [1983] April Sask. Labour Rep. 67, LRB File No. 435-82; *G. Wayne Hanna v. Government of Saskatchewan and Saskatchewan Government Employees' Union*, [1985] Aug. Sask. Labour Rep. 31, LRB File No. 338-84; and *D. Grant Griffin v. Government of Saskatchewan and Saskatchewan Government Employees' Union*, [1981] Feb. Sask. Labour Rep. 61, LRB File No. 168-80.

In the latter case, the Board made the following comment concerning such applications, at 64:

> *The Board is therefore left with the task of balancing the integrity of this bargaining unit against the wishes of a relatively small group of employees who are opposed to being represented by the certified union. The Board has many times expressed its policies favouring large bargaining units, opposing fragmentation of existing successful units into smaller units, and forcing employers to bargain with a multiplicity of bargaining units. This bargaining unit has been in existence for approximately 35 years and has had a successful bargaining history, although the 1979 strike has created some dissension within the unit as is evidenced by this application. The agrologists have been members of the unit for many years and have shown no dissatisfaction until this time. A bargaining unit of this size, comprising approximately 18,000 people is bound to have groups which dissent from the wishes of the majority. The democratic principle of majority rule must prevail in the interest of effective collective bargaining. Opposition to the use of the strike weapon generally, or in a particular case, per se, does not entitle a person or a group of persons to exclusion from a bargaining unit or to a separate bargaining unit. Opposition can be given effect to only by convincing a majority of the employees in a unit to vote against a strike. If the board allowed this application it would open the door to applications by minority groups, whenever they dissented from the wishes of the majority in a bargaining unit to either be excluded from the unit or to be placed into a separate unit. The result would be chaotic with groups moving into and out of units or to and from different units. It would also lead to a multiplicity of bargaining units. It would detract from industrial stability through collective bargaining which is the purpose of the Act.*

Counsel argued that such cases as those just listed represented a reaffirmation by the Board of a commitment to the maintenance of one comprehensive unit in the public service, and that exclusions of

small groups of professional employees must be seen as anomalous and based on specific exigencies of the period when they were granted.

He further argued that, by reinforcing the integrity of this unit, the Board has acted in the manner most consistent with the statutory aims of *The Trade Union Act*, R.S.S. 1978, c. T-17. By assisting in the effort being made by SGEU to create a single bargaining unit, represented by a single bargaining representative, for the entire public service, the Board is acting in support of its own stated objectives of fostering the largest possible bargaining units, preventing the fragmentation of the workforce, and enhancing the stability of the environment in which the trade union can represent the employees.

In addition, the adherence to the notion of a single bargaining unit in the public service serves to create the maximum harmony between the bargaining objectives of the union representing public service employees, and the principles set out in *The Public Service Act*.

Counsel for SGEU argued that the Board should not permit the efforts which have been made towards the creation of a seamless collective bargaining relationship to be impeded by this application. He acknowledged that there are persons in the bargaining unit proposed by PIPSC who would not be included in the SGEU bargaining unit even if the scope review had run its course, and would thus continue without any trade union representation. Nonetheless, he argued that the intervention of an additional union would create barriers between the Employer and SGEU, and would hamper their dealings in the future on issues related to the scope of the bargaining unit.

An additional point made by counsel for SGEU in argument was that stability of the existing structure would be imperiled by the advent of a trade union with no experience in collective bargaining in this particular context.

Counsel for PIPSC urged the Board to view much of the argument made on behalf of SGEU as irrelevant, at least at this stage of the proceedings. He argued that the characterization given to the historical evolution of the SGEU bargaining unit by counsel for SGEU and some of the witnesses was not supported by a review of all past developments. In any case, he argued that the essential point for the Board to consider at this juncture is whether a bargaining unit composed of middle managers is

appropriate. Determining the issue of who should be in that unit, or of whether SGEU has some proprietary claim to some of the employees claimed by PIPSC in the application, must occur after the decision on this aspect of the application.

We agree that the primary question before the Board is that of whether a middle management unit is an appropriate unit, and that this question has been posed independently of the issue of where the boundaries should be drawn between this unit and the SGEU unit, and between this unit and those persons excluded on the grounds of their managerial or confidential responsibilities. On the other hand, the grounds of opposition advanced on behalf of SGEU were framed in a way which made it difficult to ignore them altogether in responding to the question we have been asked to determine. It is necessary, in our view, to respond, in at least a preliminary way, to the arguments raised by SGEU in dealing with the matter before us now.

We will therefore be commenting further on the objections which were made by SGEU to further consideration of this application. At this point, however, we will turn specifically to the issue of whether a middle management bargaining unit is an appropriate one.

The question of the inclusion of middle managers within bargaining units represented by trade unions, either separately or in combination with other employees, arose in the context of deliberations concerning the proper parameters of the definition of "employee" in collective bargaining legislation in various jurisdictions. A common feature of these definitions, though worded in different ways, is the exclusion from their scope of persons who perform managerial functions or act in a confidential capacity in relation to the industrial relations of their employer.

The objective of a definition framed in these terms was summarized by the Canada Labour Relations Board as follows in a decision in *American Newspaper Guild v. Canadian Press*, [1952] 52 C.L.L.C. 16,615, at 1313:

> *Parliament has, in the definition of the term "employee", also taken cognizance of the possibilities of conflict of interest in the case of an employee arising out of the necessity of discharging his duties to his employer on the one hand and his obligations to his union on the other hand. It was the apparent intent to take care of the cases*

> *where such conflict or incompatibility of interests might normally be expected to arise, by excepting from the provisions of the Act "a manager, superintendent or any other person who, in the opinion of the Board, exercises management functions or is employed in a confidential capacity in matters relating to labour relations".*

The exclusion of persons performing managerial and confidential functions from access to collective bargaining posed troubling questions in the context of complex modern organizations. In some of the material produced in connection with the general review made in the 1960s of collective bargaining legislation at the federal level, known as the Woods Task Force, allusion was made to the tension between the objective of extending access to the benefits of collective bargaining as widely as possible, and the necessity of excluding persons from that access on the basis laid out in the definition of employee. The following passage was quoted by the Canada Board in a decision in *United Steelworkers of America v. Cominco Ltd.*, [1980] C.L.R.B.R. 105, at 115:

> *In order to encourage and ensure recognition of the social purpose of collective bargaining legislation as an instrument for the advancement of fundamental freedoms in our industrial society, we recommend that the legislation contain a preamble that would replace the neutral tone of the present statute with a positive commitment to the collective bargaining system.*
>
> *We recommend further that, in order to extend access to fundamental rights to associate and to act collectively, a number of classes of employee who are exempted from the operation of the statute no longer be exempted, subject in some cases to certain constraints at the discretion of the Canada Labour Relations Board.*
>
> *In some industries extensive exclusions from bargaining units have been made on the ground that individuals were exercising management functions or were in a confidential capacity respecting labour relations. Some exclusions may be justified to avoid conflicts of interest which are implicit in a situation where a union bargains with management respecting a unit that includes managerial as well as non-managerial personnel. Nevertheless, the exclusions deny these persons access to the normal processes of collective bargaining. In our view, the exclusions should be held to a minimum.*
>
> *Employees appropriately excluded on these grounds are effectively denied access to any form of collective bargaining. This is unjust in the case of supervisory and junior managerial employees. We recommend, therefore, that the statutory right of collective bargaining be extended to these employees, subject to their being placed in separate bargaining units and in separate unions, and provided further that these unions not be permitted to affiliate with other unions or labour organizations except those composed exclusively of similar types of employees. We would not extend these formal collective bargaining rights to middle and senior levels of management, on the ground that the*

> *extension would be incompatible with efficient management and the economic welfare of the country.*

In the *Cominco* decision, *supra*, the Canada Board made the following comment on this issue, at 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 fact that employees influence corporate policy or commit an enterprise to expenditures is equally not grounds for finding a conflict. These are common characteristics of the functions of professionals. They have been given collective bargaining rights. They are also common characteristics of the functions of specialists generally, whether tradesmen, technicians or other groups of employees.*
>
> *Similarly, the fact a person is a supervisor and as such directs the work of others, corrects and reprimands where necessary, allocates work among men and equipment, evaluates or assesses new and longstanding employees, authorizes overtime when necessary, calls in manpower when needed, trains others, receives training to supervise, selects persons for advancement, authorizes repairs, can halt production when problems arise, schedules holidays and vacations, verifies time worked, authorizes shift changes for individuals, and requisitions supplies when needed does not create the conflict or potential conflict that disentitles him to the freedom to associate. The loyalty and integrity of such a person is not altered by union membership or representation. We do not subscribe to a view that says an employee will become dishonest or abuse responsibility because he is represented by a union. We do not refer to membership because it is not necessary. A person may be a union member whether represented by a union or not. The Code does not restrict union membership to "employees" it only governs union representation.*

A related comment was made by the Canada Board in *International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Vancouver Wharves Ltd.* (1974), 5 di 30, at 52:

> *There is no dispute, the Board believes, with the recognition that the Canadian Parliament, together with the Provincial Legislatures is committed to the fundamental policy that collective bargaining must be facilitated and enhanced for as many people as possible. Collective bargaining rights are not a privilege, not a concession, not a favour, they are a basic right which will not be withdrawn from any employee unless there are very serious reasons.*
>
> *One of these serious reasons is found in the position of this group of persons who, although dependent on an employer, are associated with said employer in the senior ranks and have been delegated substantial powers over the rest of the employees in seeing that the products or the services of the employer are made or done and that the collective agreement is followed rigorously. The employer requires and needs exclusive loyalty from these people: they could not participate in union activities, and their decisions can seriously if not fatally affect the position and remuneration or career paths of the employees: dismissals, promotions, demotions.*
>
> *Again however, there are infinite variations in the structures of modern companies and it could very well be that you will find in some instances that there are many levels of authority between the employees in the bargaining unit and the most senior members of management. This may be accompanied by a serious dilution of the full force of authority in the lower levels of management. These lower level members of the management team may then only act as conduits for decisions taken above their level.*

In wrestling with the issue of how to identify the persons excluded on the basis of their managerial or confidential functions, without interpreting these exclusions so broadly as to deny access to persons who in fact had little autonomy or managerial authority, the Canada Board addressed many complex questions. These included the degree of managerial authority, the relation between various job functions and subjects with important implications for the terms and conditions of employment of other employees, and the significance of professional or technical expertise in the modern bureaucratic organization. It is not necessary to review at length the deliberations of the Canada Board, or other labour relations boards, on these issues.

It is interesting to note, however, the conclusion of the Canada Board that the term "management functions" might be open to an interpretation based on nuance and balance, rather than on one uniform

set of standards. In *International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Western Stevedoring Company Limited* (1974), 6 di 48, the Canada Labour Relations Board made the following observation, at 56:

> *This Board therefore wishes to emphasize that although it agrees in part with the Argument of Counsel for the Respondent that a key to resolving this case is in a very close analysis of the degree of performance of management functions by the persons sought to be represented by the Applicant, degree meaning both "intensity" and "frequency", intensity in any one function and also in the nature of the overall functions performed, this is only one of the elements of the solution.*
>
> *We believe also that there is a third dimension: the number and relative importance of those of the management functions which a particular individual performs with frequency and with intensity.*

The Canada Board also commented on the appropriate resolution of this issue. In *Telephone Supervisors' Association of British Columbia v. British Columbia Telephone Company* (1977), 33 di 361, the Board alluded to the relevant statutory provision, and summarized their interpretation of it, at 376:

> *Since 1973, The Canada Labour Code expressly provides that*
>
> > *"125 (4) Where a trade union applies for certification as the bargaining agent for a unit comprised of or including employees whose duties include the supervision of other employees, the Board may, subject to subsection (2), determine that the unit proposed in the application is appropriate for collective bargaining".*
>
> *At the very least, this provision indicates that an employee "whose duties include the supervision of other employees" does not necessarily perform management functions and may be an "employee." This provision goes further, however. It expressly empowers the Board to take into consideration, when determining a unit appropriate for collective bargaining, the fact that some employees may not be "ordinary employees" because their duties may include the supervision of other employees. In so doing, the Code accommodates what is now a familiar reality. Particularly in a large enterprise, many persons may wield some measure of authority over other employees without necessarily performing management functions such as would warrant their being excluded from the protection and benefits of the Code. Yet, in some cases, the nature of their work may be such that they cannot and should not be included in the same bargaining unit as the employees they supervise. To include them in the same unit might make it difficult if not impossible for them to continue to perform their job*

> *effectively. Their presence in a bargaining unit of employees they supervise might also inhibit the employees in the exercise of their rights under the Code. These are undoubtedly important considerations. Yet, they need not only be resolved by a ruling that a person is not an "employee" with resulting deprivation of the protection of the Code. As long as the persons involved do not truly perform "management functions", these legitimate interests can be accommodated by the creation, where this is appropriate, of separate "supervisory" units.*

More recently, the Canada Board summarized the jurisprudence on this point in the following way in a decision in *Communications and Electrical Workers of Canada v. Island Telephone Company Limited* (1990), 81 di 126, at 128-130:

> *What are indeed those broad industrial relations principles and values embodied in the innumerable decisions rendered and precedents established by various labour boards and tribunals in Canada with regard to the issues at hand? For the sake of brevity, and allowing for the fact that the parties have great familiarity with them, they may be captured and summarized in the following assertions.*
>
> *a) Employees' right to join a union is accorded fundamental protection under the Code. It is the cornerstone of our system of industrial relations as stated in the Preamble to Part I of the Code. This commitment expressed itself internationally through the ratification by Canada of Convention No. 87 of the International Labour Organization concerning freedom of association and protection of the right to organize ...*
>
> *b) The grounds on which the exercise of that fundamental right may be constrained or curtailed are very narrowly defined and interpreted, namely the avoidance of possible conflict of interest for employees caught between adversarial pressures inherent to the collective bargaining relationship. Hence the two elements of the Code definition referred to earlier, i.e. the management and confidential capacity exclusions. The Board has reaffirmed on countless occasions its belief that a person is entitled to enjoy the freedom of association as a matter of right, and that only under very strictly and well-defined conditions, should it be denied ...*
>
> *c) Membership in a trade union is not co-extensive with lesser corporate loyalty, nor is it per se indicative of a conflict of interest situation vis-a-vis professional standards and integrity. Referring to Canadian Press (1950), 52 CLLC 16,615 (CLRB), in which the employer argued fear of pro-union bias in the national news with the unionization of its editorial staff, the Board in British Columbia Telephone Company (1979), 38 di 145 (CLRB no. 221), at page 186, underlined the more complex climate within which board decisions must be made and collective bargaining rights exercised given that the supervisory and professional employees' industrial forerunners no longer*

> *provide the model for supervisory authority and managerial functions. In Cominco Ltd., supra; Canada Post Corporation, supra; Vancouver Wharves Ltd., supra, the Board elaborated on the factors at play in shaping a different environment and its attendant consequences on the definition of management and employee rights.*
>
> *d) Management is a generic concept and "its precise ambit is a question of fact or opinion for the Board rather than a question of law." This judgment of the Federal Court of Appeal in Bank of Nova Scotia v. Canada Labour Relations Board, [1978] 2 F.C. 807, at page 813; (1978), 21 N.R. 1, at page 7; and 78 CLLC 14,145, at page 128, sets out clearly the broad terms under which the Board has responsibility to give it precise meaning and content. By implication, it refers to the need it has to treat the concept in its most dynamic aspects, i.e. as the embodiment of everchanging corporate structures and processes, work practices, technologies and, ultimately, social values.*
>
> *All the Board's decisions previously cited reflect this understanding of its specific role in matters of managerial exclusions. The net result has been a clear trend, replicated by provincial labour legislation, to extend bargaining rights to first echelons of management.*

The theme running through the reflections of the Canada Board on this topic has been that it is necessary to view the boundary which divides employees from managers in a different way in the context of organizations in which authority is broadly diffused, in which professional, technical and administrative expertise is relied on in decision-making, and in which job functions are often highly specialized. One of the points the Canada Board has made is that it is not a matter of redefining the term "employee" so that it takes in more persons who are managers, but a matter of identifying where managerial authority really lies in order not to exclude an unnecessarily wide band of individuals from the status of employees.

We do not intend in these Reasons to track the development of the jurisprudence in other jurisdictions on this issue, other than to observe that in some provinces, notably Ontario and British Columbia, labour relations boards have come to roughly similar conclusions. In *Cowichan Home Support Society v. United Food and Commercial Workers International Union, Local 1518; Tree Island Industries Ltd. v. Office and Professional Employees' International Union, Local 378; Westfair Foods Ltd. v. Retail Wholesale Union, Local 58*, [1997] 1 BCLRB No. B28/97, the British Columbia Labour Relations Board made the following comment, at 23:

> *Further, many changes over the last several decades have taken place in the organizational and management structures of employers. Some of these new economic arrangements have flattened traditional hierarchical structures, resulting in changes to the workplace and to the nature of work itself; and some of the changes have included employees, individually and collectively, exercising greater authority over work that was formerly in the hands of managers. The old, industrial model no longer dominates. Workplaces may be quite different, and so may particular workforces.*
>
> *Some of this is new; some of it is not. Management has long shared authority over decisions with certain groups - operational issues with white and blue collar workers; technical issues requiring the specialized expertise of professionals. The purpose of this broad participation and shared authority is a renewed emphasis on enhanced workplaces. This is the confluence of shared interests: an issue of voice, dignity and security in the workplace for employees; and a corporate decision that a progressive human resources policy provides a firm with its best competitive advantage.*
>
> *Whether this is achieved through collective agreement provisions or pursuant to statutory provisions (e.g. ss. 53 and 54) such participation, in the context of the Labour Relations Code, must be at arm's length; indeed, it is a fundamental premise of the statute that such involvement and responsibility of employees is based upon their independent power to protect their workplace interests.*
>
> *On the other hand, the Code guarantees in these new economic arrangements (and in others), the authority and flexibility required by management. Beginning first with the arm's length requirement, and the undivided loyalty and commitment of a firm's managers, the policy of the Board ensures that once managerial powers have been delegated, they are not disrupted, thus ensuring that entrepreneurial control is maintained.*

In that decision, the British Columbia Board commented on the significance of amendments to the definition of "employee" which had taken place over time. In *The Industrial Relations Act*, R.S.B.C. 1979, c. 212, the definition in s. 1 reads as follows:

> *1) "employee"*
>
> *means a person employed by an employer, and includes a person engaged in police duties or a dependent contractor included in an appropriate bargaining unit under s. 48, but does not include a person who, in the Council's opinion,*
>
> *a) is employed to and does exercise the functions of a manager or superintendent in the direction or control of employees;*
>
> *b) is employed in a confidential planning or advisory position in the development of management policy for the employer; or*

> *c) is employed in a confidential capacity in matters relating to labour relations or personnel.*

In *The Labour Relations Code*, S.B.C. 1992, c. 82, the definition appeared in the following terms:

> *1) "employee"*
>
> *means a person employed by an employer, and includes a dependent contractor, but does not include a person who, in the board's opinion,*
>
> *a) performs the functions of a manager or superintendent, or*
>
> *b) is employed in a confidential capacity in matters relating to labour relations or personnel.*

With the exception of that aspect of the earlier definition which may have been intended to permit exclusions as part of a "management team," the definition in the British Columbia legislation does not, on the face of it, intimate the kind of assessment of management functions in terms of "degree" which the Canada Board felt able to make. The approach chosen by the British Columbia Board was instead to make a distinction between different kinds of management functions, and to choose a small number - hiring and firing, for example - as key indicia that the person should be allocated to the management rather than the employee side of the line. In the *Cowichan* case, *supra*, the Board described the approach in this way, at 24:

> *It serves no purpose, therefore, in relation to these new economic arrangements (or others) to have an over-inclusive definition of manager; however, at the same time, there is a need to have a more focused determination of the areas that are crucial to the preservation of the managerial role. This is important to the legislative scheme and to the parties themselves. We therefore affirm the Board's approach in Vancouver General Hospital, BCLRB No. B81/93 (VGH) that discipline and discharge, together with labour relations input, are the two most significant factors in determining managerial status - and thus exclusion from the Code definition of "employee".*
>
> *The original panel in Westfair proposed the elimination of all other criteria identified in B.C. Ferry Corp., BCLRB No. 65/78, [1979] 1 Can LRBR 116. We are largely in agreement with that suggestion, and are prepared to now limit the test further: the only other factor which materially assists the Board's s. 1(1) inquiry is the hiring and promotion of employees (and to this we expressly add demotion, to the extent it is not captured by discipline and discharge). A common element to the factors now identified*

> *is that the exercise of such powers is capable of having a significant impact on the career of any employee.*

As the passages we have quoted illustrate, it has been a matter of continuing concern to labour relations boards in various Canadian jurisdictions that the exclusion of persons on managerial or confidential grounds should not be granted so liberally as to frustrate the objective of extending access to collective bargaining as widely as possible. The way in which the definition is articulated in the *Act* makes it even more clear that this principle should guide our interpretation of scope issues. In s. 2(f)(i) of the *Act*, the term "employee" is defined 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.*

This Board has interpreted this definition as a direction to make exclusions on as narrow a basis as possible. It is not sufficient that someone who would otherwise fall within the definition of employee perform incidentally or occasionally tasks which are of a managerial or confidential nature. The provision requires that, in order for a person to be excluded, the functions which are the basis of the exclusion must be the major focus of the position.

This does not mean that the Board has not been confronted with the questions of degree which were addressed by the Canada Board in some of the cases referred to above. The rationale which has often been articulated as the impetus for the exclusion of persons performing managerial or confidential functions is, as we have seen, the possibility of an insoluble conflict of interest between the responsibilities of these persons in carrying out their duties, and their inclusion for purposes of representation with a group of employees whose terms and conditions of employment may be materially affected by their performance of those duties. Sensitivity to such potential conflict has led the Board, on occasion, to exclude positions on the basis that certain key responsibilities inevitably pose the risk of conflict, even if they may not in themselves occupy the preponderant amount of working time of the incumbents.

In a number of jurisdictions, notably British Columbia and Ontario, the legislation explicitly permits the recognition of separate bargaining units for supervisory personnel. In other jurisdictions, labour relations boards have permitted the delineation of such units in accordance with their overall jurisdiction to determine what bargaining units are appropriate.

On the face of it, this may seem inconsistent with the requirement acknowledged by the same boards that a clear division be made between those who are employees, and those who are properly on the management side of the collective bargaining relationship, either because of their decision-making authority, or because they are privy to confidential information related to industrial relations. In the *Cowichan* decision, *supra*, the British Columbia Board said this, at 27:

> *First, a separate unit cannot be created under the heading of conflict of interest because that would result in a varying scale in regard to who is a manager. It is unacceptable to have a policy that would allow persons, performing the same functions, to be treated as "employees" where they are placed in a separate bargaining unit, but conversely, treated as "managers" where a separate bargaining unit is inappropriate. The Board in VGH rejected such a varying or sliding scale in regard to the management team concept for analogous reasons. Previously, if an individual did not fulfill the criteria of a "manager", then the employer was able to argue that an individual was a "near manager" and nonetheless excluded. This sliding scale of what constituted a manager under the management team concept, in effect, lowered the test for managerial exclusion. In this case, the effect would be to raise the test for managerial exclusion; and this would inevitably result in a policy that would be in*

> *conflict with the principles expressed in both VGH and Island Medical Laboratories ltd., BCLRB No. B308/93, (1993), 19 CLRBR (2d) 161 (IML).*

It will be noted that this comment was made in the context of the removal of a "management team" exclusion from the British Columbia legislation, similar to the amendment to the *Act* which eliminated the exclusion for a person "integral to management." It draws attention to a general point, however, which is that in determining who is an employee there must be a basic assignment of a position to the management or employee side of the line. Though there might be some subsequent question concerning what kind of unit would be an appropriate home for different groups of employees, it is not a matter of drawing persons who are actually managers into the circle of employees.

On the other hand, one of the things which makes the assignment difficult in the first place is the proliferation of positions, particularly in large, bureaucratic organizations, which have associated with them at least some duties characterized by autonomy, the need to make complex judgments, supervision or monitoring of other employees, and a call on advanced educational or technical qualifications. Though the attachment of such duties to these positions may not constitute the fundamental conflict of interest which is the basis for exclusion from the definition of employee, it may create what might be called lesser or secondary conflicts. Such conflicts arise from the fact that, though the persons performing such duties may not be so closely integrated into the industrial relations machinery of the employer as to qualify for exclusion, their responsibilities may have sufficient impact on other employees that they are reasonably viewed by those employees as part of the management structure.

Insofar as this is true, the performance of their duties may be enhanced by the creation of a separate bargaining unit for them. The rationale for separate units for this "middle management" group has depended on looking at them from two perspectives. For those employees further down the administrative scale, these persons may function as part of the management structure. Looking from their own vantage point, however, their influence over essential management decisions is limited, their input into industrial relations scanty, and their ability to control their own terms and conditions of employment negligible.

In the context of Saskatchewan in particular, the legislation seems to contemplate that a person may perform at least some managerial or confidential duties some of the time, and still be included within the definition of an employee for the purposes of the *Act*. In our view, this has given the Board significant latitude in determining whether particular persons are employees in relation to bargaining units configured in various ways.

In the late 1970s, this Board recognized a number of middle management units, in the civic administration of Regina, in the universities, and in the senior officer ranks of fire and police services. With the exception of the University of Regina, where the middle management unit is one of the bargaining units represented by the University of Regina Faculty Association, all of the units are represented by special purpose trade unions.

The Board did not provide any explicit reasons for the recognition of these particular units, although, given the timing, one might perhaps assume that their reasons would parallel the kind of rationale articulated by the Canada Board in the cases we have alluded to. Neither did the Board comment on the specific language used in s. 2(f)(i) of the *Act* in relation to the delineation of the middle management units.

Since this initial series of certification Orders issued for middle management units, there have not been additional units of this kind until very recently. It is difficult to know whether this is because similar groups of employees did not think their interests would be best served by engaging in collective bargaining, or whether the example provided by the existing units was not thought worth replicating. In any case, it is perhaps no coincidence that a renewed interest in the creation of middle management bargaining units has emerged at a time of restructuring and retrenchment in public sector organizations, including the provincial public service.

Whatever the reasons for the dearth of requests in latter years for the certification of middle management units, it is difficult to see why a unit of middle management employees would, as such, be an inappropriate unit. Though, as we have said, these employees may be characterized by a significant degree of decision-making authority, their vulnerability if they go unrepresented in the current

environment makes their decision to seek whatever protection they may achieve through collective bargaining perfectly understandable.

In this case, SGEU makes no claim at all to a significant number of the employees who would be included in the bargaining unit proposed in the PIPSC application, and it is difficult to see why a unit of these employees would be inappropriate *per se*.

Leaving aside the question of the proper configuration of the bargaining unit, the major argument raised by counsel for SGEU in opposition to the recognition of any middle management bargaining unit at all in this context was that the existence of such a unit could have an impact on the dynamics of the collective bargaining relationship between SGEU and the Employer. He put this in terms of "fragmentation," and of derogation from the principle of a seamless and comprehensive bargaining unit represented by SGEU.

It is, of course, difficult to describe in concrete terms the qualities of a well-established relationship, and it is possible that there will be some change in the temper of the relationship between SGEU and the Employer if a new collective bargaining relationship between PIPSC and the Employer were to enter the scene.

On the other hand, this Board has often stressed the importance of eliminating barriers to the exercise by employees of their rights under the *Act*. Though SGEU may have some cause for concern about the alteration which may take place in the temper of their relationship with the Employer if an additional bargaining unit is recognized, this cannot, in our view, outweigh the value of permitting the creation of a bargaining unit at the middle management level to employees who would otherwise go without trade union representation.

The other and related argument raised by counsel for SGEU in opposition to the creation of a middle management bargaining unit was that the advent of an inexperienced bargaining agent would have a negative impact on the collective bargaining climate which has been established and nurtured over a long period of time by the current parties. In our opinion, it is difficult to say that PIPSC is an inexperienced bargaining agent given their long history as the representative of public servants at the

federal level. Even if they were an untried bargaining agent, however, we do not think it is desirable to interfere unreasonably with the choices of bargaining agent made by employees in pursuing their rights under the *Act*.

Our comments to this point have been framed in terms of the appropriateness of a middle management unit, and not of who would be included in such a unit. In doing this, we have assumed that at least those employees to whom SGEU has laid no claim could be included in such a unit.

This does not mean, however, that we regard it as unnecessary to consider further whether other employees - those which SGEU planned to include in their own bargaining unit as a result of the scope review - should be included, as PIPSC proposes, in this bargaining unit.

At the hearing, the parties agreed as a matter of fact, that the positions which were included in the proposed bargaining unit are not positions which were ever within the scope of the SGEU bargaining unit. The PL and ML series were created as part of the agreement between the parties legislated in 1986, and were not therefore subjected to what SGEU had come to regard as the usual process for the negotiation of new classifications. Nonetheless, the parties agreed that all of the positions and persons which were moved into those classifications at that time were outside the scope of the bargaining unit.

The caveat attached by Mr. Dorian Hassard, a witness called by SGEU, to this general proposition was that in the years since 1986, there have been several occasions on which SGEU thought in-scope positions had been moved into the ML or PL series. No grievances were filed in these instances, however, and Mr. Hassard conceded that it was a matter of speculation on the part of SGEU. Whether or not there were a limited number of instances in which such a transfer - illicit from the point of view of SGEU - took place, the group of positions as a whole has been outside the scope of the SGEU bargaining unit and was never in that unit.

One of the reasons for the depth of the SGEU reaction to the PIPSC application goes back to the version of historical events which was presented to us by counsel for SGEU and which has been presented to the Board on previous occasions. It can be seen from the summary of this argument which we gave

above that the view of SGEU is that, in certifying the comprehensive bargaining unit in 1945, the Board lent support to the position that one bargaining unit, represented by one trade union, would be the model for collective bargaining in the public service; they further take the view that the Board has repeatedly confirmed and reinforced this view.

The Board has pointed out on a number of occasions that this is not quite an accurate assessment of the implications of the original certification in 1945. Certainly, the Board has many times defended the integrity of the bargaining unit represented by SGEU, and has, as in 1945, resisted efforts of groups within the scope of that unit to establish their own bargaining structures. In *Saskatchewan Government Employees' Union and Government of Saskatchewan v. Canadian Association of Fire Bomber Pilots*, [1996] Sask. L.R.B.R. 539, LRB File No. 302-95, the Board made this comment, at 560:

> *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 SGEU 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.*

On the other hand, the Board has cautioned SGEU not to interpret this as a sign that the certification Order in 1945 established some immutable monolithic bargaining structure, or that this Board was granting SGEU a clear and non-competitive field in which to decide whether they would take in future groups of persons then unrepresented by them.

In a decision made as early as 1948, in *Electric Utilities Employees' Union v. Saskatchewan Power Commission and Saskatchewan Civil Service Association and International Brotherhood of Electrical Workers*, [1945-54] Decisions of Sask. L.R.B. 340, the Board made this comment, at 343:

> *In other words, recognition is given in this section to the principle of stability in that agreements are to remain in force for annual periods, but at the same time it is also provided that a new union may enter the picture and claim the right to represent the employees either in the whole of a unit which has previously been determined as*

> *appropriate or in part of that unit. Clearly, it is not necessarily contrary to the intent of the Act to split off a smaller unit from a larger unit which has previously been determined as appropriate; on the contrary, the Act specifically provides for this possibility.*

In the *Fire Bomber Pilots* decision, *supra*, the Board added a further gloss to the assessment of historical events urged by SGEU, at 563:

> *Counsel for SGEU 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 SGEU 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.*

As such early decisions of the Board as that in the *Saskatchewan Power Commission* case, *supra*, illustrate, the Board has never taken the view that the certification Order issued in 1945 conferred on SGEU exclusive jurisdiction over employees in every entity "under the control of or owned or operated by" the Government of Saskatchewan in a literal sense. At the time the Order was issued, the two mental hospitals were explicitly excluded. This seems to have provided a basis for further consistent exclusion of mental health facilities from the unit represented by SGEU.

We do not wish to be seen as predetermining the issue of whether particular groups of classifications of employees should be included or excluded from the bargaining unit proposed by PIPSC. The point we are making here is that we do not think that these decisions in which the Board has remarked on the desirability of maintaining the integrity of the PS/GE unit as defined at any particular point in time are inconsistent with those in which we have commented on the need for flexibility in assessing the status of employees who fall outside the PS/GE unit, and in considering their interests under the *Act*.

Whatever other course events might have taken is now a moot point. In our view, the intervention of the PIPSC application puts the matter in a new context, one in which PIPSC is entitled to ask for consideration of the appropriate boundaries of any bargaining unit which they might ultimately represent. The assessment of the delineation of bargaining units would entail a consideration of the proper allocation of all of the employees who are currently outside the SGEU unit, including those who have been earmarked for inclusion within the SGEU unit by the scope review.

For the reasons we have set out, we have concluded that a middle management unit would be an appropriate one. The matter of which employees should be included within that unit is a different issue, and we would anticipate that it will be the subject of further representations by the parties. We also anticipate further submissions concerning the means for determining the level of employee support. We will order the continuation of our interim order dated March 6, 1997, to preserve the *status quo* pending the final disposition of this application.

**RON MARTTALA, RON MULHOLLAND AND MARSHALL DESJARLAIS, Applicants and REGINA CIVIC MIDDLE MANAGEMENT ASSOCIATION AND CITY OF REGINA., Respondents**

LRB File No. 337-96; July 17, 1997
Chairperson, Beth Bilson; Members: Donna Ottenson and Don Bell

For the Applicants: Rhonda Tibbitt and Ron Gates
For the Union: Anna Crugnale-Reid
For the Employer: Jim McLellan

**Duty of fair representation - Arbitrary conduct - Board decides that union did not handle grievances concerning layoffs in an arbitrary manner.**

***The Trade Union Act*, s. 25.1.**

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** The Regina Civic Middle Management Association has been designated by this Board as the bargaining agent for a unit of employees of the City of Regina. Three members of the Union, Ron Mulholland, Ron Marttala and Marshall Desjarlais, have filed an application in which they allege that the Union failed to comply with the duty to represent them fairly in keeping with s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17. This provision 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.*

Mr. Mulholland, Mr. Marttala and Mr. Desjarlais were laid off when the positions they had been occupying were eliminated in the course of reorganizing the administrative structure by the Employer.

Mr. Mulholland began his employment with the Employer in May of 1989. In 1996, he held a permanent position as a construction and maintenance planner in the facilities department. His duties included assisting with the computerization of the maintenance system in city buildings, developing a

long-term capital plan, and developing a data base for capital budget planning. On June 27, 1996, Mr. Mulholland met with Randy Garvey, who had recently become the director of the support services department and Cal Barks from the human resources department. At the meeting, Mr. Mulholland was given a letter indicating that the position of construction and maintenance planner was being eliminated, and that he would be laid off at the end of the working day on January 31, 1997.

On July 2, 1996, Mr. Mulholland wrote a letter to Mr. Garvey requesting the Employer provide him with reference letters. He also asked for assistance in exploring whether his pension entitlement for his service with the provincial government could be combined with his pension with the Employer to permit him to take early retirement. Finally, he asked to be hired on a contract basis to carry on with the work he had been doing.

On the same day, Mr. Mulholland attended a meeting of the Union executive. At that time the executive consisted of Mark Whiting, Union president, Pat Wilson, Elora Shandler and Pat McLellan. Ms. McLellan was not present at this meeting. Mr. Whiting testified that a number of other employees who had also been given notice of future layoff were invited to the meeting, but only Mr. Mulholland attended. Mr. Whiting talked to the other employees individually.

The notes from the meeting indicate that Mr. Mulholland raised the question of "CMM's position with respect to cut-backs." According to these notes, the following explanation was given of the usual practice of the Union in these circumstances:

> *While severance is not defined in the collective agreement we try to negotiate a reasonable settlement on behalf of the employee. The City is not obligated to however have done so in the past. All CMM members have been provided some kind of severance package in the past where the end result was approximately equal to three weeks per year of service. This package would include things such as salary, severance and out placement counselling.*
>
> *This round, working notice has been provided. This is considered as part of the package.*

The notes also indicated that there was a discussion of the pension situation of Mr. Mulholland, and that he asked whether the Union would provide him with "legal assistance" for "negotiating severance and

the reciprocal agreement." The Union responded that their general practice was to negotiate the severance questions directly with the Employer. Though the Union solicitor, Rick Engel, had given them advice on these issues, they had not previously provided his services to individual members.

It should be noted that in his own evidence Mr. Mulholland denied that he had ever framed questions about his status in terms of "cut-backs," or that he was primarily interested in severance. He said that he went to the meeting to hear what the Union might be able to do for him, and that they made some general statements about their practice in the past.

In a letter dated July 10, 1996, Mr. Mulholland indicated that he wished to file a grievance in connection with his layoff. The grievance alleged that the layoff violated a Letter of Understanding between the Union and the Employer which had been signed in February of 1996. This Letter of Understanding reads as follows:

> *Re: Change Management*
>
> *The City of Regina and the Regina Civic Middle Management Association agree to establish a process to ensure that "change" is identified as early as possible to allow for available re-training or development to meet the changes.*

In the letter, Mr. Mulholland summarized a number of pieces of information which, according to him, showed that there had been no decrease in the work or the financial resources in the area he was working in. He argued that the layoff was not based on a shortage of work and should therefore be withdrawn.

In his evidence, Mr. Mulholland said that he never received any direct response to this grievance.

On August 18, 1996, Mr. Mulholland filed a further grievance, citing Article 9 of the collective agreement. The portion of the article to which he referred to reads as follows:

> *9.1 When vacancies in the permanent staff occur or new positions of a permanent nature are created in any department, a notice thereof outlining the position and grade shall be forwarded by the Director of Human Resources to all departments of the City; to the Recording Secretary of the Association at least seven working days prior to an*

> *appointment being made thereto, such notice to set forth therein the minimum rate of pay to apply.*

In the letter, Mr. Mulholland alluded to the position of business systems co-ordinator, which he said had been created in violation of this article.

Mr. Desjarlais was also invited to meet with Mr. Garvey and Mr. Barks on June 27, 1996. He was given notice that his position would be eliminated and he would be laid off effective October 31, 1996. At the time he was working as a materials engineer.

Mr. Desjarlais testified that the stress he experienced on receiving this news was considerable. He was on sick leave from July 2, 1996 to September 24, 1996. He then took vacation leave until October 9, 1996. At that time, his physician told him that he was fit to return to work. He was informed by the Employer, however, that there was no work for him to return to and that he should consider himself on unpaid leave until the end of October, which would bring him to the date of his layoff.

Mr. Desjarlais spoke to Mr. Whiting on or about July 2, 1996, and inquired whether he would be able to exercise bumping rights. He met with Mr. Whiting on July 8, 1996, and they discussed this topic at that time; Mr. Desjarlais said that he read a newspaper article in which the city manager, Bob Linner, referred to the use of bumping as a way of resolving the situation for persons being laid off. Mr. Desjarlais said he could not recall whether there was specific reference to Article 26.6 of the collective agreement during his discussion with Mr. Whiting. This provision reads as follows:

> *Reduction in Staff*
>
> *When a reduction in staff becomes necessary in a department, the employee last engaged, where practicable, shall be the first to be laid off, and to the extent that the organization of the department permits, the principle of progressive demotion in relation to comparative lack of seniority shall apply, provided, however, employees whose services are necessary to insure efficient operation may be retained irrespective of their length of employment.*

In a letter dated July 9, 1996, Mr. Desjarlais wrote to Mr. Whiting identifying several positions which he thought he might be entitled to bump into.

Mr. Whiting responded to this letter on September 18, 1996, in the following terms:

> *As per our meeting of September 11, 1996, the Executive Committee considered your request to forward a grievance on your behalf with the premise that an Engineer in the Public Works Department should have been laid off and that you should have been offered that position. The basis for your request was the application of Section 26, clause 6, of our agreement with the City of Regina.*
>
> *After reviewing your request, the Executive has decided not to forward this grievance. The rationale for the Executive's decision is as follows:*
>
> *1. That Section 26, Clause 6 of our agreement is not, in the opinion of the Association's Legal Counsel, a "bumping clause" per se, but rather is a guideline to be used when staff reduction is anticipated, and*
>
> *2. The clause specifically identified the process to apply within a Department and therefore does not suggest a City-wide application. Our opinion is that the City's action with regard to the application of this clause and the individuals who were affected by lay-offs was consistent with the language contained in the clause, and*
>
> *3. That putting forward a grievance which would suggest or require broadening the definition and/or intent of this clause would be out of the scope that, in the opinion of the Executive, the membership was in agreement with when ratifying the agreement.*
>
> *We realize that this cannot be an easy time for you or any of your colleagues who are affected by the recent layoff decisions. From the outset, the Association has outlined the alternatives that have traditionally been made available to other CMM members in your situation. The three avenues have been; investigating grievances pertaining to the application of our contract with the City; pursuing with the City all possible avenues to find alternative positions, and finding no success in these areas, negotiating some form of severance package for the member.*
>
> *At present, we have not been successful in securing employment opportunities for you. Since there are no employment opportunities currently available, it is the recommendation of the Executive that you request the Association's assistance in negotiating a severance package with the City. In the past, in order to be successful in negotiating severance, discussions must have commenced prior to the end of the individual's notice period. To ensure that this alternative is as successful as possible, sufficient notice should be given so that terms may be negotiated prior to your last day of employment with the City.*
>
> *Although you may not agree with the decision of the Executive, we assure you this decision has not been taken lightly. It has been made in the context of the Association as a whole, and based on the spirit of our collective agreement as well as precedents which have been set down over the years.*

> *It is also incumbent upon us to make you aware of the grievance appeal process that is contained within our Constitution. Should you disagree with the Executive's decision you may wish to enact Article 8, Section 4 which states "Should the member concerned not agree with the decision of the Executive Officers, any five members may over their signature direct the Executive to act on the specific grievance on behalf of that member However, you should also be aware that the Association has been advised that enactment of this clause would direct the Association to formally file a grievance but it would not necessarily mean that the Association would be required to proceed through to arbitration.*

In a letter of October 17, 1996, Mr. Desjarlais wrote again to Mr. Whiting requesting the assistance of the Union after the Employer suggested that he should be on unpaid leave until his layoff. The Union was successful in obtaining the agreement of the Employer to pay Mr. Desjarlais for an additional month prior to the end of his notice period. Mr. Whiting informed Mr. Desjarlais of this, and forwarded to him a memorandum of settlement which the Employer required him to sign in order to obtain the money. Mr. Desjarlais declined to sign the memorandum on the grounds that the document represented a severance settlement, and he did not think this was appropriate.

Mr. Marttala was working as a construction and maintenance engineer on June 27, 1996, when he was summoned to a meeting with Mr. Garvey and Mark Trowell, a representative of the human resources department. He was told that his position would be abolished and he would be laid off effective July 10, 1997, and he said that this was attributed to budget cuts. A written notice was given to him on July 10, 1996.

On July 18, 1996, Mr. Marttala sent Mr. Whiting a grievance which reads as follows:

> *On July 10, 1996, I received a letter from the Director of Support Services, Randy Garvey, that I will be laid off from the above noted position on July 10, 1997. Mr. Garvey stated that the decision is irreversible. As a result, I hereby lodge this grievance with the Association in accordance with Article 8 of the CMM Agreement with the City of Regina. I am preparing a detailed report that shows the City of Regina has violated the following Articles:*
>
> *1. 26.6 -Reduction in Staff*
>
> *"When a reduction in staff becomes necessary in a department..." The City Manager and Mr. Garvey have defined the necessity for reductions in their letters. My arguments show that none of them apply to my situation. Furthermore, my 13 years of*

> *service with the City seems to be a handicap rather than a seniority advantage - i.e. "irreversible layoff."*
>
> *2. Letter of Understanding - Change Management*
>
> *"...agree to establish a process to ensure that "change" is identified as early as possible to allow for available re-training or development to meet the changes." This "change" process has not been initiated nor have I been offered any re-training or development courses.*
>
> *I hereby demand that my lay-off letter be withdrawn by the City as no decision has been made, or possibly can be made, to change or reduce the duties of my position.*

Mr. Marttala provided further elaboration on these points in a subsequent letter dated July 22, 1996.

Mr. Marttala and Mr. Mulholland were present at a meeting of the Union executive committee on August 21, 1996, when the Union solicitor, Mr. Engel, was also present. The evidence of witnesses who were present and the notes kept by the Union indicate that there was further discussion of the proper interpretation of Article 26(6) of the collective agreement. Mr. Engel appears to have expressed the opinion that this article was not really a bumping provision. At this meeting, Mr. Mulholland and Mr. Marttala also seem to have been advised that they should apply for any vacant positions for which they were qualified.

In this connection, the Union had discussions with the Employer which led to the removal of an employment equity designation from one term position which was vacant, that of a solid waste engineer in the public works department. Mr. Mulholland applied for this position in July of 1996, and was ultimately appointed to it. The position was for a term ending July 10, 1997.

Mr. Mulholland, Mr. Marttala and Mr. Desjarlais had some contact with each other during the period after they received notice of the intention of the Employer to eliminate their positions. On September 26, 1996, they wrote a lengthy letter to Mr. Whiting setting out their concerns about the elimination of their positions and about the approach which was being followed by the Union on their behalf. The letter began with the following passage:

> *This letter is our response to the comments made by the CMM executive and its solicitor on August 21, 1996, regarding our layoff status. We cannot accept your conclusion that CMM should pursue consistent severance packages for us because of a will to reserve its resources for all the membership and an Agreement lacking of the language necessary to defend our rights as City employees. This rationale is analogous to saying that an insurance company cannot cover any single person's losses among its other customers. As the representatives of the Finance Department pointed out at the meeting, they (and most other members) do not have any problems that need "looking after." As a matter of fact, we have been told on more than one occasion that everyone is watching how well we do in our "fight" and that if we succeed, there is hope for the rest of the employees also. Our fight is everyone's fight. Yours and other members positions could be the victims of layoffs in yet another round of layoffs. Think back to the five position layoff in CSP&R a couple years ago.*
>
> *The only acceptable way for CMM to provide us with fair representation is to inform the City Manager that CMM is prepared to take our case to arbitration. We do not believe that the arbitrators would make their decision solely on the basis of the weak contract language. If, according to the Trade Union Act, every employee is entitled to representation "that is not arbitrary, discriminatory or in bad faith," would not the arbitrators expect the same standard of conduct from the employer? While we are not trying to repeat the points made in our grievance letters, the following arguments are meant to highlight the management's treatment of us that no employee in a responsible organization should have to endure, nor any bargaining unit to accept...*

In the letter, the writers went on to present arguments showing why the actions of the Employer had been arbitrary, discriminatory and in bad faith, and supported these arguments with information they had gathered. The information to which they referred included financial items, quotations from public statements of city officials, and their own observations about the organization of the department in which they worked and the work being done there.

The last section of the letter was headed "Required Action." The writers made a number of suggestions:

> *A. Job Bulletins and Position Descriptions*
>
> *If it is found to be necessary in the first place, there is no excuse for not immediately posting our positions or other positions we may be qualified for. Mr. Garvey has our job descriptions, and besides the Managers left in place know exactly what we did, are capable of doing, and are qualified for. No game playing should be tolerated with respect to the amount of work we do, splitting duties, established qualifications and salary. CMM must scrutinize and agree to all position descriptions for new positions*

*prior to their posting. The Agreement provides for retraining if there is a change in the way business is to be done.*

*B. Bumping*

*Insist that all seniority rights be respected, especially with regards to bumping. CMM's solicitor has stated that bumping is covered by the Trade Union Act and only needs CMM's directive to act on the issue. He has also stated he has been trying for years to convince CMM to clarify their language to promote seniority, hence, allowing bumping. This is all in addition to the fact that Mr. Linner (in the L.P.) and Mr. Barks (in our layoff meetings) have endorsed bumping. We agree with you that this is unpleasant business, but then we did not start it. If the management does not now wish to deal with the consequences of their own actions, it should not have tried to bump us out without justification that stands up to any kind of scrutiny. By CMM insisting on bumping rights now, then in the future top management will think twice before arbitrarily dismissing people because then they will be forced to find a replacement position as governed by seniority rules.*

*C. Arbitration*

*Not only do we have a strong case for CMM to take to arbitration, but also several grounds for wrongful dismissal suit. [sic] If the City refuses to carry out reductions in a sensible, even fair, manner, then it is the role of the union to see that it happens. That is why the CMM has to be prepared to take our cases to arbitration. If you must err in the uncertain situations, the rule of thumb is to err on the side principle, otherwise you are already defeated in more ways than one. Should the latter be the case, then, to avoid unrealistic expectations, it is only fair that CMM inform all its members that it is not able to provide even the most elementary union protection against arbitrary actions by senior management.*

*D. Reassessment*

*It has been said that management gets the kind of union it deserves. Since the management would rather exploit the weak language than provide any cooperation promised by the City Manager, the CMM has to take a hard look at its role in the organization. If the only way to get fair treatment from the City is to "get messy", as other unions do, then that is the way to go. That means first of all strengthening the contract language, and secondly pulling out of such joint ventures as strike duty, not to mention the Christmas party. While all of this may sound unpleasant, clearly written contract will eliminate the kind of problems that we are now facing, as they have done in "messy" unions.*

*E. City Manager Authority*

*The City Manager and the Directors through their statements to employees, employee news letters, and the media can be taken as City policy and can be presented in support of our case at a Board of Arbitration. CMM needs to instruct its solicitor to represent these principles.*

*F. CMM Action*

*Under the Agreement the employees must file their grievances within seven days of the act or omission giving rise to the grievance. Our grievances were filed at the beginning of July of 1996. CMM had seven days to submit the grievances to the Department Head and the Director of Human Resources. Since no hearing has taken place with the Department Head, nor has CMM denied our grievances except for the aforesaid meetings, we must assume that CMM intends to take no further action. We must therefore direct you to proceed under Clause 7, Article 8 submission of grievance to arbitration.*

The Union referred this letter to Mr. Engel, asking him to prepare a response. In a letter dated October 24, 1996, Mr. Engel responded in some detail to the suggestions for action contained in the letter from the three employees. He made some comment about each of the items which had been included in the letter dated September 26, 1996.

In connection with the bumping issue, Mr. Engel made the following comments:

*Your next point is to insist upon City-wide bumping. Under this heading, it is clear that my remarks on Good Faith Bargaining were misunderstood. I have enclosed a copy of my July 25, 1996 letter to the City Solicitor's office in which I have articulated as carefully as possible the extent of the City's bargaining obligations. Since that time, I have also received a copy of CMM's letter to Mr. Desjarlais on the application of Article 26.*

*CMM takes the position that Article 26 only permits department-wide bumping, and that the Executive is not prepared to go back to the membership at this time to obtain a mandate to try and negotiate a new City-wide bumping clause. In my view, the Association is legally entitled to take this stand. This may not be my preference, but I am not retained to give political advice. My job is to give legal advice and it is clear that all of the requirements of Section 25.1 of The Trade Union Act have been complied with by the Association in making this decision not to pursue unit-wide bumping as the result of lay-offs in the middle of the current collective agreement.*

With respect to the demand that the Union proceed to arbitration, Mr. Engel made the following comment:

> *Finally, you have demanded that grievances be filed by CMM under the Collective Agreement. This will not be happening until there is an actual breach of the Agreement. Bumping is not available in your Department. Furthermore, CMM has been meeting with City officials pursuant to the Change Management Letter of Understanding to see if there are any other options available besides lay-off at the end of your notice period.*

Mr. Engel completed his letter with the following observations:

> *Besides your suggestions, we have been working on other options as well. These include giving first preference to laid-off employees when new jobs become available that those employees are qualified to perform or can be reasonably trained to perform, recall rights, and payment of severance in lieu of notice.*
>
> *Thus far, the Executive has determined that our chances of success are best promoted through ongoing discussions with the City as opposed to what you have called messy unionization. At some point, where there has been a clear violation of the Agreement, CMM is prepared to pursue grievances to the level of arbitration. In the meantime, however, it is necessary for the lines of communication to stay as open as possible.*

It will be recalled that in October of 1996, Mr. Desjarlais was discussing with the Union the possibility of obtaining additional payment from the Employer for the period prior to the expiry of his layoff notice, and that he held back from signing the memorandum which the Employer presented. On November 13, 1996, Mr. Desjarlais wrote to Ms. McLellan, now president of the Union, to ask her for information about all of the layoffs and severance settlements going back to 1992. On November 15, 1996, he wrote her another letter indicating that he had just received a copy of the letter from Mr. Engel dated October 24, 1996.

In the letter, Mr. Desjarlais made the following comment:

> *Had I personally been aware of this stand by CMM, I would have applied for an opportunity that came up at the end of October. The position was Landscape Architect which I told Mark Whiting I had an interest in. I felt that with a minimal amount of training, I could do this job. Unfortunately, when I discussed this opportunity with Mark, he did not make me aware of CMM's above stand on applying for any job we are*

> *remotely qualified for. Had I known this, I undoubtedly would have submitted an application and resume. In discussion with Mark, I originally told him that I was interested but changed my mind a week later with the rationale being that if the City wouldn't even grant me an interview for the Junior Solid Waste Engineer position earlier advertised, why would they ever give me any consideration for the position of Landscape Architect. Upon telling Mark this very information, he said "OK" and that was the end of it. I am deeply upset that he did not take the initiative to tell me that CMM would have been prepared to argue on my behalf.*

He went on to ask that a grievance be filed on his behalf in relation to this position. Ms. McLellan responded that the position had been filled, and that it was, in any case, too late to file a grievance. She also indicated that the Union was not in a position to provide Mr. Desjarlais with the information he requested. She finished by suggesting that Mr. Desjarlais reconsider accepting the severance settlement offered by the Employer; although the Employer had imposed a deadline for acceptance, she indicated that there was some prospect of reopening the question.

On January 21, 1997, Mr. Desjarlais filed a grievance in connection with the filling of a term position as manager of solid waste. The Union filed the grievance, but later informed Mr. Desjarlais that they had decided not to pursue it on the basis of information received from the Employer.

On February 14, 1997, Mr. Desjarlais filed a further grievance in relation to a term position as roadways operations engineer on the grounds that it had been offered to a junior non-permanent employee. The Union responded that they would not file a grievance because they were pursuing a grievance on behalf of another member who was senior to Mr. Desjarlais.

On November 1, 1996, the annual general meeting of the Union was held. There was some discussion surrounding the provisions in the Union constitution outlining the handling of grievances. Mr. Marttala and Mr. Mulholland moved that a clause be added requiring the executive committee to respond to grievances within 90 days; this motion was carried.

On the same day, November 1, 1996, Mr. Marttala, Mr. Mulholland and Mr. Desjarlais filed this application with the Board.

In a letter dated November 18, 1996, the three applicants requested a meeting with Mr. Engel. They wrote to Mr. Engel again on December 2, 1996, in a lengthy letter which summarized events from their point of view, and provided information which purported to support their arguments.

In subsequent correspondence, Mr. Mulholland sought to arrange a meeting with the Union executive at the office of the solicitors who had been retained by the three employees. Ms. McLellan did not reply to these requests.

In the application, Mr. Mulholland, Mr. Marttala and Mr. Desjarlais alleged that the Union did not satisfy the requirements imposed by the duty of fair representation because they handled the grievances filed by the employees in an arbitrary manner. The major argument made by counsel in support of this allegation was that, though the Union considered a variety of issues in relation to the layoffs, they did not pay proper attention to the question which the three grievors tried to focus on, which was the necessity for the layoffs in the first place. Counsel pointed to the first part of Article 26(6) of the collective agreement, which makes the operation of the article contingent on the reduction in staff being necessary.

Counsel argued that the Union took the wrong starting point, which was how to respond to the layoffs as a *fait accompli*, without challenging the initial decision to eliminate the three positions. She further argued that the Union never responded to this aspect of the grievances, and never provided the three employees with a satisfactory explanation of their unwillingness to press this point.

The Board has had a number of occasions to comment on the principles which underlie the duty of fair representation which has been imposed upon trade unions. In *Gilbert Radke v. Canadian Paperworkers Union*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, the Board made this comment about the genesis of the duty of fair representation, 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] 84 C.L.L.C. 14,043, the Supreme Court of Canada outlined the nature of the duty in the following terms, at 12,188:

> *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 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 employee.*

The Canada Labour Relations Board summarized the nature of the duty of fair representation in *Brenda Haley v. Canadian Airlines Employees' Association*, [1981] 81 C.L.L.C. 16,096, at 609:

> *It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's*

> *grievance. The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.*

This Board characterized the obligation resting on a trade union in much the same way in the *Gilbert Radke* decision, *supra*, at 64:

> *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.*

In *Gordon Johnson v. Amalgamated Transit Union*, [1997] Sask. L.R.B.R. 19, the Board reviewed the principles which have evolved in connection with the duty of fair representation at some length, and summarized the approach which the Board has taken to assess the conduct of trade unions in representing their members, at 36:

> *It will be seen from the foregoing description of the evolution and articulation of the principles associated with the duty of fair representation that, in defining the duty of fair representation, labour relations boards, including our own, have taken into account a variety of factors which may mitigate the extent to which employees represented by a trade union can claim to have their own individual interests advanced or protected. These factors include the process of setting priorities and making accommodations which is inherent in collective bargaining, the competing interests of individual employees and groups of employees, the democratic and voluntaristic nature of trade unions as organizational entities, the volunteer nature of much trade union leadership, the resources available, and the stake of trade unions in maintaining their credibility as parties to a continuing collective bargaining relationship.*

The trade union which is under scrutiny here represents a range of professional and administrative classifications at the City of Regina. There are supervisory responsibilities associated with many of these positions.

There are approximately 100 members of the Union, which is unaffiliated with other labour organizations. The affairs of the Union are conducted by a small executive committee elected by the membership. During the summer and fall of 1996, Mr. Whiting was the president of the Union.

Mr. Whiting testified that the Union has had to deal with a number of layoffs in recent years as the Employer reorganized the administrative structure in keeping with budgetary objectives. In most years, there have been layoffs affecting one or two members of the Union, with the exception of 1993 when five members were laid off.

Mr. Whiting testified that the basic approach of the Union to collective bargaining with the Employer has been to try and foster a relationship which is as harmonious as possible. In this context, he said that the Union has taken at face value the rationale for reduction of staff positions presented by the Employer in budget documentation in successive years.

He said that the basic premise on which the Union proceeds is that, aside from the instance of dismissal for cause, there are essentially no restrictions on the ability of the Employer to terminate employment with notice. He referred the Board to Article 26(2) of the collective agreement, which reads as follows:

> *Termination of Employment*
>
> *Notwithstanding the times at which or the manner in which an employee is paid, he shall, unless he is dismissed in accordance with Section 1 [dismissal for cause], hereof, be entitled to receive two weeks written notice that his services are no longer required by the City, and, in turn, each employee shall be required to give two weeks written notice to the City of Regina his intention to terminate his employment with the City. It is understood and agreed, however, that employees who are dismissed, in accordance with the provisions of Section 1, shall not be entitled to any notice or payment as provided for in this section.*

In the case of layoffs which have taken place in recent years, the Union negotiated severance packages for laid off employees which exceeded the terms of this provision, although there is no requirement for the payment of severance in the collective agreement. The common level of the severance package or the working notice which has been negotiated for these employees was three weeks for each year of service, which is clearly more advantageous that the bare two weeks notice required under the collective agreement.

In the summer of 1996, when Mr. Mulholland, Mr. Marttala and Mr. Desjarlais were given notice that their positions would be eliminated, the Union received notice that a total of eight members would be laid off. In light of the small size of the bargaining unit, this was clearly an event of major significance for the Union.

Mr. Whiting testified that the Union considered a variety of options in deciding how to confront this situation. He said that during the summer of 1996 the executive committee met approximately every two weeks, and the layoffs were the primary topic of discussion at these meetings. Mr. Engel was present at a number of these meetings, and was consulted by members of the executive on other occasions.

One strategy which was advised by Mr. Engel, and which the Union decided to pursue, was to mount an argument that the Employer was obligated to bargain collectively with the Union concerning those aspects of the reorganization of the City structure which would affect the terms and conditions of employment of Union members, including the continuation of their employment. In a letter dated July 25, 1996, Mr. Engel made the argument that the Union was entitled to be involved in discussion of the reorganization and of the impact it would have on the employees represented by the Union. It should be noted that a copy of this letter was provided to Mr. Mulholland, Mr. Marttala and Mr. Desjarlais as an attachment to the letter Mr. Engel wrote them on October 24, 1996.

The documents filed with the Board do not disclose that the Employer made any explicit written response to the argument made by Mr. Engel in the letter of July 25, 1996. It may be assumed that they

did not accept the argument. Indeed, the documents make it clear that the Union had some difficulty in obtaining clear information from the Employer about the details of the reorganization.

At an early point after receiving their notice, both Mr. Mulholland and Mr. Desjarlais indicated their wish to exercise bumping rights, and identified specific positions held by junior employees which were outside the department in which they worked. It is clear from the notes of executive meetings that there was a considerable amount of discussion on the issue of whether these employees enjoyed bumping rights. There was also reference to this issue, of course, in some of the correspondence, particularly in the letter sent by the Union to Mr. Desjarlais on September 18, 1996, and the letter written by Mr. Engel dated October 24, 1996.

It appears that at one point in his discussions with the executive, Mr. Engel suggested that the Union might attempt to use Article 26(6) of the collective agreement as a bumping clause, and might try to lay claim to positions outside the home departments of the laid off employees on this basis. In his evidence, Mr. Whiting said that the executive specifically rejected this approach. He said that they knew the majority of their members were not in favour of extending bumping rights because they viewed the positions they held as specialized ones which should not be regarded as interchangeable.

It is also evident, from the testimony of Mr. Whiting as well as the documentary evidence, that the executive discussed, in the context of the layoffs, the import of the letter of understanding on "change management." The executive, who were supported in this respect by the advice of Mr. Engel, concluded that this letter of understanding represented a mutual commitment to future efforts to negotiate ameliorative measures for employees affected by "change," but did not confer on the Union or on employees any substantive entitlement. Mr. Whiting said that it was his recollection that the parties had engaged in some discussion of the possible options during the negotiation of the previous collective agreement; these discussions had not reached any conclusive stage so it had been agreed to incorporate the change management letter in the agreement as a sign that the discussions were to be taken further in the future.

As Mr. Whiting described the process, the Union confronted these issues as an approach which would be applicable to the circumstances of all eight laid off employees. This does not mean that the Union

did not make efforts to reach solutions which would be suitable for individual employees. Indeed, it will be recalled that, through the offices of the Union, a barrier was removed from the eligibility of Union members to apply for one engineering term position, and Mr. Mulholland was eventually successful in obtaining this position. In the case of one or two of the other laid off employees, they were able to retire or accepted a severance package negotiated by the Union.

In general, however, the Union approached the issues in a manner consistent with the assumptions and principles they had adopted before. They viewed the negotiation of a severance package as the most advantageous option available to them given the terms of the collective agreement. They accepted the explanation given by the Employer for the elimination of positions. They were of the opinion that the Employer had the power to eliminate these positions, and that the provisions of the collective agreement did not restrict this power significantly.

Counsel for Mr. Desjarlais, Mr. Marttala and Mr. Mulholland argued that by taking the approach they did, the Union failed to consider the essential issue of whether the layoffs were necessary and failed to heed the representations of the three employees on this issue.

We have concluded that the Union did not fail to take this issue into account. At the outset of their discussions of the layoffs, the executive asked Mr. Engel to consider whether there was some way to secure a more prominent and effectual role for the Union in discussions concerning these basic layoff decisions, and Mr. Engel made representations to the Employer on this issue. The Employer obviously did not feel that they had any obligation to accept the arguments made on behalf of the Union in this respect. According to Mr. Whiting, the Union felt there was nothing in the collective agreement which could be used as a basis for insisting on the consultations they requested, and the advice of Mr. Engel seems to have reinforced this. When asked about the specific wording of Article 26(6) of the collective agreement, Mr. Whiting said that they had given no explicit consideration to founding a grievance on the first clause alone; he said he assumed that this phrase did not confer on the Union any substantive basis for challenging the right of the Employer to eliminate positions and lay off staff, encumbered only by the obligation to give two weeks notice stated in Article 26(2) of the collective agreement.

Furthermore, the Union valued the relationship of trust they felt they had developed with the Employer, and felt that they were able to further their objectives by means of fostering this relationship. As an example of the benefits the Union obtained by taking this approach, Mr. Whiting pointed to the general level of severance settlements which the Employer had accepted. The Union did not feel this relationship would be advanced by second guessing the basis for administrative decisions, or questioning the rationale presented by the Employer for the steps they had taken to reorganize the administrative structure.

It may be a matter of controversy whether this is the most effective approach a trade union could take in an environment such as that in which these events occurred. Indeed, counsel for the Union seems to have suggested at times that they might consider a more aggressive or harder-edged interpretation of their rights under the collective agreement. The Union executive decided, however, that they were representing the views of their members as accurately as possible, and that there was no general sentiment which would support any marked departure from the principles which the Union had been following.

It is true that the Union did not respond to the representations of these three employees concerning the necessity of the layoffs in precisely parallel terms to those in which the issue was presented. We are satisfied, however, that they did consider this issue in a general sense, and that they did not fail to take it into account when devising the strategy which should be adopted in respect to the layoffs.

Mr. Whiting acknowledged that the Union did not respond directly to every inquiry made by the three employees. In ideal circumstances, one might expect that trade union officials would respond in a timely fashion to every concern or query raised by an employee. In this case, however, it must be remembered that the Union was faced with the prospective layoff of eight members which is a significance number in a bargaining unit of 100. This was a convulsive event for the Union and occupied a great deal of time for the small group of elected officers, who were performing these duties on a volunteer basis. The executive committee met frequently, and referred a number of matters to their solicitor for his opinion. Though not every specific point raised by Mr. Mulholland, Mr. Marttala or Mr. Desjarlais was acknowledged or addressed in detail, it is our view that the issues of significance which were of relevance to the layoffs were considered by the Union. Furthermore, we think that in

their own discussions and correspondence with the employees, and in the correspondence they commissioned from Mr. Engel, the Union clearly, candidly and expansively stated their position on all of the important issues.

This changed after this application was filed, and the responses of the Union to the three employees became somewhat guarded. This is hardly surprising, however, as the employees had charged the Union with a serious breach of their responsibilities. In these circumstances, it was perhaps to be expected that the Union would not feel able to enter into the same kind of interchange with the employees without considering the possible implications for these proceedings. The Union did continue to process the several grievances filed by Mr. Desjarlais after November 1, 1996, and responded to him as the grievance procedure required.

One must feel great sympathy for these employees as the elimination of their jobs is clearly a matter of great importance to them. It is clear from the representations they made to the Union and to Mr. Engel that they felt strongly about a number of issues. In this respect, we might make an observation about the premises on which they seem to have been proceeding, as expressed in their letter of September 26, 1996. They argued that the Employer could be held to a similar standard of fairness in dealing with employees as expressed in s. 25.1 of the *Act*, and that the Union should not permit the Employer to exploit "weak contract language."

The Union concluded that there was nothing in the collective agreement on which they could rely to challenge the decisions made by the Employer concerning the positions to be eliminated. It is not our task here to make pronouncements on the correct interpretation of the provisions of the agreement, but the interpretation arrived at by the Union does not seem to lie outside the bounds of what is reasonable. In order to proceed with a grievance, the Union must be able to make an allegation that the Employer has violated one or more terms which the parties have incorporated in the agreement as a result of the collective bargaining process.

It is, of course, open to the Union to appeal to the humane impulses of the Employer, or to encourage the Employer to explore ways of ameliorating the effects of decisions on particular employees. To

some degree, they did that here in negotiating severance packages, or altering the conditions for offering the vacant solid waste engineer position so that laid off employees like Mr. Mulholland would be eligible to apply for it. These arrangements, however, depend on the agreement of the Employer to undertake obligations which are not contained in the collective agreement, and the Union has no means of insisting that the City agree to these resolutions, though they can use persuasion.

In this case, the Union concluded that the provisions of the collective agreement did not create a basis for pursuing the grievances which had been filed by these employees, and we have not found that their handling of those grievances represented a breach of their duty to represent these employees fairly.

For the reasons we have given, we have concluded that the Union did not act in an arbitrary manner in handling the grievances filed by these employees, and that the application must be dismissed.

## UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 248-P, Applicant and STAR EGG CO. LTD., Respondent

LRB File No. 024-97; July 23, 1997
Chairperson, Beth Bilson; Members: Brenda Cuthbert and Bob Todd

For the Applicant: Gary Bainbridge
For the Respondent: Larry Seiferling, Q.C.

**Arbitration - Deferral to - Board declines to hear unfair labour practice where matter could be referred to arbitration under collective agreement.**

**Unfair labour practice - Anti-union animus - Where union concedes that employer's conduct was permitted by collective agreement, Board will not scrutinize employer's reasons.**

***The Trade Union Act*, ss. 11(1)(a), (e), (f).**

### REASONS FOR DECISION

**Beth Bilson, Chairperson:** The United Food and Commercial Workers, Local 248-P, has been designated in a certification Order dated July 4, 1977 as the bargaining agent for a unit of employees of Star Egg Co. Ltd.

The Union filed an application alleging that the Employer committed unfair labour practices and violations of ss. 11(1)(a), 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;*
> >
> > ...

> *(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;*

Counsel for the Employer objected to proceeding with a hearing of these allegations on the basis that the complaints made by the Union would be more appropriately dealt with in the context of the grievance and arbitration procedure provided under the collective agreement. These Reasons for Decision concern this preliminary objection.

In 1995, the parties concluded a collective agreement to cover the period March 1, 1995 to August 31, 1997. Among other things, the collective agreement provided for a wage increase of $0.35 per hour effective May 1, 1996.

When the date for the implementation of this wage increase was near, the Employer asked the Union to forego the wage increase until May of 1997. This request was based on the financial circumstances facing the company. The Union agreed to this delay.

In November of 1996, the Employer asked the Union to consider extending the date for the implementation of the wage increase beyond May 1, 1997, citing continuation of the financial exigencies which had led to the original request. In asking the Union to consider further delay, the representative of the Employer informed the Union representatives that the Employer would be forced to consider other alternatives, such as sale of the business or reduction of working hours for employees, should the Union refuse to agree to the delay.

The Union considered the request for delay, and eventually advised the Employer that they would not consent to further deferment of the introduction of the wage increase.

In the application, the Union alleged that the Employer took two actions in retaliation for the decision of the Union to insist on the implementation of the wage increase. The first was to post and fill three vacant positions in the plant. The allegation of the Union is that employing a posting process for the filling of vacancies was inconsistent with the long-standing practice of the Employer. The Union further stated in the application that the posting of the vacancies had the effect of discriminating against the majority of bargaining unit members who are of Vietnamese origin, and whose lack of command of the English language placed them at a disadvantage in these circumstances.

The other action taken by the Employer was to reduce the number of working hours for employees. In addition, the Employer is alleged to have added a number of part-time positions to the complement of employees in the bargaining unit, and increased the hours of some part-time workers.

The Union alleged that the previous practice of the Employer was to schedule working hours on a full-time basis as much as possible, and that the utilization of part-time workers was very limited.

Counsel for the Employer argued that all of the issues raised in the application are matters which the Union could raise through the grievance and arbitration procedure under the collective agreement. In taking these steps, he argued, the Employer has done nothing other than what they are entitled to do under the terms of the collective agreement. The collective agreement provides for, indeed requires, the posting of vacancies, and also contemplates the use of part-time employees.

Counsel for the Union said that the Union has not filed grievances, and that there is no present intention of doing so. The reason for this, he conceded, is that the Union cannot allege any infraction of the collective agreement on the part of the Employer. He stated that the unfair labour practice application is not based on alleged infractions of the collective agreement by the Employer, but on the motive of the Employer in making the changes which were made, which he alleged to be anti-union.

Though the *Act* does not specifically address the issue of whether this Board may accord deference to the grievance and arbitration procedure under a collective agreement, we have for some time taken the position that such deference is appropriate under certain circumstances. In *Retail, Wholesale and Department Store Union v. Morris Rod-Weeder Company Limited*, [1978] 78 C.L.L.C. 14,140, the Saskatchewan Court of Appeal upheld the proposition that the Board may exercise discretion in this respect.

In *Canadian Union of Public Employees v. City of Saskatoon*, [1990] Fall Sask. Labour Rep., LRB Files No. 155-89, 026-90, 043-90, 044-90 & 045-90, the Board outlined the rationale for this position in the following terms, at 81:

> *This discretion is necessary and serves to reconcile the Board's obligations to exercise its authority under the Act (see: Labour Relations Board of Saskatchewan v. F. W. Woolworth Co. Ltd., [1956] SCR 82) with the provisions of s. 25(1) of the Act which provides for final resolution of collective bargaining differences through an arbitrator appointed under the collective agreement.*
>
> *Section 25(1) of the Act reads as follows:*
>
> > *25(1) Where a collective bargaining agreement contains a provision for final settlement by arbitration, without stoppage of work, of all differences between the parties to or persons bound by the agreement or on whose behalf the agreement was entered into concerning its meaning, application or violation, the finding of the arbitrator or the board of arbitration shall:*
> >
> > > *(a) be final and conclusive;*
> > >
> > > *(b) in regard to all matters within the legislative jurisdiction of the Legislature of Saskatchewan be binding upon the parties; and*

> *(c) be enforceable in the same manner as an order of the board made under this Act.*
>
> *The Act does not provide for mandatory arbitration. Rather, it provides that where the parties have agreed to arbitrate certain matters, the arbitral award made under the auspices of a collective agreement, shall be final and binding. In those circumstances the jurisdiction of an arbitrator may well conflict with the Boards responsibility and public duty to administer the Act and the important rights that it confers on employees and employers.*

It should be noted that s. 25(1) of the *Act* has been amended since this passage was written, and 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.*

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, the Board made the following comment, at 196:

> *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 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 same decision, the Board went on to comment as follows, at 200:

> *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.*

In a recent decision in *Public Service Alliance of Canada v. Canadian Museum of Civilization Corporation* (1996), 102 di 130, the Canada Labour Relations Board reviewed the evolution of the position taken by that Board on the matter of deference to grievance and arbitration procedures, noting that s. 98(3) of *The Canada Labour Code* explicitly confers a discretion upon the Board to defer. Section 98(3) of *The Canada Labour Code* states:

> *98(3) The Board may refuse to hear and determine any complaint made pursuant to s. 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board.*

In *Denis Simpson v. Bell Canada and Communications Workers of Canada,* [1978] 1 Can. L.R.B.R. 1, the Canada Board commented as follows on the general rationale for the exercise of discretion, at 7:

> *... it seems obvious that Parliament wishes, where a contractual relationship exists between an employer and a bargaining agent, by virtue of a collective agreement, that disputes which may arise between them be settled, in so far as possible, through recourse to binding arbitration, in accordance with the terms of the said collective agreement.*
>
> *Private arbitration is undoubtedly one of the most valuable mechanisms invented in the field of labour relations for the settlement of disputes between parties. This is why the Canada Labour Code provides for the referral described in s. 188(2) [now s. 98(3)].*
>
> ...

> *... Parliament saw fit to give the Board the discretionary power to refer even unfair labour practices cases to arbitration. It would appear that it took such action in order to avoid the same litigant having recourse to two separate remedies or to avoid having the Board act as an appeal tribunal from arbitral decisions. Between the extreme position adopted by some labour boards, as evidenced by the decisions rendered by them, to the effect that the existence of an arbitration clause in a collective agreement automatically requires the boards to refer all matters to arbitration and, consequently, to decline jurisdiction, and the other extreme revealed in the decisions by other labour boards, whereby the latter never decline jurisdiction in this area, we feel that there must be a happy medium. In the case of the Canada Labour Code, the finding of this happy medium is facilitated by the very texts which govern the arbitration provisions.*

In the *Bell Canada* case, *supra*, the Canada Board set out five criteria which should govern the exercise of the discretion conferred by s. 98(3) of the *Code*, at 8:

> *... The first factor is naturally the existence of a collective agreement. The second factor is the presence or absence in the collective agreement of concrete provisions concerning anti-union discrimination which may allow recourse to the grievance procedure and ultimately, to arbitration. A third factor is the actual text outlining the grievance procedure, the universality of its application to employees and the possibility of filing a grievance in the event of an alleged violation of an anti-discrimination clause of this nature. A fourth factor is the connection which exists between the grievance procedure and the arbitration procedure itself, that is, the possibility of a given grievance being referred to arbitration. Some collective agreements limit the number and type of disputes that may be referred from the grievance procedure to arbitration. Lastly, the jurisdiction of the arbitrator and the arbitration tribunal must be examined. Some collective agreements limit this jurisdiction or the powers of the arbitrator or the arbitration tribunal in granting remedies or redress.*
>
> *If the indications concerning each and every one of the above factors are positive, then it is more likely that the board will exercise its discretion pursuant to s. 188(2) [now s. 93(3)] of the Code.*

In 1989, the Board seemed to have had second thoughts about the second criteria formulated in the *Bell Canada* decision, *supra*. In *Canada Post Corporation* (1989), 76 di 212, the Board made the following comment, at 215:

> *The approach expressed in Bell Canada, supra, has been followed by the Board to this day, with the result being that the Board rarely defers to arbitration pursuant to s. 98(3) of the Code. In fact, it has become fashionable for trade unions bringing complaints to the Board under s. 97 of the Code to allege anti-union animus and then*

> *to point out that their collective agreement contains no anti-union animus provisions or remedies, to convince the Board that it should not defer to arbitration. Applying the five-step criterion from Bell Canada, supra, the Board is almost obligated to hear all such complaints. In the respectful opinion of this panel of the Board, this should not be so. We think perhaps the time has come for the board to take another look at its practice vis-a-vis s. 98(3) of the Code and lean towards giving more priority to the private dispute resolution mechanisms that are mandatory in each collective agreement under the Code. Particularly where there has been a long-standing relationship between the parties, where the dispute arises from their day-to-day operations and where there are no important matters of public policy under the Code at stake.*

In *Canada Post Corporation* (1990), 12 C.L.R.B.R. (2d) 117, the Canada Board restated the test in the following terms, at 127:

> *Is there in this case a genuine statutory right that the board must define or reassert? After having reviewed the evidence and the parties' submissions and on the basis of the evidence, we find that there is none.*

In the *Canadian Museum* decision, *supra*, the Board considered the question of whether the jurisprudence on this point was affected by the decisions of the Supreme Court of Canada in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.), and *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967 (S.C.C.). The Canada Board drew attention to the fact that the nature of the relationship between labour relations boards and arbitrators is perforce of a different kind than that between courts and arbitrators, and pointed out that labour relations boards have a continuing interest in the collective bargaining relationship of which the grievance and arbitration procedure is a part.

The Canada Board concluded that the test set out in the *Canada Post* decision, *supra*, was consistent with the broad scope of deference and the model of exclusive jurisdiction adopted by the Supreme Court of Canada, making the following comment, at 140:

> *Insofar as the test concentrates only on whether genuine statutory rights are to be defined or reasserted, the answer would be negative. On the other hand, where the emphasis is on determining whether the dispute goes beyond the scope of the collective agreement, the test developed by the Board complies with the Supreme Court's instructions in Weber, supra which clearly held that arbitrators are to have exclusive jurisdiction over disputes arising under the collective agreement. In Weber, supra, the*

> *Court, per McLachlin J., clearly stated that the courts are not to define or characterize the action legally:*
>
> > *"... the analysis of whether a matter falls within the exclusive arbitration clause must proceed on the basis of the facts surrounding the dispute between the parties, not on the basis of the legal issues which may be framed. ..."*
>
> *Consequently, when examining whether statutory rights have to be reaffirmed under the Code, the Board is then scrutinizing the possible legal aspects of the dispute and the rights flowing from the statute, rather than asking itself whether the dispute could be resolved at arbitration, and whether the arbitrator has the power to grant the remedies requested.*
>
> *Conversely, if considering only whether the matter goes beyond the scope of the collective agreement, the Board will then concentrate on the facts of the dispute, regardless of its legal characterization, as directed by the Supreme Court in the context of court actions. The Board will then determine the "essential character" of the dispute and will be guided, inter alia, by the identity of the parties, the place of conduct, the time of the claim and whether the remedies sought may be granted by an arbitrator. In a general sense, the essential character of the dispute will be found to arise under the collective agreement if it concerns its application, interpretation, administration or alleged violation.*
>
> *Following this test, the Board adopts a more deferential approach in order to avoid possible conflicting decisions by different supervisory courts, especially since the arbitrator is given the power to determine whether a matter is arbitrable (s. 60(1)(b)).*

In the jurisprudence of the Canada Board starting in 1989, doubt was cast on the desirability of the second criterion for deference mentioned in the *Bell Canada* case, *supra* - the presence or absence in a collective agreement of a provision akin to s. 11(1)(e) of the *Act*. As we understand the comments of the Canada Board, the criticism of this criterion was that it constituted an unreasonably low threshold, providing an incentive to bring issues before the Board in any case where such a clause was absent, and to raise the issue of motive in circumstances which would otherwise clearly constitute the basis of a grievance under the collective agreement. The solution to this concern which was adopted by the Canada Board was to frame the test for deference in terms of whether the issue raised invoked a clear statutory right independent of the collective agreement.

In *Canadian Museum, supra*, the Canada Board concluded that this approach to deference was still appropriate in light of the expansive view of arbitral jurisdiction articulated by the Supreme Court of Canada in *St. Anne Nackawic Pulp and Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704 (S.C.C.), as well as *Weber*, *supra* and *O'Leary*, *supra*.

It will be noted that the wording of the provision which confers discretion upon the Canada Board refers to complaints which "could be" referred to an arbitrator. In the *Canadian Museum* decision, *supra*, the Canada Board alluded to the following comment of the Supreme Court in the *Weber* case, *supra*, at 953:

> *... 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.*

The Canada Board went on to observe that although this comment may lend support to the view expressed by the Supreme Court that broad judicial deference should be rendered to the decision of arbitrators in disputes "arising out of the collective agreement," regardless of their legal form, the advice does not completely resolve the question of the scope of deference by labour relations boards. The Canada Board concluded that a test such as that laid out in the *Canada Post* case, *supra*, was necessary to suggest proper boundaries for the exercise of discretion.

The circumstances before us in this case raise the issue in a slightly different guise than that which faced the Canada Board in the cases we have been discussing.

We should perhaps comment, to begin with, on the view expressed by counsel for the Union that the collective agreement constitutes a dead end for his client in relation to the allegations made. If we were to employ the Canada Board concept of a dispute which "could be" referred to the arbitration procedure, we might take a slightly more sanguine view about the possibilities under the collective agreement than the Union has.

The collective agreement which was filed with the Board indicates that there is a recent Letter of Agreement which commits the Employer to "make efforts" to schedule employees for 40 hours of work per week, as well as a provision which specifically prohibits discrimination on the basis of race, to name but two provisions which would seem to provide a basis for a challenge by the Union to the actions taken by the Employer.

Furthermore, if the concern of the Union is rooted in the fact that the Employer departed from established past practice, this issue as well has often been addressed by arbitrators.

Counsel for the Union asked us to suppose, however, that there is no recourse under the collective agreement, and that the Employer has, in fact, proceeded in a manner which is not open to challenge through the grievance procedure.

The only issue which has thus been submitted to the Board is that of whether, when an employer takes actions which are within the terms of the collective agreement, motive alone can be characterized as constituting violations of the *Act*.

A recent decision of the Ontario Labour Relations Board in *International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators v. Famous Players Inc.*, [1997] O.L.R.B. Rep. Jan./Feb. 50 addressed a somewhat similar issue to the one before us here. In that case a trade union brought an application alleging that the alteration by that employer of an entrenched practice of providing employees with free movie passes constituted an unfair labour practice; this practice was changed shortly after the conclusion of a first collective agreement. The Board found that the informal "agreement" under which the passes were distributed was brought to an end by the collective agreement, and was thus not subject to the grievance procedure. Nonetheless, the Board found that the change was improperly motivated and that it did constitute an unfair labour practice as alleged by the trade union.

In our view, the circumstances presented in the *Famous Players* case, *supra*, were distinguishable from those which face us here. In that case, the major reason given by the Board for finding that the

withdrawal of the free passes constituted an unfair labour practice was that the employer had continued to make the passes available to another group of unionized employees. Thus, there was an aspect of the action of the employer which could be characterized as an independent violation of the statute.

In this case, however, the Union has conceded, at least for the sake of this argument, that the actions of the Employer were sanctioned by the collective agreement. We have concluded that it would not be feasible for this Board to enter into an inquiry into the motives of an employer whose actions did not depart from those permitted by the terms of the collective agreement.

As we have often said, there are many instances in which the results of collective bargaining, and the permitted actions of the parties to collective bargaining, may have a negative impact on some or all of the participants in the process. We have not regarded this obvious fact as justification for intrusion by the Board into the relationship. If one of the parties has failed to make adequate provision for their interests in the collective agreement, it is open to them to try to change this through negotiations, through industrial action or by other means available to them under the regime established in the *Act*.

In this case, for example, the Employer evidently felt that it was disadvantageous to them to have bargained a wage increase on the scale which had been included in the collective agreement. Fortunately for them, they were able initially to convince the Union that they should be relieved of this obligation.

As counsel for the Union pointed out, there are cases where the motive of an employer is of significant interest to the Board because it changes the character of an act which is otherwise permissible. The most common example is that of dismissal, where anti-union motive may infect a lawful decision to dismiss grounded in a legitimate cause.

It would, however, open the door unreasonably wide to accept all invitations to scrutinize the reasons of employers for relying on provisions of the collective agreement to take certain actions. Collective bargaining relationships often go through periods of tension, and periods when the parties test their respective strength or attempt to achieve a more advantageous bargaining position. If their conduct goes beyond the bounds of propriety, either under a collective agreement or under the *Act*, there are a

number of mechanisms for obtaining relief. Without some manifestation in the form of such improper conduct, it is difficult to see how the Board can tell where the boundary lies between a level of tension or acrimony which is permitted, and some level which should be seen as unacceptable.

For the reasons we have given, we have concluded that the application must be dismissed.

## HILLCREST FARMS LTD., Applicant and GRAIN SERVICES UNION (ILWU - CANADIAN AREA), Respondent

LRB File No. 145-97; July 23, 1997
Chairperson, Beth Bilson; Members: Terry Verbeke and Gerry Caudle

For the Applicant: Walter Eberle
For the Respondent: Melissa Brunsdon

**Bargaining unit - Appropriate bargaining unit - Confidential exclusion - Board decides that corporate administrator position should be excluded from bargaining unit.**

**Jurisdiction - Board decides that existence of federally certified bargaining unit does not preclude determination of exclusion issue by this Board insofar as it affects provincially certified bargaining unit.**

***The Trade Union Act*, s. 2(f)(i).**

### REASONS FOR DECISION

**Beth Bilson, Chairperson:** The Grain Services Union (ILWU - Canadian Area) was designated by this Board in a certification Order dated April 19, 1995, as the bargaining agent for a unit of employees of Hillcrest Farms Ltd. In that certification Order, the bargaining unit was described as follows:

> *all employees employed at the Hillcrest Farms Ltd. working at or in connection with its Hatchery, Farm and Henbarn operations, Bruno, Saskatchewan except positions known as Farm/Henbarn General Manager, Hatchery General Manager and Henbarn Manager*

Hillcrest Farms Ltd. is a closely owned corporation which operates a number of agricultural enterprises near the town of Bruno, Saskatchewan. This corporation is the successor of a family farming operation, owned by Julius and Florence Pulvermacher, who incorporated the current company in 1968. The shareholders in the corporation are all members of the same family and are involved in the management of the business.

There are several different enterprises carried on by the corporation. These include a breeding facility, a turkey hatchery, a turkey farm raising turkeys for meat, a plant manufacturing pest control products, and a feed mill.

In 1994, the Union filed an application with the Canada Labour Relations Board requesting certification as the bargaining agent for all employees of the corporation involved in these activities. In the reply submitted to the Canada Board, the Employer argued that only the feed mill fell within the federal jurisdiction and that all of the other activities fall within the jurisdiction of this Board. The Canada Board accepted this argument and issued a certification Order on February 6, 1995, in respect of the following bargaining unit:

> *all employees of Hillcrest Farms Ltd. working at or in connection with its feed mill at Bruno, Saskatchewan, excluding the general manager and controller*

The Union subsequently filed with this Board an application for certification as the bargaining agent for those employees under provincial jurisdiction, and the certification Order was issued on April 19, 1995, as noted above.

At the time of the hearing concerning certification before the Canada Board, the Employer sought to have a number of positions excluded from the bargaining unit applied for by the Union. Among the positions proposed for exclusion were the three managerial positions eventually excluded from the provincial certification Order - Farm/Henbarn General Manager, Hatchery General Manager and Henbarn Manager. The Employer also applied for the exclusion of Operations Manager, Mill Foreman and Administrative Secretary. The Canada Board held that all three positions should be included in the bargaining unit described in the federal certification Order.

The list of duties associated with the positions of Operations Manager and Mill Manager indicate that their responsibilities are focused on the daily operations of the feed mill.

In subsequent negotiations between the Union and the Employer, the Union agreed that the scope clause of the collective agreement under the federal certification Order should exclude Operations Manager,

Sales Manager and Pest Control Division Manager. Evidence at the hearing suggested that the latter position no longer exists. In addition, the evidence seems to indicate that the parties have agreed to the exclusion of Maintenance Manager.

At the time of the certification application with the Canada Board, the duties of Administrative Secretary were described by the Employer as follows:

- *acts as confidential secretary to the Controller of the entire corporation who is located in the same office at the location of the Feed Mill*
- *acts as confidential secretary to other General Managers of Hillcrest, in particular Mill General Manager*
- *acts as confidential secretary with respect other (sic) enterprises involving the Pulvermacher family*
- *has access to and assists Controller with confidential financial and employee information*
- *works in close physical proximity with the Controller and General Manager Mill*
- *deals with confidential payroll and financial information for another business which is managed by Guy Pulvermacher*

Guy Pulvermacher, who gave evidence at the hearing on behalf of the Employer, testified that this description did not actually describe the duties which were being done by the incumbent in the position at the time. He said that it was anticipated that the position would evolve in the direction indicated in the description if it were excluded from the bargaining unit.

In early 1997, the incumbent in the position of Administrative Secretary, for a variety of reasons, was experiencing difficulty in carrying out all of the duties associated with the position. Mr. Pulvermacher asked her to provide him with a list of the duties she was actually performing in this position, which read as follows:

*Answer phones:*
*Transfer and find person being called*

*Take messages*
*Take Feed orders*
*Sort & File Invoices:*
*Go through all the invoices and recalculate tonnes of feed made.*
*Put into the respective folder boxes.*

*Front Counter:*
*Enter & billing invoices*
*Make out grain receipts and cheques*

*Customer Notes:*
*Type out visits that Brent and Terry had with customers and transcribe*

*Address accounts payable cheques*

*File Customer notes*

*Enter & file technical papers etc.*

*Pork Farms:*
*Enter bills and do up payables*
*Keep track of inventory at Pork Farms (enter SPI returns, DNL purchased hogs and feeds used).*
*Deposits ready for Pork Farms*

*Enter Durability tests from feed manufactured for all customers.*

*Gather invoices stuff envelopes and mailout statements at the end of each month.*

*Enter and make sure all entries are correct for month end mill and office inventory.*

*Feed manufacturing:*
*Enter all tonnes of feed manufactured for each month.*

*Enter repair bills into proper folders.*

*Make any changes to folders as required.*

*Pork Farms Great Plains Accounting*
*Finish all entries and prepare Financial Statement*
*Payroll Chris*

Shortly after this list was prepared, the incumbent was granted sick leave for medical problems associated with work. While she was on sick leave, representatives of the Union and the Employer discussed the conditions under which she might be able to return to work.

A new position, entitled Mill Secretary, was created. The duties associated with this position were modified to reflect the discussions concerning the incumbent in the Administrative Secretary position. According to the evidence of Mr. Pulvermacher, approximately 40 percent of the duties on the list reproduced earlier were removed to establish the Mill Secretary position. Most of the duties removed from the position were related to accounting, which was the area the incumbent expressed most uneasiness about.

The incumbent returned to work in the Mill Secretary position on a part-time basis. She only remained in this position for a short time, after which she left her employment. The Employer posted the position of part-time Mill Secretary and subsequently filled it.

The Union disputes the legitimacy of this posting. Walter Eberle, who represented the Union at the hearing, said that the Union understood the position was turned into a part-time position as part of an agreement to accommodate a particular employee, not on a permanent basis.

Mr. Pulvermacher testified that the Employer had, for some time, thought that there was a need to establish a position which would provide clerical and administrative support of a confidential nature in connection with management decision-making. With this in mind, the Employer created the position of Corporate Administrator to perform duties described as follows:

> *The Corporate Administrator is responsible for the following:*
>
> - *The maintenance of the company's computer software and equipment and any other type of equipment directly related to the accounting needs of the company.*
>
> - *Ensuring the Company's data and confidential information, including computer passwords, is secure.*

- *Providing a coordinating role for company activities by attending weekly management committee meetings, in the dual roles of recording secretary and committee member.*

- *To participate in the management committee in areas of administration and labour relations.*

- *Attending Board of Director meetings as recording secretary.*

- *Coordinating managers' schedules and to do lists related to management committee and board of director activities.*

- *Assisting the company controller and division managers in developing and monitoring divisional budgets.*

- *Acting in the capacity of confidential secretary for division managers and controller for personnel matters.*

- *To maintain and update confidential personnel files of the employees.*

- *To type and prepare confidential materials relating to the collective agreement negotiations and grievances, as required.*

- *To administer and process employee benefits, sick leave entitlements, vacation requests and leaves of absence.*

- *Assisting the controller in the area of payables, inventory calculations & payroll.*

- *To carry out all basic accounting procedures related to Hillcrest Pork Farms Ltd.*

- *To act as a resource person for basic computer training and software trouble shooting as required.*

- *Designing and maintaining record systems, filing systems etc. in cooperation with the division managers.*

- *Providing service to all divisions of Hillcrest Farms Ltd. (Farm, Hen Barn, Pest Control, Mill, Hatchery, and to Hillcrest Pork Farms Ltd.) on an as-needed basis. These jobs must be coordinated by priority between the respective department heads.*

*This Administrator job description does not limit the employee to only those areas mentioned. Further duties may be assigned as required.*

Mr. Pulvermacher said that the Union was informed of the intention to create this position when the parties were discussing the modification of the Administrative Secretary position prior to the change to the Mill Secretary designation. He conceded that several of the duties included in the job description above were those which had been subtracted from the Administrative Secretary position. When the Union seemed unwilling to accept that the position should be created out of the scope of the bargaining unit, the Employer filed this application asking for an amendment of the certification Order to specify the exclusion of this position.

The Union filed a grievance alleging that the Employer violated the provisions of the collective agreement by failing to negotiate the status of this position. The Employer takes the position that there was no obligation to negotiate concerning this position because the person occupying the position will not be an "employee" within the meaning of s. 2(f)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17. Section 2(f)(i) of the *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.*

The basis on which the Employer applied to have this position excluded is that the person will be "regularly acting in a confidential capacity" in connection with industrial relations.

The Union made a preliminary objection to the jurisdiction of this Board to determine this issue. Mr. Eberle argued that the essential question is whether this position should be included within or excluded from the bargaining unit described in the certification Order issued by the Canada Board, and that this Board does not have the capacity to determine that question. He argued that the division between the two bargaining units places the functions connected with the turkey farming, hatchery and breeding operations on one side of the line, and the work connected with the mill, including administration, office work and maintenance on the other.

There is no question that the existence of two bargaining units established under two different labour law regimes introduces complications into the relationship between a trade union and an employer. Though the definition of two collective bargaining relationships founded on different legislation - in this case involving the same two parties - must be based on drawing a line of some kind, there is bound to be an area of entanglement and overlap at the margins of the two relationships.

This is particularly true in the case of the managerial and administrative structure chosen by an employer. Some of the tasks associated with management may be exclusively connected with a particular aspect of the business - as is the case, in this instance, with the Operations Manager. Some of those responsibilities, however, are bound to be related to the full range of activities of the employer, or at least to activities which cross the boundaries defined in the certification Orders.

In cases of the latter kind, it would be entirely arbitrary to allot the positions in question to one collective bargaining relationship or the other. From our point of view, the appropriate jurisdictional question is whether the inclusion of the position within, or its exclusion from, the bargaining unit will have an impact on the collective bargaining relationship which was put in place under our certification Order.

In this case, we have concluded that the question of the status of this position does have implications for the relationship between the Union and the Employer in respect of the employees in the farm, breeding and hatchery operations. The duties associated with the position are not restricted to the sphere of operations of the feed mill, but have relevance to all of the activities engaged in by the Employer.

There is, of course, nothing which would prevent the submission of the question of the status of this position to the Canada Board. The possibility that the Canada Board might come to a different conclusion than we have on this issue would no doubt be a complicating factor for the parties. We do not think, however, that such a prospect should prevent us from determining the issue of whether the person in the position of Corporate Administrator is an employee within the meaning of the legislation of this province. It has, after all, significant implications for a collective bargaining relationship which we have had a hand in establishing, and over which we exercise a supervisory authority.

The Board has commented in a number of decisions on the basis for the exclusion from a bargaining unit employees who act in a confidential capacity. In *University of Regina (McKenzie Art Gallery) v. Canadian Union of Public Employees*, [1995] 1st Quarter Sask. Labour Rep. 213, LRB File No. 266-94, the Board made the following comment, at 217:

> *The determination of whether a position should be excluded from the bargaining unit on the grounds argued for in support of this application must be approached with caution. The rationale for the exclusion of employees who act in a confidential capacity is that an employer is entitled to a limited amount of technical and clerical support for industrial relations activities, without having to be concerned that the employees who provide that support will be torn between their responsibility to their employer and their role as members of a bargaining unit. Unlike persons who are excluded on the grounds that they perform managerial functions, those who act in a confidential capacity generally have little independent authority. It is necessary to be sure, before deciding to exclude such an employee, that the confidential role she performs is of some significance, as the cost to her is the loss of representation by a trade union.*

In *Canadian Union of Public Employees v. City of Prince Albert*, [1996] Sask. L.R.B.R. 680, LRB File No. 095-96, the Board made this comment, at 683:

> *As the representatives of the Union pointed out, the Board has not thought it sufficient to justify the exclusion of a position that the employee be engaged in handling material the Employer considers confidential, as employees in many different kinds of positions are entrusted with sensitive information, and there is an expectation that they will conduct themselves in a discreet fashion. As the passage just quoted indicates, the exclusion which is contemplated in s. 2(f)(i) of the Act is aimed at preventing any conflict of interest which might arise for an employee who regularly processes or handles information of a sensitive nature which is connected with the industrial relations of the employer.*

Several points are clear from the approach the Board has taken to the proposed exclusion of an employee on the grounds that they act in a confidential capacity. The first of these is that the rationale for the exclusion of persons performing managerial functions differs from the exclusion of employees acting in a confidential capacity in important ways. In the case of persons excluded as members of management, the reason for excluding them from the bargaining unit is in order to preserve a clear identity for the parties to collective bargaining, and to prevent the muddying of this identity by including within the bargaining unit persons whose position as bargaining unit employees may conflict with their role in making decisions which have an impact on the terms and conditions of employment of other employees.

In the case of employees excluded because they act in a confidential capacity, on the other hand, the purpose of the exclusion is to reinforce the collective bargaining process by providing an employer with administrative and clerical resources which will permit decisions to be made about bargaining or about the terms and conditions of employment of employees in an atmosphere of candour and confidence.

Another point which the Board made is that the exclusion will not be considered on the basis of some vague notion of what constitutes confidentiality in this context. The Board is alert to efforts by an employer to deny any employee access to trade union representation because of some generalized concern about employee discretion.

Unlike the instance of managerial exclusions, the Board has not required that the duties performed in a confidential capacity be the primary focus of the position, although they must be performed "regularly" rather than incidentally. We have recognized, however, that any employer who is faced with meeting the requirements imposed by the establishment of a collective bargaining relationship is likely to require some administrative or clerical support for this purpose.

In *Canadian Union of Public Employees v. Town of Moosomin*, [1994] 2nd Quarter Sask. Labour Rep. 92, LRB File No. 038-94, the Board addressed this issue, at 95:

> *Though it is perhaps exaggerating the position of the Board to suggest that every employer is "entitled" to one excluded employee to maintain confidential records and documents, the Board is certainly sensitive to the implications of the introduction of a*

> *collective bargaining regime for the administrative system of an employer. It is often the case that the demands of a collective bargaining relationship will require the addition of a confidential capacity for management which may not have been necessary prior to the certification of the trade union.*

The evidence of Mr. Pulvermacher was that the Employer was increasingly conscious of the disadvantages of not having a position which is excluded on these grounds. The focus of the grouping of duties as they have been included in the job description for the Corporate Administrator position is to provide a confidential record-keeping and clerical capacity for managers as they make important decisions about overall corporate policy, bargaining issues and matters connected with industrial relations. These duties, it will be noted, include attendance at weekly meetings of the management committee and regular meetings of the board of directors, recording the discussions at those meetings, correspondence related to administration of the collective agreements, involvement in the negotiation of collective agreements and assistance with budget matters.

Since the two certification Orders were issued, the managers themselves have performed these tasks, attempting to maintain confidential records and correspondence in addition to their other responsibilities. Mr. Pulvermacher testified that he spends approximately 20 percent of his time doing this kind of work. He further testified that the volume of such tasks has steadily increased since the inauguration of collective bargaining with the Union.

In our view, there can be little doubt that the exclusion of a single position which would provide clerical and administrative support of a confidential nature is justified in these circumstances. Though the duties associated with the position include some accounting functions which were previously done by an in-scope employee, a significant proportion of time will be devoted to the maintenance of confidential records and correspondence related to labour relations matters.

Mr. Eberle argued that the Canada Board had already disposed of this issue in dealing with the application for exclusion of the Administrative Secretary position when the application for certification was originally made. As we read the comments made by the Canada Board, they referred exclusively to the issues concerning managerial exclusions which were before them on the same application.

We might further note that a comparison of the job description of the Administrative Secretary position which was before the Canada Board, and the description of the Corporate Administrator position which was filed with us for consideration reveal significant differences in the two positions. The description submitted to the Canada Board referred it as true to duties of a "confidential" nature, but these were not linked to industrial relations or collective bargaining.

The final point made by Mr. Eberle was that the Employer has obtained a number of exclusions of a managerial nature, both in the certification Orders and through negotiation with the Union, and that this casts doubt on the necessity of making a further exclusion for this position. We said earlier that we see the two types of exclusions contemplated in s. 2(f)(i) of the *Act* as being based on different considerations. Mr. Eberle said that the Union had been persuaded to accept the exclusion of several managerial positions and had agreed to these exclusions in good faith; he expressed frustration that the Employer has now come before the Board to seek this amendment. It is clear that there is some tension between the parties as a result of differences which have arisen in the course of the process in which the evolution of this position was a part.

The question of the possible exclusion of a person acting in a confidential capacity has not been raised with us before, however, and we have concluded, for the reasons we have given, that such an exclusion is justified in these circumstances. We will therefore grant the amendment requested by the Employer.

# INTERNATIONAL UNION OF OPERATING ENGINEERS HOISTING AND PORTABLE AND STATIONARY, LOCAL 870, Applicant and JOE GOURLEY CONSTRUCTION LTD., Respondent

LRB File No. 151-97; July 23, 1997
Chairperson, Beth Bilson; Members: Gerry Caudle and Don Bell

For the Applicant: Ed Cowley
For the Respondent: Bob Smith

**Bargaining unit - Appropriate bargaining unit - Construction industry - Board rules that bargaining unit includes employees at all construction sites within boundaries of standard bargaining unit.**

**Construction industry - Appropriate bargaining unit - Board rules that bargaining unit includes employees at all construction sites within boundaries of standard bargaining unit.**

**Construction industry - Certification - Board holds trade union must demonstrate majority support of all employees working within bargaining unit.**

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

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** The International Union of Operating Engineers Hoisting and Portable and Stationary, Local 870, has filed an application seeking certification as the bargaining agent for a unit of employees of Joe Gourley Construction Ltd.

The bargaining unit proposed by the Union in the application is the standard bargaining unit for the operating engineer trade division in the construction industry. The Employer provided a statement of employment containing 14 names.

At an earlier hearing, the parties indicated that they had agreed to the deletion of four of these names because the employees had not been employed on the date the application was filed, May 7, 1997. In addition, they were in agreement that the company bookkeeper should be removed from the list.

At that time, the Employer sought an adjournment in order to have an opportunity to present evidence concerning certain events which were alleged to have occurred during the Union organizing campaign. In a letter sent to the parties after the hearing, we outlined the policy followed by the Board with respect to employee evidence with respect to organizing activity.

When hearing of the matter resumed, the Employer was represented by counsel. Counsel indicated that he did not intend to pursue the issues related to organizing activity, but he did wish to adduce evidence in connection with the question of the appropriate scope of the bargaining unit, and how the evidence of support filed by the Union might relate to that unit.

The representative of the Union opposed the request of counsel for the Employer. He argued that the Employer should be bound by the agreement which had been made to the contents of the statement of employment at the time of the original hearing. The Board permitted counsel to call Tim Gourley, owner of the company, to give evidence about operations of the company in Saskatchewan at the time the application for certification was filed.

The Employer is engaged in the preparation of various sites for use by oil companies. The work includes clearing, leveling and maintaining these sites, as well as building access roads. Mr. Gourley testified that approximately 90 percent of the work done by his company is performed in Alberta. He said, however, that there is an increasing number of opportunities in Saskatchewan, and he has been making efforts to obtain work in this province.

Mr. Gourley testified that at any given time his company might be working at anywhere between two and seven projects. A number of the projects undertaken by his company have been in the area around Plover Lake, near the town of Macklin. Other work has been done around other towns near the Alberta border. Mr. Gourley said that when he got the material connected with the application for certification, he understood it to relate to a single project at Plover Lake, and that he did not understand that other employees working for his company in Saskatchewan should be included on the list.

The testimony of Mr. Gourley was that there might have been 14 employees working in Saskatchewan at the time the application was filed.

One of the persons referred to in the evidence given by Mr. Gourley was Rick Schwab. Mr. Schwab owns heavy equipment of his own, and he and Mr. Gourley jointly own several pieces of equipment. Mr. Gourley said that Mr. Schwab sometimes operates a piece of equipment himself, and at other times the equipment is operated by other employees. The employees hired to operate this equipment are usually recruited by Brad Hein, who has been assigned by Mr. Gourley as foreman to oversee the projects in Saskatchewan.

The employees hired to work on the projects tendered by Mr. Gourley, including those working on equipment owned by Mr. Schwab or jointly by Mr. Gourley and Mr. Schwab, are all accommodated in motels in Macklin or nearby towns. The Employer pays for these accommodations, and provides all the employees with a meal allowance. The documentation of hours is kept by Mr. Hein and the payroll for all employees is administered out of the company offices in Vermilion, Alberta.

Mr. Gourley named two employees, Max McMillan and Lyle Fjeldstrom, who he thought were working on equipment either owned by Mr. Schwab or by Mr. Schwab and himself, as of the date the application for certification was filed.

Mr. Gourley also gave evidence concerning the responsibilities of Mr. Hein. He said that Mr. Hein is responsible for the record-keeping, and coordination of work being done on behalf of the company in Saskatchewan. His duties include hiring and supervising employees, and taking any disciplinary action that may be required.

Counsel for the Employer did not specifically argue that Mr. Hein should be excluded from the bargaining unit as a managerial employee, but he was identified in the reply filed by the Employer as a person performing managerial functions. We are not persuaded that the exclusion of Mr. Hein from the bargaining unit is justified. He clearly has significant responsibilities in connection with the work being done in Saskatchewan. It is usual, however, for foremen in the context of the construction industry to

have more autonomy and to exercise more authority than might be expected of an in-scope supervisor in other industries.

With respect to the composition of the bargaining unit, counsel for the Employer acknowledged that the standard description of bargaining units in the construction industry contemplates certification over a considerable geographical area, in this case the province of Saskatchewan. He argued, however, that when a trade union applies to be certified in these circumstances, they are obliged to file evidence to show that they have the support of the majority of all employees within the geographic boundaries which will be specified in the certification Order.

We agree with this as a basic proposition. Many applications for certification in the construction industry are based on a single project within the boundaries of the bargaining unit. This does not mean, however, that employees working on other projects should not be taken into account in assessing whether the Union has been able to show majority support.

Though we accept this as a principle, we have concluded that it does not affect the outcome in this case. Though Mr. Gourley spoke of "about 14" employees working in Saskatchewan at the time of the application, he specifically identified only three - Mr. Schwab, Mr. McMillan and Mr. Fjeldstrom.

The description of the relationship between the Employer and Mr. Schwab given by Mr. Gourley shows, in our view, that Mr. Schwab is an independent contractor and not an employee of the Employer.

It is not entirely clear whether Mr. McMillan and Mr. Fjeldstrom are properly regarded as employees of the Employer or of Mr. Schwab. It may be necessary to resolve this question at some future time in order to decide whether they are covered by the certification Order or by a collective agreement.

For our purposes here, however, it is not necessary to come to a conclusion on this point. Even assuming, for the sake of argument, that Mr. McMillan and Mr. Fjeldstrom should be included on a list

of employees included in the proposed bargaining unit, it does not affect the fact that the Union has demonstrated majority support.

For the reasons we have given here, we find that the application for certification should be allowed and will issue an Order accordingly.

# SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 296, Applicant and CROSSTOWN HEATING AND VENTILATING LTD., CROSSTOWN HEATING AND VENTILATING (CALGARY) LTD. AND KNN CONTRACTING LTD., Respondents

LRB File No. 366-96; July 23, 1997
Chairperson, Beth Bilson; Members: Gerry Caudle and Terry Verbeke

For the Applicant: Neil McLeod
For the Respondents: Larry Seiferling, Q.C.

**Common employer - Control and direction - Subcontracting arrangement between two companies on one project does not operate to bring non-union company into a related employer status with unionized subcontractor.**

**Common employer - Control and direction - Labour broker - Relationship between unionized employer and labour broker may give rise to related employer status - Board lacks sufficient information to decide issue.**

***The Trade Union Act*, s. 37.3.**

***The Construction Industry Labour Relations Act, 1992*, s. 18(1).**

## REASONS FOR DECISION

**Beth Bilson, Chairperson:** The Sheet Metal Workers International Association, Local 296, has been designated by this Board in a certification Order dated November 24, 1995, as the bargaining agent for a unit of employees of Crosstown Heating and Ventilating Ltd. In the application filed on December 6, 1996, the Union alleged that a company called KNN Contracting Ltd. is an associated or related employer within the meaning of s. 37.3 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the *Act*), and s. 18(1) of *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11 (*CILRA 1992*). These provisions read 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.*

> *18(1) On the application of an employer or a trade union affected, the board may declare more than one corporation, partnership, individual or association to be one unionized employer for the purposes of this Act and The Trade Union Act where:*
>
> > *(a) in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common control or direction by or through those corporations, partnerships, individuals or association; or*
> >
> > *(b) a corporation, partnership, individual or association is sufficiently related to a unionized employer that, in the opinion of the board, they should be treated as one and the same.*

In the application, the Union asked for remedies which included, in addition to a declaration that the companies should be treated as one employer, compensation in relation to construction work which was done at a mine site at McClean Lake.

Crosstown Heating and Ventilating Ltd. (Crosstown) operates from headquarters in Spruce Grove, near Edmonton, Alberta. The company was founded in 1964 by Les Popowich, who is still the president, and his wife, co-owner of the business.

Mr. Popowich has seven children, all of whom are engaged in the sheet metal business in some way. In 1973, one of his sons, Glen Popowich, set up a company called Crosstown Heating and Ventilating (Calgary) Ltd. (Crosstown (Calgary)). The Union holds certification orders from the Alberta Labour Relations Board for both Crosstown and Crosstown (Calgary).

Three of the other Popowich children - Randy Popowich, Howard Popowich and Brenda Popowich - operate a company in British Columbia, also called Crosstown Heating and Ventilating Ltd., which does sheet metal work.

The remaining three children were at one time all working for Crosstown in Spruce Grove; Kerry Popowich as an estimator, Neil Popowich as a sheet metal apprentice, and Naomi Batke as an accountant and payroll officer. In 1996, according to the evidence of Ms. Batke, she and her two brothers decided to form a company of their own in a related field. They set up a company, KNN Contracting Ltd. (KNN), which performs labour brokering functions for sheet metal construction

projects. Kerry Popowich no longer works for Crosstown, although Neil Popowich and Ms. Batke continue to be employed there. Ms. Batke testified that she performs all of the administrative and payroll work for KNN from the office of Crosstown, and during the working hours when she is also employed by Crosstown.

Ms. Batke testified that Crosstown retained KNN to provide labour for two construction projects which were being done in Saskatchewan in 1995, one at the H.M. Weir sewage treatment station in Saskatoon, and the other in Colonsay. As she recalled, about five employees were employed to carry out the sheet metal work on these projects.

Gunnar Passmore, business agent for the Union, testified that he had encountered Crosstown at a number of projects in Saskatchewan, and that they had voluntarily recognized the Union as the representative of employees on one or more occasions.

He said that he received information in August of 1996 that there was sheet metal work being done by Crosstown in Saskatoon. He investigated, and found out that the cheques employees received came from KNN. He tried to get information from the corporations registry about KNN, but could not confirm that it was registered as a company in Saskatchewan. Mr. Passmore filed with the Board a document which showed that, according to the records of the corporations branch, KNN was incorporated on August 15, 1996, and registered on October 15, 1996.

When he pressed his inquiries with the company, it was agreed that two of the employees would be given status as employees of Crosstown, and on this basis Mr. Passmore proceeded to file a certification application for Crosstown in Saskatchewan. According to the evidence of Ms. Batke, the remaining employees continued to work for KNN.

In August of 1996, the Union became aware that sheet metal work was being done on a construction project at McClean Lake owned by Cogema Resources. They obtained documents which purportedly identified the contractor awarded the sheet metal work as "Crosstown Heating and Ventilating Ltd." On

the basis of this information, the Union attempted to get Crosstown to comply with the terms of the collective agreement. In response, Crosstown denied having a contract for the work at McClean Lake.

Glen Popowich gave evidence that his father, Les Popowich, had indeed embarked on preparing a tender for the work at McClean Lake. The senior Mr. Popowich found, however, that he could not obtain a bond for the work because of the value of the work he had outstanding on other projects, and thus was unable to submit a bid.

Glen Popowich said that he and his father had an informal agreement that they would not compete with each other for the same work. When his father was unable to tender the McClean Lake project, Glen Popowich decided that his own company, Crosstown (Calgary), would bid on the work.

Crosstown (Calgary) was successful in obtaining the contract and Glen Popowich retained KNN as a labour broker to provide workers for the site. Crosstown (Calgary) also subcontracted some fabrication work to Crosstown, and rented some of the Crosstown equipment for use at McClean Lake.

Counsel for the Union argued that both s. 18(1) of *CILRA 1992* and s. 37.3 of the *Act* confer upon this Board considerable flexibility in considering whether corporate or administrative entities are so closely associated or related that they should be regarded as aspects of a single employer for purposes connected with these statutes. He also drew to our attention the definition of "employer" in s. 2(g)(iii) of the *Act*, which 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*

Counsel conceded that when the Union first filed the application, they did so on the understanding that it was in fact Crosstown which had the contract for the McClean Lake project. The evidence that Crosstown (Calgary) was the contractor, not Crosstown, was unexpected. In a written argument filed after the hearing, counsel for the Union nonetheless argued that all three of the corporate entities here - Crosstown, Crosstown (Calgary) and KNN - are related or associated within the meaning of the legislative provisions cited above, and that all three of them are therefore bound by the certification Order issued in respect of Crosstown.

Counsel for Crosstown argued that s. 37.3 of the *Act* is not applicable in circumstances where s. 18(1) of *CILRA 1992* applies. In our view, it is not necessary to consider this proposition in a definitive sense in this case. Section 18(1) of *CILRA 1992* certainly applies in this context, and its terms seem to us sufficiently broad to accommodate the issue before us.

As counsel for the Union pointed out, s. 18(1) of *CILRA 1992* permits the Board to find that two entities are associated or related employers in two kinds of circumstances. The first is on the basis of "common control or direction," which perhaps represents the more traditional approach to the question of association. In connection with the issue of common direction or control, the inquiry has focused on signs of commonality in the administrative, financial and management structures of the respective entities - shareholding, use of facilities, management personnel, corporate ownership and so on.

The second test, which is indicated in s. 18(1)(b) of *CILRA 1992*, is whether the entities are "sufficiently related" that they should be regarded as a single employer for our purposes. Counsel for the Union suggested that this is a functional test which invites the Board to look at a broader range of considerations which might be pertinent to labour relations, and to assess whether, in his words, the two entities are "so intertwined" that it is reasonable to regard them as one employer.

Under this latter test, he argued, it is not necessary to show that the business entities concerned are subject to common direction or control. The focus is on whether, in a labour relations sense, their activities are so interrelated that they cannot be sensibly separated into constituent parts.

We agree that the Board has considerable latitude in reviewing the connections between corporate entities in order to identify an employer, or to decide where collective bargaining obligations rest. Even prior to the passage of the two statutory provisions which have been cited here, the Board demonstrated a willingness to consider a range of factors in deciding these issues. In *Construction and General Workers v. Prairie Pipeline*, [1991] 4th Quarter Sask. Labour Rep. 73, LRB File No. 189-91, for example, the Board considered the traditional questions of shareholding and corporate ownership in deciding whether two entities should be regarded as a single employer. In *Saskatchewan Government Employees' Union v. Immigrant Women of Saskatchewan*, [1994] 2nd Quarter Sask. Labour Rep. 125, LRB File No. 049-94, on the other hand, the Board considered in broader terms the issue of whether naming two organizations as one employer would be more likely to produce a stable collective bargaining relationship.

It is difficult not to come to the conclusion that this application began as a case of mistaken identity. The original allegation of the Union was that Crosstown, the certified employer in Saskatchewan, was doing the work at McClean Lake, or was doing it through an entity, KNN, which should be regarded as an associated employer within the meaning of s. 18(1) of *CILRA 1992*. This was the association identified in the application as the basis of the claims of the Union for redress.

In addition to a declaration that the two entities are related employers, the Union sought relief under s. 18(5) of *CILRA 1992* on the grounds that the strategy of working through KNN had been adopted in order to evade obligations under the certification Order and the collective agreement which are binding on Crosstown in Saskatchewan.

When it became clear that it was not Crosstown, but Crosstown (Calgary), which had obtained the contract at McClean Lake, the Union amended this argument in an effort to bring Crosstown (Calgary) within the circle of the association. Counsel argued that Crosstown (Calgary) was also brought into the picture as a way for Crosstown to avoid the obligations imposed on it under the certification Order. Counsel argued that Crosstown drew Crosstown (Calgary) into the McClean Lake project, along with KNN, in order to avoid the obligations which had arisen out of the certification Order granted in Saskatchewan on November 24, 1995.

We have concluded that the evidence does not support this argument. Crosstown (Calgary) has operated for 24 years as an enterprise independent of Crosstown. Although it would appear that the relationship between Glen Popowich and his father is an amicable one, and they do business together occasionally, the evidence did not suggest that these two companies are related or associated employers within the meaning either of the *Act* or *CILRA 1992*. Crosstown (Calgary) submitted a bid for the McClean Lake work when Crosstown was unable to do so. In order to do the work, Crosstown (Calgary) entered into subcontracting arrangements with both KNN and Crosstown, but we do not think that these arrangements in themselves created an association of the kind which would impress Crosstown (Calgary) with the collective bargaining obligations resting on Crosstown.

Counsel for the Employer argued that, in any case, if there were any association between Crosstown and Crosstown (Calgary), it would have dated from before the date the current statutory provisions came into effect, and could not therefore be the subject of an application of this kind. In trying to obviate this concern, counsel for the Union argued that the association which is alleged in the application is based not on the prior relationship between Crosstown and Crosstown (Calgary), but between both of these companies and KNN.

In our view, this argument is not persuasive. On the face of it, there seems to be some force in the argument that Crosstown and KNN are associated or related entities. We do not think we can make a declaration to this effect at this point, however. The focus of the application, and of the argument which was made in connection with it, was on the McClean Lake work, and, as it turned out, on the way in which Crosstown (Calgary) carried out that work. Because of this, we are not satisfied that the Board is in possession of sufficient information about the relationship between Crosstown and KNN to make a declaration under s. 18(1) of *CILRA 1992*.

In this connection, we refer particularly to the dealings which took place between the Union and Crosstown at the time when the Union embarked on the organizing campaign which led to the application for certification. Counsel for the Employer appeared to argue that these dealings should be regarded as estopping the Union from alleging that the two entities are related employers. Given the course taken by the evidence, however, the parties did not make extensive argument on this point, and

the Board would prefer to hear additional submissions in the event the Union wishes to pursue that point.

In any event, we do not think the relationship between Crosstown and KNN, whatever its nature, can be used as some sort of hinge to bring Crosstown and Crosstown (Calgary) into association with respect to the project at McClean Lake. The evidence does not support the proposition that there was anything more than a subcontracting arrangement between those two companies.

Even if there is a more general question arising under the definition in s. 2(g)(iii) of the *Act* of whether a labour broker or the principal should be regarded as the employer in a particular case, we do not think it assists the Union in this case, as neither Crosstown (Calgary) nor KNN is designated in a certification Order in this province.

For the reasons we have given here, we have concluded that the application must be dismissed.

# INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 529, Applicant and PYRAMID ELECTRIC CORPORATION, Respondent

LRB File No. 376-96; July 23, 1997
Chairperson, Beth Bilson; Members: Gloria Cymbalisty and Tom Davies

For the Applicant: Drew Plaxton
For the Respondent: Brian Kenny

**Board - Jurisdiction - Board decides that jurisdiction under s. 37 extends to scrutiny of whether there was disposition of business in another province.**

**Practice and procedure - Production of documents - Board orders employer to provide certain documents requested by union.**

***The Trade Union Act*, s. 37.**

## ORDER AND REASONS FOR DECISION

## PRELIMINARY ISSUE

**Beth Bilson, Chairperson:** The International Brotherhood of Electrical Workers, Local 529, was designated by this Board in a certification Order dated April 27, 1992, as the bargaining agent for a group of employees of Sparrow Electric Ltd. (Sparrow). This certification Order was subsequently quashed by the Court of Queen's Bench for Saskatchewan because the panel of this Board which issued the Order was not properly constituted.

The matter was remitted to the Board and a new certification Order was issued on November 2, 1993. By the time of the second proceeding concerning the application for certification, Sparrow was in receivership. The solicitor for the receivers argued at the hearing that, because of this circumstance, a certification Order would have no meaning and the application should be dismissed. In *International Brotherhood of Electrical Workers, Local 529 v. Sparrow Electric Corporation*, [1993] 4th Quarter Sask. Labour Rep. 79, LRB File No. 270-91, the Board made the following comment:

> *On the other hand, a decision made on the basis of the circumstances in place on the date the application was filed is not entirely a wasted gesture from the point of view of*

> *the Union. If the Union was entitled to obtain a certification Order at the time the application was filed, the restoration of this status has important implications in the event the Employer returns to the construction industry, or in the event a successorship becomes an issue. Without the status of a certified bargaining agent, the Union would be unable to pursue in that context the interests of employees on their behalf.*

In the period since the certification Order was issued, Sparrow has become bankrupt. The Union has filed this application alleging that Pyramid Electric Corporation (Pyramid) is the successor to Sparrow within the meaning of s. 37(1) of *The Trade Union Act*, R.S.S. 1978, c. T-17, and that the obligations resting on Sparrow by virtue of the certification Order and the relevant collective agreement now bind Pyramid. Section 37(1) of the *Act* reads as follows:

> *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.*

In connection with this application, the Union filed a request for particulars seeking access to the following information:

> 1. *Disclosure and particulars and all documentation in relation to all and any sales, leases, transfers or other dispositions of the business or any part thereof of Sparrow Electric Corporation or any subsidiary or other related entities directly or indirectly to Pyramid Electric Corporation or any subsidiary or related entities, whether through the receiver, Coopers & Lybrand Limited or otherwise or anyone acting on its or their behalf, whether in the Province of Alberta, Saskatchewan or otherwise.*
>
> 2. *Disclosure and particulars and all documentation in relation to all acquisitions, in the above-noted circumstances, in relation to all and any assets including without restricting the generality of the foregoing, tools, vehicles, other equipment, land, buildings and leases for same, telephone numbers, fax numbers and other communication vehicles.*

3. *Disclosure, particulars and documentation in relation to all contracts entered into by the Corporation in Alberta and/or Saskatchewan, whether via Sparrow Electric Corporation, the receiver Coopers & Lybrand Limited or otherwise.*

4. *Listing of all employees of Pyramid Electric Corporation and any subsidiaries and/or other related corporations as well as those who may have been provided by outside agencies, whether by sub-contract or otherwise from date of commencement of business to present, whether in Saskatchewan, Alberta or otherwise.*

5. *Particulars of all members of management of Pyramid Electric Corporation, together with positions held and dates thereof from inception to present.*

6. *Listing of all shareholders of Pyramid Electric Corporation, subsidiaries and other related corporations from outset to present, whether beneficial or named.*

7. *Disclosure to all parties who have held management and/or consulting contracts with Pyramid Electric Corporation, subsidiary and other related corporations from outset to present.*

8. *Disclosure, particulars and documentation in relation to any agreements, direct or indirect concerning the transfer or other disposition direct or indirect of goodwill, customer lists, accounts receivable, contracts of any variety, or inventory, whether in Saskatchewan, Alberta or otherwise.*

9. *Disclosure, particulars and documentation in relation to all and any contracts or other agreements concerning the Meadow Lake Pulp Mill, be it with Millar Western or otherwise at Meadow Lake, Saskatchewan.*

10. *Disclosure, particulars and documentation in relation to all and any contracts or other agreements dealing with work at or near Clavet, Saskatchewan.*

Though Pyramid did provide some of the information requested by the Union, they denied the Union access to most of the documentation requested. The Union asked the Board to direct Pyramid to provide this information, and a hearing was convened to consider whether this should be done. At that hearing, counsel for the Employer stated that Pyramid is not required to grant the Union access to this information because it is related to transactions which may or may not have taken place outside the boundaries of Saskatchewan; he argued that scrutiny of these transactions does not lie within the

jurisdiction of this Board. Both parties indicated that they were not prepared to address this jurisdictional question at that time.

Following this hearing, the Board decided that it would not be possible to assess the request for particulars without hearing further representations on the jurisdictional question and scheduled a further hearing. These Reasons for Decision address the preliminary objection to jurisdiction and the request for particulars.

Pyramid, like Sparrow, is an electrical contracting company which operates in the construction industry. The headquarters of Pyramid are in Alberta, though they engage in construction work in a number of jurisdictions. Pyramid has worked on construction projects in Saskatchewan, but does not maintain any base of operations in this province.

Counsel for Pyramid conceded that it is open to the Board to scrutinize contracts and other documents which are related to the disposition of a "business or part of a business" in Saskatchewan, even if those documents originate in another jurisdiction. He argued, however, that, for s. 37(1) of the *Act* to apply there must be disposition of all or part of a business in Saskatchewan. If the disposition itself concerns the disposition of a business only outside Saskatchewan, the Board does not have jurisdiction to inquire into it. If the Board were to require Pyramid to provide all of the information requested by the Union, it would be giving an extra-territorial effect to the *Act*.

Counsel for both parties said they had been unable to find any authorities which deal directly with this point, though they referred us to cases which make it clear that the jurisdiction of labour relations boards is restricted by provincial boundaries. In *Labour Relations Board of New Brunswick v. Eastern Bakeries Ltd.* (1960), 26 D.L.R. (2d) 332 (S.C.C.), the Supreme Court of Canada held that a provincial labour relations board does not have jurisdiction over employees who live and work in another jurisdiction. The court made the following comment, at 336:

> *... The New Brunswick Labour Relations Board can have no jurisdiction over persons residing and working outside that Province so as to declare that they are part of the membership of a unit of the company's employees residing and working in New Brunswick. The fact of proximity in the present instance does not distinguish it from the case where employees of a company in Toronto may do similar work to that of*

> *other employees of the same company in the same category residing and working in Montreal. Such latter employees could not be included by an Ontario Labour Relations Board under similar legislation in Ontario for the purpose of declaring a bargaining unit ...*

The Ontario Labour Relations Board made a similar point in *MacLeans Magazine v. Southern Ontario Newspaper Guild* (1983), 1 C.L.R.B.R. (NS) 289, at 296:

> *Thus, it is quite clear from the pertinent jurisprudence that this Board does not have jurisdiction over employees who are employed outside of Ontario. The Labour Relations Act contains no suggestion that it is intended to have application beyond the boundaries of Ontario, nor would the Ontario Legislature have the constitutional jurisdiction to enact labour legislation having extra-territorial effect (cf., the provisions of the Canada Labour Code, R.S.C. 1970, c. L-1, as interpreted by the Canada Labour Relations Board and the Federal Court of Appeal in the jurisprudence summarized by that Board in Bell Canada, [1982] 3 Can LRBR 113).*

The Board went on to comment, at 297:

> *... Unlike a roving reporter whose sojourn in a particular location will generally be measured in days or weeks, and who might legitimately be described as working "out of" his employer's headquarters, the respondent's Bureau personnel generally work and reside in a particular city for a number of years, with only occasional, relatively brief visits to the respondent's Toronto head office. Moreover, the fact that for "conflict of laws" purposes the proper law of their employment contracts may be Ontario law, does not assist the applicant's case any more than does the fact that some of them may continue to be domiciled in Ontario. Both of those legal concepts have been developed and applied by the courts for purposes quite distinct from determining where an individual is employed and which governmental authority has jurisdiction over his employment relations with his employer. While the persons in question may have been in Ontario at the time they entered into their respective contracts of employment, and while the law of Ontario may be the proper law to be applied by a court in interpreting those contracts, that does not change the fact that the geographic locations in which they carry out virtually all of their employment obligations are outside the boundaries which define the limits of this Board's territorial jurisdiction.*

As these comments suggest, the focus of provincial collective bargaining legislation is on employment relationships within provincial boundaries and on work done there, and a labour relations board cannot extend the reach of this legislation to include employees whose work or whose relationship with their employer takes place in another jurisdiction.

Counsel for Pyramid argued that these principles can be relied on to support his proposition that no disposition of all or part of a business took place in Saskatchewan and, therefore, there is nothing to which s. 37(1) of the *Act* can be applied within the province.

This Board has had many occasions to consider factors which should be taken into account in assessing whether a transfer of collective bargaining obligations under s. 37 of the *Act* took place. Like other labour relations boards, we have often remarked that there is no universal formula which can be used in making this assessment; a wide range of features may hold clues to the question of successorship. In *Amalgamated Meat Cutter and Butcher Workmen of North America v. Culverhouse Foods Ltd.*, [1976] O.L.R.B. Rep. Nov. 691, the Ontario Labour Relations Board commented on this, at 698:

> *In each case the decisive question is whether or not there is a continuation of the business ... the cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was [sic] before, i.e. whether there has been a continuation of the business.*

In *Canadian Union of Public Employees v. Versa Services Ltd.*, [1993] 1st Quarter Sask. Labour Rep. 174, LRB File No. 170-92, this Board made the following comment, at 178:

> *What comes through clearly from the attempts by labour relations boards to arrive at a uniform definition of successorship is that there is no factor or single set of criteria which is a sine qua non for the transfer of collective bargaining obligations to occur. It may be obscured by a dizzying variety of technical legal or commercial forms, it may display puzzling or conflicting features, it may have quite a different character than the entity which was previously in existence, but a successor may still be identified because of the transmission of some imponderable and organic essential quality from the*

> *previous employer. This transmission is not tied to specific work, individual employees, or, naturally, the employment relationship which was already in existence.*

Many of the features which have been catalogued in these and other cases are most relevant to ordinary industrial or service industries where the work done by employees is connected with a particular location, a collection of physical assets and an administrative structure which operates in the same geographic locale. None of these factors is characteristic of the construction industry.

This Board has commented on many occasions on the implications, in labour relations terms, of the unique nature of the construction industry. Both the Board and the legislature have acknowledged the need to modify ordinary collective bargaining structures to accommodate these differences. In the *Sparrow Electric* decision, *supra*, the Board made this comment, at 81:

> *In the unique circumstances of the construction industry, it is not unusual for the parties named in a certification order to experience periods of hiatus in their bargaining relationship. A certified contractor may not hire employees in a particular trade or in a particular geographical area over a long period of time. A trade union may apply to be certified on the basis of the support of employees on a particular project, and find that the project is complete (and the employees gone) by the time the application is heard. One of the significant features of the decision of this Board in the case of Construction and General Workers v. International Erectors and Riggers, a Division of Newbery Energy Ltd., LRB File No. 114-79, is the acknowledgement by the Board that the interests of building trades unions should be protected in this environment, by the recognition of bargaining units whose scope was defined by geographical boundaries rather than work on a particular project. Though it was strongly argued on behalf of employers at the time that this would unfairly allow unions to gain the benefit of bargaining for employees on future projects, the Board adopted this policy in the Newbery case, supra, and has adhered to it since then.*

Like many companies involved in the construction industry, Pyramid has never had any "plant," any major physical assets or an administrative heart in Saskatchewan. In our view, however, they have had, and may still have, relationships with employees in Saskatchewan which are legitimately within our purview. In our opinion, the question of whether those relationships bring with them the bargaining obligations which were imposed on Sparrow by the 1993 certification Order lies squarely within our jurisdiction.

What the Union gains with a certification Order in the construction industry is the entitlement to insist on the recognition of collective bargaining obligations by that employer whenever they turn up in the geographical jurisdiction outlined in the Order. The fact that the Union cannot point to bricks and mortar, or an explicit administrative presence, in the province does not mean that the obligation to bargain collectively is of no effect when the employer chooses to engage employees for work on a construction project in Saskatchewan.

Employees obtain the right, under a certification Order, to bargain collectively with their employer through their trade union. Section 37 of the *Act* permits those employees, when their employer disposes of all or part of the enterprise, to ascertain whether they can look to a new employer for the recognition of that right. The basic concern of the Board in assessing whether a successorship has occurred is to determine whether there is a sufficient nexus between the certified employer and the putative successor as to justify the conclusion that, at law, the successor is the heir to the obligation to bargain collectively, along with whatever else may have been transferred.

In making this assessment, it is our view that we are entitled to consider transactions which have taken place elsewhere. This is not a matter of giving an extra-territorial effect to the *Act*, but of determining whether a particular company should be identified as the heir of an employer subject to a Saskatchewan certification Order in respect of work being done, and an employment relationship being carried on, in Saskatchewan. The only way of doing this, especially in the particular circumstances of the construction industry, may be to look at dealings which the two companies have had with each other in Alberta.

Counsel for Pyramid suggested that the question might properly be put before the Alberta Labour Relations Board. We agree, in the sense that the employees of Pyramid in Alberta may wish to make an application for a finding of successorship under the Alberta legislation. Whatever conclusion the Alberta Board comes to could, in our view, have no effect on the employees in this province, just as any decision on our part would have no impact on the status of the collective bargaining rights of employees of Pyramid who work in Alberta. It is conceivable that, given differences in the respective legislative provisions in the two provinces, our two labour relations boards might come to different conclusions on the question of whether Pyramid is a successor to Sparrow.

A finding that we can legitimately explore the nature of transactions which have taken place in Alberta in the context of a successorship application does not signify that we are trying to extend the operation of our legislation into Alberta. The implication of such a finding is that events which take place in Alberta might help us to decide whether a disposition took place which would entitle employees working in Saskatchewan to insist on their bargaining rights, and these events are therefore relevant to our proceedings.

The other major argument made by counsel for Pyramid was that the request for particulars is of an unreasonably sweeping kind. He referred us to the following comment of arbitrator Weatherill in *Canada Post Corporation and Canadian Union of Postal Workers* (1986), 24 L.A.C. (3d) 157, which was quoted by the Alberta Labour Relations Board in *International Brotherhood of Electrical Workers, Local 424 v. Canem Systems Ltd.*, [1987] Alta. L.R.B.R. 203, at 208:

> *Even on a broad view of the scope of a subpoena duces tecum, however, it is clear that it is not to be used to permit a party to go on a "fishing expedition", to endeavour, that is, "not to obtain evidence to support [a] case, but to discover whether [one] has a case at all": see Com'r for Railways v. Small (1938), 38 N. So. Wales 564 at p. 573, cited in the Becker Milk case, supra.*
>
> *In the instant case, the subpoena sought to be approved casts an extremely wide net indeed. It does not in fact indicate that any of the evidence sought to be obtained is known to exist: many of the "documents" or "records" sought to be obtained, if they exist at all, would more accurately be described as personal notes, and of course some of what they might contain would be hearsay (as is clear from the request for documents "describing any statements made or reported to have been made"). The subpoena certainly does not "state with reasonable particularity the documents which are to be produced", that being a proper requirement of any such demand: see Com'r for Railways v. Small, supra, and other cases in support of the proposition cited by the Ontario Labour Relations Board in the Becker Milk case, supra.*

This basic principle has been stated in various ways in many cases. We accept that an applicant cannot make broad and vague allegations on speculation, and hope that the process of discovery will yield some concrete material which can be used in support of those allegations.

On the other hand, as the Board has often observed, trade unions are not privy as a rule to any significant amount of the business documentation of an employer, and they cannot be expected to

pinpoint with precision all of the documents which may be relevant to an application they have filed. In the *Canem Systems* decision, *supra*, the Alberta Board made the following comment:

> *The principle running through these cases is the simple proposition that the process of compulsory production of documents, whether before or at a hearing is designed to allow a party to establish the case they have already set out, not to allow them to discover whether or not that case or some other case exists. We fully accept that principle, and it is the reason why we firstly require particulars before proceeding, and secondly only grant notices to produce that are reasonably relevant to the question placed in issue by those particulars. There is inevitably a measure of discovery involved in this because documents, previously private, may be revealed whose existence was hitherto unknown. This is not a factor, however, that persuades us to abandon pre-hearing production.*

In this case, the Union has obtained information which led them to file this application. In their request for particulars, they are seeking an opportunity to review information which may bear directly on their allegations. With some exceptions, we think their requests are stated in a way which identifies the relevant information with sufficient precision and directness to justify ordering the production of the documents.

In the first paragraph of the request for particulars, the Union seeks to have access to documentation which would help establish whether or not a disposition has taken place which would support their application. In our view, it should be clear to Pyramid what documentation is sought in this connection, and we will order that the documents be produced.

In the second paragraph, counsel for the Union alluded to some of the features which are commonly looked at by the Board as possible indicia that a disposition has taken place which would justify the recognition of a transfer of bargaining rights. Again, we are satisfied that it is sufficiently clear in the request for particulars what documents the Union seeks access to, and we will direct that they be produced.

As we interpret the third paragraph, the Union is seeking to have access to documents which would indicate whether Pyramid is or has been a party to contractual arrangements in common with Sparrow, whether in the form of tenders for work or contracts with major suppliers. We will direct that such

contracts be produced. The point of permitting the Union to review such documents is, of course, to determine whether they show that a successorship has or has not taken place. Their commercial aspects are not of significance from our point of view; we will therefore permit Pyramid to excise any reference to particular financial costs, sums of money, or other sensitive commercial information from the copies of documents produced to the Union.

In paragraph four, the Union requests a list of all employees of Pyramid. Counsel for Pyramid stated to the Board that Pyramid has or has had employees in a number of jurisdictions, and we agree that it would be unduly onerous to require Pyramid to provide a list of all the employees they have ever had in all jurisdictions. We will require that they provide a list of three kinds of persons employed by Pyramid. The first of these is the group of employees who are employed in some capacity at the corporate or administrative headquarters of Pyramid, including management, administrative and clerical staff. The second category of employees would be any employees employed by Pyramid in Saskatchewan at any time.

With respect to the third category, we also recognize that in the construction industry it is common for companies to employ a stable "core" of employees on a regular basis. If this is the case here, we will direct that Pyramid identify the employees in that core group, whether they have worked in Saskatchewan or not.

We understand that Pyramid has provided the information requested in paragraphs five and six.

In the seventh paragraph, we understand the Union to be asking for disclosure of all parties who have had management or consulting contracts with Pyramid, and we will direct that this information be provided to the Union.

Paragraph eight overlaps in some respects with paragraph three. We understand this paragraph to refer again to factors which are commonly considered by the Board in deciding whether a successorship within the meaning of the *Act* has taken place. We will direct that the information be provided to the Union.

The ninth and tenth paragraph refer to specific projects which have been undertaken in Saskatchewan. Pyramid has provided a response to these requests.

For the reasons we have given, we hereby order that Pyramid provide the information requested by the Union, with the modifications we have indicated above.

## GRAIN SERVICES UNION (ILWU - CANADIAN AREA), Applicant and HEARTLAND LIVESTOCK SERVICES LTD., Respondent

LRB File No. 003-97; July 23, 1997
Chairperson, Beth Bilson; Members: Don Bell and Donna Ottenson

For the Applicant: Hugh Wagner
For the Respondent: Dennis Ball, Q.C.

**Unfair labour practice - Union security - Refusal to remit dues - Employer not guilty of violation of union security provision of *The Trade Union Act* by failing to remit dues for employees who were not required by collective bargaining agreements entered into between employer and union on voluntary recognition basis - Union is required to refer change of its policy to internal structures before implementing.**

**Estoppel - Conduct - Employee who paid union dues for two decades without challenge is estopped from denying that she is required to pay dues.**

***The Trade Union Act*, s. 36(1).**

### REASONS FOR DECISION

**Beth Bilson, Chairperson:** The Grain Services Union (ILWU - Canadian Area) was designated by this Board in a certification Order dated June 5, 1996, as the bargaining agent for a unit of employees of Heartland Livestock Services Ltd. The Union filed this application alleging that the Employer committed unfair labour practices and violations of s. 36(2) of *The Trade Union Act*, R.S.S. 1978, c. T-17, by refusing to terminate the employment of certain employees. Sections 36(1) and 36(2) of the *Act* read 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.*
>
> *36(2) Failure on the part of any employer to carry out the provisions of subsection (1) shall be an unfair labour practice.*

The Employer had voluntarily recognized the Union as the bargaining representative for the group of employees described in the certification Order, and the parties concluded a succession of collective agreements. In the version of the collective agreement which took effect in 1994, and in a number of agreements before that, the following provision was included:

> *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.*

In a letter dated June 1, 1995, the Union sought to rely on the terms of s. 36(1) of the *Act*, and filed an application alleging that the refusal of the Employer to comply with this request constituted an unfair labour practice. The Employer took the position that the Union could not insist on compliance with s. 36 of the *Act* until they demonstrated majority support and were granted a certification Order.

In *Grain Services Union v. Heartland Livestock*, [1996] Sask. L.R.B.R. 161, LRB File No. 303-95, the Board made this comment, at 174:

> *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 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 Union subsequently filed an application for certification, and was granted the certification Order mentioned earlier on June 5, 1996. In a letter dated June 6, 1996, the General Secretary of the Union, Hugh Wagner, wrote to the Employer in the following terms:

> *This is to advise that on June 5, 1996 the Saskatchewan Labour Relations Board certified Grain Services Union (ILWU - Canadian Area) to represent the employees of Heartland Livestock Services Ltd. as described in the attached certification order. Therefore, pursuant to section 36(1) of The Trade Union Act of Saskatchewan, we are hereby invoking the membership and union security provision contained herein. We require that the Collective Agreement between the parties be amended accordingly.*
>
> *We further advise that we require, pursuant to section 36(1) of The Trade Union Act of Saskatchewan, "... that any employee in the ... 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; ...".*
>
> *In addition to the foregoing, we require that you provide each employee in the bargaining unit with a copy of this notice in order that they may be fully apprised of the requirements of the Collective Agreement and The Trade Union Act. We also enclose a supply of ten applications for membership in Grain Services Union (ILWU - Canadian Area) and we require that you present same to new hirees effective June 5, 1996 forward with the instruction that they shall complete and return same to the attention of the writer.*

The Employer took the position that they would not deduct union dues or assessments from the wages of employees without being provided the written authorization contemplated in s. 32(1) of the *Act*. Prior to the date of the certification Order, the Employer had been advised that a total of eight employees were not prepared to authorize the deduction of union dues.

Some accommodation was reached for a number of these employees. Three of the employees, Harold Wiles, Phil Sirois, and Margaret Kool, chose to challenge the claims made by the Union, and made representations through counsel in connection with this application.

All three employees had been employed prior to September 1, 1974, and thus were among the group of employees alluded to in the "grandfather" provision part of Article 5 of the collective agreement. Mr. Wiles and Mr. Sirois are accountants, a classification which was brought into the bargaining unit in 1977. Ms. Kool is in a clerical classification.

Mr. Wiles and Mr. Sirois were employed prior to the date mentioned in the grandfather provision, September 1, 1974. Neither of them joined the Union or gave authorization for the deduction of dues.

The case of Ms. Kool was somewhat more complicated. Union dues were deducted from her wages at least from 1977 until 1996. She thought, in fact, that dues might have been deducted from some time in 1974. When Ms. Kool arrived to attend a meeting to discuss the ratification of the collective agreement in 1994, the Union had not included her on their list of members. Neither the Union nor the Employer were able to find any record that she had joined the Union or given written authorization for the deduction of dues.

Ms. Kool testified that she did not recall signing an authorization for the deduction of dues, although she said that she assumed she was required to pay them. She acknowledged that on one, or possibly two, occasions over the period after 1974, she tried to "get her card back." She also conceded that by 1989, at the latest, she knew that Mr. Wiles, Mr. Sirois, and others hired before September 1, 1974, were not required to pay Union dues. She said that she thought the explanation for this might be that they had been hired before her, or that it was an arrangement which only affected accountants.

Lawrence Maier, staff representative with the Union, described the discussions which had taken place between the Union and the Employer, and the Union and those employees whose dues were not being deducted. In a letter dated May 6, 1996, he made the following statements to the Employer:

> *Your April 26, 1996 letter seeks reasons why Heartland Livestock should continue deducting dues for certain Heartland employees. I would suggest that Article 5 - Maintenance of Membership should suffice as a "cogent" reason. Please be advised that Mr. Wiles, Mr. Sirois, and Mr. Marchycha all commenced employment prior to September 1, 1974, and so have never had union dues deducted.*
>
> *I am forwarding photo copies of signed authorizations from Judy Dougherty (Dunlop), Lori Untereiner, and Alvin Tulloch. Under section 5 of the collective agreement, Heartland Livestock must remit dues for all inscope employees who began after September 1, 1974, and all employees who started before that date who have authorized the deduction. Grain Services Union expects Heartland management will comply with the collective agreement and we will use all means necessary to enforce that obligation.*

He said that the Union policy as reflected in the collective agreement was not to require those employees who had been hired before September 1, 1974, either to join the Union or pay dues. The documents used by the Union as authorization for the deduction of dues were the same documents used to gain membership in the Union; those employees who had signed such a document, even if they were employed prior to September 1, 1974, were expected to maintain their membership and continue to pay dues.

It will be noted that Mr. Wagner sent the letter citing s. 36 of the *Act* immediately after the certification Order was issued. Mr. Maier said that the executive of the Union was advised of this, but there was no specific discussion of the alteration of the policy with respect to employees who had been hired before September 1, 1974. Mr. Wagner, who appeared on behalf of the Union, acknowledged as a matter of fact that he had made the decision to send the letter of June 6, 1996, asking for the recognition of the union security provision in s. 36 of the *Act*, and that it had not been the subject of discussion with the executive or other bodies within the Union.

In the decision made by the Board concerning the significance of the voluntary recognition extended by this Employer to the Union, we outlined our reasons for placing limitations on the effect of voluntary recognition as compared to the status of a collective bargaining relationship founded on a certification Order. Given this position as we have stated it, the relationship which exists when a certification Order is granted in circumstances where a voluntary recognition has been in place for some time has many of the features of relationships where the union has not previously represented employees.

On the other hand, there is no denying in these situations that the trade union has been functioning as a representative of employees in many respects, and has had an impact on the terms and conditions of their employment. Unlike the certification of a group of employees with whom a trade union has had no previous relationship, the trade union in these circumstances has had a hand in influencing the employment relationship. In the environment which existed at the time the certification Order was granted, the employees hired prior to September 1, 1974 were not, as a condition of their employment, required either to join the Union or to pay dues. This aspect of their employment status had been in place, in the case of Mr. Wiles and Mr. Sirois, since 1977.

It is always open to a trade union to change the approach taken towards certain issues, or to revise bargaining strategy or positions. Certain of these changes may have a negative impact on individual employees or groups of employees, and may represent a derogation from the existing terms and conditions of employment for them. In deciding what direction to take, a trade union must balance many interests and take a host of factors into account. It must be expected that some of the choices made will have a less favourable effect on some groups of employees than others.

On the other hand, a trade union must be cognizant of the terms and conditions it has helped to put in place, and the reasonable expectations which may have been fostered over time by policies which the union has followed. If the union is going to alter a long-established policy in a way which will have negative effects on particular employees then, in our view, this must be done through some kind of conscious and reasoned process.

In this case, the evidence shows that the Union failed to subject this change in policy to any deliberative process. Mr. Wagner responded on June 6, 1996, in the way he might reasonably do with a "fresh" certification Order by making the usual request for the imposition of the union security regime contained in s. 36 of the *Act*. The difference in this case was that the employees in this bargaining unit had reason to rely on the existence of a different set of provisions, those reflected in the successive collective agreements to which the Union had been a party. We have concluded that the Union could not simply demand that the new policy be followed without subjecting the change to somewhat more careful scrutiny.

We have therefore concluded that the reluctance of the Employer to deviate from the terms set out in the collective agreement did not constitute an unfair labour practice.

As we said earlier, the case of Ms. Kool is of a different kind. The Employer was unable to find a record that Ms. Kool had authorized the deduction of dues, and the Union acknowledged that they had no record either. On the other hand, it is difficult to see why the Employer would have begun deducting dues from her wages without some authorization as they made a careful distinction in the case of all of the other employees hired before September 1, 1974.

Ms. Kool cannot specifically remember that she signed a union card. She did allow the deduction of union dues for a period of over two decades without raising any challenge to this. At the latest, she knew in 1989 that other employees whose employment was of a similar vintage to hers were not required to pay union dues. We have concluded that Ms. Kool is estopped from denying that she is required to continue paying dues, and we will order that she give authorization for the resumption of the deductions.

In the event the parties are unable to come to an agreement about the terms on which this will occur, the Board will remain seized of this issue.

## TROY DAVIES, Applicant and SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 333 AND DUTCHAK HOLDINGS LIMITED OPERATING AS WPD AMBULANCE CARE, Respondents

LRB File No. 117-96; August 26, 1997
Chairperson, Gwen Gray; Members: Gerry Caudle and Brenda Cuthbert

For the Applicant: Kevin Wilson
For the Union: Lorraine St. Cyr
For the Employer: Larry Seiferling, Q.C.

**Decertification - Interference - Board finds employer improperly influenced rescission application by creating conflict of interest between old and new employees.**

***The Trade Union Act*, s. 9.**

### REASONS FOR DECISION

**Gwen Gray, Chairperson:** Troy Davies applied to rescind the certification Order issued November 29, 1982 to Service Employees' International Union, Local 333 with respect to the employees of Robertson's Ambulance Service Ltd. In *Service Employees' International Union v. Battlefords Ambulance Care Ltd., Dutchak Holdings Limited o/a WPD Ambulance Care et al.*, [1996] Sask. L.R.B.R. 604, LRB File No. 202-95, the succession in ownership of this business was set out as follows, at 604-605:

> *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 Battlefords Ambulance Care, who assumed Robertson's obligations under the collective agreement and the certification Order. The latest agreement between Union and Battlefords Ambulance Care runs from July 1, 1993 to June 30, 1996. Bruce Chubb is the managing owner of Battlefords Ambulance Care.*
>
> *On August 1, 1995, Battlefords Ambulance Care sold its ambulance business to WPD Ambulance Care, 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 Ambulance Care. It is agreed between all*

> *parties that WPD Ambulance Care is the successor employer to Battlefords Ambulance Care pursuant to s. 37(1) of the Act.*

At the time this application was filed the Board had before it an unfair labour practice application (LRB File No. 202-95) brought by the Union against the Employer which alleged among other things that the Employer refused to bargain collectively with the Union. The essence of the Union's complaint was that the Employer refused to continue the employment of six of the former employees of Battlefords Ambulance Care. The Board concluded as follows, at 167:

> *Applying the cases quoted above to the present case, the Board finds that WPD Ambulance Care failed to bargain in good faith when it treated employees of Battlefords Ambulance Care 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 13 former Battlefords Ambulance Care employees; and when it refused to acknowledge that the collective agreement applied to all former employees of Battlefords Ambulance Care. This failure to bargain in good faith is not cured by WPD Ambulance Care'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 Ambulance Care 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 Inc. 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.*

The Board remained seized of its jurisdiction to issue a rectification order under s. 5(e)(ii) of *The Trade Union Act*, R.S.S. 1978, c. T-17, if requested.

Subsequently, the Union filed an application pursuant to ss. 5(d), (e), (f) and (g) of the *Act* seeking reinstatement and monetary loss for the six employees whose employment was not continued by the

Employer (LRB File No. 166-96). The Union also sought a rectification order (LRB File No. 202-95). In response to the requests, the Employer proposed that the Board defer to arbitration proceedings with respect to the remedial aspect of LRB File No. 202-95 and that it dismiss the application for reinstatement and monetary loss in LRB File No. 166-96 based on delay in filing. In *Service Employees' International Union v. Dutchak Holdings Limited o/a WPD Ambulance Care and Walter Dutchak*, [1996] Sask. L.R.B.R. 714, LRB File Nos. 202-95 & 166-96, the Board concluded, at 718:

> *Without precluding any objections the Employer may raise to the manner in which the Union has come to the Board for relief, the Board does not view the issues raised on the remedial portion of LRB File No. 202-95 or on the application filed in LRB File No. 166-96 as being appropriate for deferral to arbitration. The Board has stated its reasons for not deferring to arbitration on the main application. Those reasons apply equally to the fashioning of remedies to rectify the Employer's breach of the Act.*

This matter remained pending before the Board until December 11, 1996 at which time the parties adjourned the matter *sine die* pending settlement discussions between the Union and the Employer.

The application for rescission was heard by the Board on September 26, 1996. At the time of the hearing, the status of the six employees who were subject to applications filed in LRB File Nos. 202-95 and 166-96 had not been determined. The Board proceeded to deal with the question of whether the Employer had improperly interfered in the application for rescission which was raised by the Union in its reply to the application. The question of which employees should be listed on the statement of employment was left to be decided pending the finalization of LRB File Nos. 202-95 and 166-96.

These reasons will address the question of whether the Employer improperly influenced the bringing of this application. Section 9 of the *Act* states:

> *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 its reply, the Union alleged the following:

> *S.E.I.U. further submits that the application for decertification was influenced by actions of the Employer which, through its violation of The Trade Union Act at the time it became a successor employer, had the effect of creating a climate intentionally designed to foster or encourage a decertification application such as this.*

Mr. Davies was hired by the Employer after it commenced operations from Battlefords Ambulance Care. He had formerly been employed by the Dutchak family's ambulance service in Rosthern. On cross-examination, Mr. Davies acknowledged that the employees hired after the sale from Battlefords Ambulance to the Employer discussed whether the reinstatement of the six employees who were the subject of the Union's application would affect the newly hired employees. In addition, part of Mr. Davies' complaints against the Union centred around a union meeting held in January, 1996 where the reinstatement of the six employees was discussed. Although Mr. Davies did not attend the Union meeting, he did hear reports about it from other employees who had attended. He complained that the Union seemed only interested in obtaining the reinstatement of the six employees and that it was not concerned with the new employees.

Arnold Balisky and Terry Peckham, local Union representatives, testified that there was considerable turn-over of staff since the arrival of WPD Ambulance Care. According to their evidence the newly hired employees expressed concerns about the possible return of the six employees who had not been continued in their employment by the Employer. In particular, the newly hired employees were apparently afraid that their hours of work would be reduced if the six employees returned to work as a result of the Union's application.

As quoted earlier, a successor employer is not entitled to "weed out undesirable employees" in the course of purchasing a business by denying that the employees of the predecessor employer remain the employees of the successor employer. In this instance, the Employer set up an obvious conflict between the old and new employees. The employees whose employment was not continued by the Employer had an interest in regaining their employment, while the newly hired employees had an interest in ensuring that the displaced employees did not return to work. The latter interest could be accomplished through a rescission application. Without the Employer's conduct, which the Board

found to constitute an unfair labour practice, the conflict between the interest of old and new employees would not have arisen. The employees would have continued as they had under the predecessor employer to enjoy the benefits of the collective agreement. Whether or not the employees wished to continue to be represented by the Union would not have been influenced by the Employer's attempts to improperly weed out employees that it thought to be undesirable.

Under s. 9 of the *Act* the Board may consider whether the Employer's conduct created a climate that would foster and encourage an application for decertification. In *United Food and Commercial Workers, Local 1400 v. F.W. Woolworth Co. Limited; Myrna Johnson v. F.W. Woolworth Co. Limited and United Food and Commercial Workers, Local 1400*, [1994] 1st Quarter Sask. Labour Rep. 169; LRB File Nos. 148-93, 151-93, 192-93, 193-93 & 194-93, the Board stated as follows, at 201:

> *However, the union's ability or inability to prove the Employer's direct participation with the applicant is not determinative of the s. 9 issue. It is also necessary for the Board to determine if the disposition towards collective bargaining of the employees who supported the decertification application was influenced by the Employer's unlawful or improper conduct. Aside from or in addition to any specific unfair labour practice, this also requires an evaluation of the climate which the Employer created and whether it is intentionally designed to foster a decertification application or encourage support for one.*

The Board orders that the application be dismissed as it holds that the Employer's conduct which was found to constitute an unfair labour practice in LRB File No. 202-95 improperly influenced the making of this application by creating a conflict of interest between the newly hired employees and those employees who were subject of the applications filed in LRB File Nos. 202-95 and 166-96.

Board member Brenda Cuthbert dissents from the Board's decision. Ms. Cuthbert does not view the Employer's conduct as constituting improper influence under s. 9 of the *Act*.

## CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3996, Applicant and BOW VALLEY VILLA CORPORATION, Respondent

LRB File Nos. 196-97 & 198-97; September 2, 1997
Chairperson, Gwen Gray; Members: Gloria Cymbalisty and Don Bell

For the Applicant: Eden Guidroz
For the Respondent: Lavonne Beriault & Tammi Hackl

**Unfair labour practice - Dismissal for union activity - Probationary employee - Board finds that probationary employee who organized union campaign was dismissed for reasons tainted by anti-union animus.**

***The Trade Union Act*, s. 11(1)(e).**

### REASONS FOR DECISION

**Gwen Gray, Chairperson:** The Union filed an unfair labour practice application alleging a violation of s. 11(1)(e) of *The Trade Union Act*, R.S.S. 1978, c. T-17. The Union is also seeking reinstatement and monetary loss for Susan Durston who was fired from her position as service aide in a letter dated June 5, 1997, and received by her on June 6, 1997.

Ms. Durston commenced employment in late February or early March, 1997 and was on probation at the time of discharge. She was instrumental in organizing a union at the workplace. The organizing efforts began sometime in May, 1997, after Ms. Durston received a letter from Jim Holmes, Acting Regional Director of the Union, which included membership cards and described the certification process to her. Ms. Durston shared this letter with employees as she solicited for Union members. The letter clearly identified Ms. Durston as the Union's contact in the workplace.

An application for certification was filed by the Union on June 2, 1997. Notice of the application was received by the Employer from the Labour Relations Board on June 4, 1997. The decision to terminate Ms. Durston's employment was made on the same day that the Employer received notice of the Union's application.

The Employer is a community-based corporation that operates a personal care home for level I and II residents in Oxbow. Its staff consists of service aides, cooks, recreation director and a manager. During the week, the Employer schedules two service aides. One service aide is scheduled to work from 6:45 am to 3:15 pm. The other is scheduled to work from 7:00 am to 1:00 pm. Only one service aide is scheduled to work each evening and night shift, and all three weekend shifts. During the morning of weekday shifts service aides are expected to bath residents, change beds, wash laundry and perform housekeeping tasks in the residents' rooms. The workload on morning shifts during the week is more onerous than other shifts. As a result, it is staffed with an additional service aide for part of the shift.

In addition to the tasks set out above, service aides are expected to dispense medication to residents. Although service aides are not registered nurses, they are permitted to dispense medication provided it has been pre-packaged for each resident by a licensed pharmacist. The Employer has established a system of medication administration that service aides are expected to follow. The service aides obtain daily medication for each resident from a container stored in a locked cupboard in the medication room. The service aide then checks the medication against a scheduled medication sheet that is kept for each resident which lists the name, dosage, description of the medication and the time at which it is to be administered. The service aide places the medication in a medication cup, writes her initials on the medication sheet to indicate the medicine has been given and administers the medication to the resident. The last step involves securing the medication in the locked cupboard.

A weekly supply of medication is provided for each resident by the pharmacist and is stored in a locked filing cabinet in the medication room. A daily supply of medication is transferred from the locked filing cabinet to the container in the locked cupboard. Service aides have access to the locks, as does the manager.

Medication is generally dispensed at breakfast, lunch, dinner and bedtime. The service aide takes the daily supply of medication along with the medication sheets for each resident to the dining room and dispenses medication to the residents. The service aide administers the medication one resident at a time. The medication sheets which record the administration of medication for each resident are

completed at this time. After all medication is dispensed, the service aide is expected to return the daily supply of medication to the locked cupboard.

As can be imagined, the dispensing of medication by service aides caused a great deal of concern and anxiety both for the manager and service aides, all of whom feared making errors. Donalda Spearing, Manager, testified that errors have occurred. As a result, she made considerable efforts to design a system of delivering medication that reduced the possibility of error. She also took steps to ensure that service aides understood the system and complied with it. Ms. Spearing testified that the local pharmacist was impressed with the Employer's efforts to ensure a safe medication dispensing system.

Service aides are not required to have any formal education with the exception of a first aid certificate. They received two days of orientation on each shift during which time they worked side by side with another service aide and with the manager who specifically observed them while preparing medication. Ms. Durston indicated that service aides felt vulnerable with respect to their medication duties as it was unclear to them if they would be liable for errors should they occur in dispensing medication. This was one of the factors Ms. Durston recited as leading to the desire to join a union.

The Board received two different versions in regard to the events that led up to the termination of Ms. Durston. In this case, the stories are so divergent that it is not possible to believe that the differences are caused by slight variations in the memories and perceptions of the witnesses. Such minor differences in the testimony of witnesses are expected in the re-telling of events that occurred sometime in the past. In most circumstances, the Board can reconstruct a version of the event from the evidence that accords, at least in a general way, with the evidence provided by both parties. In the present case, we cannot reconcile the two versions of events into a coherent picture. Therefore, the Board must carefully analyze the evidence of the witnesses for the Union and the Employer to determine which version of the events seems to the Board to more likely represent what actually occurred. This process involves the Board in an assessment of the credibility of the witnesses who appeared before the Board.

## Union's Evidence

### (A) Susan Durston

Ms. Durston testified that she was scheduled to work the day shifts from June 1, 1997 to June 4, 1997. On June 2, 1997, she was informed by Lorraine Brock, a co-worker, that the manager was aware of the Union's organizing drive. Ms. Durston stated that she was afraid of the Employer finding out about the Union drive because she had heard rumours from other staff that the Board of Directors opposed a union.

On the same day, the part-time service aide scheduled to work the morning shift with Ms. Durston advised Ms. Durston that she had other work to perform and would be unable to assist Ms. Durston with the rest of the morning duties. Later that shift, the same service aide advised Ms. Durston that she would not be at work on June 3, 1997 and June 4, 1997. As a result, Ms. Durston was left to care for 15 residents without any assistance during the busy part of the day. This was complicated by her concern that the manager was now aware of the Union drive and her assumption that if management knew about the organizing drive, they would automatically know that she had been the chief organizer.

Ms. Durston reported that on June 4, 1997 she was particularly busy in the afternoon dealing with one resident who was preparing to leave for a wedding. In preparing the resident for her trip, Ms. Durston obtained the medication that the resident would require during the time that she would be away. This required Ms. Durston to gather medication from the locked filing cabinet which contained the weekly supply of medication, and from the locked cupboard which contained the remainder of the resident's medication for that day. Ms. Durston recalled obtaining the medication and packing it in the resident's suitcase.

During the time Ms. Durston was assisting the above resident, a home care nurse arrived to visit another resident. Ms. Durston took advantage of the nurse's arrival to have her examine the resident who was leaving. Ms. Durston was concerned that the resident was not well.

After completing the examination of this resident, Ms. Durston and the nurse went to attend on another resident whose room was located at the opposite end of the facility. Ms. Durston said that around 2:00 pm she asked the nurse if she could leave to attend to a third resident who required a medication at 2:00 pm. Ms. Durston recalled giving the medication.

Although Ms. Durston is familiar with the medication protocol of the Employer, she could not remember if she followed the protocol on June 4, 1997, nor did she recall if she had left the daily medications out on the cabinet in the medication room or if she had left the medication cupboard unlocked. She remembered the day as being very busy.

Ms. Durston testified that at approximately 2:50 pm Ms. Spearing approached her and asked if she could speak to her later. At this time, Ms. Durston was preparing the afternoon tea and snack for the residents. Ms. Durston acknowledged her willingness to meet with Ms. Spearing.

Around 3:15 pm, Ms. Durston asked Jean, a co-worker, to accompany her to the staff lounge to meet with Ms. Spearing. When they arrived at the lounge, they found Ms. Spearing in the room with a cook and were told that there was a meeting taking place. Ms. Durston got her cigarettes from the lounge and proceeded to the front entrance. By this time, her shift was over and she would normally be free to leave work. Once outside, Ms. Durston had stopped to talk to a resident when Ms. Spearing called her back in.

On her way back to the lounge, Ms. Durston again asked Jean to accompany her to the meeting. Ms. Durston and Jean then walked to the lounge where they were met by Ms. Spearing. Ms. Durston reported that Ms. Spearing closed the door in Jean's face telling her that there was a meeting taking place. Ms. Durston indicated that she got up from the chair in which she was sitting and opened the door, telling Ms. Spearing at the same time that she wanted the door open. According to Ms. Durston, they sat down and Ms. Spearing advised her that there were some very serious problems with medication. Ms. Durston reported that she asked Ms. Spearing if she could have someone in the room with her while the meeting progressed. Ms. Durston indicated that she got up and went into the hall and called for Jean to come in. She then said that she returned to the lounge and sat down. According to

Ms. Durston, after a short pause, Ms. Spearing got up and left the room. After Ms. Spearing left the lounge, Ms. Durston spoke briefly to Jean about what had happened and left.

Ms. Durston testified that she did not know what Ms. Spearing was referring to when she said there was a serious problem with medication. She had worked three days under the stress of knowing that the Employer was aware of the Union's organizing drive and she was certain that the Employer also knew who had spearheaded the campaign. She was afraid the Employer would retaliate against her. As a result, she wanted another person to be in the room with her and Ms. Spearing because, in her words, "not always the truth comes out" and she wanted someone else to hear what was being said. She indicated that she was very nervous.

Ms. Durston received her letter of termination in the mail on June 6, 1997, which stated the following: "Please be advised that effective immediately your employment with Bow Valley Villa Corporation is terminated." The letter was dated June 5, 1997 and signed by Ms. Spearing. No reason for the termination was provided. Ms. Durston indicated that she had learned of her firing earlier from a co-worker with whom she had a brief conversation with at a convenience store. When the co-worker expressed concern about Ms. Durston, Ms. Durston remarked that "you think I was fired or something," to which the co-worker responded that she had been fired.

On cross-examination, Ms. Durston indicated that she met with Ms. Brock in the lounge on June 2, 1997 before Ms. Durston began her shift. Ms. Brock told her that she was in the building to do a report with Ms. Spearing as Ms. Brock had filled in for the manager during the past week.

Ms. Durston testified that medication given at lunch should be returned to the medication room by 12:30 pm. She indicated that to the best of her knowledge she did return the container of daily medication to the medication room and locked it in the cupboard after lunch on June 4, 1997.

Ms. Durston was also cross-examined with respect to her attendance with the home care nurse. According to Ms. Durston, the nurse arrived around 1:30 pm on June 4, 1997 and met her in the lounge where she was eating lunch. Ms. Durston helped the resident who was leaving for the wedding before

Ms. Durston went for lunch. The nurse and Ms. Durston proceeded from the lounge to the resident's room. Ms. Durston, however, stopped first at the medication room in order to retrieve the resident's weekly and daily medications to pack. When Ms. Durston arrived at the resident's room, she packed the medications in the resident's suitcase and assisted the nurse in taking the vital signs of the resident. They had some discussion about the resident's health.

Ms. Durston acknowledged that she attended with the nurse on a second resident and assisted in recording the vital signs, and that the nurse had not requested her to attend on this resident. She was finished with this resident sometime before 2:00 pm as that was the time she had to administer medication to another resident. Ms. Durston testified that when she left the first resident's room to attend on the second resident with the nurse, she stopped in the medication room to retrieve the second resident's chart. She estimated that she would have been at the medication room around 1:45 pm. In the course of travelling between residents, Ms. Durston would have walked from the end of the north wing, past the lounge and medication room, to the end of the south wing.

Ms. Durston indicated that while she was attending on the second resident with the nurse, Ms. Spearing had poked her head in the room. She then saw her again around 2:50 pm when Ms. Spearing asked to meet with her. Ms. Durston indicated that the tone of the request was "firm, but not loud."

She also testified that it was her intention to leave work when she went outside following her first attempt to meet with Ms. Spearing. She felt that when she saw Ms. Spearing meeting with the cook, Ms. Spearing did not require her to remain in the building and she expected that Ms. Spearing would call her at home.

After Ms. Durston received the letter of termination, she testified that she phoned Mr. Holmes to report to him what had happened. He volunteered to contact Ms. Spearing to find out why Ms. Durston's employment had been terminated.

**(B) Lorraine Brock**

Ms. Brock is a real estate appraiser in Oxbow who formerly worked for the Employer and who was a personal friend for some 40 years with Ms. Spearing. She worked as a service aide from August, 1996 to May, 1997. Ms. Brock's last day of work was May 30, 1997. Prior to June 2, 1997, she covered for Ms. Spearing who was away on one week of vacation and two days of training.

Ms. Brock testified that she reported to Ms. Spearing on June 2, 1997, regarding the matters that had taken place during Ms. Spearing's absence. Ms. Brock and Ms. Spearing first met in the office and later continued their discussion outside. The meeting lasted from approximately 8:30 am to 11:30 am.

During this discussion, which covered many personal matters for both women, Ms. Spearing asked Ms. Brock what she knew about the Union. Ms. Brock testified that she replied she didn't know anything about it. She indicated that her reply was untrue as she was aware of the Union's campaign but did not think it was her place to tell Ms. Spearing.

According to Ms. Brock, Ms. Spearing went on to complain that if the staff was trying to get higher wages it would not work as there was not a lot of money in the budget. Ms. Spearing stated that she had contacted the Board of Directors and a lawyer. She also appeared to be upset. Ms. Brock testified that Ms. Spearing speculated that Ms. Durston and Jean were instrumental in forming the Union. She further stated to Ms. Brock that if the Union came in, the Employer would have to close as it couldn't afford to operate.

Ms. Brock reported that she told Ms. Durston that Ms. Spearing had asked about the Union just prior to Ms. Brock leaving, which would be around 11:30 am on June 2, 1997.

In relation to the medication protocol, Ms. Brock noted that other staff members, including Ms. Spearing, had left the medication room unattended with keys still in the lock on the medication cupboard. She recalled one instance where she found Ms. Spearing's keys left in the lock and returned them to her.

On cross-examination, Ms. Brock acknowledged that the concerns expressed by Ms. Spearing regarding the Union related to costs and the residents' ability to pay increased fees.

Ms. Brock was also questioned regarding her relationship with Ms. Spearing. She was asked if she had said to Ms. Spearing that "I will never forgive you for saying I didn't do my job." Ms. Brock relayed to the Board a discussion that had occurred between Ms. Brock and Ms. Spearing at Ms. Brock's house where she confronted Ms. Spearing with remarks that Ms. Spearing allegedly had made regarding Ms. Brock's work. Ms. Brock said that other staff told her that Ms. Spearing complained to them that she had not done her job. She told Ms. Spearing that she couldn't believe that Ms. Spearing would make such a remark, particularly after she had received a positive evaluation from her. She testified that she was crushed by the remarks. This conversation took place after June 4, 1997 and after Ms. Brock had resigned her position. She testified that Ms. Spearing did not respond to her remarks, that Ms. Spearing just "let it go" and the matter was then a "dead issue." She reported that they went on to discuss other personal matters.

Ms. Brock acknowledged that she had difficulties setting priorities and felt that she was pulled between her desire to keep the service aides with whom she worked, and Ms. Spearing, happy. Ms. Brock worked as a part-time service aide on the weekday morning shifts and, as a result, was required to assist both the full-time service aides and Ms. Spearing. She indicated that on one occasion Ms. Spearing got angry at her when Ms. Brock was having difficulties deciding whose work should receive the attention. On this occasion, Ms. Brock apologized to Ms. Spearing.

Ms. Brock also acknowledged that she was viewed with suspicion by some of the other service aides because of her close friendship with Ms. Spearing. Other staff thought she was a stool pigeon who reported their conversations back to Ms. Spearing.

Ms. Brock indicated that she did not tell Ms. Durston that Ms. Spearing had speculated that Ms. Durston was one of the Union organizers.

## Employer's Evidence

### (A) Donalda Spearing

Ms. Spearing has been the manager since October, 1995 and had worked as a service aide starting May, 1995. She is responsible to the Board of Directors for the overall operations including hiring and firing of staff, scheduling of staff, budget, and relations with residents and their families.

The Employer is a licensed personal care home with capacity for 22 residents, although only 16 currently reside in the Villa as it requires more renovations to convert a previous emergency and operating room wing into resident rooms. The building formerly housed the Oxbow Union Hospital and was converted into a personal care home. It operates in accordance with the staffing and other requirements set by the Province for personal care homes.

Ms. Spearing testified that all employees are placed on a six month probationary period when they are hired. The purpose of the probationary period is to assess the suitability of the employee for the position. Ms. Spearing testified that she is able to observe the work of new employees during their rotation through day shifts, which occurs once every three or four weeks. In addition, she relies on feedback received from the service aides who are orientating the new employees. She testified that in Ms. Durston's case, she received some negative feedback from the service aide who was responsible for orientating Ms. Durston to the weekend shift. This service aide reported that Ms. Durston did not think it necessary to encourage residents to participate in group activities in the residents' lounge. Ms. Spearing also indicated that she was uncertain if Ms. Durston understood the instructions provided to her or if she simply chose to perform the work her own way. Ms. Spearing was aware that Ms. Durston had experience working in another facility.

Ms. Spearing outlined the medication protocol which has been described earlier in these Reasons. She indicated that it was important to keep all medications under lock and key both to protect the residents, some of whom suffer varying degrees of dementia, from themselves and to prevent theft by the general public, who are given uncontrolled access to the Employer to visit the residents.

Ms. Spearing testified that on June 4, 1997 she returned to work from lunch at 1:25 pm having left for lunch somewhat late because of the morning work load. On returning, it was her intention to inform Ms. Durston that she could assist her for approximately 20 minutes before she had to leave for a meeting that was scheduled for 2:00 pm. Ms. Spearing testified that she recalled the time precisely because much of her work requires her to be aware of the time. Ms. Spearing assumed that Ms. Durston would be in the lounge having a late lunch so she headed towards the lounge on her return. When she passed the medication room, she glanced in to see if Ms. Durston was there. She noticed that the medication room door was open, the locked cupboard was wide open with keys hanging from the lock and upon entering the room, she observed that the daily supply of medications was sitting on the countertop of a cupboard directly underneath the medication cupboard. She thought it was an unusual time of day for the medication cabinets to be unlocked as the lunch medication normally would be dispensed by 12:30 pm and the next medication was not scheduled to be given until 2:00 pm.

After discovering the medication, Ms. Spearing started to look for Ms. Durston. She assumed that Ms. Durston was responsible for leaving the medication room in its current state as she was the only service aide on duty. Ms. Spearing considered immediately locking up the medication. However, she decided to leave the medication room as she found it in the hope that by doing so, the situation would be a more powerful tool in teaching Ms. Durston to follow the medication protocol. Ms. Spearing indicated that she spent 40 minutes trying to locate Ms. Durston and finally found her in the room of the second resident with the nurse. Since Ms. Spearing was by then running late for her 2:00 pm meeting, she decided to lock up the medication and speak to Ms. Durston about the matter later.

During the time that Ms. Spearing attempted to locate Ms. Durston, she tried to keep her eye on the medication room to ensure that no resident or other person entered the room while the medication was not properly secured.

Around 2:00 pm, Ms. Spearing returned to her office to pick up her mail and briefcase. She then left to attend a meeting with Orvina Black, Chairperson of the management committee of the Employer. When Ms. Spearing arrived at Ms. Black's home, she told her what she had observed in the medication room and shared her concerns about the incident with Ms. Black. As a member of the board of directors, Ms. Black was familiar with the efforts Ms. Spearing and the local pharmacist had taken to

ensure the safe delivery of medication. Ms. Spearing indicated to Ms. Black that she was quite upset with the incident. She was concerned that she had spent 40 minutes looking for Ms. Durston while medication was left unattended. Ms. Black advised Ms. Spearing to return to work and discuss the matter with Ms. Durston before she completed her shift. Ms. Spearing accepted Ms. Black's advice.

Ms. Spearing arrived at 2:55 pm and found Ms. Durston and Jean at the coffee table in the residents' lounge where they were preparing afternoon tea. Ms. Spearing indicated to Ms. Durston that she wanted to meet with her before the end of the day. Ms. Durston replied that she would just finish up tea. Ms. Spearing waited a few minutes and then decided to leave to have a quick meeting with the cook concerning menus and grocery buying. She was discussing these matters with the cook in the lounge with the door closed when Ms. Durston and Jean entered. Ms. Spearing indicated that she said to Ms. Durston that she was having a meeting with the cook and if she would not mind waiting, she would only be a couple of minutes longer.

When Ms. Spearing finished her meeting with the cook, she made brief notes of the meeting and then went out into the hallway to find Ms. Durston. Ms. Spearing indicated that she found Ms. Durston at the front of the building talking to Jean and asked to meet with her in the lounge. Ms. Spearing then returned to the lounge and sat down. She testified that when Ms. Durston walked into the lounge she left the door open. Ms. Spearing indicated that when she got up to close the door, Ms. Durston stated "when I talk to you I want a witness." Ms. Spearing replied that it was not necessary to have a witness as she just wanted to discuss something of concern which was leaving the medication room unlocked for at least 40 minutes. At that point, according to Ms. Spearing, Ms. Durston said that she refused to talk to her without a witness. Ms. Durston left the room, talked to Jean, and then left the building.

Ms. Spearing testified that after Ms. Durston left the lounge, she sat down and made notes of what had transpired. She indicated that the board of directors had instructed her to make notes of all meetings with staff and she was conscientious in following their directions. The notes which were filed with the Board as an exhibit basically confirm the details of the evidence recited above.

Ms. Spearing then returned to her meeting with Ms. Black. At that meeting, Ms. Black inquired as to how the meeting with Ms. Durston had gone. Ms. Spearing told her what had transpired and indicated that she intended to terminate Ms. Durston's employment.

At some point, Ms. Black advised Ms. Spearing that notice of the Union's application for certification from the Labour Relations Board was in the mail that Ms. Spearing had left at her house earlier. Ms. Black and Ms. Spearing considered if that information would change their approach to Ms. Durston and they decided it need not as the Board's information circular to employers advises that employers may carry on business "as usual."

Ms. Spearing prepared the letter terminating the employment of Ms. Durston the following morning and arranged for its delivery to the post office at 8:30 am. Ms. Spearing was surprised that Ms. Durston did not receive it in the mail that day.

Ms. Spearing testified that she received a call from Mr. Holmes either on the Friday of the week that Ms. Durston was fired or sometime during the following week. Ms. Spearing indicated that she initially confused Mr. Holmes with the Employment Canada office and assumed for a portion of their conversation that Mr. Holmes was calling from Employment Canada with respect to the reasons for the dismissal of Ms. Durston. Ms. Spearing was familiar with Employment Canada calling to clarify the reasons for termination of employees prior to approving unemployment insurance benefits. Ms. Spearing accused Mr. Holmes of allowing her to live with that misunderstanding and further accused him of being extremely aggressive in his tone. Ms. Spearing complained that Mr. Holmes attempted to extract an admission from her that she intended to fire Ms. Durston for the medication incident. Mr. Holmes told Ms. Spearing that the Union believed Ms. Durston had been fired for her efforts in organizing the Union. Ms. Spearing indicated that this was the first time she was made aware that Ms. Durston had been responsible for organizing the Union.

With respect to her knowledge of the Union drive, Ms. Spearing admitted that the statement made in the Employer's reply to the effect that the Employer was unaware of the Union organizing campaign at the time Ms. Durston was fired was incorrect. She indicated that one service aide had approached her prior to June 4, 1997. The service aide was extremely agitated and in tears over a disagreement she was

having with other service aides. In the middle of this conversation, the service aide mentioned the word "union." Ms. Spearing indicated that she was more concerned with the fact that this service aide had a dispute with other service aides and would have to figure out a way to continue to work with them than she was with the discussion of union. She testified that she did not realize that the dispute between the service aides was over whether or not they should form a union. She testified that the notion of a union in the workplace was not threatening nor an important issue to her.

Ms. Spearing also testified that she was approached by the activity director and asked to attend lunch with her. The activity director asked her, however, not to let anyone know that they were having lunch together. During lunch, the activity director told Ms. Spearing that a union was being organized but she cautioned her that if she mentioned to anyone that she, the activity director, had been responsible for informing Ms. Spearing of the Union's drive, the activity director would deny it. Ms. Spearing testified that she was not prepared to take the information about the Union seriously; she stated that the word "union" doesn't make her tremble. She said that she was raised in a union home; her husband is a member of a union as well as her children, brothers and sisters. Ms. Spearing indicated that she did nothing with this information as it was given to her in confidence and would be denied if she repeated it.

Ms. Spearing admitted that her main reason for objecting to a union was the impact a union could have on the residents. The Employer operates on a tight budget with its funding coming from the residents personally. She knew from helping residents with their finances that many would be unable to pay any additional fees should the staff obtain wage increases. She testified that she felt extremely concerned as far as the residents were concerned. Ms. Spearing testified that she was not intimidated by a union coming in to the workplace, and could actually envisage some positive outcomes as a result of having a union such as a more disciplined and efficient workplace.

Ms. Spearing gave evidence with respect to her meeting with Ms. Brock on June 2, 1997. This date was Ms. Spearing's birthday and she recalled meeting with Ms. Brock at work from 8:30 am to 11:30 am, both in her office and outside the building. Ms. Spearing acknowledged her long friendship with Ms. Brock. Ms. Spearing indicated that she does not recall discussing the Union's campaign during the

meeting with Ms. Brock. In fact, she thought it was unlikely that the campaign was discussed because she had been away for 10 days and had no contact with anyone concerning the Employer. She recalled discussing many personal matters with Ms. Brock, including her vacation, family problems and illnesses. At the end of the conversation, she recalled that they both went to the lounge where the staff presented Ms. Spearing with a birthday cake and where Ms. Brock presented her with a birthday present.

Ms. Spearing also presented her version of the meeting with Ms. Brock at Ms. Brock's house following the June 4, 1997 firing of Ms. Durston. Ms. Spearing indicated that she went to visit Ms. Brock as a friend; she wanted to confide in Ms. Brock regarding personal concerns over how her husband was being treated in the community as a result of Ms. Spearing's firing Ms. Durston. She indicated that at this point she was seriously thinking of resigning from her position and she wanted to discuss her concerns with a friend.

During the conversation, Ms. Brock confronted Ms. Spearing over some alleged statements Ms. Spearing had made concerning her work performance. Ms. Spearing said at this time, she realized that her friendship with Ms. Brock was over as she was choosing to believe someone who was "trashing my reputation and my husband's." Ms. Spearing did not identify who was "trashing her reputation." After she came to the conclusion that her friendship with Ms. Brock was finished, Ms. Spearing decided not to comment any further on the allegations made by Ms. Brock, which Ms. Spearing insisted were not true, and she did not comment further on the matters she had come to discuss with Ms. Brock.

Ms. Spearing denied that there was any connection between Ms. Durston's firing and her union activity. She concluded that Ms. Durston had put patient lives at risk, had shown no remorse, and taken no responsibility for it.

On cross-examination, Ms. Spearing acknowledged that she had not discussed the issue of encouraging residents to participate in group activities with Ms. Durston after receiving feedback related to Ms. Durston's performance during orientation.

Ms. Spearing was asked why she did not secure the medication that was left out, particularly if leaving medication unlocked was such a serious problem. Ms. Spearing explained that her first reaction was that Ms. Durston would be right around the corner and would return to the medication room. She thought it would just be moments before she would be able to show Ms. Durston what she had done. Ms. Spearing believed the impact of seeing the medication cupboard left open and the medications left out would make Ms. Durston realize the importance of following the medication protocol.

When asked how she travelled from the medication room to the lounge and laundry room without losing sight of the medication room, Ms. Spearing testified that she had walked with her back turned toward the medication room. She gave similar evidence regarding her trip to the second resident's room where she located Ms. Durston.

Ms. Spearing acknowledged that she could have handled the meeting with Ms. Durston differently. She indicated that she had never encountered a staff member requesting the attendance of another staff member at an one-on-one meeting before.

Ms. Spearing did not agree with the suggestion that Ms. Durston did not have enough information regarding the incident to enable her to show remorse or demonstrate responsibility for the matter.

Ms. Spearing thought that Ms. Durston's request to have Jean present in the meeting was overreacting. She indicated that she wanted to have a productive meeting with Ms. Durston and that she was optimistic about its outcome.

Ms. Spearing wanted to discuss the matter with Ms. Durston in order to have her own confidence in Ms. Durston's abilities restored. She wanted Ms. Durston to acknowledge the problem and accept responsibility for the error.

**(B) Orvina Black**

Ms. Black is secretary of the board of the Employer and chairperson of the management committee. She described the efforts of the local community to prevent the building that was formerly the Oxbow Union Hospital from being torn down, and the efforts to convert the structure into a level I and II personal care home. Ms. Black credited the many hours of volunteer time and the generosity of local citizens in financial terms for the success of the Employer.

Ms. Black's role in this matter centres on her meetings with Ms. Spearing on June 4, 1997. Ms. Black recalled Ms. Spearing attending her home on that day in a very upset state. She relayed what Ms. Spearing had told her which, in essence, repeats the essential parts of Ms. Spearing's testimony. After establishing that Ms. Durston's shift would end at 3:00 pm, Ms. Black suggested to Ms. Spearing that she return to work immediately to speak with Ms. Durston. Ms. Black thought it was important to go back and meet with the staff member.

During the time that Ms. Spearing returned to work, Ms. Black opened the mail that Ms. Spearing had brought with her. The mail included a package from the Labour Relations Board which contained notice of the application for certification, a reply form, a statement of employment form and a document entitled "Questions Employers Ask." Ms. Black said that she read the documents carefully, particularly the last one.

Ms. Black testified that between 4:30 pm and 4:45 pm Ms. Spearing called to see if she had left her keys at Ms. Black's house. Ms. Spearing arrived at Ms. Black's house shortly after the phone call and they discussed the meeting between Ms. Spearing and Ms. Durston. Ms. Black's description of what Ms. Spearing told her happened accorded with what Ms. Spearing testified as described above. Ms. Black indicated that Ms. Spearing had decided to terminate Ms. Durston. She indicated that Ms. Spearing said she was very disappointed in Ms. Durston; that she had no response from her concerning the medication problem; that she could not have Ms. Durston not discuss it, and that she had no alternative but to fire Ms. Durston. Ms. Black stated that she agreed with Ms. Spearing's assessment. She did inform Ms. Spearing about the package of information that had been received from the Labour Relations Board and she discussed with Ms. Spearing the implications of firing someone during an

organizing campaign. Ms. Black indicated that they thought they would likely be charged with an unfair labour practice but they still felt they should do what they would have done in any event, which was to fire Ms. Durston.

Ms. Black also recalled Ms. Spearing's telephone conversation with Mr. Holmes. She testified that she was present in Ms. Spearing's office when Ms. Spearing was just ending the telephone call. According to Ms. Black, Ms. Spearing burst into tears after she completed the telephone call and said that Mr. Holmes had been trying to get Ms. Spearing to admit that she had fired Ms. Durston for union activity.

In response to questions posed by the Chairperson, Ms. Black stated that she had heard rumours on the streets of Oxbow that the staff were forming a union. She indicated that she became aware of this while speaking with a friend she happened to meet on the street. According to Ms. Black, the news about the organizing drive was public knowledge in Oxbow. Ms. Black said she then discussed the issue with Ms. Spearing. She agreed that the information about the organizing drive and her discussion with Ms. Spearing occurred before June 4, 1997.

## Conflicts in the Evidence

There are three essential conflicts in the evidence before the Board:

(1) whether Ms. Spearing raised the question of the Union in her meeting with Ms. Brock on June 2, 1997;

(2) the medication incident on June 4, 1997. Ms. Spearing reported that she was unable to locate Ms. Durston for 40 minutes. Ms. Durston testified that between 1:30 pm and 2:00 pm, she was in the medication room on three occasions;

(3) the meeting of June 4, 1997 between Ms. Spearing and Ms. Durston. Did Ms. Durston leave the room and refuse to meeting with Ms. Spearing or did Ms. Spearing leave the room after Ms. Durston requested a witness to the meeting?

**June 2, 1997 Meeting between Lorraine Brock and Donalda Spearing:**

On the first question, the Board is satisfied that Ms. Brock's version of the meeting between her and Ms. Spearing more likely represents what actually occurred. Ms. Brock's testimony is consistent with Ms. Black's evidence that the rumours of the staff joining a union was well known in the community before June 4, 1997 and that she had spoken with Ms. Spearing concerning the Union prior to June 4, 1997.

Ms. Brock's description of the concerns that Ms. Spearing relayed to her regarding the Union during the June 2, 1997 conversation are similar to concerns expressed by Ms. Spearing in her testimony before this Board. That is, she was concerned that the residents would be unable to afford the fee increases that may result from unionization.

Ms. Brock's testimony is also consistent with Ms. Durston's evidence to the extent that both testified that Ms. Brock told Ms. Durston on June 2, 1997 that the Employer was aware of the Union. Ms. Brock and Ms. Durston's evidence does not coincide with respect to the time that this conversation took place, Ms. Brock having indicated that it took place around 11:30 am and Ms. Durston recalling that it took place prior to the start of her shift at 6:45 am. This discrepancy is more consistent with failed memories on the part of one or the other witness. Certainly, Ms. Durston's conduct after June 2, 1997 and her peculiar behaviour on June 4, 1997 are consistent with her fear of being fired for having organized the Union.

There was some suggestion in the cross-examination of Ms. Brock and the examination of Ms. Spearing, that Ms. Brock may have an axe to grind with Ms. Spearing, thus making her testimony less than reliable. This conclusion was reached based on the meeting that occurred between Ms. Spearing and Ms. Brock at Ms. Brock's home after June 4, 1997 when Ms. Brock confronted Ms. Spearing concerning remarks she was reported to have made regarding Ms. Brock's work performance. Having watched Ms. Brock testify and observed her during the evidence of Ms. Spearing, we found her to be a credible and straightforward witness. She has no particular interest in the outcome of this matter as she is no longer employed with the Employer. It did not appear to the Board that she was acting in a manner to "get even" with Ms. Spearing for past events.

Given Ms. Black's testimony that news of the Union was "on the street" in Oxbow before June 4, 1997 and that she had discussed the Union with Ms. Spearing, we find Ms. Spearing understated her awareness of the Union organizing campaign and understated her reaction to the Union campaign. Ms. Brock testified that Ms. Spearing was quite upset when she discussed the Union drive on June 2, 1997. This testimony is also more in keeping with Ms. Spearing's admitted concerns with the financial ability of residents to pay higher rates to accommodate a union agreement.

We find that Ms. Spearing, in her conversation with Ms. Brock on June 2, 1997, discussed the Union's campaign, reacted to it, suggested she had concerns for residents, and speculated as to who were the ring leaders of the Union's campaign. We accept Ms. Brock's testimony with respect to these matters.

**The Medication Incident on June 4, 1997**

Ms. Durston testified that she was in the medication room on three occasions between 1:30 pm and 2:00 pm on June 4, 1997. She stated that she went to the medication room around 1:30 pm to obtain the daily and weekly medication supply for the resident who was leaving for the wedding. Second, she stated that she returned to the medication room around 1:45 pm to obtain the chart of the second resident on whom she attended with the nurse. Finally, she reported attending at the medication room shortly before 2:00 pm to obtain medication that had to be administered to another resident at that time. Given the allegation that the Employer is making, that is, that Ms. Durston left the medication cupboard open and the medications on top of the countertop, it is unlikely that Ms. Durston's recollection of her movements to and from the medication room would be intentionally overstated. Ms. Durston did admit that June 4, 1997 was a "busy" day and she did not specifically recall if she locked the medication cupboard or left the medications out as alleged by Ms. Spearing.

Ms. Spearing testified that she returned to work at 1:25 pm and searched for Ms. Durston for 40 minutes without success until she located her in the second resident's room with the nurse.

The Board does not find Ms. Spearing's evidence with respect to spending 40 minutes in her search for Ms. Durston credible. The Villa is currently a 15 bed institution with nine rooms in the south wing and

six rooms in the north wing. From the drawings of the building submitted in evidence by the Employer, it is obvious that the facility is not a large one and at best, one can imagine it taking a matter of few minutes to walk from one end of the wards to the other.

Ms. Durston's evidence does substantiate Ms. Spearing's claim that she found Ms. Durston in the second resident's room but other than her own statements, there is nothing to corroborate independently her evidence that she looked for 40 minutes for Ms. Durston. The nurse was not called as a witness, nor was the recreation director from whom Ms. Spearing finally learned the likely whereabouts of Ms. Durston. Both of these witnesses may have provided useful information on the events of June 4, 1997.

Ms. Spearing claimed that she recalled the time spent looking for Ms. Durston because she is used to working on a tight time schedule and is frequently looking at her watch. On other occasions, however, she could not recall the day that events occurred, for instance, the date and time of her telephone conversation with Mr. Holmes.

Perhaps the time spent by Ms. Spearing was shorter than 40 minutes; perhaps Ms. Durston's recollection of the time of her visits to the medication room were in error as well. It may well be possible that their paths did not cross while the medication was out and the medication door open. It is not possible to tell at this point what actually did occur but the Board is in doubt as to the accuracy of Ms. Spearing's versions of the events and prefers to accept the evidence of Ms. Durston regarding her attendances on the medication room and the series of events that occurred between 1:30 pm and 2:00 pm on June 4, 1997.

At the same time, the Board has no reason to doubt Ms. Spearing's testimony that she came across the medication room in the state of disarray as described earlier. Ms. Durston found the shift to be busy; she indicated that she "grabbed" the medication for the resident who was leaving for the wedding and went to assist the home care nurse in assessing the resident; she was obviously concerned for the resident's health and in ensuring that the resident and her family were properly prepared for the trip. Ms. Durston had been working alone for four shifts and was stressed by the events of the week, including the Union's organizing drive and the knowledge that the Employer was now aware of the drive. She may not have been as focused on her work as she should have been. She did not recall if she had put the daily

medication away and locked the cupboard or if she had left it open. The Board accepts Ms. Spearing's testimony that the medication cupboard was unlocked, the keys were left in the lock and the daily medications tray was left on the cupboard.

**The Meeting of June 4, 1997 between Ms. Spearing and Ms. Durston:**

Ms. Durston indicated in her testimony that after hearing that Ms. Spearing wanted to raise questions with her concerning medication, she asked Ms. Spearing to allow Jean to attend the meeting. By Ms. Durston's own evidence, she got up and left the room in order to call Jean to attend the meeting. Ms. Durston then returned to the lounge and sat down. According to her, Ms. Spearing paused for a moment and then got up and left the room.

Ms. Spearing's testimony was similar with respect to Ms. Durston's requests for a witness during the meeting. However, it differs in one serious respect - she indicated that Ms. Durston, not her, left the meeting first, based on Ms. Spearing's refusal to allow Jean to attend the meeting. In her notes that she indicated were made at the time of the incident, Ms. Spearing recorded:

> *When Susan entered the room, I was already seated. She left the door open when she entered and when I got up to close the door, she told me that she wanted Jean at the meeting as well. I told her that it wasn't necessary and closed the door. I explained that I wanted to discuss the fact that the meds had been left out on the counter for at least forty minutes. I said that this is a concern and that we (the staff) have discussed over and over. Susan then rose from her chair and said, "I refuse to discuss anything with you without a witness." and left the room.*

In her evidence Ms. Black testified that Ms. Spearing relayed the same story to her when she attended at Ms. Black's house later in the day on June 4, 1997.

Jean was not called as a witness to testify as to those portions of the June 4, 1997 incident that she may have witnessed.

The Board finds the evidence of Ms. Durston overall to be more generally credible than the evidence of Ms. Spearing, as we have outlined to some extent above. Ms. Spearing's recollection of events

appeared lacking in some instances and exaggerated in others. This observation leads the Board to conclude that Ms. Durston's recollection of the meeting of June 4, 1997 is likely more accurate than Ms. Spearing. Ms. Spearing's written account of the meeting was very similar to Ms. Durston's testimony except that it stopped at Ms. Durston leaving the meeting. Ms. Durston denied that she refused to meet with Ms. Spearing but she did acknowledge that she left the meeting to go find Jean. She then returned to the meeting with Ms. Spearing. The Board accepts Ms. Durston's testimony regarding the June 4, 1997 meeting.

**The Unfair Labour Practice Allegation**

The Union alleges that Ms. Durston was fired because she was engaged in union activity contrary to the provisions contained in s. 11(1)(e) of the *Act* which provides:

> *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;*

Section 11(1)(e) of the *Act* requires the Union to initially establish that the employee in question was engaged in union activity prior to the termination of her employment before the onus of proving that the employee was terminated for good and sufficient cause is transferred to the Employer. In the present instance, Ms. Durston was the Union's chief organizer in the workplace; her role was known through the circulation of the letter from Mr. Holmes to the employees which was addressed to Ms. Durston and identified her as the Union contact. The Employer was aware of the organizing drive before the events of June 4, 1997 took place and Ms. Spearing speculated to Ms. Brock that Ms. Durston and Jean were the likely organizers. The Union has clearly established that Ms. Durston was engaged in union activity and that the fact that a union was being organized was known to the Employer.

In assessing the Employer's reasons for terminating the employment of an employee during a union organizing campaign, the Board considers whether the decision to terminate was motivated solely or partially by anti-union reasons: see *Saskatchewan Union of Nurses v. Jubilee Lodge Inc.*, [1990] Summer Sask. Labour Rep. 70; LRB File Nos. 021-90 to 023-90.

A probationary employee is entitled to the same protection under the *Act* as a permanent employee. A probationary employee cannot be dismissed at will if the dismissal is motivated by anti-union reasons: see *Dairy and Produce Workers v. Dairy Producers' Co-operative Ltd.*, [1990] Spring Sask. Labour Rep. 60, LRB File No. 180-89; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Holiday Inn Ltd.*, [1989] Spring Sask. Labour Rep. 64, LRB File No. 222-88.

The Board is not particularly concerned with whether or not the Employer is able to establish that the employee was fired for "just cause" as would an arbitration board acting under the provisions of a collective agreement. However, the lack of coherent and cogent reason for the dismissal may lead the Board to conclude that the decision was motivated by anti-union sentiments: see *The Newspaper Guild v. The Leader-Post, A Division of Armadale Co. Ltd.*, [1994] 1st Quarter Sask. Labour Rep. 242; LRB File Nos. 251-93 to 253-93.

Even if the Employer can establish that there is a coherent and credible reason for the dismissal, those reasons will only provide a defence to a claim made under s. 11(1)(e) of the *Act* if it is unaccompanied

by anti-union sentiments: see *United Steelworkers of America v. Eisbrenner Pontiac Asuna Buick Cadillac GMC Limited*, [1992] 3rd Quarter Sask. Labour Rep. 135, LRB File Nos. 161-92 to 163-92. In *Doyle and Mitchell v. Yellowknife District Hospital Society*, 77 CLLC 458, the Canada Labour Relations Board expressed a similar policy as follows, at 461:

> *At any point in time employers can often point to past or recent employee behaviour or inadequacies to justify a termination of or a change in the terms of the [employment] relationship... It is a rare experience for labour boards to hear an employer who cannot advance a justification for his act ... They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his rights under s. 110(1). To give substance to the policy of the legislation and properly protect the employee's rights, an employer must not be permitted to achieve a discriminatory objective because he has coupled his discriminatory motive with other non-discriminatory reasons for his act.*

The Board will consider a broad range of factors in assessing the Employer's decision to terminate an employee during an organizing campaign. 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 stated, at 125:

> *In determining whether an employer is able to meet the difficult test of showing that activity in support of a trade union was not a factor in a decision to terminate the employment an employee, the Board has considered a wide range of factors, including the involvement of the employee in trade union activity, the knowledge the employer had of the activity, other conduct of the employer which might betray anti-union feeling, the timing of the decision, and other various considerations.*

In our view, in this case the Employer had cogent and coherent reasons for dismissing Ms. Durston based on her breach of the medication protocol. As a probationary employee, the standard of misconduct that is required to justify the termination of employment, particularly when it relates to the ability to perform the job in question, is low. Ms. Durston was aware of the proper procedure but in this instance, she did not follow it. This is compounded by her request to have Jean attend her meeting with Ms. Spearing, which frustrated Ms. Spearing. Ms. Durston was understandably worried about being terminated for her union activity, but this in itself does not permit the employee to insist on a change in the normal methods of discussing performance issues between the employer and employee.

Having said this, however, we are also convinced that anti-union reasons played a role in Ms. Spearing's decision to dismiss Ms. Durston. Ms. Durston was the main union organizer; she was fired shortly after the Employer became aware of the union activity. Ms. Spearing suspected that Ms. Durston was one of the main instigators of the Union and reacted in an upset fashion when discussing the possibility of unionization of the Employer. She also understated both her knowledge of the union activity and her reaction to it in her testimony. We have found that her evidence in respect to the medication incident was to some extent exaggerated, at least in the amount of time she spent trying to locate Ms. Durston. In another context, we are of the view that Ms. Spearing may not have reacted to the medication incident with such concern. This is consistent with Ms. Brock's testimony that other instances of lapses in medication protocol had occurred without consequence. In the context of the Union's campaign, however, the incident took on different dimensions for both Ms. Spearing and Ms. Durston and both are at fault for escalating the situation beyond what it might otherwise have been.

The main object of the *Act* is stated in its long title: "An Act respecting Trade Unions and the right of employees to organize in trade unions of their own choosing for the purpose of bargaining collectively with their employers." The Board's role is to ensure that the employees of the Employer enjoy their rights unimpeded by employer conduct that may discourage employees from union activity. One of the more powerful tools an employer can use to discourage union activity is to fire the key organizer. Although in the present case, Ms. Durston's conduct provided coherent reasons to support the termination, we do not find that the Employer's decision was free of anti-union sentiments. As a result, the Board will issue an order finding the Employer in breach of s. 11(1)(e) of the *Act* and requiring the Employer to reinstate Ms. Durston to her position with full payment of monetary loss. The Employer shall discuss Ms. Durston's return to work with the Union, which shall occur no later than seven days from the date of the Order. The Board will remain seized of the matter pending final settlement of the monetary loss.

Counsel for the Employer asked the Board, if it intended to reinstate Ms. Durston, to reinstate her as a probationary employee. The Board makes no ruling with respect to this matter as it is one that should properly be the subject of collective bargaining between the parties.

# SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and REGINA EXHIBITION ASSOCIATION LIMITED AND DOUG CRESSMAN, Respondents

LRB File No. 266-97; September 2, 1997
Chairperson, Gwen Gray; Members: Don Bell and Carolyn Jones

For the Applicant: Larry Kowalchuk
For the Respondent: Larry Seiferling, Q.C.

**Remedy - Technological change - Board decides to not issue interim order where parties have agreed to expedited hearing.**

***The Trade Union Act*, ss. 5.3 and 42.**

## REASONS FOR DECISION

**Gwen Gray, Chairperson:** The Union applied for an interim order to require the Employer to comply with the technological change provisions contained in s. 43 of *The Trade Union Act*, R.S.S. 1978, c. T-17 in relation to the permanent closure of the Silver Sage Casino in Regina. A review of the affidavit material filed on the application indicated that the Employer has provided the Union with 103 days advance notice of the closure, and has indicated its willingness to enter into negotiations with the Union with respect to any matter the Union wishes to discuss in relation to the closure. The Employer, however, has refused to acknowledge that the closure is a technological change within the meaning of s. 43 of the *Act*. The contentious issue for the Employer is whether a permanent closure of a business falls within the definition of technological change. The parties are in the process of negotiating a revised collective agreement and are in an "open period" under s. 34 of the *Act*.

At a hearing of the matter the Board questioned whether, in the circumstances of this case where the Employer appears to have complied with the spirit of s. 43 of the *Act* by providing notice and signifying its willingness to enter into negotiations with the Union with respect to the closure, an interim order was needed to prevent harm to the Union. At the conclusion of the hearing, the parties agreed to expedite a hearing of the final application which will be heard by the Board on September 5, 1997. As a result, the

Board declines to make any interim order and will dispose of the matter as a final application after hearing evidence and argument on behalf of both parties.

# SASKATCHEWAN JOINT BOARD RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and PEPSI-COLA CANADA BEVERAGES (WEST) LTD., Respondent

LRB File Nos. 172-97 to 187-97; September 4, 1997
Chairperson: Gwen Gray; Members: Don Bell and Carolyn Jones

For the Applicant: Larry Kowalchuk
For the Respondent: Melissa Brunsdon and Rob Garden, Q.C.

**Reference of dispute - Application pending - Board finds that employer and union withdrew lock-out and strike notices unequivocally in cooling off agreement - Applications are currently pending before the Board on dismissal applications - Union and employer prohibited from engaging in further strike or lock-out activity until applications are no longer pending before Board.**

***The Trade Union Act*, ss. 11(1)(j), 11(2)(b) and 24.**

## REASONS FOR DECISION

**Gwen Gray, Chairperson:** The Union commenced a strike against the Employer and the Employer locked-out its employees on May 15, 1997. Subsequently, the Union applied to the Board to have the lock-out declared a violation of *The Trade Union Act*, R.S.S. 1978, c. T-17 due to the fact that the Employer had employed replacement workers during the lock-out. An interim Order was issued by the Board on July 7, 1997 ordering the Employer to cease the lock-out activity. A final hearing of this application, which is designated as LRB File No. 166-97, was heard by the Board on August 20, 1997. Reasons for decision will be issued shortly.

The Board granted an interim Order in LRB File No. 166-97 (the "lock-out" application) as a result in part of an undertaking made by counsel for the Union. In the decision which is cited as *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Pepsi-Cola Canada Beverages (West) Ltd.*, [1997] Sask. L.R.B.R. 433, LRB File Nos. 166-97, 172-97 to 187-97, the Board stated as follows, at 446:

> *Counsel for the Union conceded that the Employer would be able to reinstate a proper lock-out in very short order, and we take this to be a statement that the Union waives*

> *any possible right to allege that a reinstituted lock-out would constitute an unfair labour practice under s. 11(1)(j) of the Act. We wish to make it clear that we regard this as an undertaking which has affected our view of the matter, and that we see it as precluding the Union from bringing any such application.*

After the Board issued its interim Order, the parties negotiated a 60 day cooling off agreement with the assistance of Mr. Fred Cuddington, mediator. The cooling off agreement, which was contained in a letter from the mediator to the parties, reads in part as follows:

> *Further to our telephone conversations, this is to confirm my appointment as mediator in the above dispute and to confirm your agreement to the following terms for the mediation process:*
>
> *1.* . . .
>
> *2.* *In order to facilitate this process, the parties agree to a cessation of all strike and lock-out activity. This "cooling off" period will be in place for sixty (60) days commencing July 9. The Union agrees to withdraw in writing its strike notice and the Company agrees to withdraw its lock-out notice. Both parties will take whatever steps are necessary to suspend the court orders to provide for the return to work.*

On August 25, 1997, the Board commenced hearings dealing with applications arising out of the dismissal of five union members during the lock-out (designated as LRB File Nos. 172-97 to 187-97 - the "dismissal" applications). At the conclusion of the third day of these hearings, both parties asked the Board to decide if the dismissal applications constitute "applications pending" within the meaning of ss. 11(1)(j) and 11(2)(b) of the *Act*. In particular, the parties wanted to clarify their respective abilities to commence a strike or lock-out once the cooling off period comes to an end.

It is evident that the hearing of the dismissal applications will not be completed before the expiry of the cooling off period. In this regard, the parties estimate that an additional 14 days of hearing time will be required to complete the matter.

The Board has jurisdiction under s. 24 of the *Act* to hear and determine disputes referred to it by the agreement of a trade union and an employer.

Sections 11(1)(j) and 11(2)(b) of the *Act* 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:*
>
> > *(j) to declare or cause a lock-out or to make or threaten any change in wages, hours, conditions or tenure of employment, benefits or privileges while any application is pending before the board or any matter is pending before a board of conciliation or special mediator appointed under this Act;*
>
> *11(2) It shall be an unfair labour practice for any employee, trade union or any other person:*
>
> > *(b) to commence to take part in or persuade an employee to take part in a strike while an application is pending before the board or any matter is pending before a board of conciliation or special mediator appointed under this Act;*

Counsel for the Employer indicated that the Employer took no position with respect to the application of ss. 11(1)(j) and 11(2)(b) of the *Act*. However, counsel went on to argue that if the provisions are read literally, they cast a wide net. Counsel urged the Board to "read down" the provisions in order to permit the commencement of strikes or lock-outs when applications relating to the strike or lock-out were before the Board. Counsel referred to *Retail, Wholesale and Department Store Union v. Westfair Foods Ltd., operating a Division of Western Grocers*, [1993] 2nd Quarter Sask. Labour Rep. 100, LRB File Nos. 007-93 & 011-93. In that instance, the Board held that its reservation of a remedial issue at the conclusion of the hearing of an application did not render the application an "application pending" within the meaning of s. 11(1)(j) of the *Act*.

Counsel for the Union argued that the Union has not withdrawn its original strike notice which was served on the Employer on May 13, 1997. He argued that the Union merely suspended the operation of the strike notice for the cooling off period. In this regard, he referred the Board to the letter delivered to the Employer from the Union on the signing of the cooling off agreement. The letter stated as follows:

> *This will confirm that the Union is formally withdrawing its strike notice for the period not to exceed 60 days commencing July 9, 1997.*

Counsel argued that the cooling off agreement did not require the parties to withdraw the strike or lock-out notice unequivocally. If the strike notice was merely suspended then s. 11(2)(b) of the *Act* would not prevent the Union from engaging in strike activity on the expiry of the cooling off period.

Initially, counsel for the Union argued that the Employer was prohibited from engaging in lock-out activity because it had not complied with the lock-out provisions in the *Act* or with the agreement set forth in the cooling off period, that is, that it did not provide the Union with notice in writing of the suspension of its lock-out notice. However, during the argument, counsel for the Union indicated that his client was not concerned if the Employer could or could not engage in a lock-out.

The purpose of ss. 11(1)(j) and 11(2)(b) of the *Act* has been commented on by this Board in *Retail, Wholesale and Department Store Union v. Westfair Foods Ltd. and its Western Grocers Division*, [1993] 1st Quarter Sask. Labour Rep. 57, LRB File No. 007-93 (interim Order) as follows, at 59:

> *In our opinion, the objective underlying s. 11(1)(j) of the Act is to prevent one party attempting to subvert the access of the other party to the Labour Relations Board by raising the stakes when an application is being brought there. The decision to take action of the dramatic nature referred to in s. 11(1)(j) of the Act might have the effect of inhibiting a trade union in its presentation of a case, of coercing it into withdrawing an application or of affecting unfairly the way issues are addressed before the Board.*

It should be noted that ss. 11(1)(j) and 11(2)(b) of the *Act* were included before the *Act* prohibited strikes or lock-outs during the term of a collective agreement. Section 44 of the *Act* which prohibits strikes and lock-outs during the life of a collective agreement was added in 1983 and survived the 1994 amendments. Prior to its inclusion in the *Act*, the parties were free to engage in strike or lock-out activity as a method of resolving both collective bargaining disputes and disputes involving the interpretation and application of the collective agreement. In this context, ss. 11(1)(j) and 11(2)(b) of the *Act* can be seen to play a role in containing disputes by not allowing a dispute that has been referred to the Board to become the subject matter of industrial action, although such action otherwise may be permitted under the *Act*. The prohibition contained in ss. 11(1)(j) and 11(2)(b) of the *Act* not only prevents the parties from upping the ante in a dispute that is already before the Board, as was suggested

as its purpose in the *Westfair Foods Ltd.* case, *supra*, it also prevents certain issues from causing unnecessary or protracted industrial action.

The first three days of hearings on the dismissal applications lead the Board to suspect that a resolution of the dismissal applications is essential in order to enable the parties to arrive at a negotiated settlement of their contract dispute. It would be difficult to imagine the Union being able to conclude a collective agreement if the applications remain outstanding. From the Employer's point of view, its action in dismissing five employees during a lock-out speaks to the seriousness with which it views the matter. From the Board's perspective, permitting the parties to engage in strike or lock-out activity during the time that the dismissal applications are pending would invite the parties to engage in unnecessary and protracted industrial action that has little hope of bearing fruit in the form of a new collective agreement.

It remains for the Board to decide if the Employer and the Union have withdrawn the strike and lock-out notices which were served by each party prior to the Board commencing to hear the dismissal applications. An application is not pending before the Board until it is first heard by a properly constituted panel of the Board. If the parties have not withdrawn the strike and lock-out notices, then they remain free to engage in strike and lock-out activity without violating s. 11(1)(j) or s. 11(2)(b) of the *Act*.

It is our view that both parties clearly agreed in the cooling off agreement to withdraw their respective notices. The wording of the agreement quoted above is not consistent with the interpretation urged on us by counsel for the Union that the parties intended to suspend the strike and lock-out notices only for the duration of the cooling off period thereby enabling them at the conclusion of the cooling off period to resume strike or lock-out activity without further notice. It is our view that the parties agreed to withdraw their strike and lock-out notices in unequivocal terms. At the conclusion of the cooling off period, it clearly would be open to either party to serve a new notice of strike of lock-out in accordance with ss. 11(6) and (7) of the *Act*. However, as a result of having unequivocally withdrawn their strike and lock-out notices, the parties are now in a position that attracts the strike and lock-out bans contained in ss. 11(1)(j) and 11(2)(b) of the *Act* as the dismissal applications in all likelihood will be pending before the Board at the time the cooling off period expires.

Having found as a fact that the Employer and Union withdrew their respective strike and lock-out notices by having agreed to do so in the cooling off agreement, the Board rules that s. 11(1)(j) of the *Act* prevents the Employer from declaring or causing a lock-out while the dismissal applications are pending before this Board. Similarly, the Board rules that s. 11(2)(b) of the *Act* prevents the Union from commencing to take part in or to persuade employees to take part in a strike while the dismissal applications are pending before the Board. An Order will be issued accordingly.

It is our view that the undertaking given by the Union in the application for an interim Order on LRB File 166-97 does not apply to prohibit the Union from bringing an application under s. 11(1)(j) of the *Act* should the Employer seek to lock-out the employees while the dismissal applications are pending. That undertaking was given prior to the signing of the cooling off agreement wherein the Employer voluntarily withdrew its lock-out notice in the terms set forth above. The undertaking permitted the Employer to give notice of lock-out even though the lock-out application was pending before the Board. This undertaking was extracted from the Union because it was seeking an interim Order, as opposed to a final Order, with respect to whether the Employer had complied with the *Act* when it engaged in lock-out activity.

The Board will leave open the question of whether, if it reserves on any issues at the conclusion of hearing the dismissal applications, the application remains pending and will consider the implications of the Board's decision in the *Westfair Foods Ltd.* case, *supra*. This matter can be addressed at the conclusion of the hearings on the dismissal applications, if required.

**SASKATCHEWAN GOVERNMENT EMPLOYEES' UNION, Applicant and SASKATCHEWAN ASSOCIATION OF HEALTH-CARE ORGANIZATIONS, SERVICE EMPLOYEES' INTERNATIONAL UNION, CANADIAN UNION OF PUBLIC EMPLOYEES AND SASKATCHEWAN UNION OF NURSES, Respondents**

LRB File No. 129-97; September 29, 1997
Chairperson: Gwen Gray; Members: Hugh Wagner and Ken Hutchinson

For the Applicant SGEU: Rick Engel
For the Respondent SAHO: Bonnie Reid, Brian Morgan
For the Respondent SEIU: Ted Koskie, George Wall
For the Respondent CUPE: Ted Koskie, Andrew Huculak
For the Respondent SUN: Cathy Zuck, Beverley Crossman
For the Interested Party HSAS: Alice Robert

**Health care - Transition of LTD plan - Board finalizes terms of LTD plan to be implemented for former members of SGEU who were transferred to other unions by *The Health Labour Relations Reorganization (Commissioner) Regulations*.**

**Health care - Transition of LTD plan - Board will require employer to meet and discuss recurring disability claims of former members of SGEU with SGEU before approving leave of absence for recurring disability.**

**Jurisdiction - Statutory power - Board has statutory jurisdiction under s. 10(2) of *The Health Labour Relations Reorganization Act* to determine terms of LTD plan for former members of SGEU.**

**Practice and procedure - Natural justice - Board members who acted as Board agents to assist in resolution of interest dispute can continue to sit as Board members to resolve final terms of LTD plan - Board members have expertise in area of dispute and could advise Board on most appropriate transitional arrangement for LTD plan - Use of Board members as Board agents in dispute does not give rise to conflict where Board is resolving interest, as opposed to rights, dispute.**

***The Health Labour Relations Reorganization Act*, s. 10(2).**

## REASONS FOR DECISION

**Gwen Gray, Chairperson:** On May 28, 1997, the Board made an interim Order with respect to the continuation of a LTD plan for former members of the Saskatchewan Government Employees' Union ("SGEU") who were transferred to Saskatchewan Union of Nurses ("SUN"), Canadian Union of Public Employees ("CUPE") or Service Employees' International Union ("SEIU") as a result of the implementation of *The Health Labour Relations Reorganization Act*, S.S. 1996, c. H-0.03, and *The Health Labour Relations Reorganization (Commissioner) Regulations*, R.R.S. c. H-0.03 Reg 1 ("Dorsey Regulations"). In its interim Order, the Board requested that the parties return to the Board to make representations with respect to the payment of premium costs of the LTD plan imposed for former SGEU members. SGEU also requested that the Board amend its interim Order by deleting one provision. These Reasons deal with both issues.

### Preliminary Objection

At the outset of this hearing, the Saskatchewan Association of Health-Care Organizations ("SAHO"), which was designated under the Dorsey Regulations as the representative employers' organization for health-care employers, raised three preliminary objections to the jurisdiction of this Board. First, it argued that the Board lacked any jurisdiction to make an order with respect to the SGEU LTD plan under *The Health Labour Relations Reorganization Act* and the Dorsey Regulations. Second, SAHO challenged the composition of the Board panel on the grounds that Mr. Hutchinson and Mr. Wagner were no longer impartial members given their involvement as Board agents in attempting to find a resolution to the LTD problem. Third, SAHO argued that SGEU's request to delete paragraph 2.1.4 from the May 28, 1997 Order is an improper attempt to amend a contract of insurance between SGEU and its members, or former members.

First, we will address the Board's jurisdiction to hear and determine this dispute. In a hearing conducted by the Board on March 14, 1997 on matters arising from the Dorsey Regulations, SGEU raised the problem of ensuring continued long term disability coverage for former SGEU members. Prior to the Dorsey Regulations, SGEU members were covered by a union sponsored LTD plan that

was not part of a collective agreement. Coverage under the plan was premised on membership in SGEU. To facilitate a transition of its members to other Unions, SGEU agreed to continue coverage for its former members for a period of 60 days after the issuing of new certification Orders. This period was extended voluntarily by SGEU. In order to achieve an orderly transfer, SGEU requested that the Board appoint a Board agent to assist the parties to reach an agreement. The Board, in its Reasons issued March 20, 1997, responded to the request as follows:

> *After the other parties had an opportunity to consult, counsel for the Canadian Union of Public Employees (CUPE) indicated that SAHO and the other trade unions affected were in agreement with this proposal.*
>
> *Pursuant to this agreement, the Board has decided to appoint Mr. Hugh Wagner and Mr. Ken Hutchinson as agents of the Board on the following terms:*
>
> *1) Mr. Wagner and Mr. Hutchinson shall, during the period of 60 days following March 14, 1997, attempt to secure agreement among the parties on strategies or mechanisms for facilitating the transfer into new bargaining units of employees formerly represented by the SGEU who were covered by and/or contributing to the LTD plan administered by that trade union;*
>
> *2) At or before the end of the period, Mr. Wagner and Mr. Hutchinson shall report to the Board concerning their progress in assisting the parties to reach agreement; and*
>
> *3) The parties may, by agreement, refer any issues to the Board for determination in the course of this process. Mr. Wagner and Mr. Hutchinson may also refer issues to the Board, with notice to the parties.*

In its interim Order dated May 28, 1997, the Board reviewed the report filed by Mr. Wagner and Mr. Hutchinson and ordered that it be implemented as an interim measure pending final resolution of one matter relating to the cost-sharing of LTD premiums.

In the Board's opinion, SGEU took a responsible position with respect to its former members by raising the LTD issues with the Board. The matter is clearly one that arises out of the reorganization of labour relations in the health sector and it was not addressed in the Dorsey Regulations. Although the SGEU LTD plan was not contained in any collective agreement, it was a key benefit enjoyed by SGEU members and was inherently connected to their work and their continued membership in SGEU. In this situation, if every party adopted a strict view of their obligations, SGEU members,

who were transferred from SGEU to other Unions as a result of the Dorsey Regulations, would stand to lose their LTD coverage. SGEU could rely on the strict wording of its LTD plan to conclude that it had no legal obligation to continue coverage for non-members; SAHO and the receiving Unions could rely on s. 9 of the Dorsey Regulations to conclude that, because the SGEU plan was not contained in a collective agreement, they had no obligation to provide an alternate plan. This result was unacceptable to all parties who appeared before the Board. As a result, the only issues to be resolved were the source and type of coverage former SGEU members would receive in the interim period between the time they were transferred out of SGEU until SUN, SEIU and CUPE could negotiate other LTD coverage for this group of employees.

It is this type of problem arising from the re-organization of bargaining units that *The Health Labour Relations Reorganization Act* appears to have contemplated when it granted the Board broad powers in s. 10(2) to deal with matters arising from the reorganization that were not addressed in the Regulations. Section 10(2) of *The Health Labour Relations Reorganization Act* provides as follows:

> *10(2) Subject to section 8, the board may make any order that it considers appropriate respecting any matter arising out of the reorganization of labour relations between health sector employers and employees that is not addressed in the regulations.*

In its March 20, 1997 and May 28, 1997 Orders, the Board stepped in at the request of SGEU, with the concurrence of all other parties, to provide assistance and guidance in order to facilitate a resolution of the matter. The Board is of the view that it had authority under s. 10(2), as quoted above, to conduct the initial hearing and issue its two Orders and that it continues to have jurisdiction to hear and determine the matter until it is finally resolved.

With respect to the objection concerning the constitution of the panel on this hearing, the Board panel consisted of Mr. Hutchinson and Mr. Wagner, both of whom had sat on the earlier panel and both of whom acted as Board agents to assist in the resolution of the matter. Mr. Hutchinson and Mr. Wagner are both experienced negotiators and have extensive knowledge of long term disability plans. They provided the Board with the expertise needed to undertake an assessment of the LTD options available and the costs of those options. The Board was not dealing with an assessment of

"rights" in the sense of having to interpret and apply the provisions of a statute or regulation to the facts before them. The process embarked on by the Board was more akin to an interest dispute in which the Board is asked to determine which of two bargaining positions provides the best resolution to a bargaining dispute. In this sense, the process used in the present application was similar to the procedures used by the Board on an application for first collective agreement where a Board agent is appointed to report back to the Board on the state of bargaining, the need for Board intervention and if Board intervention is required, the form that intervention should take. When making such "interest" determinations, it is prudent for the Board to have access to advice from Board agents or Board members who are knowledgeable in the field and whose assessment of the reasonableness of various bargaining positions is valued. In our view, the use of the Board members as Board agents does not disqualify them from continuing to sit on the application where their expertise, judgment and knowledge of the LTD plan options is critical in order to assist the Board to reach a sound decision.

The final objection raised by SAHO relates to the propriety of SGEU's request to amend the Order made by the Board in its May 28, 1997 ruling by deleting paragraph 2.1.4 in order to permit SGEU to revise its plan documents to reduce the period of liability for recurring disability. In our view, this objection is not strictly a preliminary objection but is an argument on the merits of the application that will be dealt with below.

**Analysis and Decision**

As indicated above, on May 28, 1997 the Board issued an Order with respect to the transition of long term disability coverage for employees who formerly were members of SGEU and who now have been included in bargaining units assigned to SUN, SEIU and CUPE as a result of the Dorsey Regulations. In its decision, the Board left open one issue with respect to recommendation 2.1.1 which states as follows:

> *2.1.1. That they will contribute to SAHO the same monthly premium in percentage terms as are contributed by other members of the plan. The contribution shall be by payroll deduction.*

There was disagreement among the parties as to the proper interpretation of this recommendation. The Unions interpreted the provision as requiring transferring members of SGEU to pay the same premiums as are charged to other employee members of the SAHO plan, i.e. .88% of payroll cost shared on a 50-50 basis with their employer. Each affected employee would pay .44% of her or his salary to the SAHO plan. The Unions pointed out that other employees of health sector employers, including those who participate in the SAHO LTD plan, share on a 50:50 basis the premium costs of LTD plans with their employees. Cost-sharing of the premiums for former SGEU members would be more equitable vis-a-vis other employees in their bargaining units.

SAHO, on the other hand, assumed that the entire cost of the premium would be borne by the employee. It came to this conclusion based on its understanding of the current status quo. Employees who formerly were members of SGEU participated in a union sponsored plan with no participation from their employer. To support the SGEU plan, these employees contributed 1.25% of their pay to the plan. A hiatus in LTD coverage occurred for members of SGEU when they were required by the Dorsey Regulations to become members of SUN, SEIU and CUPE. In the agreement reached with the assistance of Board members Wagner and Hutchinson, SAHO was prepared to offer SGEU members coverage under the SAHO plan on the condition that SGEU members pay the entire cost of the premium, i.e. .88% of pay. In this way, the funding of LTD coverage for former SGEU members would be accomplished without cost to the health sector employers whose budgets had not included the costs of sharing the LTD premiums for former SGEU members. SAHO was not of the view that its proposal created any inequities. Counsel for SAHO referred the Board to s. 9 of the Dorsey Regulations which maintains the current collective agreements until they are renegotiated by each union and SAHO. Counsel pointed out that until the employees in each bargaining unit are brought under one collective agreement, many differences will exist between employees. SAHO proposed that the most tenable position with respect to the treatment of former SGEU members is to keep their overall employment terms as close as possible to those that they enjoyed as SGEU members. In this regard, their contribution toward the cost of the SAHO LTD plan is roughly equal to the contribution made to the SGEU plan.

With respect to this issue, the Board holds that the costs of the LTD premiums for former SGEU members who are now part of the SAHO LTD plan will be borne by the employees until such time as SUN, CUPE, SEIU and SAHO negotiate a different arrangement. The Board agrees with SAHO that this arrangement continues the status quo as best as can be done in the circumstances given the need to find a new plan for former SGEU members at a cost that is comparable to the SGEU plan. The cost-sharing arrangements that are sought by the receiving Unions can continue to be pressed for in negotiations and no doubt these arrangements will be achieved when former SGEU members are brought into plans that now cover the majority of members in the bargaining units. However, that transition has financial implications for both the employers and for the receiving plans which may impact on other aspects of collective bargaining. The Board views its Order as providing the least disruptive temporary resolution to the problem of continued LTD coverage for former SGEU members and will leave any improvements to this basic arrangement to be negotiated by the parties.

A second issue arose on this application with respect to SGEU's liability for recurrent disability. In the interim Order on this application, the Board directed SGEU in paragraph 2.1.4 to retain responsibility for recurring disability for a six month period from the date the employee recommences employment. SGEU now asks paragraph 2.1.4 be removed from the document. The period of coverage for recurrent disability would then be set by the plan document itself. SGEU argues that it is disadvantaged in the management of its plan because it is no longer able to use its clout as bargaining agent to facilitate the rehabilitation and integration of disabled members back into the workplace. SGEU wants to limit its on-going liability in this area.

SAHO argues that SGEU would be reneging on its agreement if it withdrew the six month recurring provision. It also argued that SGEU would be amending its contract with the former members improperly. SAHO was fearful that the change in policy on the part of the SGEU plan would burden its plan by adding to it the cost of recurring disability for former SGEU members during the period from 60 days to six months from the date of return to work.

The Board is sympathetic to the position SGEU finds itself in with regard to problem of policing the rehabilitation program for LTD claimants when it no longer represents these members in the workplace. To address this problem, the Board will require SAHO, on behalf of all health sector

employers, prior to approving a leave of absence for a former SGEU employee for recurring disability that will be charged to the SGEU plan, to meet with SGEU officials to discuss the various options for the employee in question, including any rehabilitation options. The Union now representing the employee will be notified of the request for meeting by the Employer and will be entitled to attend. Any party may refer a dispute that may arise from this direction to the Board for determination. Co-operation among the Unions and SAHO with respect to the rehabilitation issue should alleviate the need for a reduction in the time allowed for claiming recurring disability under the SGEU plan. SGEU's request for the elimination of paragraph 2.1.4 is therefore denied at this time.

A third issue concerns the transfer dates for persons formerly included in the SGEU LTD plan. It appears that this issue has been resolved by the parties agreeing that former SGEU members in the provider unit are covered by the SAHO plan for all disabilities arising after May 31, 1997; former SGEU members in the nurse bargaining unit are covered by the SAHO plan for all disabilities occurring after June 30, 1997; and former SGEU members in the practitioner union will be covered by the SAHO plan for all disabilities occurring after September 28, 1997.

The Board will amend 2.1.1 of its Order to read as follows:

> *2.1.1 That they will contribute to SAHO the same monthly premium in percentage terms as is required for each member of the SAHO general long term disability income plan. The premium will be paid in its entirety by the employee and shall be made by payroll deduction; and*

The Board will add new clause 2.1.7 to its Order as follows:

> *2.1.7 That prior to approving a leave of absence for recurring disability to a former SGEU member where the recurring disability will be charged to the SGEU LTD plan, SAHO, on behalf of the health care employers, will meet with SGEU officials to discuss the various options for the employee in question, including any rehabilitation options.*

In all other respects, the Order of the Board issued on May 28, 1997 is confirmed as the final order and will issue accordingly.

**SASKATCHEWAN UNION OF NURSES, Applicant and PRINCE ALBERT DISTRICT HEALTH BOARD, HOLY FAMILY HOSPITAL, PRINCE ALBERT AND MONT ST. JOSEPH HOME INC., Respondents**

LRB File No. 078-97; September 30, 1997
Chairperson: Gwen Gray; Members: Brenda Cuthbert and Bruce McDonald

For the Applicant: Cathy Zuck
For the Respondent: Bonnie Reid

**Health care - Reference of dispute - Managerial exclusions - Board holds that *The Health Labour Relations Reorganization (Commissioner) Regulations* permit Board to determine managerial and confidential exclusions of affiliated health sector employers.**

**Reference of dispute - Managerial exclusions - Board holds that schedule of disputed positions attached to certification Order issued pursuant to *The Health Labour Relations Reorganization (Commissioner) Regulations* and employer letter indicating disputed positions will be referred to Board for determination by agreement of parties constitute valid reference of dispute under s. 24 of *The Trade Union Act.***

**Practice and procedure - Board agent - Appointment of Board agent to expedite resolution of exclusions to certification Orders is voluntary process - Parties are not required to continue meeting with Board agent if they no longer agree to process.**

***The Health Labour Relations Reorganization Act*, ss. 8 and 10.**

***The Health Labour Relations Reorganization (Commissioner) Regulations*, ss. 3(1), 3(2), 6, 8(1) and 14(4).**

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

## REASONS FOR DECISION

### Background

**Gwen Gray, Chairperson:** On March 14, 1997, the Union was certified to represent all nurses employed by the Prince Albert District Health Board, Holy Family Hospital, Prince Albert and Mont St.

Joseph Home Inc. in accordance with ss. 3 and 8 of *The Health Labour Relations Reorganization (Commissioner) Regulations*, R.R.S. c. H-0.03 Reg 1 (the "*Dorsey Regulations*").

The certification Order provided as follows:

> *THE LABOUR RELATIONS BOARD, pursuant to Sections 5(a), (b), (c), (j) and 42 of The Trade Union Act, Sections 10 and 11 of The Health Labour Relations Reorganization Act, and Sections 2, 3, 6, 7(1), 8(1) and 12(1) of The Health Labour Relations Reorganization (Commissioner) Regulations, HEREBY ORDERS:*
>
> *(a) that all nurses employed by Prince Albert District Health Board, Holy Family Hospital, Prince Albert and Mont St. Joseph Home Inc., except those classifications listed in Schedule A, B, C and D attached hereto, are an appropriate unit of employees for the purpose of bargaining collectively;*
>
> *(b) that Saskatchewan Union of Nurses, a trade union within the meaning of The Trade Union Act, represents a majority of employees in the appropriate unit of employees set forth in paragraph (a);*
>
> *(c) Prince Albert District Health Board, Holy Family Hospital, Prince Albert and Mont St. Joseph Home Inc., the employers, to bargain collectively with the trade union set forth in paragraph (b), with respect to the appropriate unit of employees set out in paragraph (a) through the representative employers' organization, The Saskatchewan Health-Care Association, commonly known as the Saskatchewan Association of Health Organizations (SAHO);*
>
> *(d) "nurse" means an employee who:*
>
> > *(i) is a registered or graduate nurse registered pursuant to The Registered Nurses Act, 1988 or a registered or graduate psychiatric nurse registered pursuant to The Registered Psychiatric Nurses Act; and*
> >
> > *(ii) is functioning as a registered or graduate nurse or a registered or graduate psychiatric nurse.*
>
> LABOUR RELATIONS BOARD
>
> _____
> Beth Bilson,
> Chairperson

SCHEDULE A

Classifications of persons employed by Prince Albert District Health Board who are excluded from nurses bargaining unit:

- Director of Patient Care Services
- Director of Rural Health Services
- Nursing Unit Manager in each of the following areas:
  Pineview Terrace, Birchview Nursing Home, Kinistino Hospital, Kinistino Jubilee Lodge, Victoria Union Hospital (7) and Herb Bassett Home (2)
- Coordinator C.S.R.

SCHEDULE B

Classifications of persons employed by Holy Family Hospital, Prince Albert who are excluded from nurses bargaining unit:

- Executive Director
- Director of Nursing

SCHEDULE C

Classifications of persons employed by Mont St. Joseph Home Inc. who are excluded from nurses bargaining unit:

- Administrator
- Director of Care

SCHEDULE D

The status of positions for these classifications of persons employed by the employers named in paragraph (c) of this Order remain in dispute and will be determined by the Labour Relations Board:

Prince Albert District Health Board:
- Nursing Supervisors
- Coordinator - Adult Day Care Centre
- Director of Rehabilitation
- Coordinator Special Projects
- Director of Residential Services
- Director of Inpatient Services
- Coordinator of Home Care
- Team Managers, Home Care

- Research Officers MDS RUGS
- Public Health Nurse III

Holy Family Hospital, Prince Albert:
- Administrative Supervisors
- Nursing Unit Managers/Administrative Supervisors
- Nursing Unit Managers

Mont St. Joseph Home Inc.:
- Care Managers

In order to provide background to this application, we will outline the process that occurred when certification orders were issued in accordance with the provisions of the *Dorsey Regulations*.

Section 3 of the *Dorsey Regulations* provided for multi-employer bargaining units consisting of all nurses working for a health district and all the unionized affiliated employers located in that district. "Affiliated employer" is a term defined in *The Health Districts Act*, R.S.S. 1978, c. H-0.01. Primarily, the term "affiliate" refers to institutions and services that receive funding from a health district but which are not owned or operated by the district. "Affiliates" are designated in Regulations passed pursuant to *The Health Districts Act.*

The Labour Relations Board was required to issue new certification Orders consistent with the *Dorsey Regulations* within 60 days after the *Dorsey Regulations* came into force. In order to accomplish this task within the time frame allowed, the Board asked the parties to review the existing certification Orders and provide the Board with a list of the managerial and confidential exclusions that should be carried forward into the new certification Orders. This task was complicated by the fact that many certification Orders were not up-to-date in recording exclusions and by the fact that the new certification Orders would merge different bargaining units into one new unit. In order to meet the 60 day time frame, the parties asked the Board to issue certification Orders in the form recorded above; that is, the exclusions that could be agreed upon for each health district and affiliated employer were recorded in schedules to the Orders and the exclusions that eluded agreement would be recorded in a separate schedule to be dealt with later by the Board.

In a letter to the Board dated February 4, 1997, the employers' representative organization, Saskatchewan Association of Health Organizations (SAHO), set out the agreement reached between the parties with respect to how the disputed exclusions would be resolved. The letter stated:

> *In a meeting with the Saskatchewan Union of Nurses, Service Employees International Union and Canadian Union of Public Employees, we agreed to the following process to identify the list of exclusions for the certification orders which will be issued pursuant to regulation 8(1) namely:*
>
> - *The employer will make every effort to identify regulation 6 exclusions for each designated unit on or before February 17, 1997.*
> - *The lists of exclusions will be provided to the unions on or before February 17, 1997.*
> - *By February 24, 1997, disputed exclusions will be identified.*
> - *Thereafter, the exclusion list for each unit will be referred to the Saskatchewan Labour Relations Board with a request that the Saskatchewan Labour Relations Board issue the certification order pursuant to regulation 8(1). The order will set out the exclusions so listed.*
> - *Those positions in the exclusion list that remain in dispute will be jointly referred to the Saskatchewan Labour Relations Board for final determination as soon as possible after the certification order is issued.*

Prior to issuing the Orders, the Board was asked to provide an interpretative ruling with respect to the status of certain non-managerial employees of affiliated employers. The particular issue focused on by the Board was whether non-managerial, non-union employees of affiliates would be "swept" into the new bargaining units. In *Health Labour Reorganization (Commissioner) Regulations - Interpretative Ruling #1*, [1997] Sask. L.R.B.R. 147, LRB File No. 152-97, the Board held in part as follows at 152:

> *There are a number of positions whose inclusion in any of the new bargaining units is in dispute on the grounds that they may be managerial or confidential in nature. It is highly unlikely that all of the issues related to these positions will have been resolved by the time the Board issues the Orders pursuant to The Regulations. As with any description of a bargaining unit, the issue of whether the incumbents of certain positions are "employees" within the meaning of s. 2(f) of the Act may be addressed at any time by joint submission of the parties under s. 24 of the Act. It is anticipated that any outstanding issues of this nature will be put before the Board in the period after the Orders are issued. The employees we have been describing in this interpretive*

> *ruling are not "in dispute" in the same sense, and it would be misleading to suggest, in the Orders or elsewhere, that their inclusion or exclusion depends on a review of whether they are "employees" within the meaning of the Act. The persons whose positions we have been discussing here are, by definition, "employees" in that sense.*

Following the issuing of the Orders, the Union and SAHO requested the Board to appoint a Board agent for the purpose of assisting the parties to resolve the outstanding disputed positions through an informal process. With the agreement of both parties, the Board appointed Hugh Wagner as Board agent. During the course of their meetings with the Board agent, the parties disagreed over the scope of the matters to be resolved in the informal process and ultimately, in the formal process, should the matter be referred back to the Board. The Union insisted that all managerial and confidential disputes in both the health district and affiliated employers should be resolved through the Board agent process, failing which they should return to the Board. SAHO took the position that only those positions that are in dispute in the health districts at the time the Order was issued are to be resolved through this process.

The issue for the Board to determine is whether the managerial exclusions related to the affiliated employers listed in the certification Order are included in the reference of dispute process that the parties have agreed to apply in order to finalize the new certification Orders.

**Relevant Statutory Provisions**

***The Health Labour Relations Reorganization Act*, S.S. 1996, c. H-0.03.**

> *8. Until the expiry of three years from the date that the regulations made by the commissioner are filed with the Registrar of Regulations, the board shall not make an order pursuant to clause 5(a) or (b) of The Trade Union Act that amends, varies or rescinds those regulations.*
>
> *10(1) For the purpose of carrying out the intent of this Act, in addition to the powers conferred on it by this Act and the regulations made by the commissioner, the board has all the powers conferred on it by The Trade Union Act.*
>
> *(2) Subject to section 8, the board may make any order that it considers appropriate respecting any matter arising out of the reorganization of labour relations between health sector employers and employees that is not addressed in the regulations.*

*(3) An order made by the board pursuant to this Act or the regulations is enforceable in the same manner as a board order.*

*(4) There is no appeal from an order or decision of the board pursuant to this Act, and the proceedings, orders and decisions of the board are not reviewable by any court of law or by any certiorari, mandamus, prohibition, injunction or other proceeding.*

***The Health Labour Relations Reorganization (Commissioner) Regulations.***

*3(1) The appropriate units prescribed in this section are prescribed as the appropriate units for bargaining collectively between health sector employers and nurses.*

*(2) Subject to subsections (4) and (5), for each health district, there is to be one multi-employer appropriate unit respecting nurses composed of:*

*(a) all nurses who are employed by the district health board; and*

*(b) all nurses who:*

*(i) are employed by a health sector employer listed in Table A that operates a facility within the boundaries of that health district; and*

*(ii) on the day these regulations come into force, were represented by a trade union for the purposes of bargaining collectively.*

*6. Subject to any order of the board made pursuant to the Act, these regulations or The Trade Union Act and unless otherwise included pursuant to clauses 3(2)(a), 4(2)(a) and 5(2)(a), all positions that were excluded, by an order of the board or by any agreement between a trade union and an employer, from the scope of any former appropriate unit continue to be excluded from any of the appropriate units.*

*8(1) Subject to sections (2), within 60 days after the day that these regulations come into force, the board shall issue orders that are consistent with these regulations pursuant to:*

*(a) clause 5(a) of The Trade Union Act, for the purposes of sections 3 to 5; and*

*(b) clause 5(b) of The Trade Union Act, for the purposes of subsection 7(1).*

*14(4) The board shall decide all questions concerning who is an employee that are not resolved by a health sector employer and a trade union that represents health sector employees.*

***The Trade Union Act*, R.S.S. 1978, c. T-17.**

*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.*

*24. A trade union representing the majority of employees in a unit of employees may enter into an agreement with an employer to refer a dispute or disputes or a class of disputes to the board and the board shall hear and determine any dispute referred to it by either party pursuant to such agreement and the finding of the board shall be final and conclusive and shall in regard to all matters within the legislative jurisdiction of the Legislature of Saskatchewan be binding upon the parties and enforceable as an order the board made in accordance with this Act.*

**Union's Argument**

Counsel for the Union argued that the new certification Order contained an agreed list of disputed positions in both the health district and affiliates. SAHO's letter to the Board, which is quoted above, made it clear that all parties agreed to refer the disputed exclusions to the Labour Relations Board as is

permitted by s. 24 of *The Trade Union Act*. Counsel for the Union argued that s. 6 of the *Dorsey Regulations* does not prohibit the Board from determining whether certain positions are in or out of scope because it expressly contemplates the Board making an alternate order when it states "subject to any order of the board made pursuant to the *Act*, these Regulations or *The Trade Union Act*". Counsel noted that this application is not dealing with the issue of non-unionized employees of affiliated employers, which is the primary issue dealt with by the Board in *Interpretative Ruling #1*, *supra*. Counsel argued that *Interpretative Ruling #1*, *supra* does not say that the issue of exclusions from affiliated employers cannot be dealt with in this process; it only held that non-unionized employees of affiliated employers would not be brought into the scope of a certification Order unless the Union filed majority support among the members of that group.

**Employer's Argument**

Counsel for SAHO argued that s. 8 of *The Health Labour Relations Reorganization Act* (the "*Health Act*"), prevents the Board, for a period of three years, from making any order under s. 5(a) or (b) of *The Trade Union Act* that amends, varies or rescinds the regulations. In s. 10 of the *Health Act*, the Board's general power to make incidental orders arising out of matters not dealt with in the *Dorsey Regulations* is made expressly subject to the prohibition contained in s. 8 of *The Trade Union Act*. Section 11 of the *Health Act* confirms the primacy of the *Health Act* over *The Trade Union Act*. Turning to the *Dorsey Regulations*, counsel argued that they do not permit a non-unionized employee of an affiliate to be swept into a bargaining unit without proof of support similar to what is required when a union wishes to add on a group of employees to an existing certification order. This was the effect of *Interpretative Ruling #1*, *supra*. Technically, then, until they are "organized", non-unionized employees of affiliated employers remain listed as exclusions from the bargaining units. The list of exclusions, therefore, that should be included in the new certification Orders in relation to the affiliated employers are those that existed in the previous certification Order, as it had been amended by agreement between the parties. Any disputes concerning such positions must be referred to the Board by way of a new application. Counsel also noted that the process entered into with the Board agent is a voluntary process, not a compulsory one.

**Analysis**

We agree with counsel for SAHO that the Board agent process is voluntary. If the parties cannot agree on the scope of the issues that are before the Board agent, they are free to jettison the process and have the matter returned to the Board for a formal hearing. The Board made its members available to health care employers and health care unions in order to help expedite resolution of the disputed "ins and outs" that were not resolved prior to the issuing of the new certification Orders. The process has, by and large, been successful. However, it is totally voluntary and depends on the continued agreement of both parties in order for it to work. The Board will not require the parties to continue in the process if there is disagreement over the scope of its assigned tasks.

With respect to the application before the Board, a reading of Schedule D of the certification Order quoted above along with SAHO's letter to the Board of February 4, 1997, leads the Board to conclude that all of the positions listed in Schedule D are included in the reference of dispute made to the Board pursuant to s. 24 of *The Trade Union Act*. The Board has authority by virtue of the agreement entered into between the parties to hear and determine the status of all positions listed in Schedule D.

The question remains as to whether the *Dorsey Regulations* and the *Health Act* permit the Board to make the determination that the parties have referred to it under s. 24 of *The Trade Union Act*.

In our view, the wording of s. 6 of the *Dorsey Regulations* quoted above, particularly its opening phrase "subject to any order of the board", grants the Board the power to determine on-going exclusion/inclusion issues in relation to the certification Orders issued pursuant to s. 8 of the *Dorsey Regulations*. Even though the Board is prohibited by s. 8 of the *Health Act* from making other amendments to Orders for a period of three years, an interpretation of the provision as permitting the Board to amend the managerial and confidential exclusions makes sense given the current degree of re-organization that is occurring in this sector. The consolidation of health services into health districts and the consolidation of bargaining units has altered and continues to alter the management structure in all areas of health care. In this context, it would seem peculiar to freeze the managerial exclusions during the period of greatest reorganization. Sections 6 and 14(4) of the *Dorsey Regulations*, which are

quoted above, clearly contemplate that the Board will continue to supervise this aspect of the new certification Orders.

In our view, s. 8 of the *Health Act* does not affect the Board's ability to amend the excluded positions. Section 8 of the *Health Act* prevents the Board from issuing an order that "amends, varies or rescinds the regulations." The *Dorsey Regulations* do not have the effect of freezing the managerial exclusions, rather the *Dorsey Regulations* leave the matter open to the Board for determination. As such, an Order of the Board amending the exclusions does not offend the prohibition contained in s. 8 of the *Health Act*.

It seems to the Board that, in relation to the affiliated employers, there are three categories of excluded positions:

(1) positions that were excluded in a previous Board order or in the collective agreement between the parties because of the managerial or confidential functions attached to the positions;

(2) positions that were excluded in a previous Board order or in the collective agreement between the parties for reasons other than their managerial or confidential functions;

(3) positions which the Employer now alleges to be managerial or confidential in nature because of their functions but which are not currently excluded by Board order or collective agreement.

*Interpretative Ruling #1*, *supra* related to the second category of employees. The Board held that if a Union wanted to include such a group of employees in its bargaining unit, it must treat the group as an "add-on" and file support from a majority of the members of the group. This process was followed by various unions when adding non-managerial, excluded employees to other health sector bargaining units. Otherwise, the excluded employees will remain excluded from the bargaining unit under s. 3(2)(b) of the *Dorsey Regulations* as they were not "represented by a trade union for the purposes of bargaining collectively" on the date the *Dorsey Regulations* came into force.

Positions that fall within the first and third category raise the traditional scope issue of whether a person is an "employee" within the meaning of s. 2(f)(i) of *The Trade Union Act*. In our view, the Board is not prevented by *Interpretative Ruling #1*, *supra* from determining if these positions should or should not be excluded from a certification Order. These positions do not fall within the same category as the non-managerial, non-unionized employees who continue to be excluded as a result of s. 3(2)(b) of the *Dorsey Regulations*. It is our view that ss. 6 and 14(4) of the *Dorsey Regulations* give the Board authority to amend or vary certification Orders issued under s. 8 of the *Dorsey Regulations* in order to address the exclusion of disputed positions.

The Board therefore rules as follows:

(1) that all positions listed in Schedule D to the certification Order issued by the Board on March 14, 1997, have been referred to the Board by agreement between the parties under s. 24 of *The Trade Union Act* for final determination of their status as employees within the meaning of s. 2(f)(i) of *The Trade Union Act*, and the Board is authorized to make this determination by ss. 6 and 14(4) of the *Dorsey Regulations*;

(2) that, if it is the Employers' position that any of the positions listed in Schedule D to the certification Order are positions that were excluded in a previous Board order or in the collective agreement between the parties for reasons other than its managerial or confidential functions, the Employers may identify such positions to the Union and may make representations to the Board related to the continued exclusion of such non-managerial, non-unionized positions;

(3) that, by agreement, the Union and the Employers may refer the status of all positions listed in Schedule D to the certification Order to the Board agent; failing such agreement, either party may request the Board to convene a hearing to determine the status of all or some of the positions listed in Schedule D to the certification Order.

## SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and PEPSI-COLA CANADA BEVERAGES (WEST) LTD., Respondent

LRB File No. 166-97; October 10, 1997
Chairperson: Gwen Gray; Members: Bruce McDonald, Gerry Caudle, Brenda Cuthbert and Bob Cunningham

For the Applicant: Larry Kowalchuk
For the Respondent: Melissa Brunsdon
For the Saskatchewan Federation of Labour: Gary Bainbridge
For the Saskatchewan Chamber of Commerce: Larry Seiferling, Q.C.

**Lock-out - Replacement workers - Board concludes that definition of lock-out does not preclude employer from using replacement workers during lock-out.**

**Practice and procedure - Interim order - Board will reconsider arguments made on interim application where significant provision of *The Trade Union Act* was overlooked on interim application.**

***The Trade Union Act*, ss. 2(j.2), 2(k.1), 3, 12 and 46(4).**

### REASONS FOR DECISION

#### Background

**Gwen Gray, Chairperson:** The Union applied to the Board for a declaration that a lock-out instituted by the Employer on May 15, 1997 was illegal and/or contrary to *The Trade Union Act*, R.S.S. 1978, c. T-17, and for an order allowing the workers to return to work and to engage in strike activities. In its application, designated as LRB File No. 166-97, the Union alleged that the Employer had committed an unfair labour practice or violation of ss. 2(j.2), 2(k.1), 3 and 12 of the *Act*.

On June 2, 1997 the Union filed a further unfair labour practice, designated as LRB File No. 172-97, which alleged that the Employer had violated ss. 3, 11(1)(a) and 12 of the *Act* by terminating the employment of five bargaining unit members, including members of the bargaining committee, and by contacting Union members and encouraging them to cross the picket line.

At the same time, the Union filed applications seeking reinstatement of the five employees whose employment was terminated. These applications are designated LRB File Nos: 173-97 to 187-97.

On June 18, 1997, the Union applied to the Board for interim Orders with respect to LRB File No. 166-97 (the "lock-out" application) and LRB File Nos. 172-97 to 187-97 (the "termination" applications).

The Board heard the interim application on June 25, 1997 and issued Reasons for Decision and an interim Order on July 7, 1997. In the interim Order, the Board found that the Union had established a strong *prima facie* case in relation to its argument that the Employer had engaged in a form of lock-out that was not contemplated by the definition of lock-out contained in s. 2(j.2) of the *Act*. The Board concluded that irreparable harm would ensue to the Union if an interim Order was not issued and accordingly granted an interim Order requiring the Employer to terminate the current lock-out of its employees.

On the interim application, the Union advanced the argument that the definition of lock-out in s. 2(j.2) of the *Act* precludes an employer from using replacement workers to perform any work previously performed by the locked-out employees. In the interim Reasons for Decision (*Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Pepsi-Cola Canada Beverages (West) Ltd.*, [1997] Sask. L.R.B.R. 433, LRB File Nos: 166-97 & 172-97 to 187-97 the Board agreed with the rationale proposed by the Union. The Board stated, at 443:

> *... One of the implications of this, in our view, is that if an employer chooses to "refuse to continue to employ employees," those employees cannot be replaced by other employees.*

The labour relations policy underlying the Board's interpretation of s. 2(j.2) of the *Act* balanced the cost of industrial action for union members against the cost of such action taken by an employer. The Board commented, at 442:

> *It is our view that what is permitted in the context of a lock-out is somewhat different. We would begin with the proposition that, just as a trade union which calls employees out on strike - and the employees who support the strike - must be prepared to incur a financial cost for choosing industrial action as a means of exerting pressure on an*

> *employer, an employer who chooses lock-out as an instrument for exerting pressure on the trade union must be prepared to incur a cost of some kind.*

Subsequent to the interim Order, the Employer applied to the Court of Queen's Bench for an application for judicial review seeking to set aside the interim Order on a number of grounds. This application was heard by the Court on August 12, 1997 before Wright J.

In arguments filed with the Court, counsel for the Board requested that the matter be returned to the Board in order to permit the Board to hear full arguments on the final, as opposed to the interim, application. The Board made this request in light of the fact that it learned after the interim Order was issued that counsel for the Employer and the Union had not addressed the significance of a provision contained in s. 46(4) of the *Act* which discusses the return to work of striking and locked-out employees at the conclusion of a strike or lock-out.

The failure to deal with s. 46(4) of the *Act* was an oversight on the part of both counsel appearing before the Board. However, it must be understood that the application brought by the Union was an interim application where it is not expected that all matters of law will be settled in a final manner. Where relief in the nature of an interlocutory order is sought, the Board's task is to determine if the applicant has made out a *prima facie* case that requires the Board to intervene on the basis of the likelihood of irreparable harm to the applicant, or failing irreparable harm, a balance of convenience favouring the applicant. As a matter of practice, where it has issued an interim Order, the Board will convene a hearing of the main application at the request of either party as soon as practical. On most occasions, the Board schedules a hearing of the main application at the time of granting the interim Order. This is done to prevent any injustice that may occasion to the Respondent should the interim Order not be sustained on the final application. The Board does not view an interim Order as providing final relief by default and it expects the parties to proceed to a hearing on the main application as soon as possible.

To continue the chronology of this application, after the Employer's application was argued in the Court of Queen's Bench, the Union's request for a final hearing on the lock-out application was granted by the Board. The matter was heard by a five member panel of the Board on August 20, 1997. During the

hearing, the Board received a copy of the Fiat issued by Mr. Justice Wright which kindly deferred the Court proceedings pending a final determination by this Board.

The Board granted intervenor status to the Saskatchewan Chamber of Commerce and the Saskatchewan Federation of Labour as the interpretation to be placed on the *Act* was viewed by both organizations as being a matter of significant interest to their members.

These Reasons for Decision deal with the lock-out application only. The matters raised in the remaining applications are left to be heard and determined at another time. The parties agreed that the evidence before the Board on the lock-out application would consist of the same material and affidavits filed with the request for the interim Order. No other evidence was presented at the hearing. In addition, the question of remedies was reserved in the event the Board upheld the unfair labour practice complaint.

**Facts**

The factual background of the current dispute were summarized accurately by the Board in its interim Reasons for Decision as follows, at 433 and 434:

> *The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union was designated by this Board in a certification Order dated April 22, 1994, as the bargaining agent for a unit of employees of Pepsi-Cola Canada Beverages (West) Ltd.*
>
> *The parties began negotiations towards a revised collective agreement in April of 1997. On May 13, 1997, the Union served the Employer with a strike notice. The Employer responded by serving a notice of lock-out.*
>
> *On May 15, 1997, the Union commenced industrial action in the form of a work slowdown and study session on the premises of the warehouse operated by the Employer. According to the material filed by the Employer, representatives of the Employer requested the employees to leave the premises a number of times, and ultimately circulated a written notice asking employees to depart. A number of employees occupied the warehouse, and were successful in persuading management representatives and security personnel to leave the building.*
>
> *On May 16, 1997, the Employer obtained a temporary injunction in the Court of Queen's Bench for Saskatchewan, directing the employees to vacate the building.*

*Following this, the employees engaged in a variety of other activities, including picketing at the warehouse and other locations. On May 22, 1997, the Employer sought further injunctive relief from the Court of Queen's Bench, and obtained orders restraining employees from certain conduct. The conduct which was prohibited included picketing at locations other than the warehouse, picketing on the premises of the Employer, obstructing entrance or egress from the premises, watching and besetting, and harassment or intimidation of employees of the company.*

*On May 26, 1997, the Employer terminated the employment of five employees who they described as the "ringleaders" of activity which was regarded by the Employer as illegal and as providing grounds for dismissal.*

*On June 23, 1997, the parties appeared once more in the Court of Queen's Bench to make representations respecting an application for a contempt order by the Employer. In their application, the Employer alleged that certain employees continued to act in violation of the earlier injunctive order. The parties consented to the issuing of an order restraining the conduct of a list of named employees.*

**Relevant Statutory Provisions**

The relevant statutory provisions under consideration in this application include the definition of lock-out contained in ss. 2(j.2) and 46(4) of the *Act*:

*2. In this Act:*

*(j.2) **"lock-out"** means one or more of the following actions taken by an employer for the purpose of compelling employees to agree to terms and conditions of employment:*

*(i) the closing of all or part of a place of employment;*

*(ii) a suspension of work;*

*(iii) a refusal to continue to employ employees;*

*46(4) Striking or locked-out employees are entitled to displace any persons who were hired to perform the work of striking or locked-out employees during the strike or lock-out.*

**Union's Argument**

Counsel for the Union urged the Board to apply the interpretative rules set down by the Board in *United Automobile, Aerospace and Agricultural Implement Workers of America v. Boyd Chevrolet Limited*, [1983] Apr. Sask. Labour Rep. 64, LRB File Nos. 457-82, 458-82, 488-82 & 489-82, where the Board made it clear that it would not sit on appeal of the Board's previous decisions simply because the membership of the Board had changed, as it has in the present application. In addition, counsel urged the Board to follow its ruling in the *Boyd Chevrolet* decision, *supra*, at 66, "to do more than to be receptive to constantly evolving legislation and to changes in the climate of industrial relations" but to "be receptive to constantly evolving legislation and to changes in the climate of industrial relations."

Counsel pointed out that the *Act* did not contain a definition of strike or lock-out until the amendments made to the *Act* by S.S. 1994, c. 47, s. 3. Prior to the 1994 amendments, the Board had defined the terms "strike" and "lock-out" in *Retail, Wholesale and Department Store Union, Local 454 v. Bi-Rite Drugs Ltd. et al.*, [1987] Mar. Sask. Labour Rep. 35, LRB File Nos. 293-86 & 294-86, as follows, at 41-42:

> *Section 11(6) of the Act applies to a strike, which the Board has frequently held may be defined as a concerted withdrawal of services or reduction of output by a group of employees with the purpose of compelling an employer to agree to terms and conditions of employment (see, for example, Willock Industries Ltd., 1980 2 CLRBR 423; Wascana Hospital, LRB File No. 324-82, Reasons dated November 1, 1982; Jessup and Hannah v. S.G.E.U., Sask. Labour Mthly. Rep., Vol. 37, No. 2, p. 48). That definition encompasses many different kinds of activities including, for example, a concerted refusal to work overtime, a concerted work to rule, booking off sick or being otherwise unavailable for assignments, or rotating withdrawals of service by groups of employees. This limited type of strike activity is becoming commonplace, particularly in larger bargaining units where a complete and continuous withdrawal of all services by all employees is impractical or impossible.*
>
> *Section 11(7) of the Act applies to a lock-out, which may be defined as the suspension of work by an employer or the refusal to employ a group of employees for the purpose of compelling a union as their bargaining representative to agree to terms and conditions of employment. Such action must take place during an industrial dispute. Just as a strike may take different forms, a lock-out need not necessarily be a complete closure of the entire workplace or a continuing refusal to permit all of the employees to work. It may legitimately include, for example, the suspension of only some work, the reduction of hours of some employees, or a refusal to permit a particular group of*

> *employees to work overtime. In addition to its right to lock-out employees, an employer is free to take measures designed to limit the disruptive effect of strike activity, such as the increased use of managerial personnel and non-striking employees.*

Counsel noted that the statutory definition of the term "strike" in s. 2(k.2) of the *Act* differs from the interpretation placed on the term by the Board in the *Bi-Rite Drugs* decision, *supra*, in that the statutory definition does not contain a purposive element, that is, the definition of "strike" does not require that the concerted activity take place for a specific purpose. In the *Bi-Rite Drugs* decision, *supra*, the Board specified the purposive element as attempting to "compel the employer to agree to terms and conditions of employment." Counsel argued that by inserting a statutory definition of the term "strike" in the *Act* the Legislature intended to overturn the Board's previous interpretation of what constituted a strike and no longer required that strike activity be restricted to concerted attempts to compel the employer to agree to Union demands in collective bargaining.

By contrast, Counsel pointed out that the statutory definition of "lock-out" in s. 2(j.2) of the *Act* contains a purposive element; that is, a lock-out must be conducted for the purpose of "compelling employees to agree to terms and conditions of employment." Counsel argued that the Board cannot expand the definition of lock-out to permit the employer to engage in any activity except as described in s. 2(j.2) of the *Act* and for the purpose stated in s. 2(j.2) of the *Act*.

Counsel also noted that in the *Bi-Rite Drugs* decision, *supra*, the Board did not contemplate the use of replacement workers by an employer who had locked-out its employees. The Board stated, at 42, "in addition to its right to lock-out employees, an employer is free to take measures designed to limit the disruptive effect of strike activity, such as the increased use of managerial personnel and non-striking employees."

Through the analysis of the previous cases, including *Retail, Wholesale and Department Store Union, Local 635 v. Weyburn Co-operative Association Ltd.*, [1989] Fall Sask. Labour Rep. 43, LRB File No. 232-88, and *Retail, Wholesale and Department Store Union v. Westfair Foods Ltd.*, [1993] 2nd Quarter Sask. Labour Rep. 100, LRB File Nos. 007-93 & 011-93, both of which dealt with the lawfulness of

lock-outs, counsel concluded that where the definition of "lock-out' is provided in the *Act*, the Board must judge an employer's lock-out activity against both components of the statutory definition, being the activity contemplated by the definition, and the purpose of the activity. Counsel argued that employers cannot engage in activity outside the three activities contemplated by s. 2(j.2) of the *Act*.

The activity complained of in the present instance was the hiring of replacement workers by the Employer. The Union argued that the use of replacement workers is not permissible activity because it does not fall within any one of the three branches in the definition of lock-out. In the Union's opinion, the activity of locking-out employees and hiring replacement workers does not result in "the closing of all or part of a place of employment", "a suspension of work" or "a refusal to continue to hire employees".

It was also argued that the Employer did not comply with a procedural requirement of lock-out which is contained in s. 11(7) of the *Act*. This provision states:

> *11(7) No employer may cause a lock-out unless:*
>
> *(a) he gives the union or union's agent at least 48 hours written notice of the date and time that the lock-out will commence; and*
>
> *(b) promptly, after the service of the notice, notifies the minister or his designate of the date and time that the lock-out will commence.*

The lock-out notice read:

> *Pepsi may lock-out in any manner permitted by law, but not limited to closing all or part of its place of employment, suspension of work or a refusal to continue to employ employees.*

The Union put forth the position that the Employer could not serve notice of lock-out that contained reference to activity that was not contemplated by the definition of lock-out contained in s. 2(j.2) of the *Act*. Counsel argued that the words "but not limited to" expressed an intention on the part of the Employer to engage in activity other than the activity sanctioned by the definition of lock-out in the *Act*. In this regard, the Union referred the Board to its decision in *Regina Board of Police Commissioners v.*

*Regina Police Associations Inc.*, [1994] 3rd Quarter Sask. Labour Rep. 235, LRB File No. 159-93, where the Board found the Union to be in violation of the strike vote provisions contained in s. 11(2)(d) of the *Act* by engaging in conduct that was not a legal form of strike action.

Counsel reserved argument on the interpretative impact of s. 46(4) of the *Act* for argument in reply.

**Employer's Argument**

Counsel for the Employer argued that the Board had no jurisdiction to decide if the lock-out complied with the *Act* because the Union did not allege a violation of any provision of the *Act* that would permit the Board to make an order against the Employer. In this regard, counsel noted that the Union alleged that the Employer violated ss. 2(j.2), 2(k.1), 3 and 12 of the *Act*, none of which create a substantive prohibition or offence. Sections 2(j.2) and 2(k.1) of the *Act* are set out above. Sections 3 and 12 of the *Act* read 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.*
>
> *12. No person shall take part in, aid, abet, counsel or procure any unfair labour practice or any violation of this Act.*

Counsel also argued that the interpretation placed on s. 2(j.2) of the *Act* by the Board in the interim Order was incorrect. According to counsel, the Board misinterpreted the phrase "to continue to employ employees" in three ways. First, the Board assumed that replacement workers are "employees" within the meaning of the *Act*. Counsel referred the Board to its earlier decision in *United Steelworkers of America v. Bird Machine Co. of Canada*, [1991] 1st Quarter Sask. Labour Rep. 39, LRB File No. 111-90, where the Board held that replacement workers lacked a community of interest with striking members of a bargaining unit and therefore were not part of the bargaining unit. Counsel argued that in its interim ruling the Board must have equated replacement workers with "employees".

Counsel also argued that the Board failed to consider the meaning of the words "to continue" as they are used in s. 2(j.2) of the *Act*. It was counsel's position that the words "to continue" limits the meaning of the word "employees" to those employees who are employed at the time of the lock-out. The goal of a lock-out is to put pressure on the employees in the bargaining unit in order to encourage them to agree to the employer's bargaining proposals. Such compulsion is only aimed at existing employees as they are the only ones who will benefit from the resulting collective agreement. Counsel also referred the Board to a decision of the Ontario Labour Relations Board in *Retail, Wholesale and Department Store Union et al. v. Humpty Dumpty Foods Limited*, [1977] July OLRB Rep. 401, where the Ontario Board stated in relation to the definition of lock-out, at 406:

> *. . . both the act and the motive must relate to those persons in the employ of the employer as of the date of the lock-out (i.e. "his employees").*

The last objection to the interim Order was that it failed to consider the interpretative implications of s. 46(4) of the *Act* which was cited earlier in these Reasons. Counsel argued that s. 46(4) of the *Act* clearly contemplates the use of replacement workers when it uses the phrase "striking or locked-out employees are entitled to displace any persons who were hired to perform the work of striking or locked-out employees." In order to give meaning to the words used in s. 46(4) of the *Act*, the Board must interpret the third branch of the definition of lock-out as not precluding the use of replacement workers.

In addition, counsel noted that s. 46(4) of the *Act* uses the word "persons" as opposed to employees. Counsel noted that the word "persons" was consistent with the Board's ruling in the *Bird Machine* decision, *supra*, where the Board ruled that replacement workers are not part of a union's bargaining unit.

The Board was also referred to the Minister's speech to the Legislative Assembly on the second reading of Bill No. 54 - An Act to Amend The Trade Union Act which took place on April 14, 1994. In the speech, Hon. Minister Ned Shillington, then Minister of Labour, indicated that the Government had withdrawn its proposals for amending the *Act* to prohibit the hiring of replacement workers. Counsel noted that legislation creating a ban on the use of replacement workers has been in force in Quebec, Ontario and British Columbia. The language used by legislators in these jurisdictions to create the ban

has been extensive and dealt with many of the contingencies that can arise where such a ban is instituted. Counsel argued that in the absence of such detailed provisions in the *Act*, and in light of the adoption of the 1994 amendments to the *Act*, it is unlikely that the Legislature intended the addition of the definition of "lock-out" to result in a ban on replacement workers during a lock-out.

Counsel pointed out the anomaly that would result from a ban on the use of replacement workers only during a lock-out. In the case of a strike in the form of a work slowdown or other on the job action, the Employer would be free to hire replacement workers to work side-by-side with striking workers. In the Employer's opinion, such a consequence would engender more violence and resentment among striking workers that does the use of replacement workers during a lock-out.

With respect to the sufficiency of the lock-out notice, counsel argued that the phrase "but not limited to" as was used in the lock-out notice was inconsequential because the Employer did not exceed the bounds of permissible activity in the conduct of the lock-out. Counsel also argued that the words "but not limited to" could also refer to more specific activities than are listed in the definition of lock-out.

**Chamber of Commerce's Argument**

Counsel for the Chamber reminded the Board that its task is to determine legislative intent. Counsel argued that from a consideration of the law as it existed prior to the 1994 amendments and the amendments that were enacted in 1994, it is clear that the Legislature did not intend to ban replacement workers during a lock-out. Counsel referred the Board to the *Bird Machine* decision, *supra*, and noted that it had not been overturned by any amendments made in 1994. The *Bird Machine* decision, *supra*, was then carried forward in s. 46(4) of the *Act* by the Legislature's use of the word "persons" to describe replacement workers. The interim Order in the present case would have the effect of overturning the *Bird Machine* decision, *supra*, by including replacement workers in the definition of "employees". It was also pointed out that the word "employees" is used twice in s. 2(j.2) of the *Act*. In the first instance, it is used in reference to the purposive element of a lock-out, i.e "compelling employees"; in the second instance, it is used to describe the lock-out activity, i.e. "refusal to continue to employ employees." Counsel argued that the group of persons covered by the term must be the same group in both instances.

In this regard, the only group that the employer is trying to compel to agree to certain terms are the employees who are employed in the bargaining unit at the time the lock-out commences.

**Saskatchewan Federation of Labour's Argument**

Counsel for the Saskatchewan Federation of Labour ("SFL") addressed comments around the interpretation of the definition of lock-out and its relation to the provisions contained in s. 46(4) of the *Act*. Counsel agreed with the labour relations policy underpinning the interim Order and pointed out that it is his client's position that the use of replacement workers during a strike or lock-out causes a major source of instability in the course of a labour dispute. He argued that an employer should not be able to have his cake and eat it too; that if an employer locks-out its employees, it should suffer a financial consequence comparable to the cost to employees of engaging in strike activity. It is this balance of economic harm that each side must bear that will provide the incentive to conclude a collective agreement.

On the proper interpretation of the lock-out provisions, counsel pointed out that the definition of lock-out contained in s. 2(j.2) of the *Act* is an exhaustive definition, not an inclusive one. Counsel referred the Board to the Supreme Court of Canada decision in *Yellow Cab Ltd. v. Board of Industrial Relations et al.*, [1980] 2 S.C.R. 761 (S.C.C.), where the Court drew the distinction between an exhaustive and inclusive definition as follows, at 768-769:

> *It is significant that the Act employs the word "means" in this definition and not the word "includes" and it follows, in my view, that the definition is to be construed as being exhaustive and that in so far as the Board adopted common law principles defining "employer" which were at variance with the language of the section, there was an error of law.*

Counsel proposed as a rule of construction that a section in the *Act* defining a word used in that *Act* must take priority over other provisions. He also applied the rule of construction that the specific provision overrides the general with the definition section, in this instance, being the specific provision. Counsel went on to conclude that the definition of lock-out and the provisions contained in s. 46(4) of the *Act* are not in conflict. He argued that the word "persons" which is used in s. 46(4) of the *Act* can refer to persons other than replacement workers, in particular, it can refer to management personnel

who perform the work of locked-out employees or to persons who choose to abandon the strike or lock-out and return to work. Counsel argued that the interim Order does not render s. 46(4) of the *Act* meaningless as it has clear application to at least two groups of persons who may otherwise be used during a strike or lock-out to perform the work of the absent employees. The Board was also cautioned about relying on extracts from Hansard in its attempt to determine the Legislature's intention. Counsel referred the Board to the Supreme Court decision in *Toronto Railway Co. v. City of Toronto* (1906), 37 S.C.R. 430 (S.C.C.) where the Court remarked, at 435: "the question is not what may be supposed to have been intended, but what has been said."

With respect to the sufficiency of the lock-out notice, counsel argued that neither the Employer or the Union is required to list the activity that is being contemplated. However, he argued, if a strike or lock-out notice does contain a description of the planned activity, the activity contemplated must comply with the activity described in the definition of strike or lock-out.

**Employer's Reply to Intervenors**

In response to the arguments made by counsel for the SFL, counsel for the Employer noted that s. 46(4) of the *Act* is only intended to refer to replacement workers who have been "hired to do the work of striking or locked-out employees during the strike or lock-out." In counsel's view, this precludes the application of s. 46(4) of the *Act* to management employees and to employees who have abandoned the strike or lock-out and returned to work. Counsel also noted that s. 46(6) of the *Act* refers to the latter group by using the word "employee".

Section 46(4) reads as follows:

> *46(4) Striking or locked-out employees are entitled to displace any persons who were hired to perform the work of striking or locked-out employees during the strike or lock-out.*

**Union's Reply to Employer's Argument**

Counsel for the Union responded to the arguments made with respect to the ruling of the Board in the *Bird Machine* decision, *supra*, by pointing out that in that decision the Board did not hold that replacement workers are not employees. Rather, the Board held that replacement workers are not part of the functional bargaining unit as they lack a community of interest with the striking or locked-out employees. For the purpose of the union security provisions contained in s. 36 of the *Act*, the Board did not consider replacement workers to be members of an appropriate bargaining unit. Counsel argued that there is no question that replacement workers are employees as that term is normally understood.

In reviewing the cases referred to by the Employer, counsel pointed out that the Court of Appeal decision in *Thomson et al. v. Board of Education of Saskatoon School Division No. 13* (1996), 144 Sask. R. 11 (Sask. C.A.), provided support for the Union's arguments as the Court ruled that a provision enacted for the benefit of pupils which was not intended to confer any rights on teachers could not be enforced by teachers for their own collective bargaining purposes.

In that instance, teachers argued that because *The Education Act* obligated the school board to provide instruction to students for 200 days each year, the school board was prohibited from engaging in a lock-out of teachers. Following the logic of this decision, counsel for the Union pointed out that s. 46(4) of the *Act* confers benefits on employees, not employers, and for that reason it cannot be relied on by the Employer to give the Employer the substantive right to hire replacement workers.

Counsel also raised the question of the redundancy of s. 46 of the *Act* as a whole. Counsel argued that s. 46(1) of the *Act* sets out the essential obligation of an employer to reinstate striking and locked-out employees at the conclusion of a strike or lock-out with the remaining clauses simply reiterating that main obligation.

**Analysis**

All parties presented cogent arguments in support of their positions. The Board had the assistance of very capable counsel. As can be appreciated by the labour relations community, the decision the Board

is called upon to make involves one of the most contentious issues to confront both policy makers and labour relations boards in the past decade. Replacement worker legislation has been a demand of the labour movement in Canada for many years. The *Labour Code of Quebec* has banned the use of replacement workers during strikes or lock-outs since 1977: see *Labour Code*, S.Q., 1977, c. C-27. The Legislatures of Ontario and British Columbia followed suit in 1993: see R.S.O. 1990, c. L.2, as am. S.O. 1992, c.21 and *Labour Relations Code*, S.B.C. 1992, c. 82. With the change of government in Ontario in 1995, the ban on the use of replacement workers during a strike or lock-out was removed from the *Labour Relations Act*: see *Labour Relations and Employment Statute Law Amendment Act*, S.O. 1995, c.1. In Saskatchewan, the issue was debated thoroughly in the consultations leading up to the adoption of amendments to the *Act* in 1994. It was also a central issue of debate of the Sims Commission which was appointed by the Government of Canada to review the provisions of the *Canada Labour Code*, which came quickly on the heels of a strike at Giant Mines in the North West Territories where the use of replacement workers during a protracted labour dispute sparked violent confrontations of tragic proportions for all concerned.

The arguments for and against a legislated ban on replacement workers were summarized by Professor Ish in his report to the Government of Saskatchewan as Chairperson of the Trade Union Act Review Committee. This Committee was established by Ministerial Order on March 2, 1992 to review collective bargaining legislation in Saskatchewan. The Committee consisted of Professor Ish, four representatives of labour and four representatives of unionized employers. In his report, Professor Ish set out the position of labour and employers on the issue of replacement workers, at 18:

> *There is likely no issue upon which there is more difference of opinion between business and labour than with respect to the use of replacement workers during strikes. The debate is often framed in the context of finding the correct balance of power between the respective parties.*
>
> *Employers take the position that anti-replacement worker legislation creates an imbalance in the collective bargaining relationship because it essentially removes the employer's power and right to operate during a collective bargaining dispute, thus giving labour the advantage in the dispute. It is pointed out that such legislation where it exists, contains no corresponding bar to employees seeking alternative employment to replace income lost during a strike. Also, it is very forcefully argued by the business community that the existence of such legislation will have an adverse impact on investment in the province.*

*The trade union movement, on the other hand, begins this debate from the position of viewing the right to strike as a fundamental right of employees in Canada either by virtue of labour law or the Constitution of the country. The power to strike enables employees to bring economic pressure on an employer during a labour dispute. Thus the ability of the employer to replace the strikers with other workers substantially undercuts this power and thus tilts the balance in favour of the employer. Two other arguments are put forth by the unions. First, it is argued that use of replacement workers prolongs the length of labour disputes and has the effect of injuring the continuing relationship between the employer and the employees. Second, it is strongly argued that the use of replacement workers results in excessive violence and, in some cases, injury or death.*

*In response to the employer's argument that there is no corresponding bar to employees seeking work to replace income during a strike, the unions argue that the ability of workers to replace their income is largely overstated particularly in poor economic times. The employer's response to the union argument concerning violence is that Saskatchewan does not have the same history of picket line violence as does some other jurisdictions, namely, Quebec, which has had worker replacement legislation since 1978. Thus, it is argued that there is no need to respond to the violence issue because it is not part of the Saskatchewan scene.*

Professor Ish proposed the following resolution of the replacement worker issue of his Report, at 18 - 19:

*While replacement worker legislation similar to that adopted in Quebec, Ontario and British Columbia is completely supportable as a matter of public policy, it is recommended that a solution be adopted which is in accord with the underlying principles of the legislation proposed in this report. Particularly these principles include:*

1. *the promotion and encouragement of collective bargaining;*
2. *the encouragement of co-operation and co-determination in the workplace;*
3. *the confinement of work disputes to the concerned parties as much as possible; and*
4. *the facilitation of resolution of disputes by conciliation and mediation.*

*To these ends it is recommended that the Act include provisions which allow either party to request that a special mediator be appointed by the Minister of Labour where the employer uses replacement workers, when a legal strike is in force.*

*Once appointed the special mediator would immediately meet with the parties to define the issues in dispute and to assist the parties toward resolution. If necessary, the mediator would submit a report to the Minister within a defined time period. The report would contain recommendations for settlement of the terms of a collective*

> *agreement or a method by which outstanding matters may be resolved, including recommendations concerning the continued use of replacement workers.*
>
> *Precise legislation is required to flesh out a number of issues in detail, such as the definition of "replacement workers".*
>
> *This method of addressing the issue of replacement workers would go a long way toward meeting the interests of all parties because of its lack of rigidity. An independent person would examine the underlying issues of each dispute and the dynamics at play. The threat of imposition of an agreement will, in some cases, act as a deterrent to the use of replacement workers. Where replacement workers are used, this approach should result in a faster resolution of the dispute. Importantly, this approach is flexible and can be responsive to the needs of small business. A special mediator can examine the underlying issues and fashion a resolution or propose a method of resolution which can accommodate the concerns of the employers, the employees and the community.*

In the dissenting report issued by the Labour Representatives to the Review Committee, the labour members expressed their position on replacement worker legislation as follows, at 12 - 13:

> *If one was searching for a reason to justify anti-replacement worker legislation, they would need to look no further than Nipawin, Saskatchewan, where employees of the Co-operative have been on strike for almost eight years. Since day one, the facility has been operated by replacement workers. First it was a group of Co-op managers from various points in the Province and later on a replacement staff was recruited locally. The Co-op has rejected every attempt to settle the dispute, including a mediation process in which the Minister of Labour participated.*
>
> *The current lockout of Western Grocers employees in Regina also demonstrates the need for the legislation sought by Labour. In this instance, the work of Regina employees has been shipped to other branches of the company and replacement workers have been hired.*
>
> *We cannot agree with the proposal of Chairperson Ish. It would permit the hiring of replacement workers until a time-consuming process had been followed and even then, the banning of replacement workers would be left to the discretion of the Minister. In our view, the prohibition against the employment of strike breakers, which is what so-called replacement workers are, should be immediate and automatic and should apply to both strikes and lockouts. The definition of a replacement worker should include every person except members of the bargaining unit involved in the dispute. It being understood, of course, that these members would be subject to whatever fines the Unions might choose to impose against them.*

In their dissenting report, the Employer Representatives to the Review Committee recorded their opposition to a legislated ban on replacement workers in the following terms, at 29 - 30:

> *The Chairperson's Report contains a proposal relating to replacement workers which, on the surface at least, appears to be a compromise between the right of employees to strike and the right of employers to attempt to carry on their business. Essentially, the Report proposes that if an employer uses any replacement workers during a strike, then a settlement will be imposed on both parties through governmental intervention.*
>
> *This proposal is not nearly as evenhanded or balanced as it at first seems. What it means is that if an employer attempts to carry on his business during a strike, either by hiring new employees or by using its existing employees from other locations, governmental intervention will be triggered which will impose a settlement through arbitration. This proposal will place a struck employer at the mercy of either the striking employees, on the one hand, or the government, on the other neither of whom know or understand the employer's business or are capable of making the ultimate determination of what the employer can, or cannot, afford to pay and still remain in business.*
>
> *The practical effect of the proposed replacement worker legislation is to ban the use of replacement workers during a strike. No employer can afford to risk the imposition of wages and benefits on its business through governmental decree, which is exactly what would automatically occur as a result of the proposal set forth in the Chairperson's Report.*
>
> *In the opinion of the employer representatives, this proposal changes the historical dynamic of industrial disputes in a way that skews the traditional adversarial framework in favour of trade unions and ensures that any attempt by the employer to survive the dispute will inevitably lead to the establishment of an employer's labour costs through governmental intervention. Like so many of the recommendations already noted above, the proposal empowers trade unions and government at the expense of employers. The employer representatives on the Committee strongly oppose the introduction of this "replacement worker" proposal.*

Following the Trade Union Act Review Committee, the Minister of Labour appointed the Priel Committee consisting of L. Ted Priel, Q.C., Michael Carr and Hugh Wagner to report on amendments to the *Act*. Mr. Carr represented employers, Mr. Wagner represented unions and Mr. Priel was appointed mediator. The process was designed to forge a consensus between labour and management on amendments to the *Act*. The Committee reported to the Minister of Labour on December 15, 1993, and its findings with respect to replacement workers were summarized in its Report as follows, at 27:

> *The current Trade Union Act does not restrict an employer's ability to hire replacement workers during a labour dispute. Labour very strongly supports the proposition that there should be a ban against the use of replacement workers. Business takes the view that it has and should continue to have the right to use replacement workers as business's answer to the withdrawal of services by the Union. Business further points out that the use of replacement workers occurs so seldom that it ought not to be considered to be a major issue.*
>
> *The committee spent considerable time discussing the replacement workers' matter. There was no consensus which was arrived at.*

The Sims Task Force, formally called the Task Force to inquire into Part I of the *Canada Labour Code Review*, issued its report entitled "Seeking a Balance" on January 31, 1996. It described the competing values that inform the debate on replacement worker legislation as follows, at 124 - 125:

> *We live in an age of institutionalized unemployment. This has changed the ability of striking employees to find alternate work for the duration of a dispute. It has also reduced the risk to the employer of losing the services of some of its better employees to greener pastures.*
>
> *Employers have less ability to take a strike because of reductions in the numbers of supervisory and managerial employees. In the past, these people often enabled employers to get by, maintaining a core of operations and shipping stockpiled product.*
>
> *In some industries at least, there is a reduced flexibility in the supply arrangements between suppliers and producers. The advent of just-in-time delivery and similar concepts has reduced reliance on stockpiled parts and raw materials. Thus, employers are subject to more pressures to keep their product moving. These pressures are also felt by employers in the transportation and communication industries.*
>
> *Part of the question involves the balance of power between labour and management. However, underlying the issue is a more fundamental difference between the parties about what bargaining rights entail. From an employer's perspective, the obligation to bargain is an obligation to bargain over the terms of work for their employees. They retain, in their view, the residual right to get the work done in other ways, restrained only by any commitments that they make through collective bargaining (for example, a prohibition on contracting out). Such commitments end, in any event, once a work stoppage takes place.*
>
> *From the union's perspective, employees retain a permanent connection to their job until terminated. The Code maintains employees' status during a work stoppage, and protects them against retaliation for exercising their right to strike. Employees often perceive themselves as having almost a proprietary right not just to employment, but to*

> *the performance of the work. They therefore see it as an invasion of this proprietary right when someone else takes over their job.*
>
> *There are also differences of view over what a strike is all about. Some see collective bargaining as an important market instrument. The strike or lockout tests competing views of the market value of work. The union maintains that the work is worth a specified price; the employer, in turn, believes it can get the work done for less. The availability of willing replacement workers and the efficiency with which they perform the work tests these assumptions. If replacement workers are unavailable or unsatisfactory, the employer is persuaded to raise its offer. If they work well, this pressures the employees, through their union, to reduce their demands to the market level.*
>
> *Others see the strike as being fought on the more limited field of the financial ability of the employer to survive a shutdown versus the ability of the employees to survive without wages. Under this perception, the employer is seen as garnering an unfair advantage by maintaining a revenue stream during a shutdown. Employers argue that employees are not precluded from seeking alternative employment during a work stoppage and that to achieve balance, employers should not be prohibited from using alternate sources of labour.*

It is in the context of this provincial and national debate on replacement workers that the current provisions of the *Act* must be interpreted. The amendments contained in S.S. 1994, c. 47 followed the report of the Trade Union Act Review Committee and the Priel Committee, both of which demonstrated the depth of disagreement between labour and management on the replacement worker issue and the lack of consensus in seeking a legislated resolution to it.

When interpreting the provisions of the *Act*, the Board must try to ascertain the intention of the Legislature. More often than not, determining that intention is more of an art than a science as language does not always capture the true intent in a clear and concise way. The Supreme Court of Canada in *City of Pointe-Claire v. Syndicat des Employees et Employes Professionnels-les et de Bureau*, (1997), 146 D.L.R. (4th) 1 (S.C.C.), expressed the problem facing both the courts and administrative tribunals when they attempt to interpret statutes as follows, at 28:

> *Unfortunately, tribunals and courts must often make decisions by interpreting statutes in which there are gaps. . . . When faced with such legislative gaps, tribunals have used their expertise to interpret the often terse provisions of the statute.*

In *Re Bradburn v. Wentworth Arms Hotel Ltd.*, (1978) 94 D.L.R. (3d) 161 (S.C.C.), speaking for the majority Estey J. rejected an interpretation of two conflicting collective agreement provisions that would perpetually prohibit strike activity. In doing so the majority adopted the reasoning of Lacourciere J.A. in the Ontario Court of Appeal, who stated at 70 D.L.R.(3d) 303 (Ont. C.A.) as follows, at 310:

> *In assessing the significance of this art. 13.02, one must not only follow ordinary canons of construction, but do so in the framework of the Labour Relations Act as a whole as well as modern labour law and practice. The conflicting interests must be weighed realistically and fairly, having regard to the social policy behind the Labour Relations Act as progressively administered by the Labour Relations Board and interpreted by the Courts.*

This contextual approach to the interpretation of statutes, in which the purpose, overall context and general history of a provision are considered in order to determine the meaning of a provision, is well summarized by Professor Ruth Sullivan: *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) as follows, at 131:

> *There is only one rule in modern interpretation, namely, courts are obligated to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.*

At the Supreme Court of Canada, L'Heureux-Dube J. urged the adoption of this modern contextual methodology of statutory interpretation, as opposed to the "plain meaning" methodology in which the plain meaning of a word is to be applied unless the context suggests that it means something else: see *City of Pointe-Claire, supra,* at 34 - 36 (dissenting judgment); *Verdun v. Toronto Dominion Bank*, [1996] S.C.R. 550 (S.C.C.) (concurring judgment). In *2747-3174 Quebec Inc. v. Quebec*, (1997), 140 D.L.R. (4th) 577 (S.C.C.), L'Heureux-Dube J. discussed the competing methodological approaches to statutory interpretation, at 631 - 647, and described the "modern" approach as follows, at 637 - 638:

> *All of these approaches reject the former "plain meaning" approach. In view of the many terms now being used to refer to these approaches, I will here use the term "modern approach" to designate a synthesis of the contextual approaches that reject the "plain meaning" approach. According to this "modern approach", consideration must be given at the outset not only to the words themselves but also, inter alia, to the context, the statutes other provisions, provisions of other statutes in pari materia and the legislative history in order to correctly identify the legislature's objective. It is only after reading the provisions with all these elements in mind that a definition will be decided on. This "modern" interpretation method has the advantage of bringing out the underlying premises and thus preventing them from going unnoticed, as they would with the "plain meaning" method.*

The central criticism made of the "plain meaning" approach is that it fails to recognize the linguistic principle that words take on their meaning only in the context in which they are written. What may pass for "plain meaning" is in fact an interpretation based on unstated assumptions. The principle advantage of the contextual approach is that it attempts to provide an explicit rationale for accepting one interpretation over another thereby demystifying the process and hopefully increasing the likelihood that the tribunal or court charged with the interpretation of a statute remains faithful to the legislative purpose.

This Board is of the view that the contextual approach is the most appropriate methodology to apply in interpreting the provisions of the *Act*. In doing so we will start by identifying the purpose of the *Act* and any interpretative guidance that flows from that purpose. We will then address the plausibility of the competing interpretations to determine which is more consistent with the legislative text contained in the *Act*. The Board will also consider the efficacy of the interpretations proposed in terms of their ability to promote the objectives of the *Act* and the acceptability of both interpretations.

**Statutory Purpose**

Section 3 of the *Act* sets out the explicit legislative purpose of the *Act* when 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.*

When faced with an interpretative issue under the *Act*, the Board starts with the overall purpose of the *Act* which is to grant rights to employees to bargain collectively through unions of their own choosing. The *Act* is not "neutral" in the sense of not preferring unionized or non-union workplaces. It is explicit in preferring the development of collective bargaining relationships between employees acting through trade unions of their own choosing and employers. The *Act* reinforces the preference of this relationship through its various provisions which prohibit certain conduct that would otherwise destroy or weaken the collective bargaining relationship. As a result, the remainder of the *Act* must be interpreted in light of the *Act's* central purpose.

In the recent Supreme Court of Canada decision in *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119 (S.C.C.), in a dissenting judgment, McLachlin J. observed as follows, at para. 76:

> *In interpreting statutes relating to Indians, ambiguities and "doubtful expressions" should be resolved in favour of the Indians: Nowegijick v. The Queen, [1993] 1 S.C.R. 29; Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85. As La Forest J. stated in Mitchell, "in the interpretation of any statutory enactment dealing with Indians, and particularly the Indian Act, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them" (p. 143).*

While trade unions lack the constitutional status that has been accorded to aboriginal people of Canada, in our view, the same interpretative approach should apply to the *Act*, that is, in resolving any "ambiguities or doubtful expressions" the benefit of the doubt should be resolved in favour of establishing and maintaining collective bargaining rights for employees. This interpretative approach derives from s. 3 of the *Act* and its explicit preference for collective bargaining relationships as the method of determining wages and conditions of work for employees.

**Plausibility**

The Board was asked to choose between two competing interpretations of s. 2(j.2) of the *Act*. The Union asks the Board to interpret the provision as requiring the employer to shut down its business. Once an employer has declared a lock-out of its employees by having engaged in one of the three activities assigned to the definition of lock-out - that is, by the closure of all or part of a place of

business, a suspension of work or a refusal to continue to employ employees - it cannot then restart its business by engaging replacement workers to perform the work of the locked-out employees.

The hiring of replacement workers is viewed by the labour movement as being the equivalent of requiring an employer to pay wages to striking employees. In its view, if replacement workers are permitted there is no *quid pro quo* in terms of the real costs of engaging in economic warfare between workers and their employers. Employers are allowed to continue to produce profits through the use of replacement workers while inflicting economic loss on their regular employees. Striking or locked-out employees have no equivalent ability to continue to minimize their economic losses while inflicting economic loss on their employer. There is some suggestion that workers, of course, are free during a lock-out to engage in other employment but that begs the question of whether, by engaging in other employment, workers can exert the kind of economic pressure on their employer that is required to resolve the collective bargaining dispute. It is difficult to imagine a successful union strategy during a strike or lock-out being premised on the ability of union members to obtain well-paying temporary employment.

The Employer, on the other hand, urged the Board to consider the language of the provisions contained in ss. 2(j.2) and 46(4) of the *Act* in order to determine the legislative intention. The Employer argued, as a matter of statutory interpretation, that the Legislature did not intend to prohibit the use of replacement workers when it amended the *Act* in 1994. The Employer concluded that the Legislature clearly contemplated the use of replacement workers during a lock-out when it used the words in s. 46(4) of the *Act*:

> *46(4) Striking or locked-out employees are entitled to displace any persons who were hired to perform the work of striking or locked-out employees during the strike or lock-out.*

On the policy side, the Employer argued that replacement worker legislation that exists in other jurisdictions has been implemented through provisions that contain considerably more detail and which take into account the need for essential services and emergency work. That legislation also details what constitutes a replacement worker by specifying who can perform the work of striking or locked-out employees. The Employer argued that there are many unforseen consequences of the interim Order.

The Board must determine the meaning to be assigned to the third branch of the definition of lock-out, that is, the phrase "a refusal to continue to employ employees." Central to this task is an attempt to determine if replacement workers hired by the Employer during a lock-out are "employees" within the meaning of s. 2(j.2) of the *Act* which, by implication, the Board in its interim Order decided to be the case.

In *I.W.A. v. Moose Jaw Sash and Door Co. (1963) Ltd.*, [1980] Dec. Sask. Labour Rep. 40, LRB File Nos. 061-80, 062-80 & 063-80, the Board, in the context of the 1972 *Act*, implicitly found that replacement workers are "employees" within the meaning of the union security provisions contained in s. 36(1) of the *Act*. Section 36 of the 1972 *Act* provided 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) Subsection (3) does not apply to an employee who has engaged in activity against the trade union.*
>
> *(5) For the purpose of subsection (4), activity on behalf of another trade union does not alone constitute activity against the trade union.*

In the *Moose Jaw Sash & Door* decision, *supra*, the Board required replacement workers to apply for and maintain membership in the trade union if the union formally requested the implementation of the union security provision found in s. 36(1) of the *Act*. As the *Act* was framed at that time, the union could refuse membership to a replacement worker based on the replacement worker's "activity against the trade union" which, in the *Moose Jaw Sash & Door* decision, *supra*, was found to include the act of crossing of a union picketline (see: s. 36(4)). As a final result, the employer could be required to terminate the employment of replacement workers hired during a strike or lock-out if, as a result of being denied membership in the trade union or having been expelled from the trade union as a result of having crossed a picketline, they failed to comply with the union security provision. It was implicit in the Board's reasons that replacement workers were "employees" as the union security provision applied to "every new employee whose employment commences hereafter."

In the 1983 amendments to the *Act*, subsection 36(4) of the 1972 *Act* was replaced with the following provision:

> *36(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 the strike.*

The amendment limited the ability of trade unions to regulate the use of replacement workers through a demand for the implementation of a union security provision, as had been permitted in the *Moose Jaw Sash & Door* decision, *supra*. The Union was now limited to taking disciplinary actions against members who cross a picketline during a lawful strike.

Subsequent to the amendment, the Board in the *Bird Machine* decision, *supra*, dealt again with the issue of whether a union could require replacement workers who were hired during a strike to join the union under the mandatory union security provision set out in s. 36(1) of the *Act*. In that instance, the Union argued that s. 2(f)(i) of the *Act* does not exclude replacement workers from the definition of "employee" and that, as a result, they must apply for and maintain membership in the Union and pay union dues. The Employer took the position that replacement workers are not members of the bargaining unit for the purpose of the union security provision and are therefore not subject to that provision. In the *Bird Machine* decision, the Board concluded, without reference to the *Moose Jaw Sash & Door* decision, *supra*, as follows at 47:

> *Appropriate unit is defined in s. 2(a) of the Act as "a unit of employees appropriate for the purpose of bargaining collectively ...". Bargaining collectively, is defined in s. 2(b) of the Act as, inter alia, "negotiating in good faith with a view to the conclusion of a collective bargaining agreement ...".*
>
> *The bargaining unit therefore consists of a group of employees determined by the Board to be an appropriate unit for the specific function of bargaining collectively. In reality, it is that function that determines the bargaining unit and the community of interest of those who are in it. A bargaining unit is a functional unit and its members cannot be defined or identified without regard to that function.*
>
> *When a strike is declared and members of the bargaining unit walk out, the appropriate functional unit "walks out" with them. The employer then has the right to employ management personnel and replacement workers for the purpose of doing the*

> *work of the bargaining unit. However, those non-union replacement workers do not become members of the bargaining unit any more than management personnel who are also replacing striking employees.*
>
> *Members of an appropriate unit call a strike with the intention that it will be instrumental, as part of the collective bargaining process, in concluding a collective agreement with the employer. The employer's equivalent economic bargaining weapon is to make the necessary adjustments to take the strike and stay in operation. The raison d'etre of replacement workers is to assist the employer in attaining that goal. Replacement workers are employed to advance management's interest in time of strike or lock-out. They have no immediate interest in, nor do they derive any benefit from, negotiating the conclusion of a collective bargaining agreement with the employer. This observation of the function of replacement workers is in no way pejorative, but rather a reflection of the reality that they do not share a community of interest with striking employees in attaining the fundamental goals of collective bargaining.*
>
> *Considering that one of the basic purposes of the Act is to facilitate the right of employees to organize for the purpose of bargaining collectively, it becomes apparent that replacement workers cannot be part of the bargaining unit because of their obvious conflict with the community of interest shared by members in the appropriate unit.*

Although in the *Bird Machine* decision, *supra*, the Board held that replacement workers were not "members of the bargaining unit", its implicit decision was that such workers are not "employees" at least within the meaning of the mandatory union security provision contained in s. 36 of the *Act*. While the Board in the *Bird Machine* decision, *supra*, explained its policy reasons for finding that replacement workers are not covered by the union security provision, it did not explain why it departed from the Board's earlier conclusion in the *Moose Jaw Sash & Door* decision, *supra*, that replacement workers were covered by the provision.

We can conclude from Board precedents that the word "employee", which is a term defined in the *Act*, has been interpreted to both include and exclude replacement workers. If there were no other indications in the *Act* as to the intention of the Legislature with respect to the hiring of replacement workers during a lock-out, we could find the Board's interpretation of the term "lock-out" in its interim Order to be a plausible interpretation. The Board may have moved the interpretation of the word "employee" back to the understanding that existed in the *Moose Jaw Sash & Door* decision, *supra*, that is; the word "employee" includes replacement workers and may, as a result, have overturned the Board

in the *Bird Machine* decision, *supra*. However, a change in the interpretation of words in an *Act* is not unheard of even in the courts. As L'Heureux-Dube J. expressed in her dissenting judgment in *Symes v. Canada*, (1993) 110 D.L.R. (4th) 470 (S.C.C.), at 487:

> *Our court has, in the past, altered its interpretation of legislation in a number of cases to conform with our changing social framework: see Murdoch v. Murdoch...; Rathwell v. Rathwell ...; and most recently, Canada (Attorney-General) v. Mossop ...*

This Board has consistently held that it is not bound to follow its previous decisions and that it is entitled to reverse its interpretation of the provisions of the *Act*. This position has been upheld by the courts on review. See: *Schuett v. International Union of Operating Engineers, Local 870 and Campbell West (1991) Ltd.*, [1994] 2nd Quarter Sask. Labour Rep. 114; LRB File No. 059-94, upheld on review, [1994] 3rd Quarter Sask. Labour Rep. 75 (Sask. Q.B.) where Lawton J. stated, at 78:

> *The applicants attempted to make much of the fact that these Board decisions reversed an approach which it had used since the 1984 decision Linda Heckel and Revelstoke Companies Limited and Construction and General Workers Local Union No. 890, LRB File No. 071-84 ("Revelstoke") whereby a tie vote led to a rescission. I do not see that this advances the applicants' case, for it is trite law that the Board is not bound to follow previous decisions. The Revelstoke decision, which the applicants accept, reversed a previous approach which required 50% plus 1 to effect a rescission. So here we are, 10 years later, reversing the Revelstoke approach in favour of the previous one. If the Board had the right to adopt the Revelstoke approach, which I am satisfied it had, then it has the right to adopt this new approach.*

In this instance, however, we are required to interpret the definition of lock-out in the context of s. 46(4) of the *Act*. In that subsection, the use of the phrase "to displace any persons who were hired to perform the work of ... locked-out employees during a ... lock-out" clearly indicates that the Legislature, when it amended the *Act*, contemplated that replacement workers may be hired by an employer during a lock-out.

The Board noted the use of the word "persons" as opposed to "employees" in s. 46(4) of the *Act* to describe replacement workers. It is possible, as counsel for the SFL argued, to restrict the meaning of the word "person" to refer only to managerial employees and employees who have abandoned a lock-out. This restriction, however, does not take into account the modifying phrase "who were hired to

perform the work of ... locked-out employees during the ... lock-out." The categories suggested by the SFL as covering the field of the term "persons", that is managerial personnel and employees who abandon a strike or lock-out, would be in the employ of the Employer at the time of the commencement of the lock-out. Generally, they would not be "hired" during a lock-out.

In our view, the use of the word "person" is consistent with the Board's prior ruling in the *Bird Machine* decision, *supra*, that replacement workers are not "employees" and it would appear to the Board that s. 46(4) of the *Act* was specifically drafted to take the *Bird Machine* decision, *supra*, into account. We conclude, therefore, that s. 46(4) of the *Act* demonstrates clearly that the Legislature contemplated whether replacement workers should be used during a lock-out. Section 46(4) of the *Act* is not so ambiguous or doubtful so as to require the application of the interpretative presumption set out above.

We note the Union's argument following the Court of Appeal's decision in the *Thomson* decision, *supra*, that the Board should not permit the Employer to rely on a provision which is intended to give rights to the employees and is not intended to give rights to the Employer. In this regard, we would respond by indicating that the Board referred to s. 46(4) of the *Act* for the purpose of ascertaining the intention of the Legislature when it amended the *Act* to include a definition of lock-out. It is not referred to for the purpose of giving rise to a right not otherwise contained in the *Act*, as was attempted by the applicants in the *Thomson* decision, *supra*. The Board must use all the interpretative tools available to determine what the Legislature intended when it defined the term "lock-out" and for that purpose, it must consider all of the provisions of the *Act*.

In light of this finding, we must then address the meaning to be assigned the words used in s. 2(j.2) of the *Act*. We agree with counsel for the SFL that the definition of lock-out is exhaustive. An employer cannot engage in conduct other than the three activities set out in s. 2(j.2) of the *Act* - the closure of all or part of a place of business, a suspension of work or a refusal to continue to employ employees. When an employer engages in conduct covered by the first two branches of the definition - a closure or a suspension of work - the clear implication is that work is suspended and no one is performing the work or at least a part of the work.

With respect to the third branch of activity, that is "a refusal to continue to employ employees", it is our view that the word "employees" refers to those employees who were employed at the time the lock-out commenced and does not apply to replacement workers who are hired during a lock-out. In order to make sense of s. 46(4) of the *Act* and to give it the meaning we have attached to it above, it is necessary to interpret the word "employee" in the manner set out in the *Bird Machine* decision, *supra*. The Board finds that the interpretation urged on the Board by the Employer is more plausible in relation to the entire legislative text, and particularly s. 46(4) of the *Act*, than is the interpretation urged on the Board by the Union. We are not of the view that the definition of "lock-out" is sufficiently ambiguous or doubtful as to necessitate the application of the interpretative presumption set out earlier in these Reasons.

## EFFICACY

We must address the question of whether the interpretation we have placed on the definition of lock-out promotes the legislative purpose of the *Act* by encouraging and fostering free collective bargaining. There are many sound arguments favouring a ban on replacement workers during a strike or lock-out. In this instance, however, the Legislature has clearly not addressed such a ban at least in relation to a strike.

We appreciate the policy reasons for the Board in its interim Order which outlined a distinction between a strike and lock-out. In that instance the Board was of the view that there should be some costs associated with the initiation of lock-out that are similar to the costs incurred on the initiation of a strike. In the case of a strike, union members suffer a loss of their regular incomes. In a lock-out, unless replacement workers are prohibited, the Employer can continue production and thereby reduce the extent of its loss.

Generally, however, we do not think that there is any labour relations purpose for applying different rules depending on whether the Employer engages in a lock-out or the Union engages in a strike. In both situations, employees incur the cost of lost income. In terms of properly balancing the use of economic power between employers and unions, it would make more sense, in our view, to apply the

same rules to both events. Otherwise, the difference between the consequences of a strike and a lock-out could alter the bargaining tactics of both parties. Employers who foresee a bargaining impasse may be tempted to force a full scale strike by taking extreme positions at the bargaining table. Unions in the same position may attempt to force a lock-out by engaging in disruptive slow-downs or other partial strike activity. In addition, disputes would undoubtedly arise over the characterization of industrial activity.

In our view, the different outcomes that would result from adopting the Union's interpretation of lock-out mitigate against the Union's interpretation of "lock-out." The Employer's interpretation continues to maintain an equilibrium between the two forms of activity and removes the consideration of the different consequences of strike or lock-out activity from the arsenal of bargaining tactics. A total ban on the use of replacement workers would achieve the same equilibrium but the *Act* does not contain a total ban.

## ACCEPTABILITY

The final question to be asked is whether the interpretation of lock-out which permits the use of replacement workers during a lock-out is an acceptable interpretation. Does it result in an outcome that is reasonable and just?

The ultimate acceptability of the interpretation we have placed on the term "lock-out", that is, that it does not prevent the hiring of replacement workers, is for the Legislature to decide. From the perspective of the Board's interpretative task, the outcome of the Board's interpretation continues the state of affairs that has existed since the Board's decision in *Bird Machine, supra*. It does not alter any defects that may exist in the balance of power between unions and employers. On the other hand, it is respectful of the legislative intent that is demonstrated by a reading of the *Act* as a whole.

## CONCLUSION

To summarize our decision, the Board finds that the definition of lock-out contained in s. 2(j.2) of the *Act* does not prohibit the Employer from hiring replacement workers during a lock-out. It is our finding that the *Act* contemplates the use of replacement workers during a lock-out in s. 46(4) of the *Act* and by so doing, requires the Board to reconsider its earlier decision.

Given our ruling above, the Board will forego comment on the remaining objections raised by the Employer with respect to the sufficiency of the Union's application. However, we need to address the issue of the sufficiency of the lock-out notice. This Board agrees with the decision rendered on the interim Order that the original lock-out notice was defective in that it contemplated activity beyond that contemplated by the definition of lock-out which we have already ruled is an exhaustive definition. In providing lock-out or strike notices, the Employer and the Union are not required by ss. 11(6) or (7) of the *Act* to specify the form of activity contemplated. All that is required to be stated in a notice of strike or lock-out are words to the effect that a strike or lock-out will commence at a particular time and date. However, if the notice lists the activities that may be engaged in during the strike or lock-out, the activities must be ones that fall within the activities specified in ss. 2(j.2) and (k.2) of the *Act*. If the specified activities are outside the boundary of the terms "strike" or "lock-out", the notice will be defective. Any lock-out or strike activity that follows the delivery of a defective notice will give rise to a breach of s. 11(6) or s. 11(7) of the *Act* and can be the subject of an unfair labour practice application. In this regard, the Board relies on its previous decisions in the *Bi-Rite Drugs Ltd.* decision, *supra*, and in the *Regina Board of Police Commissioners* decision, *supra*.

As a final matter, in making its ruling the Board was not influenced by the filing of the Hansard excerpt containing the Minister's speech to the Legislature on the second reading of the 1994 amendments. The Board is of the view that such evidence is not generally admissible to determine the intent of the Legislature and the Board will discourage the filing of such evidence.

Mr. McDonald and Mr. Caudle dissent from this decision for the reasons attached.

An Order will be issued dissolving the interim Order except with respect to the sufficiency of the lock-out notice.

## SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and PEPSI-COLA CANADA BEVERAGES (WEST) LTD., Respondent

LRB File No. 166-97; October 10, 1997
Chairperson: Gwen Gray; Members: Bruce McDonald, Gerry Caudle, Brenda Cuthbert and Bob Cunningham

For the Applicant: Larry Kowalchuk
For the Respondent: Melissa Brunsdon
For the Saskatchewan Federation of Labour: Gary Bainbridge
For the Saskatchewan Chamber of Commerce: Larry Seiferling, Q.C.

***The Trade Union Act*, ss. 2(j.2), 2(k.1), 3, 12 and 46(4).**

### DISSENT

It is with respect and regret that we have concluded that we must dissent in part from the Board decision. "Strikes" and "lock-outs" are different! In a prior decision designated as LRB File No. 166-97, chaired by the then Chair of the Labour Relations Board, Beth Bilson, the Board said at p. 10 (second paragraph):

> *It is our view that what is permitted in the context of a lock-out is somewhat different. We would begin with the proposition that, just as a trade union which calls employees out on strike - and the employees who support the strike - must be prepared to incur a financial cost for choosing industrial action as a means of exerting pressure on an employer, an employer who chooses lock-out as an instrument for exerting pressure on the trade union must be prepared to incur a cost of some kind.*

and further down the same page it said:

> *In our view, however, the employer must be able to point to some part of the workplace, the work or the workforce that they are planning to do without. It is this abstention from the operation of some or all of the activities which are ordinarily carried out, or the choice to attempt to carry out production without some or all of the employees, which exacts the price which an employer who chooses this form of industrial action must incur.*

The current decision correctly sets out that *The Trade Union Act's* overall purpose is to grant rights to employees to bargain collectively through unions of the their own choosing and prohibits conduct that would destroy or weaken the collective bargaining relationship. We believe it was this principle that the Legislature intended to protect when they enacted new provisions to the *Act* in 1994. Excerpts from the studies and discussion with stakeholders around the use of replacement workers are referenced in this decision. The discussions almost exclusively dealt with the use of replacement workers in strike situations. In other jurisdictions where anti-scab legislation was adopted, the legislatures exclusively dealt with a ban on replacement workers in strike situations. In the introduction part of a published paper by Gary Hopkinson, *Holding the Line: A Defence of Anti-Scab Laws,* (1996) 4 C.L.E.L.J. 137 at page 138 the author said:

> *Ontario became one of only three jurisdictions in Canada to limit an employer's ability to use temporary replacement workers to perform bargaining unit work during a strike. Under the 'anti-scab' amendments, an employers' ability to maintain the struck portion of its operation was significantly attenuated. In short, under Bill 40 an employer could no longer hire temporary replacements to perform the work of striking employees.*

The other jurisdictions referred to are British Columbia and Quebec. Although our legislature did not include an anti-scab provision in the 1994 amendments, they did insert a definition of "strike"; and a new definition of "lock-out" in s. 2, and in s. 46 a back to work protocol.

Section 46 is interesting, as it provides direction to the parties at the conclusion of a strike or lock-out. This whole section is only operative if the parties have not negotiated a return to work protocol. Subsection (2) of this section legislates that employees are entitled to return to their previous positions at the conclusion of strike or lock-out situations. In respect to subsection (4), we agree with counsel for the Union, who argued that the subsection appears to have been added to re-emphasize this right. The subsection reads as follows:

> *46(4) Striking or locked-out employees are entitled to displace any persons who were hired to perform the work of striking or locked-out employees during the strike or lock-out.*

This clause states that locked-out employees can replace any persons hired during the lock -out. It does not state that persons hired during a lock-out are legally hired. If by the operation of the definition of lock-out, the hiring of scabs is illegal, then s. 46(4) gives the locked-out employees the right to replace those illegally hired scabs.

Our interpretation of s. 46(4) differs considerably from the majority. The majority has interpreted s.46(4) to find a right of employers to hire scabs during a lock-out. With respect we feel that right was removed by the definition of lock-out. Despite the plausibility of the majority's interpretation, we feel that a recognition that employers occasionally act illegally, as in the case at hand, would be consistent with the *Act.*

In respect to the Legislature's use of the term "persons" in s. 46(4), the majority decision has adopted the reasoning found in the *Bird Machine* case. With respect, we disagree that "persons" means something other than an employee or a person who is excluded from an appropriate unit. The definition of employee was not amended to include persons hired during a labour dispute. In *Moose Jaw Sash and Door,* referred to in the decision, the Board found that replacement workers were indeed employees. The *Bird Machine* case dealt with different issues and concluded that replacement workers were not "members of the bargaining unit" and the majority here have indicated that implicit in this statement is a finding that therefore replacement workers were not employees -- we do not agree! The provisions of s. 36 of the *Act* which relate to the requirement that all new employees must take out and maintain membership in the union within thirty days of commencement of employment requires a union to advise the employer of any failures to adhere to this position. It is conceivable that a union would not want to pursue this requirement as it pertains to replacement workers. Failure to do so would not make this type of worker less than an employee under the *Act*.

Finally, the Board has concluded that the Legislature intended that there would be no restrictions on the use of replacement workers in labour disputes. The Board has, as a policy, concluded that they are creating a balance between the concept of "strike" and "lock-out". This premise totally fails to recognize the economic advantage that an employer who replaces his regular workers with scabs engaged at lower wages and benefits enjoys through the use of a lock-out. The paper by Gary

Hopkinson referenced earlier had this to say at p.153 in regards to the balance of power between capital and labour:

> *As Panitch and Swartz have argued, the conventional model of the balance of power obscures the structural inequality between capital and labour.*[1] *First, the 'sheer scale, flexibility and durability' of capital's material resources overwhelm those of labour.*[2] *The nature of capital accumulation and the surplus value derived from labour provide an employer with a fundamental bargaining advantage. Second, the interjurisdictional mobility of capital provides the employer with an ultimate trump in compelling its employees to accept its terms of employment. This is the threat of capital flight. Even if the union has enough market strength to wage an effective strike, the employer can simply move its operations elsewhere -- specifically, to a jurisdiction with more favourable labour laws or community support.*
>
> [1] *The Assault on Trade Union Freedoms* (Toronto: Garamond Press, 1988)
> [2] *Ibid.*

This clearly points out a major difference as a starting point in any collective bargaining relationship. Further to this, an employer may invoke a lock-out in order to achieve his own bargaining demands, i.e. wage concessions, and achieve them through the hiring of replacement workers.

It was this type of unfairness that we feel was being addressed by the Bilson Decision and as a policy reinforces the purpose of the *Act* referred to above.

There is no "imbalance" in restricting scabs to strike situations and denying them during a lock-out. Each side will face a negative consequence upon deciding to strike or lock-out.

In conclusion, we would have adopted the reasoning contained in the Bilson Decision as Board policy in respect to lock-out situations.

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## SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and PEPSI-COLA CANADA BEVERAGES (WEST) LTD., Respondent

LRB File Nos. 172-97 to 187-97; October 10, 1997
Chairperson: Gwen Gray; Members: Carolyn Jones and Don Bell

For the Applicant: Larry Kowalchuk
For the Respondent: Melissa Brunsdon and Rob Garden, Q.C.

**Evidence - Solicitor-client privilege - Board held that employer may elect to exclude evidence of meetings held between solicitor and client on basis of solicitor-client privilege - Such election must be made with respect to all testimony given in relation to the meetings - Employer cannot pick and choose which evidence will be offered in testimony.**

*The Trade Union Act*, s. 11(1)(e).

### EVIDENTIARY RULING: SOLICITOR-CLIENT PRIVILEGE

**Gwen Gray, Chairperson:** The Union filed unfair labour practice applications, along with applications for reinstatement and the payment of monetary loss, respecting five employees of Pepsi-Cola Canada who were terminated from their employment during the course of a labour dispute between the Union and Pepsi. The hearing has proceeded over the course of eight days during which time the Board has heard from twelve witnesses for the Employer. During the course of the testimony of the plant manager, Graham Taylor, an issue arose with respect to the application of the rule of evidence relating to solicitor-client privilege. The Board adjourned its hearing on October 1, 1997, at noon to permit the parties the opportunity to prepare arguments on the issue. The Board heard arguments on the afternoon of October 1, 1997 and adjourned to consider its ruling. On October 2, 1997, the Board gave oral reasons dealing with the claim for solicitor-client privilege. Counsel for Pepsi requested that the Board issue written reasons which counsel for the Union did not oppose. These reasons expand on the oral ruling made at the hearing.

**Background Testimony**

The Board will state its understanding of the evidence given to date by Mr. Fraser only for the purpose of providing background to its ruling on the application of solicitor-client privilege. The Board's statement of the evidence to this point is not to be misconstrued as findings of fact in the main application, as not all of the evidence has been placed before the Board.

Mr. Fraser is the territory development manager for Pepsi in Saskatoon and, as such, is the most senior member of the management team at the Saskatoon warehouse. He is a member of the Employer's negotiating committee and has played a key role in the labour dispute.

There are three portions of Mr. Fraser's testimony that have given rise to a claim for solicitor-client privilege. First, Mr. Fraser testified that on May 15, 1997, employees of Pepsi began a study session on Pepsi premises starting around 2:30 p.m. By 7:30 in the evening, some 30 to 40 people were milling inside and outside the warehouse, including employees, spouses of employees and their children. Around that time, Mr. Fraser, another member of the Pepsi management team, Mr. Blair Patterson, and two private investigators, Mr. Chris Mason and Mr. Mike Robinson, began handing out notices to employees. The notices instituted a lock-out by requesting that employees vacate the premises within 15 minutes of being served with a copy of the notice. Mr. Fraser testified that he and Mr. Patterson then returned to Mr. Fraser's office where they were engaged in an on-going conference call with Pepsi officials from Toronto and New York. Mr. Fraser testified that he told the participants of the conference call that they (Fraser, Patterson, Mason and Robinson) had handed out the lock-out notices. Mr. Fraser then indicated that he returned to the warehouse around 8:00 p.m. where he heard Gary Burkhart, Union representative, say to a group of 10 to 12 employees words to the effect "are we going to take this place over ... ." Mr. Patterson testified that he returned to his office to let Blair (Mr. Patterson) and people on the conference call know what had taken place in the warehouse.

On cross-examination of Mr. Fraser in relation to this incident, Mr. Kowalchuk, counsel for the Union, asked a series of questions relating to the conference call. Mr. Fraser testified that the conference call had been going on all afternoon. He indicated that Mr. Jim Diotte, Human Resources Manager, was on the call with the lawyers. Also, the President of Pepsi Canada was on from Toronto, along with the

head of human resources for Canada. Two members of Pepsi's staff from New York were also on the conference call one of whom was the person in charge of labour relations issues for North America. Mr. Fraser was asked if the lawyers were on the call and he responded by saying "yes, Ms. Brunsdon and Mr. Wirth", both of whom are members of the firm now appearing for Pepsi before the Board. Mr. Fraser acknowledged that Mr. Patterson was with him as well. Further, he acknowledged that Pepsi had acted on its lock-out notice around 7:30 p.m. on the evening in question. Mr. Kowalchuk then proceeded to ask Mr. Fraser if management had discussed Pepsi's lock-out strategy during the conference call. At this point, Ms. Brunsdon objected to the line of questioning and claimed solicitor-client privilege in relation to the entire conference call.

During argument with respect to this objection, Mr. Kowalchuk noted that the same problem may arise with respect to two other meetings that Mr. Fraser had touched on in his evidence. Both meetings took place with solicitors for Pepsi present. This testimony relates to the decision made by Pepsi to terminate the employment of the five employees.

Mr. Fraser testified that on the evening of May 22nd, he and Mr. Mason, the lead private investigator, spent 10 to 12 hours reviewing video tapes of the picketing and other activities, made notes to identify repeat offenders, who engaged in the most objectionable activities, who incited other employees to act. Mr. Fraser also testified that he reviewed some of the security reports made by security officers and heard some verbal reports from Mr. Mason relating to picketline incidents. After getting a couple of hours of sleep on the morning of May 23rd, he attended the office of his solicitors and spent several hours reviewing material with Ms. Brunsdon and Mr. Mason.

After the meeting at the solicitors' office, Mr. Fraser flew to Calgary on May 23rd and had a meeting with members of Pepsi management on Sunday, May 25th. The management members included Mr. Diotte, Human Resources Manager; Mr. Deschner, Market Unit Manager for Western Canada; and Mr. Blair Patterson, Market Unit Manager for Southern Alberta and Northern Saskatchewan. Mr. Fraser testified that the meeting discussed the conduct engaged in by many of the striking employees, including the five employees who were ultimately fired. At the end of this meeting, however, Mr.

Fraser recalled that no clear decision was reached. He stated that the meeting concluded that something would need to be imposed to stop illegal activity on the picketline.

Mr. Fraser testified that Mr. Blair Patterson, Mr. Jim Diotte and he returned to Saskatoon in order to meet with Pepsi lawyers and Mr. Mason and make a final decision on the action to be taken against Pepsi employees. The meeting took place on Monday, May 26, 1997 at the solicitors' office. Mr. Fraser testified that a decision was reached at the meeting that there was sufficient evidence to terminate the employment of the five employees. Mr. Fraser was asked by his counsel what factors were considered by Pepsi in reaching its decision to terminate and Mr. Fraser gave extensive evidence on this aspect of the Employer's case relating to the factors taken into account by the members of management who attended the meeting on May 26, 1997. Letters of termination were then issued by the Employer to the employees in question on the same day.

Mr. Kowalchuk wishes to cross-examine Mr. Fraser with respect to the meetings of May 23rd and May 26th, both of which took place with legal counsel for Pepsi present. Counsel for Pepsi claims that both meetings are covered in their entirety by solicitor-client privilege and cannot be the subject of cross-examination.

**Employer's Argument for Solicitor-Client Privilege**

Ms. Brunsdon, counsel for the Employer, argued that the solicitor-client privilege rule is a substantive rule of law, not an evidentiary or procedural rule. She argued that the purpose of the rule is to permit the full and frank disclosure of information between solicitor and client in order to ensure the soundness and completeness of legal advice. Ms. Brunsdon summarized the rule as applying to confidential communication between solicitor and client for the purpose of seeking or giving legal advice. Counsel noted that the evidence given by Mr. Fraser was carefully elicited in order to avoid disclosure of matters discussed in meetings involving solicitors in order to avoid any suggestion that Pepsi had waived its solicitor-client privilege.

Counsel for the Employer argued that the Union is not prejudiced by the claim of solicitor-client privilege because the witness has testified fully as to the reasons for the termination of the five

employees. She urged the Board not to draw any negative inference from the application of the exclusion rule. In her view, the Union is not entitled to ask questions on cross-examination relating to the conference call of May 15th or the meetings of May 23rd and May 26th.

Counsel referred the Board to the following cases: *Lac La Ronge Indian Band et al. v. Canada and Saskatchewan* (1996), 147 Sask. R. 257 (Sask. Q.B.); *International Minerals & Chemical Corp. et al. v. Commonwealth Insurance Co. et al.* (1991), 89 Sask. R. 1 (Sask. Q.B.); *Laundry and Linen Drivers and Industrial Workers, Local 847 v. Careful Hand Laundry and Dry Cleaners Limited et al.* (1995), 27 C.L.R.B.R. (2d) 187 (Ont. L.R.B.); *St. Marie v. St. Marie* (1994), 127 Sask. R. 81 (Sask. Q.B.); *Re Great Atlantic & Pacific Co. of Canada Ltd. v. United Food & Commercial Workers Union, Locals 175 & 633* (1995), 47 L.A.C. (4th) 59 (Sammels); *Hartz Canada Inc. v. Colgate-Palmolive Co.* (1988), 27 C.P.C. (2d) 152 (Ont. S.C.); *Royal Bank v. Lee* (1992), 9 C.P.C. (3d) 199 (Alta. C.A.).

**Union's Argument on Solicitor-Client Privilege**

Mr. Kowalchuk, counsel for the Union, argued that the Board must make its ruling in the context of this case, particularly the reverse onus provision contained in s. 11(1)(e) of *The Trade Union Act*, R.S.S. 1978, c. T-17. Counsel argued that the Employer's evidence as to the reasons for termination must be sufficient, direct and credible enough to satisfy the onus assigned to it by s. 11(1)(e). Otherwise, the five dismissed employees must be reinstated to their positions.

Mr. Kowalchuk summarized Mr. Fraser's testimony as indicating that the decision to terminate was not made at the May 25th meeting of management in Calgary - only a decision to discipline was made at that time. The Employer asserts that nothing is admissible with respect to the meeting of May 26th at which the decision to terminate was made. Mr. Kowalchuk concludes that there is then no evidence as to what Pepsi decided when it terminated the employment of the five employees. In particular, there is no evidence touching on one key aspect of the Union's case, that is, why the particular group of five employees was selected for termination. He pointed out that, if the meetings are covered by solicitor-client privilege, the Board has no way of knowing how the Employer arrived at its decision to terminate the five employees. If such is the case, the Union has no case to meet under s. 11(1)(e). In this regard,

counsel for the Union referred the Board to its decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Holiday Inn Limited*, [1989] Spring Sask. Labour Rep. 64, LRB File No. 222-88 where the Board held that in the absence of any direct evidence relating to the reasons for termination, the Board will rely on the presumption contained in s. 11(1)(e) of the *Act* that the termination was contrary to the *Act*.

**Analysis**

In its ruling at the hearing of this matter, the Board stated that it respects the claim for solicitor-client privilege and views it as a substantive matter, not simply a procedural or evidentiary rule. The nature of the rule and its rationale is set out in the *Lac La Ronge Indian Band* case, *supra*, as follows at 261:

> *It is well established that confidential communications, whether oral or written, passing between a solicitor and client, for the purpose of seeking or giving legal advice, are privileged from disclosure or production in legal proceedings. The rationale for the privilege is the public interest in protecting the right of confidential access to professional legal advice. While originally regarded as a rule of evidence, the privilege is now recognized not only as a substantive rule of law, but as a fundamental civil and legal right. Confidential communications between a solicitor and client, made for the purpose of giving or obtaining legal advice, are permanently protected from disclosure.*

It is not the desire of the Board to hinder the role of legal counsel in providing legal advice to clients in relation to labour relations issues. A difficulty, however, arises when legal counsel play a key role in the development of the employer's or union's strategy in negotiations. Legal counsel are not insulated from the obligations contained in *The Trade Union Act*. When they are engaged in a negotiating role on behalf of one party with another party, their conduct in that role will be measured against the same standards that are set by the *Act* as apply to all other negotiators. For instance, they are not permitted to engage in conduct that constitutes bargaining in bad faith.

This Board, however, will not extend its scrutiny of the conduct of legal counsel to advice provided by legal counsel unless the advice is put into issue by the client in the proceedings, or unless the privilege is waived by the client either explicitly or implicitly. In this regard, the Board generally will accept the claim for solicitor-client privilege without going behind it to determine the constituent elements: (1)

that legal advice was sought; and (2) that it was intended to be confidential. We are confident that a claim to such privilege is not made lightly by counsel appearing before the Board.

However, where such a claim is made, the party making the claim cannot be selective about the evidence to which it applies, especially when that evidence relates to a key area of dispute. A similar view was expressed in the *St. Marie* case, *supra*, where Grotsky J. quotes from *Wigmore on Evidence* (McNaughton Rev. 1961), vol. 8, pp. 635-636, as follows at 91:

> *What constitutes a waiver by implication?*
>
> *Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must remain final..."*
>
> (emphasis added)

As we indicated at the hearing of this matter, the claim of solicitor-client privilege is an "either-or" situation. If the claim is made with respect to a particular meeting, it applies to all of the evidence relating to the meeting, not simply the evidence the party making the claim wishes to exclude. In this instance, then, the Board directed Pepsi to elect if it wished to include or exclude all of the evidence relating to the conference call held on May 15th and the meetings of May 23rd and May 26th. If Pepsi elects to include the evidence, then the Union is entitled to cross-examine the witness fully on what was discussed in the meeting or conversations, what was decided, by whom and the like. The Board, however, does not extend the right to cross-examination to any advice provided by legal counsel to the Employer in the course of the meetings. As would normally occur before the Board, counsel for the Union should preface his questions to the witnesses with words that indicate that such disclosure is not required.

If Pepsi elects to exclude evidence relating to the conference call of May 15th and the meetings of May 23rd and May 26th, then the Board will disregard all of the evidence that has been tendered with respect to the meetings. The Board is of the view that this procedure is the only mechanism of ensuring fairness in the proceedings. If the Board were to hold otherwise, the Union would be unfairly deprived of its right to cross-examine on all aspects of the meetings in question and would be required to accept the witnesses' version of the meeting unchallenged by any of the normal methods used on cross-examination.

The hearings of this matter will reconvene on October 28, 1997 at 9:30 a.m. at which time the Board will ask counsel for Pepsi to indicate its election with respect to the evidence in question.

## GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 75M, Applicant and STERLING NEWSPAPER COMPANY, Respondent

LRB File No. 323-97; October 28, 1997
Chairperson, Gwen Gray; Members: Don Bell and George Wall

For the Applicant: Drew Plaxton
For the Respondent: Dennis Ball, Q.C.

**Remedy - Interim order - Unfair labour practice - Dismissal for union activity - Board refuses to grant interim order in circumstances where employer offered to reinstate employee unconditionally - Board holds that union cannot demonstrate irreparable harm in circumstances.**

***The Trade Union Act*, ss. 5.3, 11(1)(e) and 42.**

### REASONS FOR DECISION

#### Background

**Gwen Gray, Chairperson:** The Union filed an application with the Labour Relations Board for an unfair labour practice in which it alleged that the Employer had terminated the employment of Jessica Anderson contrary to s. 11(1)(e) of *The Trade Union Act*, R.S.S. 1978, c. T-17. At the time of filing the application, the Union also requested that the Board issue an interim Order requiring the Employer to reinstate Ms. Anderson pending the hearing of the final application. The interim Order was heard by the Board on October 28, 1997.

#### Facts and Argument

An application for an interim Order proceeds on the basis of affidavit material which is required to contain evidence that is within the personal knowledge of the person who signs and swears the affidavit. The Board will accept evidence that can be agreed to by both counsel appearing on the matter.

In this instance, the Union filed two affidavits: one sworn by Duncan Brown, Canadian Organizing Coordinator for the Union, and one by Ms. Anderson. In his affidavit, Mr. Brown deposed that the Union commenced an organizing drive of the staff at the Times-Herald in Moose Jaw. On October 7, 1997 the Union made its presence known to employees by handing out hand bills at the job sites. Mr. Brown further deposed that Ms. Anderson assisted in arranging the event. The Union then conducted a meeting with employees on October 9, 1997 which Ms. Anderson attended. Mr. Brown commented in his affidavit that the organizing campaign was well received initially but that the problems experienced by Ms. Anderson, this is, her lay-off, had a chilling effect on the organizing drive.

Ms. Anderson confirmed Mr. Brown's description of her involvement in the organizing drive. In addition, she indicated that she had been given a written reprimand on October 10, 1997 related to her work in reporting on a vehicle accident. This incident was followed by a heavier than expected workload on the Thanksgiving long weekend. On October 16, 1997, Ms. Anderson came across a document on the computer that she took to be threatening to her continued employment. The document indicated that "two recently hired employees have recently revealed poor attitudes, being critical of the paper and their co-workers. This will not be tolerated. The employees have been cautioned and will be closely monitored to ensure the cancer doesn't spread." Ms. Anderson assumed that, as a recent hire, the document was referring to her and one other employee. Finally, on October 21, 1997, Ms. Anderson received a notice of lay-off from the Employer citing downsizing as the reason for the lay-off.

The Employer did not file affidavit material before the Board. However, Mr. Ball, counsel for the Employer, explained that after receiving the Union's application, he discussed the Board's previous decisions on matters of this nature with the Employer and advised the Employer that the responsible position to take would be to reinstate Ms. Anderson so that there is no perception that the Employer was attempting to "chill" an organizing drive. Counsel advised the Board that the Employer accepted his advice.

Counsel filed two letters with the Board. The first letter was addressed and mailed to Ms. Anderson, although at the date of the hearing Ms. Anderson had not received the letter. The letter was signed by A.R. Calvert, Publisher, and it stated:

> *This letter is to advise you the Times-Herald has decided to withdraw your layoff notice order dated October 21, 1997.*
>
> *You may report to work on Monday, November 3, 1997.*

The second letter was addressed to the Union. It was faxed to counsel for the Union on the morning of the day of the hearing. The letter again was signed by Mr. Calvert and it stated:

> *GCIU has filed an application with the Labour Relations Board requesting reinstatement of Jessica Anderson, who received notice of layoff dated October 21, 1997 effective November 4th, 1997. The application states that Ms. Anderson assisted GCIU to engage in hand billing on October 7, 1997 and was then laid off on October 21, 1997. The material alleges that the layoff occurred because Ms. Anderson was engaged in union activity.*
>
> *We are writing to advise you as follows: first, we had no knowledge whatsoever that Ms. Anderson assisted the union in its hand billing on October 7, 1997. Second, we recognize that there could be a perception that the event of October 7, 1997 was related to the layoff on October 21, 1997.*
>
> *We understand that as an employer we must prove that the two events were unrelated. Given the time available to us to prepare that information and the expense involved in attending at the Labour Relations Board, we have decided to simply reinstate Ms. Anderson to her position. We enclose a copy of our letter dated October 27 advising her that she should return to work on Monday, November 3, 1997. Ms. Anderson has already been paid in full to November 4th, 1997.*
>
> *The management of Moose Jaw Times-Herald understands that it must not interfere with the right of employees to organize and bargain collectively through a trade union. The company's decision to reinstate Ms. Anderson should ensure that no one is put to the expense and inconvenience of a Labour Relations Board hearing. It should also ensure that employees are not misinformed about the company's position.*
>
> *We trust that you will find this to be satisfactory.*

Based on these events, counsel for the Employer argued that the matter was moot as there was no issue to be remedied by the Board on the interim application. Ms. Anderson has her job back without conditions and she has suffered no economic loss, having been already paid to November 4, 1997. Counsel argued that the Board should not take the Employer to task for acting responsibly by taking

steps to overcome any perception that may exist that it terminated Ms. Anderson's employment for reasons related to her union activity.

Counsel for the Union advised that while the Union was pleased that the Employer had decided to reinstate Ms. Anderson, the Union took the position that the Board should issue the interim Order to ensure that Ms. Anderson was reinstated, and to eliminate the "chill" effect that the termination of Ms. Anderson had caused on the organizing drive by demonstrating to employees that the Union had the ability to protect employees. Counsel argued that the proper route for the Employer to take in these circumstances is to consent to an interim Order reinstating Ms. Anderson.

**Relevant Statutory Provisions**

The powers of the Board to hear and determine an interim application are contained in ss. 5.3 and 42 of the *Act*. Section 11(1)(e) of the *Act* creates an unfair labour practice for terminating the employment of an employee who has been engaged in union activity. These provisions state 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.*
>
> *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;*
>
> *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.*

**Analysis**

On an interim application, the Board has defined its task in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Loraas Disposal Services Ltd. et al.*, [1997] Sask. L.R.B.R. 517 as follows, at 522:

> *This Board considered the grounds on which injunctive relief will be issued in a number of decisions and the criteria can be summarized as requiring the following elements:*
>
> *(1) the applicant must demonstrate that there is a serious issue to be decided;*
>
> *See: RJR-MacDonald Inc. v. Canada (Attorney-General), [1994] 1 S.C.R. 311, at 314.*
>
> *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.*
>
> *(2) the applicant must demonstrate that an injunction order is necessary to protect it against irreparable harm. In the labour relations setting, the Board will be particularly concerned with harm to the collective bargaining relationship;*

*See:* *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, at 77.*

*(3) where any doubt exists on points (1) and (2), the Board will determine the application based on the balance of convenience, particularly the balance of the respective labour relations harm to the parties.*

*See:* *WaterGroup Companies Inc., supra, at 78.*

*Regina Exhibition Association Limited and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, [1997] Sask. L.R.B.R. 393; LRB File No. 165-97, at 398.*

Where an employee has her employment terminated during an organizing drive and where the timing of union activity and termination are close in proximity, the Board usually will reinstate the employee on an interim basis until the final application is heard and determined. The rationale for the Board's normal response is that the labour relations harm arising from such a termination cannot be easily undone if reinstatement is ordered sometime in the future. That harm is referred to as the "chill effect" and describes how the momentum of an organizing campaign is stalled when employees are reluctant to participate in a union campaign once an employer has demonstrated its attitude towards the union by firing a key employee.

In this instance, the Employer has received proper and helpful legal advice; that is, on the face of the matter, the Employer's actions may be perceived by employees and the Union and ultimately, perhaps the Board, as demonstrating an anti-union attitude and an attempt to "chill" the organizing campaign, even if the Employer did not intend this result when it made its decision to terminate Ms. Anderson's employment. Acting responsibly, based on this advise, the Employer has offered to reinstate Ms. Anderson on November 3, 1997. It has not reinstated her on an interim basis until the outcome of the final application, as a consent interim Order would require it, but has made the reinstatement unconditional.

While it remains open to the Union to proceed before the Board on its unfair labour practice application, the remedial portion of that application has been satisfied almost entirely by the Employer's

offer to reinstate Ms. Anderson. Counsel for the Union indicated in his argument that the Union was not seeking to have Ms. Anderson reinstated any sooner than November 3, 1997. In addition, the Union's request for a meeting with employees on work time was withdrawn. There may be issues of monetary loss but these matters could be resolved on a hearing of the final application.

The only serious question to be dealt with on the application is whether the Employer's motivation for terminating Ms. Anderson was improper under s. 11(1)(e) of the *Act*. The labour relations harm that flows from this question is normally met by the reinstatement of the employee on an interim basis until the hearing of the final application, which, in this case, has been agreed to on an unconditional basis. The Union has demonstrated that it has the ability to intervene effectively to protect employees who are engaged in union activity. An interim Order, therefore, is not required in order to protect the Union from irreparable harm to its organizing campaign. Based on these two factors, the Board is not required to determine if the balance of convenience favours the Union or the Employer.

The Board directs the Employer to provide a copy of these Reasons to its employees by posting them in a location where employees have an opportunity to read them, such as in the coffee room or other area. This direction is made to ensure that all employees have an opportunity to understand what transpired at the hearing and why the Board declined to issue an interim Order.

An Order will issue dismissing the request for an interim Order.

# SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and REGINA EXHIBITION ASSOCIATION LIMITED AND DOUG CRESSMAN, Respondents

LRB File No. 266-97; October 31, 1997
Chairperson, Gwen Gray; Members: Don Bell and Carolyn Jones

For the Applicant: Larry Kowalchuk
For the Respondents: Larry Seiferling, Q.C.

**Technological change - Definition - Closure - Closure of all of work of bargaining unit where work is not transferred elsewhere outside bargaining unit is technological change within meaning of term "removal" in s. 43(1)(c).**

**Statutory interpretation - Words and phrases - Board interprets two phrases in s. 43(1)(c), "removal" and "relocation outside the appropriate unit", as referring to different employer decisions.**

**Statutory interpretation - Interpretative rules - Board prefers to apply purposive approach to interpretation of *The Trade Union Act* - Board considers statutory purpose, plausibility in terms of legislative text, efficacy and reasonableness of competing interpretations.**

***The Trade Union Act*, s. 43.**

## REASONS FOR DECISION

### Background

**Gwen Gray, Chairperson:** The Union filed an unfair labour practice application pursuant to ss. 3, 11(1)(c) and 43 of *The Trade Union Act*, R.S.S. 1978, c. T-17, alleging that the Regina Exhibition Association Limited ("REAL") effected a technological change at the Silver Sage Casino and failed to acknowledge its obligations to bargain with respect to the technological change. The Union sought an interim Order from the Board on August 29, 1997. The Board required the parties to deal with the application as a final application and scheduled the matter to be heard on that basis on September 15, 1997. See *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd.*, [1997] Sask. L.R.B.R. 667, LRB File No: 266-97.

At the hearing of the final application, the parties agreed that the issue they would like the Board to address is whether a permanent closure of the Casino constituted a technological change within the meaning of s. 43 of the *Act*. It was agreed between the parties that a "significant number" of employees, as that term is used in s. 43(2) of the *Act*, will be affected by the closure.

**Facts**

The Union was certified to represent the employees at Silver Sage Casino by certification Orders dated November 20, 1992 and September 8, 1994. The parties entered into a collective agreement which expired August 22, 1996 and since that time have been engaged in renewal bargaining.

On August 12, 1997, the Union was notified of the closure of Silver Sage Casino by letter from REAL which stated as follows:

> *I regret to inform you that the Silver Sage Casino will be closing effective November 22, 1997.*
>
> *As this will result in the termination of the employment of more than ten employees, in accordance with Section 44.1 of The Labour Standards Act, I am giving you notice of the following:*
>
> *1. Number of employees whose employment will be terminated:*
>
> | | |
> |---|---|
> | *In-scope Casino Employees:* | *135* |
> | *Out-of-scope Employees:* | *10* |
>
> *2. In addition, as a result of the Casino closure, the following number of Regina Exhibition Park employees will receive layoff notices and will be given the opportunity to exercise their seniority rights:*
>
> | | |
> |---|---|
> | *Operations Employees:* | *40* |
> | *Food Services Employees:* | *23* |
>
> *All numbers are approximate.*
>
> | | | |
> |---|---|---|
> | *3.* | *Effective date of termination/layoff:* | *November 22, 1997* |
> | *4.* | *Reason for termination/layoff:* | *Permanent closure of Silver Sage Casino* |

*We do not believe that the closure of the Casino constitutes a technological change within the meaning of The Trade Union Act, but in any event we are not closing the Casino for one hundred and three days (103) and all the information required by Section 43(3) of The Trade Union Act is included in this notice. We are also prepared to meet with you to discuss the implementation of the Casino closure.*

*Please contact me if you have any questions regarding the foregoing.*

A copy of the notice was sent to the Minister of Labour.

On August 12, 1997, the Union responded to the notice of closure as follows:

*It is our belief that the closure of the Silver Sage Casino does constitute technological change under Section 43 of The Trade Union Act and we are hereby requesting official notice in compliance with the Act and failure to provide such notice will cause us to file an application with the Labour Relations Board to enforce the employees' rights contained in The Trade Union Act with respect to technological change.*

*The notices that were given on August 8, 1997 to Operations staff are over and above any usual layoff that occurs in the fall and we consider these to be associated with the closure of the Casino and subject to Section 43 of The Trade Union Act. We request that you forward technological change notice on behalf of those employees. Failure to do so will require us to file an Unfair Labour Practice with the Saskatchewan Labour Relations Board.*

*Please advise.*

On August 25, 1997, REAL responded to the Union's letter as follows:

*We have your letter relating to the above.*

*We accept your letter as an indication that you wish to negotiate terms and conditions for Casino employees affected by the closure. We are prepared to have discussions with you on any item you wish to discuss at this time.*

*As we are already in bargaining on the Casino Collective Agreement, you may forward your proposals to us at this time or arrange a meeting date to provide us with your proposals.*

*Although we do not feel that this is a technological change under The Trade Union Act, we are prepared to follow the above procedure that we may deal with the issues raised by the closure. As we have a Collective Agreement that has expired, and we are*

*already under a duty to negotiate with you, we have no objection if you amend your position to deal with any issues you wish to discuss with us.*

*We await your early response in order that discussions can begin quickly.*

**Relevant Statutory Provisions**

Section 43 of the *Act*, which was amended by S.S. 1994, c. 47, s. 22, provides as follows:

*43(1) In this section 'technological change' means:*

*(a) the introduction by an employer into the employer's work, undertaking or business of equipment or material of a different nature or kind than previously utilized by employer in the operation of 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 the 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.*

*(4) The minister may by regulation specify the number of employees or the method of determining the number of employees that shall be deemed to be 'significant' for the purpose of subsection (2).*

*(5) Where a trade union alleges that an employer has failed to comply with subsection (2), and the allegation is made not later than thirty days after the trade union knew, or in the opinion of the board ought to have known, of the failure of the employer to comply with that subsection, the board may, after affording an opportunity to the parties to be heard, by order:*

*(a) direct the employer not to proceed with the technological change for such period not exceeding ninety days as the board considers appropriate;*

*(b) require the reinstatement of any employee displaced by the employer as a result of the technological change; and*

*(c) where an employee is reinstated pursuant to clause (b), require the employer to reimburse the employee for any loss of pay suffered by the employee as a result of his displacement.*

*(6) Where a trade union makes an allegation pursuant to subsection (5), the board may, after consultation with the employer and the trade union, make such interim orders under subsection (5) as the board considers appropriate.*

*(7) An order of the board made under clause (a) of subsection (5) is deemed to be a notice of technological change given pursuant to subsection (2).*

*(8) Where a trade union receives notice of a technological change given, or deemed to have been given, by an employer pursuant to subsection (2), the trade union may, within thirty days from the date on which the trade union received the notice, serve notice on the employer in writing to commence collective bargaining for the purpose of developing a workplace adjustment plan.*

*(8.1) On receipt of a notice pursuant to subsection (8), the employer and the trade union shall meet for the purpose of bargaining collectively with respect to a workplace adjustment plan.*

*(8.2) A workplace adjustment plan may include provisions with respect to any of the following:*

*(a) consideration of alternatives to the proposed technological change, including amendment of provisions in the collective bargaining agreement;*

*(b) human resource planning and employee counselling and retraining;*

*(c) notice of termination;*

*(d) severance pay;*

*(e) entitlement to pension and other benefits, including early retirement benefits;*

*(f) a bipartite process for overseeing the implementation of the workplace adjustment plan.*

*(8.3) Not later than 45 days after receipt by the trade union of a notice pursuant to subsection (2), the employer or the trade union may request the minister to appoint a conciliator to assist the parties in bargaining collectively with respect to a workplace adjustment plan.*

*(10) Where a trade union has served notice to commence collective bargaining under subsection (8), the employer shall not effect the technological change in respect of which the notice has been served unless:*

*(a) a workplace adjustment plan has been developed as a result of bargaining collectively; or*

*(b) the minister has been served with a notice in writing informing the minister that the parties have bargained collectively and have failed to develop a workplace adjustment plant.*

*(11) This section does not apply where a collective bargaining agreement contains provisions that specify procedures by which any matter with respect to the terms and conditions or tenure of employment that are likely to be affected by a technological change may be negotiated and settled during the term of the agreement.*

*(12) On application by an employer, the board may make an order relieving the employer from complying with this section if the board is satisfied that the technological change must be implemented promptly to prevent permanent damage to the employer's operations.*

Prior to the 1994 amendments, s. 43(1) read as follows:

*43(1) In this section "technological change" means:*

> *(a) the introduction by an employer into his work, undertaking or business of equipment or material of a different nature or kind than that previously utilized by him in the operation of the work, undertaking or business;*
>
> *(b) a change in the manner in which the employer carries on the work, undertaking or business that is directly related to the introduction of that equipment or material; or*
>
> *(c) the removal by an employer of any part of his work, undertaking or business.*

**Employer's Arguments**

Counsel for REAL noted that the interpretation placed on s. 43(1)(c) of the *Act* prior to the 1994 amendments clearly did not extend its coverage to include permanent closure as a technological change. Counsel suggested that the cases drew a distinction between a relocation of work from one bargaining unit to some place outside the bargaining unit, and a cessation of work altogether. In the former case, the Board has found that technological change has occurred. In cases involving a total cessation of work, the Board has held that such an event does not constitute a technological change within the meaning of s. 43(1)(c) of the *Act*. Counsel argued that had the Legislature intended s. 43(1)(c) of the *Act* to apply to a permanent closure, it would have used words to indicate clearly that closures were covered.

Counsel also submitted that the application of the technological change provisions to a complete closure of a business was illogical. Counsel argued that in a closure circumstance there is no intention to continue the business and the economic impact of requiring the employer to give 90 days notice of closure is too significant a cost to impose on businesses in Saskatchewan.

Dealing with the 1994 amendments to the *Act*, in particular the addition of the phrase "or relocation outside of the appropriate bargaining unit" to s. 43(1)(c) of the *Act*, counsel argued that the Legislature simply wanted to clarify and codify what was already covered by the technological change provisions. Counsel argued that the Legislature took the exact words that had been used by the Board in its decisions on s. 43(1)(c) of the *Act* and put them into the *Act*. In *United Food and Commercial Workers*

*Union, Local 248-P v. Saskatoon Poultry Products Ltd.*, [1995] 2nd Quarter Sask. Labour Rep. 220, LRB File No. 089-95, the Board used both phrases to describe the movement of work from a bargaining unit to elsewhere when it described the change as follows, at 228: "The Employer has admitted that it **removed** a part of its work to a location outside of the appropriate unit. The admitted facts are that on January 13, 1995, the Employer permanently transferred or **relocated** its kill operations from Saskatoon to Wynyard." (Emphasis added) Counsel noted that no reference was made in the amended s. 43(1)(c) of the *Act* to "closure" or the permanent cessation of work although past decisions of the Board had distinguished between a cessation of work and a removal and relocation of work to a location other than the bargaining unit.

Counsel argued that the Board's recent decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Acme Video Inc.*, [1995] 4th Quarter Sask. Labour Rep. 134, LRB File Nos. 179-95, 180-95, 181-95 & 182-95, can be distinguished or was wrongly decided. In that instance, the Board held that the permanent lay-off of a shift of workers did constitute a technological change within s. 43(1)(c) of the *Act*.

Counsel also argued that had the Legislature intended to cover a closure of a business in the 1994 amendments, it would have provided a list of circumstances to which the provision would not apply, similar to the list of exceptions allowed for the notice of group termination which is set out in *The Labour Standards Act*, R.S.S. 1978, c. L-1, s. 44.1 and *The Labour Standards Regulations*, R.R.S. 1978, c. L-1, Reg 5, s. 22(2). It was stressed that the application of s. 43 of the *Act* to a closure will be uncertain unless such a list of exemptions was included in the statute.

Counsel referred the Board to *Retail, Wholesale and Department Store Union, Local No. 568 v. Sunshine Uniform Supply Services, Division of Sunshine Uniform Supply (Wpg.) Ltd.*, [1978] May Sask. Labour Rep. 51; LRB File No. 662-77; *Oil, Chemical and Atomic Workers International Union, Local 9-687 v. Northern Petroleum Division, Canadian Propane Gas & Oil (Sask.) Ltd.*, LRB File No. 270-76 (unreported); *United Food & Commercial Workers Union, Local 248-P v. Saskatoon Poultry Products Ltd.*, [1995] 2nd Quarter Sask. Labour Rep. 220, LRB File No. 089-95; *United Food and Commercial Workers, Local 1400 v. Westfair Foods Ltd.*,[1991] 3rd Quarter Sask. Labour Rep. 45, LRB File No.

136-91; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Macdonald's Consolidated*, [1991] 2nd Quarter Sask. Labour Rep. 48, LRB File No. 078-91; and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Acme Video Inc.*, [1995] 4th Quarter Sask. Labour Rep. 134, LRB File Nos. 179-95, 180-95, 181-95 & 182-95, quashed (1996), 146 Sask. R. 224 (Sask. Q.B.).

**Union's Arguments**

Counsel for the Union argued that there is no issue that REAL is closing part of its business. REAL operates the entire exhibition site of which the Casino is one of several bargaining units. REAL, in this instance, decided to cease operations at the Silver Sage Casino.

The Board was urged to follow its earlier interpretation set out in the *Acme Video* case, *supra*. In that instance, the Board found that s. 43(1)(c) of the *Act* covered two aspects of change. One aspect is the relocation of work from a bargaining unit. Counsel argued that this phrase would cover all cases where the work was transferred from one location to another, either within the same company or to a subcontractor, such as was the case in the *MacDonald Consolidated* decision, *supra*. Given the addition of the phrase "or relocation outside the appropriate unit" to s. 43(1)(c) of the *Act* in the 1994 amendments, the word "removal" must refer to situations where the work is permanently terminated, that is, it ceases to exist and is not merely transferred or relocated to another place.

Counsel argued that the Court of Queen's Bench decision quashing the Board's ruling in *Acme Video*, *supra*, does not have the effect of overturning the Board's interpretation of s. 43(1)(c) of the *Act*. Counsel noted that the Court stated, at 233 "In this decision I have not seen need to be concerned with the Board's interpretation of the word "removal" as it appears in s. 43(1)(c) of the *Act*." Rather, the Court expressed concern over the absence of a finding by the Board that the employer in that instance **decided** "to cease or remove or transfer or deal in any respect with any part of Acme's work, undertaking or business." (231) Counsel argued that the learned Justice used the word "cease" interchangeably with "removal." The Court's criticism of the Board in *Acme Video*, *supra*, was with the Board's failure to find that the employer had "decided" to cease or remove work, rather than it having merely responded to a decline in market forces by laying off staff.

Counsel reviewed the cases cited by counsel for REAL in his argument and pointed out how the term "technological change" has been interpreted differently by successive panels of the Board. Counsel pointed out that requiring notice of technological change would not bring catastrophe to employers. He noted that both the labour standards provisions and the common law require extensive notice periods for termination. In the event of immediate or pressing need to institute a closure, the *Act* permits employers to apply to the Board for relief against the notice requirement (s. 43(12)).

**Analysis**

There is no question in this instance that REAL has decided to close a part of its business, being the Silver Sage Casino located at the Regina Exhibition Park. REAL gave notice to the Union of the closure, including information required to be included in the notice by s. 43(3) of the *Act*. The notice was provided within the time frame specified by s. 43(2) of the *Act*. The only question for the Board to determine is whether, on the facts of this case, there is a technological change within the meaning of s. 43(1) of the *Act*. The Board was invited by REAL to revisit the Board's earlier decision in *Acme Video, supra,* while the Union urged the Board to maintain the status quo and apply the Board's decision in *Acme Video, supra.*

The Board's approach to the interpretation of the *Act* was recently set out in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Pepsi-Cola Canada Beverages (West) Ltd.*, [1997] Sask. L.R.B.R. 696; LRB File No. 166-97, where the Board summarized its approach as follows, at 717:

> *This Board is of the view that the contextual approach is the most appropriate methodology to apply in interpreting the provisions of the Act. In doing so we will start by identifying the purpose of the Act and any interpretative guidance that flows from that purpose. We will then address the plausibility of the competing interpretations to determine which is more consistent with the legislative text contained in the Act. The Board will also consider the efficacy of the interpretations proposed in terms of their ability to promote the objectives of the Act and the acceptability of both interpretations.*

**Statutory Purpose**

As the Board outlined in the *Pepsi-Cola* case, *supra*, the *Act* explicitly prefers the development of collective bargaining relationships between employees acting through trade unions of their own choosing and employers, and it reinforces the preference of this relationship through its various provisions which prohibit certain conduct that would otherwise destroy or weaken the collective bargaining relationship. The provisions of the *Act* must be interpreted in light of the *Act's* central purpose. When dealing with ambiguous or doubtful expressions in the *Act*, the interpretation that expands on trade union rights is to be preferred over interpretations that restrict or limit such rights.

**Plausibility**

The statutory text defining what constitutes "technological change" was amended in 1994 as noted above. The words "or relocation outside of the appropriate unit" were added to the third branch of the definition of technological change. It is useful in determining the legislative intent to examine the case law that existed prior to the amendment.

From a review of the cases decided prior to the 1994 amendment to s. 43(1)(c) of the *Act*, it can be concluded that the word "removal" has been interpreted to include the following situations:

(1) a closure of part of a business, but not closure of the entire business;
See *Canadian Propane Gas & Oil (Sask.) Ltd.*, *supra*.

(2) movement of part of the employer's work from one place to another, or from one group of employees to another, but not a closure of a business;
See *Sunshine Uniform Supply Services*, *supra*.

(3) a transfer of work, but not a closure or cessation of part of the work that results in a permanent lay-off of a portion of the workforce;

See *United Steelworkers of America, Local Union 7458 v. Potash Corporation of Saskatchewan Mining Limited, Cory Division*, [1989] Summer Sask. Labour Rep. 26, LRB File No. 159-88.

(4) a closure of part of the business where the work performed by the unit is transferred to other parts of the business, but only if the significant number is calculated on the basis of the whole operation, not only the bargaining unit that is closed;

See: *United Food and Commercial Workers International Union, Local 373-P v. Intercontinental Packers Limited*, [1984] July Sask. Labour Rep. 47, LRB File No. 459-83.

*United Automobile, Aerospace and Agricultural Implement Workers of America, Local 2182 v. Imperial Optical Canada*, [1984] July Sask. Labour Rep. 51, LRB File No. 465-83.

(5) a closure of part of the business where the work performed by the unit is transferred to another part of the business where the significant number is calculated on the basis of the bargaining unit affected;

See: *Westfair Foods Ltd., supra.*

*Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Ltd. (Regina and Moose Jaw)*, [1993] 3rd Quarter Sask. Labour Rep. 79, LRB File No. 156-93.

*Saskatoon Poultry Products Ltd., supra.*

(6) contracting work out to a third party.

See *Macdonald's Consolidated, supra.*

The interpretation of s. 43(1)(c) of the *Act* has evolved to cover a greater territory than was first envisaged by the Board, no doubt due, in part, to the tendency of business in the 1980's and 1990's to restructure downward.

As indicated, the Legislature amended s. 43(1)(c) of the *Act* in 1994 to add the phrase "or relocation outside of the appropriate unit." The third branch of the definition of technological change that is set out in s. 43(1)(c) of the *Act* now addresses a "removal" and a "relocation". The Board dealt with the implications of this change in the *Acme Video* decision, *supra*. In that instance, the Board found that the employer permanently reduced the night shift by eight employees and held that this reduction constituted a technological change within s. 43(1)(c) of the *Act*. The Board summarized its conclusions as follows, at 152:

> *Our conclusion on the technological change aspect of the applications may be summarized as follows. The interpretation by the Board of the term "removal" in the previous version of Section 43 excluded circumstances where work ceased to be done or there was a "closure" of all or part of the business. It is our view that the term "removal" in the amended version of Section 43(1)(c) must now be given an altered reading, in light of the addition of the term "relocation outside the bargaining unit," which covers all of the ground previously occupied by the term removal, and of signs of an intention on the part of the legislature to address the impact of permanent restructuring and "downsizing." In our opinion, it is consistent with the purposes of labour legislation in general, and The Trade Union Act in particular, that employees represented by a trade union should be given an opportunity to address the implications for them of decisions which result in an absolute diminution of the work done, as well as those which lead to the relocation of the work elsewhere or the reassignment of it to others.*

The Board provided the following rationale for its decision, at 151:

> *In our view, it is not unreasonable to require an employer to engage in bargaining with a trade union representing employees concerning the impact on those employees of a decision which will result in the permanent loss of jobs to a significant number of them. Where an employer is contemplating restructuring on a scale which will permanently dislocate a significant proportion of the bargaining unit, a requirement that there be a discussion of the implications of such a decision with the trade union prior to its implementation seems entirely in keeping with the thrust of Section 43 and of The Trade Union Act as a whole. It would, however, be unreasonable to include within the sweep of the definition of technological change ordinary fluctuations in the workforce which may take place for a variety of reasons.*

The Board went on to suggest that the exemptions listed in the Regulations to s. 44.1 of *The Labour Standards Act* provide a workable starting point for determining when a reduction in the number of employees will be covered by the technological change provisions. These exemptions, in many ways,

address the issue of a "permanent" cessation of work, as opposed to a temporary or seasonal reduction in the workforce or to project or term work where the expectation of both employees and employer is that the work will last for a limited period of time.

In reaching its determination in *Acme Video*, *supra*, the Board applied a standard rule of construction that requires that an attempt be made to give meaning to each word used in a statute. When two expressions are used, it can be assumed that they are intended to apply to different events, otherwise the Legislature would be content to use only one expression.

The Board's interpretative approach to s. 43(1)(c) of the *Act* was not quashed by the Court of Queen's Bench in *Acme Video*, *supra*, rather the Board's decision was quashed because, in the Court's view, it failed to make a crucial finding that the employer made a decision to reduce the number of employees.

It is our view that the interpretative conclusion arrived at by the Board in the *Acme Video* case, *supra*, is more plausible than the interpretation urged on the Board by REAL in this instance. The interpretation takes into account the past decisions of the Board and the recent amendment to the *Act*. Although an interpretation of the word "removal" to cover relocations, but not the total cessation of work, is a plausible interpretation, as past Board decisions have made clear, it is not the most plausible interpretation given the addition of the phrase "or relocation outside of the appropriate unit".

In addition, the remainder of the amendments to s. 43 of the *Act* support a broader application of the provision. Section 8(8) of the *Act* permits the Union to give notice to the Employer to bargain a "workplace adjustment plan." The provisions that may be included in such a plan are set out in s. 43(8.2) of the *Act* and include "human resource planning and employee counselling and training, notice of termination, severance pay, entitlement to pension and other benefits, including early retirement benefits", all of which speak to permanent job loss. Although the change that occurs when work is relocated outside the bargaining unit includes permanent job losses, from a labour relations point of view, it is difficult to understand why the Legislature would specifically address the problems of permanent job loss only in the context of a closure where the work is transferred elsewhere. In terms of

the impact on the bargaining unit, there is little to distinguish the effects of a relocation from a total cessation of work.

Section 43(12) of the *Act* also provides some indication that the Legislature intended the section to apply to closures. This section provides an escape valve for employers who must implement a change promptly to prevent permanent damage to the employer's operations. Although this provision has not been the subject of any application before the Board, it would appear to take into account emergency situations that may render the giving of notice an undue hardship for the employer. In the Board's opinion, this provision would likely have more application to a permanent closure or cessation of work than to a relocation of work. A relocation of work requires planning and organization in order to properly implement the change, while a complete closure can happen overnight depending on the employer's circumstance. The need to reduce or eliminate the 90 day notice period before effecting the technological change would be more frequently required in a permanent closure situation where time may be of the essence.

**Efficacy**

It is our view that the Board's interpretation in the *Acme Video* case, *supra*, is the preferred interpretation. It has greater plausibility given the overall legislative text than does the interpretation urged on us by REAL. In our view, it is also more consistent with the statutory purpose of the *Act* which is to encourage collective bargaining as the preferred method of governing the workplace.

The technological change provisions contained in s. 43 of the *Act* expand the negotiating sphere of unions to include the bargaining of workplace adjustment plans when decisions that will affect a significant portion of the workforce have been made. The requirement to negotiate is imposed whether or not there exists a current collective agreement between the parties and whether or not the parties are currently in an open period. The Board's decision in *Acme Video*, *supra*, is respectful of the statutory purpose by enhancing the ability of the parties to a collective bargaining relationship to negotiate and find collective bargaining solutions to the very real problems faced by employees when work is permanently removed from the bargaining unit.

**Acceptability**

There is obvious employer resistance to the notion that unions should be permitted to access the collective bargaining regime set up in s. 43 of the *Act* on a permanent closure. Part of this reluctance relates to the inability of employers to know when a reduction in the workforce constitutes a change that requires the giving of notice and imposes the obligation to bargain collectively. In the *Acme Video* case, *supra*, the Board referred to the exceptions in the Regulations to s. 44(1) of *The Labour Standards Act* as providing some guidance as to when no notice under s. 43 of the *Act* will be required. These generally relate to situations where employees are hired for a definite term; employees are hired on a casual basis; employees are laid-off because of seasonal fluctuations that are known and predictable; or employees are temporarily laid-off. The Board stressed that it interprets s. 43(1)(c) of the *Act* as applying to a **permanent** reduction of work, not a temporary fluctuation in production that may require temporary lay-offs.

There are two additional safeguards for employers. First, the whole of s. 43 of the *Act* does not apply unless a "significant number" of employees are affected by the change. Second, an employer can apply under s. 43(12) of the *Act* for relief from the provision. Overall, the interpretation of s. 43(1)(c) of the *Act* adopted in these reasons does not place an unreasonable burden on employers, nor does it grant unions an unreasonable advantage. Both are required to use their best efforts to negotiate a workplace adjustment plan that deals with the impact of the closure on the employees affected. The *Act* does not guarantee any specific collective bargaining outcome for those employees; it merely grants them the right to negotiate the change through their union.

While we appreciate the difficulties that might arise in determining if a specific decision by an employer requires it to provide the union with notice of technological change, the Board is of the opinion that there is no labour relations rationale for distinguishing between a closure caused by a relocation of work outside the bargaining unit and a total closure.

**Conclusion**

The Board concludes that the decision by REAL to permanently close the Silver Sage Casino is a technological change within the meaning of s. 43(1)(c) of the *Act*. At the outset of the hearing, the parties requested that the Board simply issue a declaratory Order as to whether or not the closure of the Silver Sage Casino is a technological change. Any remaining issues can be referred by either party to the Board by letter.

## GARRY GREGOIRE, Applicant and UNITED STEELWORKERS OF AMERICA, LOCAL 5890 AND IPSCO INC., Respondents

LRB File No. 317-95; November 7, 1997
Chairperson, Gwen Gray; Members: Gordon Hamilton and Hugh Wagner

For the Applicant: Lyle Phillips
For the Union: Neil McLeod
For the Employer: Val MacDonald

**Duty of fair representation - Bad faith - In union setting, harsh language, in and of itself, does not constitute bad faith.**

**Duty of fair representation - Contract administration - Whether union acted in a discriminatory fashion toward disabled member - Board deciding no evidence that union's action precluded an accommodation of member's disability through rigid adherence to collective agreement provisions.**

**Duty of fair representation - Scope of duty - Board does not sit in appeal of decisions made by union in good faith, honestly, conscientiously and without prejudgment or favouritism.**

**Duty of fair representation - Scope of duty - Union's failure to communicate information to member, in and of itself, does not constitute a violation of duty.**

*The Trade Union Act*, s. 25.1

### REASONS FOR DECISION

#### Background

**Gwen Gray, Chairperson:** Garry Gregoire filed an application against the United Steelworkers of America, Local 5890 (the "Union") alleging that the Union failed to fairly represent him in respect to a grievance filed by Mr. Gregoire against his employer, IPSCO Inc. (the "Employer"), a steel manufacturing company located in Regina.

**Facts**

Mr. Gregoire testified that he commenced employment with the Employer in September of 1979. On August 24, 1984, Mr. Gregoire injured his right shoulder while rolling pipe out of a burning station. He was off work due to this injury from August of 1984 to July of 1987, at which time he was assigned to perform light duties. Mr. Gregoire tried working as a scrap cutter in the steel division but after a day or two experienced pain in the right shoulder. He was then transferred to a janitorial position in the Steel Division and remained there until he was laid off at Christmas of 1987 for a short period of time. During his lay-off, he received compensation benefits from the Workers' Compensation Board ("WCB"). When he returned to work in early 1988, Mr. Gregoire was assigned to the pipe mill to perform final inspections on pipe and to trim pipe. After a week on this job, Mr. Gregoire experienced considerable pain in the right shoulder and was unable to continue to perform the work. Although the Employer thought that Mr. Gregoire should be able to perform the final inspection and trim work, the Employer offered Mr. Gregoire a more sedentary position as store counterman in the pipe mill stores area. Sometime later, Mr. Gregoire was transferred to the position of stores counterman in spiral stores.

On May 24, 1990, Mr. Gregoire was issued a displacement notice advising him that effective May 29, 1990 he would be displaced from his position as stores counterman and advising him to exercise his bumping rights under the collective agreement. Mr. Gregoire's seniority entitled him to bump into a number of positions. However, he felt physically unable to perform any of the work offered and, as a result, he did not exercise his bumping rights. The Employer concluded from Mr. Gregoire's failure to bump that he had resigned from his position. A letter to this effect was forwarded to Mr. Gregoire on June 19, 1990. Mr. Gregoire then inquired if he could bump into a light duty position, but was advised that he did not have sufficient seniority to bump into one of these positions.

Mr. Gregoire filed a grievance with the Employer dated June 20, 1990, which stated as follows:

> *Nature of Grievance - I grieve under the collective agreement that I have been unjustly treated resulting in the company improperly stating that I have voluntarily resigned from IPSCO. The result of which is me losing my job and livelihood.*

> *Article Numbers - Articles 1.01, 12.06, 12.01, 12.02 and company policy, but not excluding any other provisions of the current collective agreement or applicable legislation.*
>
> *Settlement Requested - That I be reinstated immediately and paid all monies lost and benefits lost and that I have all seniority credited from the time I have been off the job. I also request that the company place me on a suitable job as per the C.B.A. with regard to my physical restrictions.*

On July 6, 1990, counsel for Mr. Gregoire wrote to the Union asking for an update on the progress of the grievance. Subsequently, counsel wrote the Union to confirm that Mr. Gregoire felt there were no light duty jobs at IPSCO which were available to him through the bumping procedure. Further, counsel suggested that Mr. Gregoire may be a candidate for job retraining through the WCB. On August 7, 1990, counsel again wrote to the Union to complain that Mr. Gregoire had not been advised by the Union of any progress with respect to his grievance.

Although he did not refer to attending a grievance meeting in his evidence in chief, Mr. Gregoire did recall on cross-examination that he had attended a grievance meeting in June of 1990. Mr. Gregoire could not recall being offered a job at that meeting which he could perform. When asked if the Union had persuaded him to try a stencilling position, he testified that he was unable to perform this work. Mr. Gregoire denied that he had raised a question about his ability to perform the stencilling work because of medications he was taking at that time. Mr. Gregoire also recalled on cross-examination that he had been requested to attend a meeting at the Union office with Mr. Geravelis, staff representative for the Union, and Mr. Krushlucki, President of the local, on June 27, 1990. During the meeting, a copy of a work crew list was reviewed and Mr. Gregoire identified two positions that he thought he could perform. One was a "light duty" position and the second was a sonic operator position. Mr. Gregoire testified that he was told by the Union that he lacked seniority for the first position, and that he lacked the qualifications needed to perform the second position. These were the only positions that Mr. Gregoire thought he might be able to perform.

On October 2, 1990, Mr. Gregoire received a third stage grievance settlement document from the Union which provided as follows:

*The parties hereby agree to resolve the aforementioned grievance on the following terms and conditions:*

*1) that Garry Gregoire's termination shall be revoked;*

*2) that the parties agree that there shall be no retroactive pay owing from IPSCO Inc. to Garry Gregoire;*

*3) that Garry Gregoire shall resign from IPSCO Inc.;*

*4) that IPSCO Inc. shall issue correspondence to the Workman's Compensation Board indicating that there are no jobs at IPSCO which Garry Gregoire is capable to performing;*

*5) that this is a unique case and that this settlement shall not be used as a precedent by either party in future cases, and;*

*6) that this settlement constitutes full and final settlement of all issues between the parties and is full and final settlement of the aforementioned grievance.*

The settlement was signed by the Employer. Mr. Gregoire advised the Union through a letter from his counsel that he would not sign the settlement agreement. The letter stated as follows:

*I received your Fax today with the Grievance Settlement between IPSCO Inc. and United Steelworkers of America.*

*On discussing the same with Mr. Gregoire, we came to the conclusion that, Mr. Gregoire, should not have to resign from IPSCO Inc. We agree to all the rest of the proposals.*

*Our reasons for deleting paragraph three (3), are as follows:*

*A) If Garry should resign and the Workers' Compensation Board reject his claim, then no one is responsible for him;*

*B) That in the event that a job does become available that could be handled by Mr. Gregoire, then we feel that he should be able to return to work.*

*We fully agree that there is no job at the present time which Mr. Gregoire can handle.*

*I would be pleased to hear from you in this connection.*

Mr. Gregoire wrote the Union a letter on January 31, 1991 and requested a meeting with the executive. This was arranged for March 7, 1991 with Mr. Gregoire and Mr. Phillips in attendance. Mr. Geravelis, Mr. Krushlucki, Peter Susa, Compensation Chairperson, and Bill Topp, Grievance Chairperson were in attendance for the Union. The meeting focused on the ways the Union could assist Mr. Gregoire with his WCB claim. A summary of the meeting was contained in a letter from Mr. Geravelis to Mr. Phillips dated March 12, 1991 which stated as follows:

> *The outcome of our discussions as we see them now is that Garry is unable to do any of the jobs at IPSCO. This has been confirmed in discussions with you, Garry and Garry's Doctors.*
>
> *It is now decided and agreed by all present that Local 5890 will help you, Mr. Phillips, in pursuing Garry's appeal with the Workers' Compensation Board.*
>
> *It has also been suggested that Garry get another Orthopaedic Specialist's evaluation to accompany the first Specialist's report to pursue his appeal. It is agreed that not only will we help in perusing this, but that Local 5890 will cover the cost of Garry's trip to Saskatoon to see the Orthopaedic Specialist, bus fare and incidentals or mileage. Listed below are the names of the three Specialists given to us by our Saskatoon office as I gave to your office over the phone Monday, March 12, 1991:*
>
> *Dr. T.R. Evans*
> *240 - 140 Wall Street, Saskatoon*
> *244-1247*
>
> *Dr. Robert Shannon*
> *621 - 750 Spadina Crescent East, Saskatoon*
> *244-5561*
>
> *Dr. J. McKerrell*
> *(see Dr. R. Shannon)*
>
> *As stated at our meeting you were to send us a copy of the appeal you sent in on Garry's behalf. I am enclosing forms from IPSCO for Garry to fill out. The Accident and Sickness Benefits Claim Form (green) has section for attending Physician Statement. The Application for Disability Pension (white) is also enclosed as per our discussion regarding Garry's application in that direction.*
>
> *This letter should reflect all items discussed and agreed upon at the March 7, 1991 meeting. We will work with you in every way possible to establish Garry's rightful claim with the Workers' Compensation Board.*

At the same time, Mr. Gregoire obtained the sickness and accident insurance forms from the Union in order to submit a disability claim through the workplace insurance plans. The Employer responded to the forms by indicating that "Mr. Gregoire was a terminated employee. An offer of settlement was extended by the Company which by all appearances was accepted by Mr. Gregoire and his representatives." Mr. Phillips responded to the Employer's correspondence by writing the Union and advising as follows:

> *I received a copy of a letter which was written to you by IPSCO, on April 16, 1991 in which they state that an Offer of Settlement was extended by the Company which by all appearances was accepted by Mr. Gregoire and his representatives. This, of course, is not true as Mr. Gregoire did not resign from his position. The only thing that he agreed upon was that there were no jobs at IPSCO which Mr. Gregoire was capable of performing.*
>
> *The Appeal with the Workers' Compensation Board is apparently proceeding.*
>
> *I would request you to inform me if there are any other proceedings we can take in regard to IPSCO.*

Mr. Gregoire appeared before the Medical Review Panel of the WCB in November of 1991 with Mr. Krushlucki. As a result of this appeal, Mr. Gregoire's permanent functional impairment was set at 16% from the WCB's previous assessment of 3%, and his payments were adjusted accordingly. He was deemed fit for light duty with limitations on lifting heavy objects or working with the right arm above shoulder level. Mr. Gregoire complained at the hearing that he had wanted Mr. Susa to attend this meeting and to act as his representative. He accused Mr. Krushlucki of preventing Mr. Susa from attending the meeting.

On January 13, 1992, Mr. Phillips again inquired of the Union if any further steps could be taken against IPSCO. Mr. Gregoire testified that he attempted to get a response from the Union but was unsuccessful. At Union meetings, his grievance remained on the unfinished business agenda. Mr. Gregoire complained that Mr. Krushlucki and Mr. Geravelis spoke to him in crude and threatening terms during his various encounters with them including the membership meeting that Mr. Gregoire attended.

Mr. Phillips wrote the Union again on November 26, 1992 asking if the Union was pursuing Mr. Gregoire's claim against the insurance company or IPSCO. One year later, on November 24, 1993, he wrote the Union another letter asking if any further steps had been taken in the grievance. He followed this up with another letter to Mr. Krushlucki on January 7, 1994. Mr. Krushlucki replied on January 12, 1994 and set out the Union's position as follows:

> *In reference to your letter of January 7, 1994, let me first apologize for the delay in responding as I have been extremely tied up in bargaining with IPSCO, but have had an opportunity to review the above with my colleagues.*
>
> *As you are aware, Mr. Gregoire has not got a grievance currently in effect with us. We have on numerous occasions gone the distance with Mr. Gregoire in an attempt to attain work for him over the years, to get him back to work as a result of his grievance, to represent him at the Workers' Compensation Board (appeals, etc.), and have been doing more than normal. It is our opinion that we have nothing further to offer him regarding the grievance which you refer to in your letter. I do not know what further assistance we can be to Mr. Gregoire, but if you have some ideas, would appreciate you contacting us so we may discuss them with you.*

Mr. Gregoire testified that this was the first time he was informed by the Union that he had no grievance pending with the Employer. On behalf of Mr. Gregoire, Mr. Phillips replied to Mr. Krushlucki's letter as follows:

> *I have your letter of January 12, 1994.*
>
> *I can not understand when Mr. Gregoire refused to resign and sign the grievance settlement that the grievance was apparently dropped by the Union.*
>
> *I would have expected that you have kept the same open to the extent that Mr. Gregoire could have applied for compensation.*
>
> *I would request you to inform me if this would still be possible.*

On March 1, 1994, Mr. Phillips wrote Mr. Krushlucki claiming damages for the Union's failure to fairly represent Mr. Gregoire in relation to his grievance against IPSCO. Mr. Krushlucki responded as follows:

> *Further to your letter of March 1, 1994, you claim that our Union has not represented Mr. Gregoire fairly. It is our heartfelt belief that we did everything we could to accommodate Mr. Gregoire, over a number of years. It is also our firm belief that Mr. Gregoire did not do everything that he could have to help himself. That is most regrettable.*
>
> *If you wish to have a conversation with me on this matter, please feel free to give me a call. Should you wish to proceed otherwise, please do so through our legal counsel.*

Mr. Gregoire described the struggle he has had to regain full employment. After using up his Unemployment Insurance benefits, he applied for welfare. He also attended upgrading classes. At the time of the hearing, he had a temporary janitorial job.

Mr. Susa testified as to the assistance he provided Mr. Gregoire in appealing the WCB rulings. As chairperson of the Union's WCB committee, Mr. Susa had represented many members before the WCB. Mr. Susa also recalled the discussions between Mr. Gregoire and the Union after Mr. Gregoire's job in stores was abolished. He testified that there were no jobs available at that time which Mr. Gregoire could perform given his disability and his seniority. Mr. Susa testified that it was not usual for an employee to use his seniority to obtain work in another division of the plant as each division has a separate seniority list.

Mr. Susa was present at the grievance meeting held on June 22, 1990. Mr. Susa testified that prior to the meeting, the Union committee met with Mr. Gregoire to persuade him to identify a job that he could perform. Mr. Susa recalled that the meeting was very frustrating. He felt that Mr. Gregoire was hedging on selecting a job because of his disability. Mr. Susa and the committee wanted Mr. Gregoire to try a job. Finally, after much discussion, Mr. Gregoire selected a stencilling position. The Union's grievance committee, along with Mr. Gregoire, then met with members of the Employer's management team to discuss the grievance. Mr. Susa testified that everyone was "on board" in their efforts to find Mr. Gregoire work that he was capable of performing. However, according to Mr. Susa, Mr. Gregoire raised a concern "out of the clear blue sky" that he was on heavy medication that might affect his work performance. At this point in the meeting, Jack Mathieson, Director of Safety, became upset with the progress of the meeting and brought it to an end.

The Union gave evidence of the events leading to the withdrawal of Mr. Gregoire's grievance through Mr. Geravelis and Mr. Krushlucki. With the exception of one meeting which Mr. Geravelis alone testified to, their evidence was by and large similar, with Mr. Krushlucki's evidence providing the most detailed description. We will summarize his evidence and later provide details of the one meeting which Mr. Geravelis described in his testimony that was not touched upon in Mr. Krushlucki's evidence.

Mr. Krushlucki has worked for the Employer for 29 years as an electrician. He continues to work at the plant and takes leaves of absence to deal with his Union responsibilities. Unlike Mr. Geravelis, he is not a full-time employee of the Union.

In 1990, Mr. Krushlucki became aware of Mr. Gregoire's job problem when he was advised by a shop steward that Mr. Gregoire's position as stores counterman may be abolished. Mr. Krushlucki's notes indicated that he tried to set up a meeting on June 7, 1990 with Mr. Susa and Mr. Mathieson to discuss Mr. Gregoire's situation. On June 5, 1990 he spoke with Mr. Shortridge, Supervisor - Recruitment and Industrial Relations, about Mr. Gregoire's position and after a heated exchange, was told by Mr. Shortridge that the Employer might place Mr. Gregoire on a job that he could not handle. After this discussion, Mr. Krushlucki proceeded to file the grievance set out above. Mr. Krushlucki did not view Mr. Gregoire's situation as a voluntary resignation as the Employer maintained. He viewed the matter as giving rise to a complaint for unjust treatment.

After the grievance was filed on behalf of Mr. Gregoire, the parties met for a "step 2.5" meeting. A "step 2.5" meeting is a term used by the Union and the Employer to describe their informal attempts to resolve grievances before sending them on to the next step in the grievance procedure. Mr. Krushlucki explained that the Union was unsure at what step to file the grievance as it was not a discharge grievance. As a result, the Union filed the grievance at step 1. However, the parties agreed to treat it at the step 3 level of the grievance procedure. Before the step 3 meeting was held, the parties engaged in the informal step 2.5 meeting on June 22, 1990.

Mr. Krushlucki, Mr. Susa and the Union's grievance committee attended the June 22, 1990 meeting along with Mr. Gregoire. Mr. Mathieson and Mr. Hallson, Supervisor of Employee Relations, attended the meeting for the Employer. As Mr. Krushlucki recalled the events, the Union tried to persuade the Employer to take Mr. Gregoire back. Mr. Mathieson was finally convinced to say that if Mr. Gregoire would pick a job he was willing to try, the Employer would consider appointing him to the job.

According to Mr. Krushlucki, at that point the Union asked for a recess in order to discuss the proposal with Mr. Gregoire. The Union put various job options to Mr. Gregoire, who seemed to Mr. Krushlucki to be unwilling to decide, although finally he settled on the stencilling position. Mr. Krushlucki described the conversation as tense. He indicated that the Union officers were frustrated with Mr. Gregoire who appeared to them as not being interested in seeking a resolution to the grievance.

Mr. Krushlucki testified that when the committee and Mr. Gregoire returned to the meeting, Mr. Gregoire indicated to Mr. Mathieson that he was willing to try the stencilling position. Mr. Mathieson indicated that he would try to arrange to work Mr. Gregoire back into the position. At that point "out of the blue" Mr. Gregoire disclosed that he was taking heavy medications that made him drowsy and dizzy. Mr. Mathieson broke up the meeting at that point and stated that he was not going to play "these games".

The next meeting between the Union and Mr. Gregoire occurred on June 27, 1990 at the initiation of Mr. Krushlucki. He testified that he told Mr. Gregoire at this meeting that if it could be demonstrated to the Employer that the medications he was on did not pose any risk to himself or others, the company may reconsider his request to be placed in that job. According to Mr. Krushlucki, Mr. Gregoire suggested that the Union phone his doctor to get the names of the medication. Mr. Krushlucki and Mr. Geravelis advised him that the doctor would not be willing to release such information to them and they insisted that he provide the Union with the information. Mr. Krushlucki did not believe that Mr. Gregoire was being truthful when he indicated that he did not know the names of the medication he was taking. Mr. Krushlucki left the meeting and was told later by Mr. Geravelis that Mr. Gregoire promised to phone in the names of the medication.

During the June 27, 1990, meeting there was also a discussion between the Union and Mr. Gregoire over possible job openings. Mr. Gregoire had a work crew list for May 28, 1990 and pointed out a light duty job held by Mr. Koller. The Union advised Mr. Gregoire that the light duty job no longer existed and, in any event, he lacked the seniority to bump into it as it was held by Mr. Koller who was 49th on the seniority list while Mr. Gregoire was 130th on the list.

Mr. Krushlucki indicated that there are no "light duty" jobs *per se* with the Employer. All jobs in the plant are classified and the classifications are set out in the collective agreement. When a person is injured at work, the company may place them on "light duty" and have them perform various functions within their range of abilities until they are rehabilitated. The functions otherwise do not constitute a position in the bargaining unit and cannot be claimed by another worker through the bumping procedure. Mr. Krushlucki testified that he did not know of any way the Union could require the Employer to create a light duty job.

Mr. Gregoire also indicated in the meeting that he could perform work described as a sonic operator. The Union advised Mr. Gregoire that he would not meet the requirements for this position as he lacked the training required to perform the work.

On August 15, 1990, the Union wrote the Employer referring Mr. Gregoire's grievance to expedited arbitration. It was agreed later that this reference to arbitration was premature as no step 3 meeting had taken place. On September 17, 1990, the third step grievance meeting was held between the Employer and the Union. During the meeting, a discussion ensued in relation to Mr. Gregoire's medication. The Union advised the Employer that the medication would not pose a threat to Mr. Gregoire or other workers. The Union proposed that both parties work towards getting WCB to retrain Mr. Gregoire. Initially, the Employer was reluctant to participate in a joint letter to WCB because it felt unable to tell WCB that there was no work available for Mr. Gregoire. At the same time, the Employer expressed a concern that Mr. Gregoire would re-injure himself if he did return to work. According to Mr. Krushlucki, during the grievance meeting the Union promoted the notion that Mr. Gregoire should be given a chance to work at stencilling. Mr. Krushlucki testified that the mood in the meeting changed

from one of being unwilling to allow Mr. Gregoire back into the plant to one of trying to cooperate to get Mr. Gregoire retrained through WCB benefits.

In response to this meeting, the Employer proposed the settlement agreement set out earlier in these reasons, along with a draft letter to WCB. Mr. Krushlucki testified that Mr. Gregoire could not revert to laid-off status because work was available at IPSCO that Mr. Gregoire was entitled to bid on. In his letter to the Union dated October 2, 1990, in which he rejected the offer to settle proposed by IPSCO, Mr. Phillips suggested that Mr. Gregoire could be maintained on the recall list for work that may come open in the future.

Mr. Krushlucki testified that on October 12, 1990, he spoke with Mr. Gregoire on the telephone and provided him with an update of his most recent meeting with the Employer which had taken place that morning. Mr. Krushlucki relayed the message that the Employer did not seem receptive to Mr. Phillips' proposal that the offer be accepted except for the requirement that Mr. Gregoire resign. Mr. Krushlucki then proposed to Mr. Gregoire that he see an independent specialist to review his case and give a prognosis of his injury. Following this discussion, Mr. Krushlucki also telephoned Mr. Phillips to relay the same information to him.

At the Union's monthly membership meeting held on December 17, 1990, the grievance committee recommended to the membership that Mr. Gregoire's grievance be withdrawn by the Union. This recommendation was first discussed at a Union executive meeting that was held immediately prior to the monthly membership meeting. Mr. Krushlucki testified that at the executive meeting the grievance file was reviewed and discussed in some detail. It was concluded that the grievance would not succeed at arbitration because the bumping process had been followed correctly and the alternative duty policy had also been followed. This latter policy was developed between the Union and the Employer to deal with the creation of temporary "light duty" positions and the bumping options for workers suffering permanent disabilities as a result of workplace injuries.

The Union executive noted that Mr. Gregoire had said at the time of the abolishment of his storekeeper position that there were no other jobs that he was capable of performing given his restrictions. Although the Union would have liked Mr. Gregoire to try working at a position in his bumping range,

he did not exercise that option and, as such, he tied the Union's hands. Mr. Krushlucki testified that the Union executive did not think there was much else they could do for Mr. Gregoire under the terms of the collective agreement. As a result, the recommendation to withdraw the grievance went forth to the membership meeting and was approved by the membership.

Mr. Krushlucki testified that the main factor contributing to Mr. Gregoire's problems was his refusal to exercise his option to bump. As Mr. Krushlucki put it, "it scuttled him". On his view of the matter Mr. Krushlucki did not think Mr. Gregoire had done much to help himself and that he weakened the Union's efforts to find alternate work through his conduct at the June 22, 1990 meeting with the Employer.

The Union executive concluded that the efforts made on behalf of Mr. Gregoire should focus on restoring his WCB benefits.

Mr. Krushlucki testified that there is no record of a letter being sent by the Union to Mr. Gregoire advising him that the Union would be dealing with his grievance at the December meeting. Likewise, there is no record of a letter being sent to Mr. Gregoire or Mr. Phillips advising them of the outcome of the meeting until Mr. Krushlucki's letter to Mr. Phillips dated January 12, 1994. In regard to notice of the membership meeting at which a grievance will be discussed, the Union's normal practice is to post notice of membership meetings one week in advance of the meeting on the bulletin boards at the plant. The membership meetings are held on the third Monday of each month at the same location. The agenda regularly contains a grievance committee report. Mr. Krushlucki testified that individual grievors may not receive individual notice that their grievance will be discussed at a certain membership meeting; however, they may obtain such information from their shop steward or the chief shop steward for their division.

Following the December 17, 1990 meeting, the Union received Mr. Gregoire's letter of January 31, 1991 requesting a meeting with the Union to pursue his claim either against the Employer or the WCB. At the meeting held on March 7, 1991, the Union suggested and Mr. Gregoire agreed to obtain an independent medical assessment of Mr. Gregoire's injuries to pursue the WCB aspect of his claim. Mr. Krushlucki recalled that everyone at the meeting, including Mr. Gregoire and Mr. Phillips, were aware

that the grievance against the Employer had been dropped. There was, however, no mention of this discussion in the written minutes of the meeting.

On March 21, 1991, Mr. Geravelis forwarded Mr. Gregoire's application for long term disability benefits to the Employer's benefits department. On April 16, 1991, Mr. Hallson replied that "Mr. Gregoire is a terminated employee not eligible for employee benefits." On April 16, 1991, Mr. Hallson wrote to Mr. Krushlucki as follows:

> *Mr. Gregoire was a terminated employee. An offer of settlement was extended by the Company which by all appearances was accepted by Mr. Gregoire and his representatives.*
>
> *His status as terminated/resigned remains the same.*

Copies of these letters were forwarded to Mr. Phillips who responded in his April 24, 1991 letter quoted above by concluding "I would request you to inform me if there are any other proceedings we can take in regard to IPSCO."

On October 18, 1993, Mr. Krushlucki responded to an inquiry from the WCB indicating that Mr. Gregoire's grievance had been dropped without prejudice in December of 1990.

Mr. Krushlucki testified that he attended the appeal hearing in November of 1991 in place of Mr. Susa because Mr. Susa was unable to obtain a leave of absence from the Employer to attend the hearing. Mr. Krushlucki denied that he had jettisoned Mr. Susa from the hearing, as alleged by Mr. Gregoire in his evidence.

Mr. Krushlucki also addressed Mr. Gregoire's assertion that he had been denied an opportunity to speak to his grievance at a membership meeting. Mr. Krushlucki recalled that in November of 1990, a special meeting was called to ratify a collective agreement. He indicated that when a special meeting is called, members are restricted to discussing the issues posted on the notice of meeting. Mr. Krushlucki does not specifically recall Mr. Gregoire asking to speak to his grievance at this meeting, but if Mr. Gregoire had made such a request, Mr. Krushlucki would have called him out of order. Mr. Krushlucki denied

that he had used foul language directed either at Mr. Gregoire or Mr. Phillips. He indicated that at the June 22, 1990 and June 27, 1990 meetings, he may have sworn in frustration at Mr. Gregoire's conduct.

The one meeting that Mr. Geravelis recalled in his evidence, that was not mentioned by Mr. Krushlucki, was a meeting between the Union and the Employer that took place on July 23, 1990. Mr. Geravelis testified that he attended the meeting along with the Union's grievance committee. During the meeting, the Union pressed the Employer to reconsider offering Mr. Gregoire a position at the plant. Mr. Hallson indicated that he would consider the Union's request. However, on August 14, 1990, Mr. Hallson replied in writing that the Employer was standing by its original decision to treat Mr. Gregoire's refusal to bump as a resignation.

**Relevant Statutory Provisions**

The applicant alleges that the Union violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17, which provides 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.*

**Applicant's Argument**

Counsel for Mr. Gregoire argued that the Union acted arbitrarily in withdrawing Mr. Gregoire's grievance. He argued that the Union should have pursued the grievance and Mr. Gregoire's bumping rights as set out in the alternate duty policy. The last stage of this policy would require the Union and the Employer to refer Mr. Gregoire to the WCB for retraining if there were no jobs available in the company that Mr. Gregoire could perform. Counsel argued that had the grievance been pursued, Mr. Gregoire's claim for WCB benefits for retraining would have been dealt with earlier. Counsel seemed to suggest that Mr. Gregoire could have been laid off in May of 1990, when his position as stores counterman was abolished. His entitlements to other benefits, such as Unemployment Insurance, would not have been delayed.

Counsel referred the Board to *Barabe v. Communication, Energy and Paperworkers Union, Local 649*, [1994] 3rd Quarter Sask. Labour Rep. 162, LRB File No. 116-94; *Canadian Merchant Services Guild v. Gagnon et al.*, [1984] S.C.R. 509 (S.C.C.); and *Chrispen v. International Association of Fire Fighters' Local 510 (Prince Albert Fire Fighters' Association)*, [1992] 4th Quarter Sask. Labour Rep. 133, LRB File No. 003-92.

**Union's Argument**

Counsel for the Union argued that there was nothing that could be achieved through the grievance process. Mr. Gregoire had an opportunity at the step 2.5 meeting to obtain other employment through the Employer but his own conduct destroyed that option. Even then, the Union did go back to the Employer seeking to get the Employer to support Mr. Gregoire's claim for retraining with the WCB and to get the Employer to reconsider Mr. Gregoire for the stencilling position. At the end of the day, the Employer did agree to support Mr. Gregoire's claim for WCB benefits and proposed a settlement of the grievance that would have provided such support. At the same time, Mr. Gregoire was requested to formally resign from the Employer. When this agreement was presented to Mr. Gregoire, he agreed with everything, including his inability to perform any jobs for the Employer, except the request that he resign from the Employer. Counsel argued that the resignation request was a legitimate employer response to the employee's acknowledgement that he was physically unable to perform any work at the plant. Counsel noted that, in any event, there was no evidence to suggest that Mr. Gregoire's claim for retraining was prejudiced by the lack of support from the Employer. He also argued that it was not a matter that could be resolved by an arbitrator.

On the procedural aspects of the grievance handling, counsel acknowledged that there was evidence that indicated the Union did not advise Mr. Gregoire that it had withdrawn his grievance. He argued that this failure did not constitute bad faith or arbitrariness.

Mr. McLeod referred the Board to the *Chrispen* case, *supra*; *Yearley v. Service Employees' International Union, Local 299*, [1993] 4th Quarter Sask. Labour Rep. 57, LRB File Nos. 055-92, 080-92 & 081-92; *Brideau v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (AFL-CIO-CLC)* (1986), 86 CLLC 14,096 (Can. L.R.B.); *Young v.*

*United Transportation Union* (1989), 89 CLLC 14,310 (Can. L.R.B.); and *Hanson v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 179*, [1992] 3rd Quarter Sask. Labour Rep. 104, LRB File No. 041-92.

**Analysis**

In assessing the Union's conduct in the present instance, the Board must determine if the Union acted in a manner that was arbitrary, discriminatory or in bad faith. These parameters were discussed by this Board in *Banga v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93, where the Board stated as follows, at 98-99:

> *It is clear from the jurisprudence which has accumulated concerning the duty of fair representation that it is not the task of a labour relations board to second guess a trade union in the performance of its responsibilities, or to view the dealing of that union with a single employee without considering a context in which numerous other employees and the union itself may have distinct or competing interests at stake.*
>
> *Perhaps the most authoritative description of the nature of the duty of fair representation is contained in the decision of the Supreme Court of Canada in Canadian Merchant Services Guild v. Gagnon, 84 CLLC 12,181:*
>
> > *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.*

*This description was reaffirmed by the Supreme Court in decisions in Supply and Services Union of the Public Service Alliance of Canada v. Gendron, [1991] S.C.R. 1298; and Centre Hospitalier Regina Ltee. v. Labour Court, [1991] S.C.R. 1330.*

*The terms "arbitrary," "discriminatory" and "in bad faith" have also been the subject of much discussion, in the Gagnon case, supra, as well as in others. In Walter Prinesdomu v. Canadian Union of Public Employees, [1975] 2 C.L.R.B.R. 310, at 315, the Ontario Labour Relations Board applied the terms "discriminatory" and "in bad faith" to:*

> *... 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, colour, 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.*

*The concept of arbitrariness gave the Board considerably more difficulty, and they made the following comment, at 315:*

> *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 judgment, mistakes, negligence and unbecoming laxness.*

*This Board made an attempt to summarize what may reasonably be expected by an employee in the decision in Gilbert Radke v. Canadian Union of Paperworkers, LRB File No.262-92:*

> *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 interest 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.*

There is no serious allegation on the part of Mr. Gregoire that the Union acted in bad faith toward him. Mr. Krushlucki and Mr. Geravelis may have used harsh language with him during the meetings of June 22, 1990 and June 27, 1990, however, the language used was not intended in a derogatory sense or in a demeaning sense. Both Union officials were expressing their frustration with Mr. Gregoire who appeared to be incapable of making a decision or of providing the Union with the information it required to assist him obtain other employment from the Employer. Harsh language, in and of itself, in the Union setting does not constitute bad faith.

Similarly, there is no serious suggestion that the Union acted in a discriminatory fashion toward Mr. Gregoire. There may have been a suggestion that Mr. Gregoire was discriminated against based on his physical disability. During the course of the hearing, it was disclosed that Mr. Gregoire had referred some portion of this dispute to the Human Rights Commission. However, no further mention was made of discrimination based on disability. In terms of applying the collective agreement and the alternate duty policy for injured workers, there was no evidence that Mr. Gregoire was treated in a discriminatory manner. His disability had been accommodated in two ways. First, he was off work from May of 1984 until July of 1987. Second, when he returned to work, he was accommodated by being permitted to

perform jobs that met his physical limitations. The abolition of his job as stores counterman in May of 1990 created a dilemma because there was no other position that Mr. Gregoire felt capable of performing due both to his physical disability and his seniority. Although the Employer was willing to try Mr. Gregoire in the stencilling position, Mr. Gregoire precluded that possibility by raising the issue of his medication at the June 22, 1990 meeting. Even then, the Union attempted to get the Employer to change its mind and permit Mr. Gregoire to return to work. There is no indication that the Union's action precluded an accommodation of Mr. Gregoire's disability through rigid adherence to the provisions contained in the collective agreement. The Union was a party to the alternate duty policy which expanded the bumping provisions for injured workers and which formed a legitimate attempt on the part of the Employer and the Union to accommodate injured and disabled workers.

Finally, there is no convincing evidence that the Union acted in an arbitrary fashion. Mr. Susa, Mr. Geravelis and Mr. Krushlucki all appreciated the nature of Mr. Gregoire's claim, including the underlying WCB problem. They used their best efforts to resolve the employment problem by meeting with the Employer and encouraging a negotiated settlement of the matter. They were almost successful in returning Mr. Gregoire to work until Mr. Gregoire jettisoned the mission by raising the issue of medication at the June 22, 1990 meeting. The Union then switched its efforts to encouraging the Employer to support Mr. Gregoire's claim for retraining and, again, were attaining success until Mr. Gregoire decided the settlement was insufficient. The Union did not demonstrate any lack of care or inattention in dealing with the grievance at this stage of the matter.

The Union may be fairly criticized for failing to advise Mr. Gregoire that a recommendation was going to be made with respect to his grievance at the membership meeting in December of 1990. In addition, the Union can be criticized for failing to keep Mr. Gregoire properly informed as to the outcome of his grievance. It is imperative in order for the grievance and arbitration procedure to work properly and efficiently that information pertaining to a grievance be relayed to the individual grievor.

We are satisfied, however, that the failure to communicate information to Mr. Gregoire was an oversight on the part of the Union officials, who assumed Mr. Gregoire and his counsel were aware of the outcome. There is no suggestion in the evidence that Mr. Gregoire had meaningful new information to present to the Union before it made its final decision that may have influenced the Union's

assessment of the likelihood of successfully arbitrating the grievance. Mr. Gregoire's physical limitations were unchanged since 1984; his assessment of his ability to perform other work had been thoroughly explored; settlement options had been considered and rejected. The Union had a full understanding of the nature of the problem in December of 1990. The Union executive fairly assessed the likelihood of winning the arbitration taking into account these factors and the Union's understanding of the terms of the collective agreement and the alternate duty policy for disabled and injured workers. In these circumstances, the failure to communicate, in and of itself, does not constitute a violation of s. 25.1 of the *Act*. See *Brideau, supra*, at 16,012 and *Young, supra,* at 16,035.

Although the Board has sympathy for the situation Mr. Gregoire is in as a result of his workplace injury, we do not sit in appeal of decisions made by the Union in good faith, honestly, conscientiously and without prejudgment or favouritism. The Union, in this instance, has met the representation requirements set out in s. 25.1 of the *Act*. As a result, the Board will dismiss this application.

**SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and REGINA EXHIBITION ASSOCIATION LIMITED AND DOUG CRESSMAN, Respondents**

LRB File Nos. 256-97, 266-97, 308-97 & 321-97; December 1, 1997

**REGINA EXHIBITION ASSOCIATION LIMITED, Applicant and SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Respondent**

LRB File No. 279-97; December 1, 1997

Chairperson, Gwen Gray; Members: Don Bell and Donna Ottenson

For the Applicant: Larry Kowalchuk
For the Respondents: Larry Seiferling, Q.C.

**Duty to bargain in good faith - Collective agreement - Board reviews factors to be considered in determining if party engaged in good faith bargaining and taking reasonable steps to conclude collective agreement.**

**Duty to bargain in good faith - Disclosure - Disclosure obligation arises when employer is asked question at bargaining table or when employer makes decision likely to impact on bargaining unit during term of collective agreement being negotiated.**

**Technological change - Duty to bargain in good faith - Workplace adjustment plan - Bargaining collectively with respect to workplace adjustment plan carries same degree of effort expected when parties negotiating collective agreement.**

**Technological change - Duty to bargain in good faith - Workplace adjustment plan - Simple exchange of proposals is insufficient - Parties must engage in serious, determined and rational discussion of proposals put forward - For bargaining to "fail" parties must be at genuine impasse, having exhausted all reasonable efforts to achieve plan.**

**Lock-Out - Definition - Defensive lock-out occurs when employer responds to strike activity by effecting lock-out - Board holds that use of defensive lock-out under circumstances did not constitute a violation of *The Trade Union Act*.**

**Remedy - Technological change - Board orders employer not to effect closure of business until s. 43 of *The Trade Union Act* complied with - If employer cannot lawfully continue to operate business, Board orders employer to continue to pay employees affected by technological change for duration of collective bargaining relating to workplace adjustment plan.**

**Unfair labour practice - Threatened closure - Board considers motives of employer when statements made during bargaining concerning closure of business - When employer takes concrete steps, which are not motivated by anti-union animus, to initiate closure of a business, employer has obligation to disclose closure information to union.**

***The Trade Union Act*, ss. 2(j.2), 11(1)(c), 11(1)(i) and 43.**

## REASONS FOR DECISION

### Background

**Gwen Gray, Chairperson:** The Union represents employees at the Silver Sage Casino ("Casino") which is operated by the Regina Exhibition Association Limited ("REAL") in Regina. On August 12, 1997, REAL gave notice to the Union and its employees that it intended to close the Silver Sage Casino on November 22, 1997. The closure will result in the layoff of 135 casino workers, 40 employees in the operations bargaining unit and 23 employees in the food services bargaining unit. The operations and food service employees are represented by the Union in separate bargaining units.

In LRB File No. 256-97, the Union asked the Board to find REAL in violation of ss. 11(1)(a) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17, for failing to disclose its intention to close the Casino to the Union in the course of bargaining the operations agreement and the casino agreement. The Union alleged that it questioned REAL during negotiations of the operations and casino agreements on numerous occasions with respect to the closure of the Casino. As a remedy, the Union asked the Board to order REAL to open the operations agreement in order to allow the Union to negotiate the impact of the Casino closure. The Union also requested that the Board order REAL to compensate the Union for the time spent so far in negotiating revisions to the casino agreement. In the reply to this application, REAL asserted that it disclosed all information known to it at the time of any request from the Union.

In LRB File No. 266-97, the Union alleged that REAL had effected a technological change at the Casino within the meaning of s. 43 of the *Act* and had refused to acknowledge that it was obligated to adhere to the provisions of the *Act* respecting this change in its operations. The Union also claimed that

REAL violated ss. 3, 11(1)(c) and 43 of the *Act*. On October 31, 1997, the Board issued Reasons for Decision finding that the closure did constitute a technological change within the meaning of s. 43 of the *Act*.

The remedial portion of this application was left for argument at the hearing of the remaining applications. The remedial orders requested by the Union include: (a) a declaration that the closure is a technological change and an order requiring REAL to comply with s. 43; (b) an Order requiring REAL to negotiate a workplace adjustment plan with the Union by meeting within a specified time frame; and (c) an Order to stop the implementation of the closure until REAL has satisfied the Board that it has complied with s. 43 of the *Act*. REAL's reply with respect to the remedial aspect of the Union's application asserted that it had complied with the requirements of s. 43 of the *Act* by giving the Union advance notice of the change and by agreeing to negotiate on any proposal the Union wished to present.

In LRB File No. 279-97, REAL alleged that the Union was in violation of s. 11(2)(c) of the *Act* by refusing to execute the formal agreement reached between it and the Union on June 4, 1997 with respect to the operations bargaining unit. The Union replied by asserting that the parties are not in agreement as to the exact terms of the agreement reached on June 4, 1997 and claiming that the agreement that was ratified by its members was not the same agreement as was contained in REAL's proposed formal collective agreement.

In LRB File No. 308-97, the Union brought a further application in which it alleged that REAL breached ss. 11(1)(a), (c) and 43 of the *Act*. The Union claimed that after it had requested to continue bargaining the casino agreement, and after REAL had indicated to this Board in the affidavit material filed on LRB File No. 266-97 that it was prepared to discuss any proposals the Union made dealing with the closure, REAL sent the Union a letter stating that it would not accept any proposals from the Union submitted and dated after November 6, 1996. REAL replied to this application by stating that it did not intend to agree to any proposal submitted after November 6, 1996 but it had and did intend to meet with the Union for the purpose of bargaining collectively.

The remedies sought on LRB File No. 308-97 include: (a) a declaration of an unfair labour practice under ss. 11(1)(a), (c) and 43 of the *Act*; (b) an Order directing REAL to remain open until an

agreement is reached on the outstanding proposals and/or an arbitrator is appointed to resolve the outstanding proposals prior to closure; (c) an Order compensating the Union for time spent so far in negotiations; and (d) an Order requiring compensation for the Union's legal fees. In its reply, REAL stated that the remedies requested are outside the Board's statutory jurisdiction.

In LRB File No. 321-97, the Union claimed that REAL violated ss. 3, 11(1)(a), (e), (f), (j), (m) and 12 of the *Act* by disciplining employees at the Casino who engaged in lawful strike activity. REAL replied that it had not disciplined the employees for strike related activity. The Union requested that the Board issue an Order directing REAL to restore the wages and benefits of employees who had been disciplined for engaging in strike activity. This matter was the subject of an interim application, as well as argument on the final application. The Board will deal with the application as a final application in these Reasons.

**Preliminary Matter**

At the conclusion of the arguments on the applications, counsel for REAL asked the Board to rule on the issue of whether or not the affidavits filed with the various applications constituted evidence on the main applications. As a general matter, the Board will refer to all the material filed on any application in its final Reasons, unless the parties have agreed otherwise during the course of the hearing. In this hearing, there was no explicit agreement to exclude the affidavit material. Affidavit material, however, will always take second place to evidence that is tendered through witnesses at the hearing who are subject to full cross-examination. In this instance, the evidence that was presented to the Board through witnesses at the hearing formed the primary basis of our fact finding, with the affidavit material being of assistance in determining sequence and filling in minor gaps in the documentary evidence presented at the hearing.

The Board also notes as a matter of record that certain agreements were tendered in evidence as Board exhibits. These agreements were entered into between REAL and Saskatchewan Gaming Commission ("SGC") and Saskatchewan Liquor and Gaming Authority ("SGLA"). The agreements were produced through subpoenas issued by the Board.

**Facts**

The Union is certified for four bargaining units at REAL. The largest unit is called the operations group; it constitutes the main bargaining table. In addition, the Union bargains for a group of employees at the race track, another group at the Casino and a group of food service workers.

Negotiations for a new collective agreement with respect to the operations group commenced in the spring of 1996. Doug Cressman, General Manager, was REAL's main spokesperson at the operations bargaining table; Mark Hollyoak, Union Representative, was the chief negotiator for the Union. In October, 1996, REAL requested that the Union table its monetary proposals which the Union agreed to do.

At the bargaining meeting subsequent to the meeting at which the Union tabled its monetary proposals, REAL advised the Union that it was unable to respond to the monetary proposals at that time because it was negotiating an agreement with SLGA and SGC. Until an agreement with the two government agencies was reached, REAL was unsure of its financial situation and was unable to commit itself to a monetary package at the operations table.

In January of 1997, Mr. Hollyoak asked Mr. Cressman at the operations bargaining table how the negotiations with SLGA and SGC were proceeding. Mr. Cressman told Mr. Hollyoak that there were three matters that remained outstanding. When Mr. Hollyoak asked what those issues were, Mr. Cressman would not disclose them to the Union. At the same meeting, REAL did not respond to the Union's monetary proposals except to say that it was still unsure of its financial picture.

According to Mr. Hollyoak, during a bargaining meeting held on April 9, 1997, Mr. Cressman informed the Union that REAL had given up on signing an agreement with SLGA and SGC and would proceed to bargain with respect to the monetary proposals without further delays. In his testimony, Mr. Hollyoak noted that the date - April 9, 1997 - stuck in his mind because he later learned that REAL had concluded an agreement with SLGA and SGC on April 9, 1997. He did not become aware of the April 9, 1997 agreement until after a tentative settlement had been reached between REAL and the Union with respect to the operations bargaining unit. Mr. Hollyoak learned of the April 9, 1997 agreement after

receiving from an anonymous source a copy of what appeared to be a letter from the solicitor for REAL to Gord Staseson, then Acting President and CEO of SGC. The letter stated: "... it is our client's position that an Agreement was, in fact, arrived at on April 9, 1997, following which the Agreement in final form was prepared by your solicitors and forwarded to us for our Board approval and execution on April 10, 1997." The significance of the agreement between REAL, SLGA and SGC will be discussed later in these Reasons.

Mr. Cressman recalled that at the April 9, 1997 bargaining meeting with the Union he said words to the effect that they would now bargain the monetary package and would do so on the basis of what they knew at that time.

After the April 9, 1997 meeting, negotiations between REAL and the Union progressed with an exchange of proposals at the end of May of 1997. Mr. Hollyoak testified that around this time he again asked Mr. Cressman if an agreement had been reached between REAL, SLGA and SGC. Mr. Cressman told Mr. Hollyoak that a couple of matters remained outstanding. Mr. Hollyoak asked him for details of what items remained outstanding. According to Mr. Hollyoak, Mr. Cressman refused to disclose the matters to the Union.

In May, 1997, the Union and REAL exchanged strike and lock-out notices. On May 28, 1997, in response to work slowdowns, REAL locked out the operations employees. On June 4, 1997, the parties reached a tentative agreement on the operations unit and employees returned to work under a back to work agreement. The Union recommended the settlement to its members who ratified the agreement shortly after returning to work.

The Union then sent REAL its draft of a formal collective agreement which incorporated the terms of settlement. REAL responded by sending the Union its own version of a formal collective agreement. According to Mr. Hollyoak, REAL's version of the final agreement contained some corrections to the wording of the Union's formal agreement that he agreed were proper corrections to make, but it also contained some wording that was incorrect. Mr. Hollyoak testified that he fixed all the matters that required fixing and sent the agreement back to REAL for approval. Since forwarding the amended

version of the formal agreement back to REAL, Mr. Hollyoak indicated that he had not heard back from REAL, except for one conversation with Bob Osadchy, Casino Manager, who suggested that they have a meeting on the matter.

Starting in November of 1996, the Union and REAL were also bargaining with respect to the Casino. Mr. Osadchy was the chief negotiator for REAL at this table. The main issue at this table centred around REAL's proposal for block scheduling of part-time employees. REAL indicated to the Union that if it had some agreement on this issue, it would be willing to consider other Union proposals. Meetings for the purpose of bargaining this agreement spanned a time frame from November, 1996 to July 21, 1997.

The Union took a strike vote among the employees of the Casino and served strike notice on May 12, 1997. Mr. Hollyoak testified that the strike notice was given to permit all unionized employees at REAL to engage in strike activity in support of the operations table. The operations table was viewed as the trend setting agreement which would ultimately impact on the settlement of the casino bargaining table.

During bargaining for the casino agreement, the Union heard continuous rumours that the Casino was going to close. Mr. Hollyoak testified that Mr. Osadchy was asked several times during bargaining if the rumour was true. Mr. Osadchy would check with Mr. Cressman and would come back to the table with word that there would be no closure of the Casino and that no agreement had been reached between REAL, SLGA and SGC.

Specifically, Mr. Hollyoak recalled that he had asked Mr. Osadchy in March of 1997 if it was true that Casino Regina, the main competitor of the Casino, was developing software to take over the slot machines then operating at the Casino. Mr. Osadchy denied the rumour and replied that the Casino would operate as usual.

Again, in May of 1997, Mr. Hollyoak raised questions regarding rumours of closure with Mr. Osadchy at a union-management meeting. He was again reassured that REAL was not considering closing the Casino. At one point during the course of the casino negotiations, REAL posted a notice at the Casino

urging employees not to worry about the rumours of closure and reassuring them that the Casino was not closing. Mr. Hollyoak testified that REAL denied the closure possibility as early as January of 1997 and as late as July 21, 1997.

Mr. Hollyoak also read a newspaper article in the Regina Leader-Post which provided details of the negotiations that were on going between REAL, SLGA and SGC. In the article, it was reported that the parties were considering three options: (a) REAL would operate the Casino with SGC taking over the slot machines; (b) REAL would operate both the table games and the slot machines; (c) REAL would close and be paid $2.6 million per year. After reading the article, Mr. Hollyoak asked Mr. Osadchy which option REAL was pursuing. He was told by Mr. Osadchy that option (b) was the option being pursued - that is, that REAL would continue to operate both table games and slots.

At a bargaining meeting held on July 21, 1997, the Union agreed to put REAL's proposal on block scheduling to the membership for a vote in order to test the members' support for REAL's proposal. However, prior to taking the vote, Kathleen Hewitt, the shop steward at the Casino, received information that led her to believe that REAL had decided to close the Casino and was preparing to make the announcement of closure on August 12, 1997. The information Ms. Hewitt received was contained in a computer document addressed to a contractor of the Casino in which the closure of the Casino was discussed. Ms. Hewitt approached Mr. Osadchy with the information and asked him if it was true. After checking with Mr. Cressman, Mr. Osadchy told Ms. Hewitt that Mr. Cressman would not confirm or deny the information.

Mr. Cressman's response to the Union's inquiry was the first formal indication the Union received from REAL that confirmed the closure rumour. Up until that time, the Union had been reassured that the Casino would remain in operation and it was in this context that the Union negotiated the collective agreement. Mr. Hollyoak was obviously frustrated with having spent many months of bargaining on the scheduling issue which, in the end result, was rendered meaningless and irrelevant as a result of REAL's decision to close.

On July 25, 1997, the Union received a letter from Mr. Cressman which indicated that he was reviewing the options for the Casino and would let the Union know when he and the Board had reached a decision. This letter was written in response to the persistent rumours of closure and was received by the Union three days before the Union became aware through Ms. Hewitt that closure was going to be announced on August 12, 1997.

On August 12, 1997, the Union received notice from REAL that the Casino would close on November 22, 1997 and that its members would be out of work on that day. In addition, some members of the operations unit and the food services unit would also be laid off as a result of the Casino closing. The notice of closure read as follows:

> *I regret to inform you that the Silver Sage Casino will be closing effective November 22, 1997.*
>
> *As this will result in the termination of the employment of more than ten employees, in accordance with Section 44.1 of The Labour Standards Act, I am giving you notice of the following:*
>
> *1. Number of employees whose employment will be terminated:*
>
> *In-scope Casino Employees: 135*
> *Out-of-scope Employees: 10*
>
> *2. In addition, as a result of the Casino closure, the following number of Regina Exhibition Park employees will receive layoff notices and will be given the opportunity to exercise their seniority rights:*
>
> *Operations Employees: 40*
> *Food Services Employees 23*
>
> *All numbers are approximate.*
>
> *3. Effective date of termination/layoff: November 22, 1997*
>
> *4. Reason for termination/layoff: Permanent closure of Silver Sage Casino.*
>
> *We do not believe that the closure of the Casino constitutes a technological change within the meaning of The Trade Union Act, but in any event we are not closing the Casino for one hundred and three days (103) and all the information required by*

> *Section 43(3) of The Trade Union Act is included in this notice. We are also prepared to meet with you to discuss the implementation of the Casino closure.*
>
> *Please contact me if you have any questions regarding the foregoing.*

After receiving notice of closure, the Union filed the various unfair labour practice applications under consideration. On August 12, 1997, the Union also served a notice to bargain on REAL pursuant to s. 43(8) of the *Act* as follows:

> *It is our belief that the closure of the Silver Sage Casino does constitute technological change under Section 43 of The Trade Union Act and we are hereby requesting official notice in compliance with the Act and failure to provide such notice will cause us to file an application with the Labour Relations Board to enforce the employees' rights contained in The Trade Union Act with respect to technological change.*
>
> *The notices that were given on August 8, 1997 to Operations staff are over and above any usual layoff that occurs in the fall and we consider these to be associated with the closure of the Casino and subject to Section 43 of The Trade Union Act. We request that you forward technological change notice on behalf of those employees. Failure to do so will require us to file an Unfair Labour Practice with the Saskatchewan Labour Relations Board.*
>
> *Please advise.*

REAL responded to the Union's request to bargain on August 14, 1997 as follows:

> *With reference to the recent announcement regarding the closure of the Silver Sage Casino and that we are currently involved in negotiating a new Casino Collective agreement, I suggest that we agree to apply the terms of the old collective agreement until November 22, 1997.*
>
> *I would also suggest that we cancel our negotiations meeting planned for August 26, 1997.*
>
> *Please advise.*

The Union responded to REAL in the following terms on August 19, 1997:

> *We are not prepared to cancel our negotiation meeting that is scheduled for August 26, 1997.*

> *Even though most of the proposed revisions are no longer relevant, there are four directly related to closure and the issue of retroactive pay, etc. Unless the employer is willing to concede technological change and enter into negotiations with respect to a workplace adjustment plan, we will continue the process of negotiations on existing relevant proposals.*
>
> *Please advise.*

Mr. Osadchy responded to the request to meet on August 26, 1997 by notifying the Union that he was unable to meet on that occasion due to his vacation schedule.

On August 25, 1997, REAL responded to the Union's request to bargain the technological change as follows:

> *We accept your letter as an indication that you wish to negotiate terms and conditions for Casino employees affected by the closure. We are prepared to have discussions with you on any item you wish to discuss at this time.*
>
> *As we are already in bargaining on the Casino Collective Agreement, you may forward your proposals to us at this time or arrange a meeting date to provide us with your proposals.*
>
> *Although we do not feel that this is a technological change under The Trade Union Act, we are prepared to follow the above procedure that we may deal with the issues raised by the closure. As we have a Collective Agreement that has expired, and we are already under a duty to negotiate with you, we have no objection if you amend your position to deal with any issues you wish to discuss with us.*
>
> *We await your early response in order that discussions can begin quickly.*
>
> (Emphasis added)

Subsequently, the Union wrote to request that REAL assign 20 full days prior to closure for negotiations. The Union and REAL met on September 15, 1997 at which time the Union presented to REAL a proposed Workplace Adjustment Plan as follows:

> 1. *In exchange for an orderly closure, no strike activity, etc, the Employer and the Union agree to submit all unresolved issues as of October 15, 1997 to binding Arbitration. The parties shall agree on a chairperson or, failing agreement, shall ask the Minister of Labour to appoint a chairperson. The*

*arbitrator, after hearing from the parties, shall have the power to decide and enforce the implementation of any unresolved issue.*

2. *The Employer and the Union shall form a Workplace Adjustment Committee with one representative from the Employer and one representative from the Union. The Committee shall be responsible for overseeing all aspects of the workplace adjustment plan. The Employer shall pay for all costs associated with the operation of the Committee including but not limited to the Union nominee's wages at 40 hours per week at their regular rate. The committee shall be formed as of September 15, 1997 and shall run for one month after the closure date of the Casino.*

3. *Any person whose employment is terminated or affected for any reason between August 12, 1997 and the closure date of the Casino shall receive in addition to any other money, four weeks' pay for every year of service. The amount of weekly pay shall be established by averaging the employee's weekly earnings retroactive for a period of one year from closure excluding all leaves or periods of no work for any reason. The Employer shall pay the severance in the manner requested.*

4. *Any person whose employment is terminated or affected for any reason between August 12, 1997 and the closure date of the Casino shall be entitled to access a guaranteed job placement plan and unlimited access to outplacement counselling. The Employer shall pay the full cost of such plans.*

5. *The Employer, the Union and the Gaming Corporation shall enter into an agreement with respect to employees moving to Casino Regina. The agreement shall be in place by October 15, 1997.*

6. *Any person whose employment is terminated or affected for any reason between August 12, 1997 and the closure date of the Casino shall be entitled to enrol in any educational upgrading or training course(s) and the Employer shall pay the full cost of such education upgrading or training for a period of two years after the closure date of the Casino.*

7. *All employees shall receive a 5 percent wage increase retroactive to the expiry of the Collective Agreement.*

8. *The Employer shall pay the full cost of relocation for any person whose employment is terminated or affected for any reason between August 12, 1997 and the closure date of the Casino.*

9. *The Union reserves the right to forward additional proposals on all matters related to the closure of the Casino.*

REAL replied to the Union's proposal through two letters dated September 19, 1997. The first letter stated as follows:

> *With reference to your document "RWDSU - Silver Sage Workplace Adjustment Plan" tabled on September 15, 1997. It is our position that our discussions are not based on technological change as outlined in The Trade Union Act as this question has not yet been decided by the Labour Relations Board as it pertains to the closure of the Silver Sage Casino.*
>
> *Based on the above we wish to respond as follows:*
>
> 1. *There is nothing in the current Collective Agreement regarding binding arbitrations and we are unwilling to accept this proposal.*
> 2. *We cannot agree to this proposal.*
> 3. *We cannot agree to this proposal.*
> 4. *We cannot agree to this proposal.*
> 5. *We cannot agree to this proposal.*
> 6. *We cannot agree to this proposal.*
> 7. *We cannot agree to this proposal.*
> 8. *We cannot agree to this proposal.*
> 9. *We cannot agree to this proposal.*
>
> *Our next meeting is scheduled for Monday, September 22, 1997 at 9:30 am in the Agridome Administration office Board Room.*
>
> *Please advise how you wish to proceed.*

The second letter read as follows:

> *With reference to your correspondence of August 19, 1997 concerning the continuation of collective bargaining on existing relevant proposals, I wish to advise that, while this entire process appears to be moot, bearing in mind the closure of the Casino on November 22, 1997, we are none-the-less willing to continue discussions.*
>
> *Please be advised that the employer is not willing to accept or entertain any additional proposals submitted by the Union and dated after November 6, 1996.*

*Please advise.*

Following this exchange of correspondence, the Union decided to exercise its right to strike by having its members refuse to wear their uniforms to work. The Union advised REAL that members would be engaging in this form of strike activity. When employees appeared for work on September 23, 1997, REAL sent them home. Some employees returned to work in their uniforms and were permitted to work; others decided to remain at home and not attend work. Employees who did not return to work did not get paid for the day. No other action was taken by REAL in response to the Union's actions. When Mr. Hollyoak asked if REAL was disciplining employees or locking them out, Mr. Osadchy advised that he was implementing REAL's policy which required attendance at work in uniform.

After the September 15, 1997 meeting between the Union and REAL, the parties met on September 22 and 29, 1997, and October 7, 1997. On October 9, 1997, REAL made a counter-proposal to the Union's workplace adjustment plan as follows:

> *With reference to our October 7, 1997 meeting on the above mentioned subject and your submitted proposals, we respond as follows:*
>
> 1. *The employer will offer a 3% increase for all current employees effective on the signing of a new collective agreement.*
>
> 2. *We cannot agree to this proposal.*
>
> 3. *You are to provide additional details to this proposal.*
>
> 4. *We cannot agree to this proposal.*
>
> 5. *We propose a joint meeting with the Saskatchewan Department of Education, Federal manpower and employment insurance to explore potential options available to Silver Sage employees.*
>
> 6. *The proposal has been discussed by myself with Gord Staseson of SGC who has indicated that they are not receptive to such an agreement.*
>
> 7. *We are receptive to entering into discussions concerning the leasing of the Silver Sage property.*
>
> 8. *We are currently meeting to attempt to mitigate the impact of the Casino closure upon casino employees, therefore this proposal has no relevance.*

*9. Employees who have indicated an interest in a one day seminar with Price Waterhouse may opt to receive a lump sum payment of $150.00 provided they have registered by the September 12, 1997 cutoff date.*

*10. We have responded to this grievance.*

*11. We will consider any additional proposals.*

*Following your review of our response please contact me to set up a meeting date.*

Mr. Hollyoak felt there was little point in meeting with REAL over the workplace adjustment plan as REAL did not appear to want to reach any agreement on closure and continued to maintain their position that the closure was not a technological change. As far as Mr. Hollyoak was concerned, REAL managed to dupe the Union by getting the operations table resolved before the announcement of the closure of the Casino. Mr. Hollyoak believed that had the Union been properly informed in April of 1997 of REAL's proposed agreement with SGC and SLGA, the Union could have brought the strength of all its bargaining power at REAL to bear on negotiating a fair workplace adjustment plan for the Casino workers. The delay in advising the Union put it at a bargaining disadvantage because REAL's busy season occurs in the summer months. A strike in the fall or winter would not bring the same kind of economic pressure on REAL as a summer strike.

Mr. Cressman testified on behalf of REAL. Mr. Cressman set out for the Board the general relationship between REAL, SGC, SLGA and Casino Regina, and he gave detailed evidence as to the course of the negotiations between REAL and the government agencies that led up to the announced closure of the Casino. In general, he described a history of stormy negotiations that began with the Government of Saskatchewan's proposal to open its own casino in Regina in January of 1996. REAL has operated a gaming operation in various forms on the Exhibition grounds for 25 years. It is licensed to operate through SLGA, which is the licensing authority and supplier of VLT's. The Casino operation was the largest generator of net income for REAL and was central to its on-going financial health.

When the Government announced its intentions to own and operate Casino Regina, REAL decided to continue to operate its Casino in competition with Casino Regina. At the time, REAL invested $1.5 to $1.7 million in renovations to make the Casino more attractive to its gambling patrons. REAL sought and received assurances from the Government that the opening of Casino Regina would not affect

REAL's financial picture and to that effect, the Government and REAL entered into an agreement that guaranteed REAL an annual net profit of $2.2 million to be paid by either SLGA or SGC until the opening of Casino Regina. In order to fulfil this guarantee, the Government acted through SGC, the crown corporation established to operate casinos, and entered into an Interim Slot Machine Site Contractor Agreement with REAL whereby SGC provided slot machines for REAL to operate in the Casino in return for a guaranteed payment to REAL of $.525 million net profit related to the operation of the slot machines and $2.2 net profit related to the operation of REAL's table games until the opening of Casino Regina.

When the interim agreement terminated on the opening of Casino Regina, there were several issues outstanding between REAL, SLGA and SGC. The parties disagreed over the amounts that were then owing to REAL from SGC and SLGA pursuant to the two agreements; SLGA and SGC had not made payments in accordance with the agreement; and REAL complained that SGC did not provide it with the number or type of slot machines that it wanted. Mr. Cressman observed that SLGA and SGC were under the gun to make Casino Regina a financial success. REAL felt that the two agencies' failure to fulfil their obligations under the agreements was intended to put financial pressure on REAL in the hope that it would close the Silver Sage Casino.

Through all of 1996 and until June of 1997, REAL was without an agreement with SGC on the slot machines. It entered into negotiations with SLGA and SGC in 1996 in order to finalize the sums owing under the interim agreement and to conclude a new slot machine site agreement with SGC. These negotiations were central to the continued ability of REAL to operate its Casino and to finance its other operations, and both the Union and REAL were aware of the significance of the agreement on the overall ability of REAL to function.

Mr. Cressman testified that during the negotiations with SLGA and SGC, which he described as tough negotiations, the government agencies insisted that the new agreement contain a termination provision. This provision ultimately took the form of a notice clause which permitted either party to give 100 days notice of its intention to terminate the agreement. Upon termination, SGC and SLGA agreed to pay REAL $2.825 million in its first year of closure and $2.6 million per year for a further 29 years,

contingent, among other things, on the continued operation of a casino in the location of Casino Regina. The first version of the agreement, and the one that was agreed to by REAL negotiators on April 9, 1997, continued the payment to REAL on closure for as long as a casino operated on the Casino Regina site.

The agreement otherwise provided that SLGA and SGC would make annual payments of $3.5 million to REAL for operating the slot machines owned by SGC and in satisfaction of the Government's commitment to assist in maintaining REAL's pre-Casino Regina income. The commitment to pay $3.5 million annually was made for a 10 year term to be renewed for successive 10 year terms without change, unless the agreement was terminated by the notice provision.

Mr. Cressman explained that when the negotiators for SLGA and SGC were adamant in obtaining a termination clause in the agreement, he was advised by the solicitor for REAL to calculate all costs of closure and to negotiate those costs into the first year payment. Mr. Cressman indicated that an extra sum of $225,000 was added to the first year payment to take into account the closure costs. Part of the costs related to severance costs of employees, which were calculated on the basis of the cost to REAL of paying severance in lieu of full notice to those employees who would be entitled by law or agreement to more than 100 days notice of the termination of their employment based on current costs. No generic formula was negotiated with respect to determining severance costs at some time in the future. Only the actual liability under current laws and agreements were used to calculate REAL's severance costs. REAL's first position with respect to the costs of closure was to allow for severance pay for all employees whose employment would be terminated in lieu of notice. This position, however, was rejected by SGC. The discussions on the costs of closure took place in February or March, 1997, during which time REAL was also engaged in bargaining the operations and the casino agreements with the Union.

As indicated, an agreement in principle was reached between REAL, SGC and SLGA on April 9, 1997. The Board of Directors of REAL was asked to approve and sign the agreement on April 10, 1997, which they did. The agreement required Treasury Board and Cabinet approval and it was understood by REAL that no final agreement could be entered into without such approval. It was reported by SGC to REAL shortly after April 9, 1997 that the agreement would not be approved by Cabinet unless a

sunset clause was negotiated with respect to the payment to REAL on closure. Under the April 9, 1997 agreement, SLGA and SGC agreed to pay REAL $2.6 million for as long as a casino operated at the Casino Regina site. Further negotiations ensued between the parties which resulted in the Board of Directors of REAL agreeing to cap the closure payment at 30 years. The agreement was finally signed by all parties on June 27, 1997.

Despite the amount of attention that was focused on the termination provision in the negotiations between REAL, SGC and SLGA, Mr. Cressman was adamant that no discussion occurred between REAL and SGC negotiators on the possibility of SGC or SLGA exercising the termination option. According to his testimony, the first time the possibility of exercising this option was raised was on June 27, 1997 at the signing meeting, when Mr. Staseson, Chief Executive Officer of SGC, requested a meeting with REAL to discuss the termination option. According to Mr. Cressman, when the parties met on July 2, 1997, SGC requested that REAL give notice to SGC and SLGA that it wished to terminate the agreement.

A closure proposal was put before REAL's executive committee and eventually its Board of Directors. On August 11, 1997, the Board of Directors passed a resolution that stated: "THAT Regina Exhibition Association Limited serve the Saskatchewan Gaming Corporation Notice of Termination of the Silver Sage Casino as soon as possible." Prior to the Board resolution, the management staff of REAL had taken all steps that were required to be taken in order to implement the decision immediately on receiving Board approval. It was through this preparation work that the Union became aware of the possibility of closure.

Mr. Cressman acknowledged that the Union had requested information at the operations bargaining table about the agreement between REAL, SGC and SLGA. He also acknowledged that REAL had advised the Union in the fall of 1996 that it would be unable to respond to the Union's monetary proposals until the agreement with SGC and SLGA was finalized.

Mr. Cressman maintained that closure of the Casino was not considered until July 2, 1997. He testified that he was surprised by SGC's request on June 27, 1997 for a meeting to discuss the termination

option. He was also of the view that all of his answers to questions asked at the table were truthful, that is, REAL had not finalized an agreement with SGC and SLGA until June 27, 1997; REAL planned to continue to operate the Casino; and REAL had not proposed the closure of the Casino until its decision on August 11, 1997. Mr. Cressman justified his response to Mr. Hollyoak at the bargaining table on April 9, 1997 by saying that until Cabinet approval was obtained he did not feel confident that REAL had a final agreement with SGC and SLGA. In addition, he did not believe that SGC or SLGA would exercise the termination option, although he acknowledged that the option could be exercised as soon as the agreement was signed. He was also of the opinion that if he discussed the agreement in detail at the bargaining meetings, the Union might accuse him of threatening to close the Casino which might constitute an unfair labour practice under s. 11(1)(i) of the *Act*.

**Positions of the Parties**

Counsel for the Union argued that s. 11(1)(c) of the *Act* required an employer to respond honestly to questions asked in bargaining and to disclose on its own initiative any decisions that it had made that might impact the bargaining unit. The Union argued that REAL misled the Union by answering the Union's questions relating to the agreement with government and the Casino closure untruthfully at both the operations and the casino bargaining tables. In support of the disclosure proposition, counsel referred to *Iberia Airline of Spain and Canadian Union of Public Employees, Local 4027* (1990), 13 CLRBR (2d) 224 (CLRB) which holds that the duty to bargain in good faith entails an obligation on the part of REAL and the Union to engage in rational and informed discussion with a view to concluding a collective agreement. He also referred to the Canada Labour Relations Board decision in *General Truck Drivers and Helpers Local Union No. 31 and Yukon Freight Lines Limited et al.* (1988), 75 di 164 (CLRB) for a summary of the case law that required a party to a collective bargaining relationship to answer questions asked at the bargaining table honestly and to disclose decisions already made that might have an impact on the bargaining unit. He also relied on decisions of this Board in *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada v. Provincial Maintenance Ltd. et al.*, [1987] Feb. Sask. Labour Rep. 65, LRB File No. 117-85; *Saskatchewan Government Employees' Union v. Government of Saskatchewan*, [1989] Winter Sask. Labour Rep. 52, LRB File Nos. 245-87 & 246-87; *Construction and General Workers Union. Local 890 v. Midway Sales (1979) Ltd.*, [1988] Jan. Sask. Labour Rep. 35; LRB File No. 302-

86; and *Construction and General Workers, Local 890 v. Interprovincial Concrete Ltd.*, [1991] 1st Quarter Sask. Labour Rep. 85; LRB File No. 077-89, all of which adopt and support the propositions set forth in the Canada Labour Relations Board decisions cited above.

Counsel argued that, on the facts, the timing of REAL's conduct was key to a finding of bargaining in bad faith. REAL delayed advising the Union of the possible termination of the slot machine site agreement until after the operations agreement was ratified. Prior to the settlement of the operations agreement, the Union was in a position to stop all work at REAL as a result of having conducted strike votes among all four bargaining units. REAL's conduct created an imbalance in the respective bargaining powers of REAL and the Union.

As a result of REAL's conduct, the Union submitted that the remedy ordered by the Board must take into account the loss to the Union. Had the Union been properly informed of the April 9, 1997 agreement, it would have used its bargaining power to secure better agreements for both the operations group and the casino employees. REAL's failure to bargain in good faith illegally removed the Union's bargaining strength which peaked in the summer months. Counsel argued that the Board must fashion a remedy for the failure to bargain by putting the Union back in the position it should have been in before the breach. In this instance, counsel noted that the ability of the Union to regain its bargaining strength has been destroyed by REAL's conduct. The only remedial order that may be effective is an order requiring REAL to compensate the employees who are affected by the closure.

With respect to REAL's application against the Union for failing to execute the formal collective agreement with respect to the operations table, counsel argued that the matter should be dismissed for lack of evidence. REAL led no evidence with respect to the matters that were agreed to at the bargaining table and failed to establish that the formal agreement submitted to the Union was in fact the agreement reached at the table. In addition, the Union submitted that it was not required to sign the formal agreement when the negotiations that led up to it were marred by bad faith bargaining. The Union is entitled to ask the Board to order REAL to reopen the agreement to permit bargaining with respect to matters not disclosed in bargaining.

The Union also alleged that REAL failed to adhere to the technological change provisions contained in s. 43 of the *Act*. Counsel submitted that REAL refused to bargain a workplace adjustment plan as required by s. 43(8.1) of the *Act*. This failure occurred when REAL refused to recognize the closure of the Casino as a technological change within the meaning of the *Act* and when it refused through its September 19, 1997 letter to the Union to discuss any proposals with the Union that had been made after November 6, 1996. The evidence demonstrated that REAL was not prepared to accept its obligation to bargain under s. 43 of the *Act*. Counsel pointed out to the Board that s. 43(8.1) of the *Act* required that the parties meet for the purpose of bargaining collectively (which is defined in s. 2(b) of the *Act* as "negotiating in good faith") with respect to a workplace adjustment plan. The Union asserted that REAL failed on both accounts under s. 43(8.1) of the *Act*, that is, it did not bargain in good faith and it refused to bargain for the purpose of reaching a workplace adjustment plan.

On the remedial side of the s. 43 application, counsel for the Union argued that s. 43(10) of the *Act* only permits an employer to effect a technological change if: (a) a workplace adjustment plan has been concluded with the Union, or (b) the Minister of Labour has been served with a notice advising that the parties have bargained collectively but have failed to conclude a workplace adjustment plan. Counsel noted that "bargaining collectively" is a pre-condition to the provision of notice to the Minister. Hence, until such bargaining had taken place, notice could not be provided to the Minister and the change could not be implemented.

The Union also argued that the operations and food services employees were also part of the group of employees that should be considered part of the significant number who were affected by the technological change. Counsel seemed to argue that the Board could find that the technological change obligations arose under all three bargaining relationships - that is, the casino, the operations and the food services tables.

Finally, the Union submitted that REAL's action in sending employees home without pay when they arrived at work without their uniforms constituted discipline for union activity. The Union was engaged in a proper form of strike activity; REAL was not purporting to lock-out employees when it sent them home. The Union characterized REAL's action as discriminatory discipline which was meted out by REAL on the improper grounds of union activity.

Counsel for REAL argued that REAL complied with the *Act* in all respects. REAL took the position that it disclosed all that it was required to disclose to the Union; that is, that it was negotiating an agreement with SGC and SLGA. Counsel argued that in May of 1997, before the labour dispute, the Union knew that the agreement between REAL and the government agencies was going to Cabinet for approval. According to REAL, the Union knew exactly what was happening with the agreement between REAL, SGC and SLGA before it signed the tentative agreement on June 4, 1997. As a result, there was no failure on the part of REAL to bargain collectively with the Union at the operations or casino tables.

Counsel also argued that REAL made no decision to close the Casino until its Board meeting on August 11, 1997. SGC and SLGA did not disclose that they wanted REAL to close the Casino. REAL did not become aware of SGC's and SLGA's intent to request the closure of the Casino until the July 2, 1997 meeting between the three parties. Counsel argued that until that time, it was REAL's intent to continue to operate the Casino.

Counsel argued that the disclosure of a closure decision is different from other forms of disclosures that are required to be made during the collective bargaining process because s. 11(1)(i) of the *Act* makes it an unfair labour practice to threaten to close a business in the course of a labour-management dispute. Counsel cited the Board's decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Ltd.*, [1993] 3rd Quarter Sask. Labour Rep. 79, LRB File No. 156-93 to support the proposition that an employer cannot inform a union in bargaining that it is considering closing its business unless the decision to close has been made.

With respect to s. 43 of the *Act*, counsel argued that REAL gave proper notice of the technological change 103 days in advance of the closure. REAL made a technical argument that the closure was not a technological change within the meaning of s. 43 of the *Act* but it was prepared to bargain collectively with the Union with respect to the closure. REAL then engaged in various meetings with the Union for the purpose of bargaining the effects of the closure. Counsel argued that no allegation was made in the Union's materials that REAL was engaged in surface bargaining with respect to the closure meetings. REAL submitted that it has engaged in collectively bargaining with the Union and asked the Board to

draw a distinction between a failure to bargain and tough bargaining. REAL may say "no" to the Union's proposed workplace adjustment plan but that, in itself, does not constitute bargaining in bad faith. Counsel pointed out that the Union did not seek any clarification of REAL's September 19, 1997 letter that indicated it did not wish to discuss any proposals that were presented after November 6, 1996.

Counsel argued that REAL had provided proper notice of the technological change even if it did not accept that the closure of the Casino constituted technological change within the meaning of s. 43 of the *Act*. REAL gave notice of closure in excess of 90 days before closure was to take place. Counsel argued that the Board has no authority to extend the notice period beyond the 90 day period. In addition, REAL is unable to continue to operate the Casino beyond November 22, 1997 as its license will be terminated and its equipment removed as of this date. Counsel requested that the Board not issue a remedial Order if it decides that REAL has violated the *Act*; instead, he requested that REAL be given an opportunity to propose a rectification plan as is permitted under s. 5.1 of the *Act*.

On REAL's application against the Union, counsel indicated that the application was filed for the purpose of having the Board decide if there was an operations agreement in effect. He argued that the Board does not have to decide if all the "t's" are crossed and "i's" are dotted but only if there is in fact an agreement.

With respect to the application pertaining to the Union's strike activity, counsel for REAL relied on the cases filed on the interim application which stand for the proposition that activity engaged in by an employer for the purpose of putting pressure on the Union to reach an agreement will constitute lock-out activity no matter how an employer describes the activity. In this instance, REAL did not purport to discipline the employees who were sent home from work for failing to wear their uniforms. Mr. Osadchy indicated that he was implementing REAL's workplace policy that required employees to wear uniforms. He implemented the policy by sending employees home, not by implementing corrective discipline against them. Counsel argued that this conduct constituted a lock-out because it was a defensive response to the Union's strike activity. As such, it was permitted under the *Act* and did not constitute discipline for strike activity.

Counsel referred to *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Western Grocers, A Division of Westfair Foods*, [1992] 4th Quarter Sask. Labour Rep. 83, LRB File No. 168-92; *Saskatchewan Government Employees' Union v. Government of Saskatchewan, supra, United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Limited*, [1980] 80 CLLC Para. 16,053; *Canadian Union of Public Employees v. Saskatchewan Health-Care Association*, [1993] 2nd Quarter Sask. Labour Rep. 74, LRB File No. 006-93; *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; *Construction and General Workers, Local 890 v. Interprovincial Concrete Ltd.*, [1991] 1st Quarter Sask. Labour Rep. 85, LRB File No. 077-89; *Manitoba Government Employees' Union v. ISM Information Systems Development Manitoba Corporation* (1993), 20 CLRBR (2d) 89 (CLRB); *Cook v. International Woodworkers of America, Local 1-174 et al.*, [1981] Feb. Sask. Labour Rep. 51, LRB File No. 268-80; *Saskatoon Typographical Union No. 663 v. Armadale Publishers Limited*, [1978] June Sask. Labour Rep. 46, LRB File No. 013-77; *Lee v. Carpenters Provincial Council of Saskatchewan and Wm. C. Clark Interiors Ltd.*, [1990] Spring Sask. Labour Rep. 41, LRB File No. 092-88; *Re Mississauga Hydro Commission v. International Brotherhood of Electrical Workers, Local 635* (1984), 17 LAC (3d) 299 (Picher); and *Re Canteen of Canada Ltd. v. Retail, Wholesale and Department Store Union, Local 414* (1984), 15 LAC (3d) 305 (Mitchnick).

**Analysis**

The Board is asked to determine the following questions:

1. Did the Employer fail to bargain in good faith by not disclosing the details of the agreement between REAL and SGC-SLGA to the Union at the operations and casino tables?

2. Did the Employer give proper notice of the implementation of technological change?

3. Did the Employer bargain collectively with the Union with respect to the technological change?

4. Did the Union fail to execute a formal collective agreement at the operations table?

5. Did the Employer discipline employees for engaging in strike activity?

We will deal with each issue in the order presented and will address the question of the appropriate remedies at the conclusion of these Reasons.

**1. Did the Employer fail to bargain in good faith by not disclosing the details of the agreement between REAL and SGC-SLGA to the Union at the operations and casino tables?**

*The Trade Union Act* establishes a legal framework for the co-determination by an employer and a union of the terms and conditions of work for employees in a bargaining unit. The cornerstone of this framework is the duty to bargain collectively, which entails two related obligations: first, an obligation to bargain in good faith, and second, an obligation to make every reasonable effort to conclude a collective agreement. The duty to disclose pertinent information during the course of collective bargaining is part of the overall duty to bargain in good faith. In *Saskatchewan Government Employees' Union v. Government of Saskatchewan*, *supra*, the Board summarized this obligation as follows at 58:

> *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.*

The purpose of the disclosure requirement is to enable parties to bargain matters that may impact on the bargaining unit over the term of the agreement that is under negotiation. It is also designed to foster rational discussion of the bargaining issues. In order for collective bargaining to work effectively without mid-contract disruptions, a union must be kept informed during bargaining of the initiatives that the employer is planning over the course of the collective agreement. The union is also entitled to use its economic weapons in order to negotiate provisions to protect its members from the effects of the employer's initiatives.

In the present case, the Board finds that REAL failed to disclose to the Union both at the operations and casino tables significant details of its agreement with SGC-SLGA. The significant details include the financial arrangements made between REAL and SGC-SLGA, and the termination provision. By April 10, 1997, REAL's Board of Directors had committed itself to entering into an agreement with SGC-SLGA on terms that provided it $3.5 million annually to continue to operate the slot machines, and $2.6 million annually to discontinue the agreement, with an additional sum added to the first year of payments to cover closure costs. Also, it had agreed to a termination clause that effectively gave SGC-SLGA the option to close the Silver Sage Casino.

Both the financial aspects of the agreement and the closure issue were matters that had been raised and discussed at the bargaining tables. REAL itself made the financial aspect of the agreement an issue at the operations table when it asked to delay the bargaining of monetary issues until the agreement with SGC-SLGA was settled. The Union made frequent requests for information pertaining both to the agreement with SGC-SLGA and the closure of the Silver Sage Casino.

REAL's responses to the Union's requests for information pertaining to the agreement at the operations table were incomplete or misleading. At the April 9th meeting between the Union and REAL, REAL led the Union to believe that no agreement was forthcoming between REAL and SGC-SLGA. Mr. Cressman indicated that he told the Union they would deal with monetary issues based on what they knew at the time. Unfortunately, Mr. Cressman did not share with the Union what he knew at that time, that is, that an agreement had been approved in principle for SGC-SLGA to pay REAL $3.5 million annually to operate the slot machines, or $2.6 million annually to close to the Casino.

Mr. Cressman was sufficiently confident of this agreement being finalized with SGC-SLGA that he removed the restriction on discussing monetary issues and proceeded to conclude the collective bargaining. Had there been significant doubt in his mind that an agreement would not be concluded with SGC-SLGA on terms similar to the terms set forth in the April 10th agreement, it is unlikely that REAL would have been in a position to finalize the collective bargaining with the Union at the operations table. According to Mr. Cressman's testimony, the agreement with SGC-SLGA was central to REAL's continued ability to operate.

REAL also failed to disclose to the Union at the operations table the termination clause that had been negotiated between it and SGC-SLGA. The negotiation of the termination clause was a significant decision made by REAL that could and would impact the operations bargaining unit. Forty of the members of that unit would be laid off if and when the termination clause was exercised.

In its evidence, REAL downplayed the significance of the termination clause by suggesting that the clause was similar to termination clauses that exist in most agreements. This may be true. However, parties to a business agreement generally are not in competition with one another in the same business and market and would not benefit financially by eliminating the other party as a competitor. In our view, the agreement between REAL and SGC-SLGA is more akin to a corporate takeover or merger where the terms for continuing and discontinuing operations are clearly set out. If the termination provision had been disclosed to the Union, the provision would have signalled to the Union that closure of the Silver Sage Casino was now a likely possibility. This would have been especially apparent to the Union if it had also known the details of the financial arrangements which reduced the outlay of funds

from SGC-SLGA from $3.5 million annually to $2.6 million annually if the termination option was exercised.

REAL did not remedy the failure to disclose the agreement at the operations table by its subsequent conduct of informing the Union in May, 1997 that an agreement between it and SGC-SLGA was going to Cabinet. Instead, it kept the Union in the dark about the significance of the agreement and continued negotiations on that footing until a tentative collective agreement was reached on June 4, 1997. Similarly, REAL's letter of July 25, 1997 to the Union vaguely warning the Union that changes might be forthcoming came too little and too late for the operations agreement.

The Board also finds that REAL failed to disclose the significant aspects of the agreement reached between it and SGC-SLGA to the Union at the casino bargaining table. REAL was asked very direct questions relating to the closure of the Silver Sage Casino and it answered those questions in an incomplete and misleading manner. It failed to advise the Union at the table that the Board of Directors had committed REAL to entering into an agreement with SGC-SLGA which permitted those agencies to terminate the slot machine site agreement on 100 days notice. It also failed to tell the Union that the agreement required SGC-SLGA to pay a lower annual payment to REAL if the slot machine site contractor agreement was terminated.

Although REAL protested that the agreement with SGC-SLGA was an operations, not a termination, agreement, taking into account the competitive environment between REAL and SGC, the Board concludes that it was predictable that SGC-SLGA would exercise the termination option within the lifetime of any agreement reached between REAL and the Union at the casino table. Mr. Cressman testified that he did not predict that SGC would exercise the termination option. When questioned as to why he would not have predicted this event, given the bargaining history that REAL had with SGC-SLGA, he answered that he thought they had reached some sort of steady state but that they would terminate the agreement if they saw the performance of the Silver Sage Casino deteriorating.

Frankly, the Board did not believe Mr. Cressman's evidence on this point. It was inconsistent with the historical relationship between the competing casinos, and it was inconsistent with his own approach to

bargaining of the termination clause in the Slot Machine Site Contractor Agreement. On the first point, Mr. Cressman testified that he concluded from SGC's and SLGA's failure to abide by the terms of the first slot machine agreement that SGC and SLGA were motivated by a desire to cause the closure of the Silver Sage Casino.

On the second point, REAL approached the negotiation of the closure costs, which were added to the first year of the termination payment, on the basis of the current costs of closure, particularly the current severance costs. Many costs could change depending on when closure was to occur. For instance, the severance notice or pay in lieu of notice varies according to employees' length of service. The actual costs of severance could not be determined unless the date of closure was known. According to Mr. Cressman, the issue of negotiating closure costs was a matter of some concern for REAL. If the time of closure was then unknown to Mr. Cressman, one would think that the prudent way to negotiate closure costs would be to include a formula in the agreement to take into account the costs that may change depending on when closure occurs. REAL did not pursue this path and its negotiating behaviour with SGC-SLGA would lead one to conclude that it did anticipate closure in the near future.

The Board holds that REAL was required to disclose to the Union at the casino table the significant information pertaining to the financial arrangements and the termination clause contained in the agreement between REAL and SGC-SLGA in order to allow the Union the opportunity to bargain provisions that would deal with a possible closure during the term of the agreement. Timely disclosure would also have prevented the unnecessary expenditure of time and resources on the block scheduling issue, the importance of which would likely have been significantly reduced to both parties had bargaining been focused on the real issue of likely closure.

We find that REAL's obligation to disclose this information arose around the time of reaching the April 10, 1997 agreement with SGC-SLGA. The timing of the disclosure was critical to the Union who was attempting to co-ordinate its bargaining strategy over 4 bargaining units with its bargaining strength peaking in early summer. REAL's failure to disclose the information in a timely fashion significantly weakened the Union's bargaining position. REAL's letter of July 25, 1997 and the subsequent disclosure of the closure decision on August 11, 1997, do not cure the original failure to disclose the

information to the Union as the untimely disclosure could not restore the Union to the bargaining position it enjoyed in the spring and early summer of 1997.

REAL argued that it was not required to disclose the details of the agreement with SGC-SLGA to the Union until its Board of Directors actually passed the resolution to terminate the slot machine agreement. If the parties had not been engaged in collective bargaining for the operations and casino tables the Employer would not have been required to disclose the details of the agreement or the decision to close until 90 days prior to the date the decision would be implemented. This requirement is set out in s. 43(2) of the *Act* when it states: "An employer ... 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."

However, when the parties are engaged in collective bargaining for the renewal of a collective agreement, the disclosure obligation arises when the employer is asked a question at the bargaining table or when the employer makes a decision that will likely impact on the bargaining unit during the term of the agreement being negotiated. In this case, REAL was obligated to provide the Union with the significant details of the agreement with SGC-SLGA under either branch of the disclosure obligation. The Union asked questions about the possibility of closure at least as early as March, 1997. On April 10, 1997, REAL had committed itself to an agreement in principle with SGC-SLGA.

REAL also argued that it was prevented from disclosing the agreement, particularly the termination clause of the agreement, because such disclosure would constitute a threat of closure within the meaning of s. 11(1)(i) of the *Act*. Counsel for REAL argued that the Board's decision in *Western Grocers*, *supra*, prevented the Employer from disclosing the possibility of closure until a final decision was made.

The Board does not interpret its ruling in *Western Grocers* in this manner. In that instance, the Employer held a meeting with its employees to encourage the employees "to put pressure on the Union to soften its position so that unfortunate consequences could be avoided" (at 84). The unfortunate consequences related to the closure of the warehouse. Subsequent to this meeting, the Employer

notified the Union that it intended to permanently close the warehouse. At 88-90, the Board discussed the interplay between s. 11(1)(i) and the duty to disclose accurate information to the Union and concluded as follows:

> *Counsel for the employer suggested that, on the face of it, s. 11(1)(i) creates an obligation inconsistent with another duty which has been imposed on employers, that of disclosing information necessary to allow bargaining to proceed on a realistic basis.*
>
> *This Board has made it clear on a number of occasions that part of the duty to engage in bargaining collectively which is imposed on an employer by virtue of s. 11(1)(c) of The Trade Union Act consists of a duty to disclose information which is vital to the bargaining process.*
>
> *It should be noted that these decisions describe a duty under s. 11(1)(c) to disclose information to the trade union representing employees, and lend no support to a proposition that an employer has a duty to disclose directly to employees. The limits on the nature and purpose of employer communications to employees, as distinct from their bargaining agent, are covered by the distinct principles which have been developed in connection with s. 11(1)(a).*
>
> . . .
>
> *On the other hand, s. 11(1)(i), which deals with one particular topic, clearly contemplates that there may be circumstances in which an employer is not merely conveying information, but is using an opportunity for communication to gain an illicit advantage in the context of a labour-management dispute. The section is intended, in our view, to prevent an employer from exploiting a possibility to which employees are especially vulnerable - the loss of their jobs - to undermine the capacity of their bargaining representatives to pursue an effective bargaining strategy.*
>
> *There are a number of factors in this case which lead us to the conclusion that the conduct of this employer at the meeting of July 7 was marked by the kind of improper purpose which makes it an unfair labour practice under s. 11(1)(i), and distinguishes it from a conscientious effort to comply with any duty to disclose information to a union, and from lawful employer communication with employees.*

The Board then considered the following factors in determining that the Employer's motives in raising the possible closure at the meeting with employees were improper and constituted a threat within s. 11(1)(i): the failure to provide detailed financial information to the Union at the bargaining table which would make the closure of the warehouse an option that would need to be faced by the Union; the lack of knowledge by the Employer's chief negotiator of the Employer's financial picture; and the fact that

the closure option had not been fully explored and no decision had been finalized to close the warehouse.

The Board attempts to ascertain the motives of an employer when the employer has made statements during bargaining concerning the closure of a business. If it appears to the Board that an employer is motivated by a desire to gain the upper hand at the bargaining table, remarks that suggest the employer may close the business will constitute "threats" within the meaning of s. 11(1)(i). On the other hand, when an employer takes concrete steps to initiate closure of a business, the employer has an obligation to disclose this information to the union. In these circumstances, the disclosure does not constitute a threat within the meaning of s. 11(1)(i) unless it is improperly motivated by anti-union animus.

In this instance, REAL had taken concrete steps by signing the April 10th agreement with SGC-SLGA that would make the closure of the Silver Sage Casino a real possibility within the life of the collective agreements then being negotiated with the Union. Disclosure of the significant provisions in the agreement between it and SGC-SLGA would not constitute an improper threat within the meaning of s. 11(1)(i).

**2. Did the Employer give proper notice of the implementation of technological change?**

Section 43(2) of the *Act* requires an employer to provide the union and the Minister with notice of technological change at least 90 days prior to the date on which the change is to be effected. Section 43(3) of the *Act* requires an employer to specify the following information in its notice of technological change:

(a) the nature of the technological change;

(b) the date upon which the employer proposed 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;

(e) such other information as the minister may by regulation require.

REAL's letter of August 12, 1997 to the Union set forth the information required to be contained in a notice of technological change under s. 43(3) and was served on the Union and the Minister 90 days or more in advance of the date of the implementation. Although REAL stated in the notice that it did not believe the closure constituted a technological change, the Board concludes that the content of the notice was sufficient to provide the Union with the information required by s. 43.

The purpose of s. 43 is to provide the union with knowledge of a technological change in advance of its implementation in order to provide the union with an opportunity to negotiate a workplace adjustment plan. In this instance, although the Employer disputed the legal characterization of the closure as constituting a technological change, it nevertheless complied with the notice requirement and opened an opportunity for negotiations related to the change.

**3. Did the Employer bargain collectively with the Union with respect to the technological change?**

As indicated, the significant purpose of the technological change provisions contained in s. 43 of the *Act* is to provide the union with notice of the change and an opportunity to bargain with respect to the change prior to its implementation. Section 43(8) allows the union to serve notice on the employer "to commence collective bargaining for the purpose of developing a workplace adjustment plan." Upon the service of the notice to bargain, the union and the employer are required by s. 43(8.1) to "meet for the purpose of bargaining collectively with respect to a workplace adjustment plan." "Bargaining collectively" is a defined term in the *Act* and as indicated earlier, it requires the parties to negotiate in good faith and it requires them to make every effort to enter into a collective agreement, which in this case is described as a workplace adjustment plan. The topics that may be addressed in bargaining such a plan are set out in s. 43(8.2) as follows:

> *43(8.2) A workplace adjustment plan may include provisions with respect to any of the following:*
>
> > *(a) consideration of alternatives to the proposed technological change, including amendment of provisions in the collective bargaining agreement;*
> >
> > *(b) human resource planning and employee counselling and retraining;*
> >
> > *(c) notice of termination;*
> >
> > *(d) severance pay;*
> >
> > *(e) entitlement to pension and other benefits, including early retirement benefits;*
> >
> > *(f) a bipartite process for overseeing the implementation of the workplace adjustment plan.*

REAL took contradictory and confusing positions with respect to its obligation to bargain the closure of the Silver Sage Casino pursuant to the technological change provisions. These positions were not explained or clarified in the Employer's evidence.

In its August 12, 1997 letter to the Union, REAL advised that it was prepared to meet with the Union to discuss the implementation of the Casino closing. At that time, it also continued to deny that the closure constituted technological change. Subsequently, on August 14, 1997, REAL suggested that the terms of the current expired contract continue until closure and that all bargaining meetings be cancelled. The Union rejected this suggestion and proposed to continue negotiations of the new agreement to address issues relating to the technological change unless the Employer was willing to acknowledge that the closure constituted a change and was prepared to negotiate a workplace adjustment plan. The planned bargaining meetings were then cancelled by REAL's negotiator due to his holiday schedule. In its August 25th letter to the Union, the Employer undertook to bargain and concluded: "As we have a Collective Agreement that has expired, and we are already under a duty to negotiate with you, we have no objection if you amend your position to deal with any issues you wish to discuss with us." The Union then forwarded the Employer its proposed workplace adjustment plan

and met with the Employer on September 15th. Subsequent to that meeting, the Employer reiterated its position that the closure was not a technological change and it provided its response to the Union's proposed workplace adjustment plan by indicating that it could not agree to the Union's proposals. On the same date, it sent the Union a second letter which stated that it would not accept any bargaining proposals with respect to the negotiations of the Casino agreement that were submitted by the Union and dated after November 6, 1996. Subsequently, the parties met again to discuss the workplace adjustment plan proposed by the Union and the Employer made a counter-offer on October 9th, 1997.

The Board will consider a number of factors to determine if a party is engaged in good faith bargaining and if it is taking reasonable steps to conclude a collective agreement. In *Royal Oak Mines v. Canadian Association of Smelter and Allied Workers , Local 4*, [1996] 1 S.C.R. 369 (S.C.C.), Cory J. described the overall approach to determining compliance with the duty at para. 42 as follows:

> *Section 50(a) of the Canada Labour Code has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry.*

In *Canadian Commercial Corporation* (1988), 74 di 175 (CLRB), the Canada Labour Relations Board described the duty to bargain collectively in similar terms at 186:

> *Bad faith has been judged present in situations where one party has advanced a key position curtly and without any attempt to justify, explain or rationalize it; where there has been no serious discussion of the matter and the atmosphere created is one of "take it or leave it and bloody well face the consequences."*

In the present case, the Board concludes that REAL has not demonstrated a sincere desire to conclude a workplace adjustment plan with the Union, rather it has simply been going through the motions of bargaining. We come to this conclusion from the exchange of correspondence set out above in which REAL blows hot and cold with respect to its desire to hear, discuss and respond to Union proposals

concerning the closure of the Silver Sage Casino, and from its curt and unreasoned responses to the Union's workplace adjustment proposal.

This bargaining stance can be contrasted with REAL's negotiations with SGC-SLGA. The contrast in the seriousness of the bargaining efforts on the part of REAL are stark. In the SGC-SLGA negotiations, REAL engaged in hard bargaining which was backed up with written proposals on closure costs, including the severance costs for employees, discussions, exchanges of ideas, informal meetings, and the like. In its dealings with the Union over the closure of the Casino, REAL sent unclear messages as to what it was willing to bargain. It also responded to the Union's workplace adjustment plan with curt answers that are not explained or justified by financial or other considerations.

As described by this Board in the *Western Grocers* case, *supra*, "it is not within the mandate of the Board, under ordinary conditions, to seek to modify the substantive bargaining positions of the parties or to monitor too closely the bargaining strategies adopted by the parties as each seeks to attain the agreement of the other to their terms." So long as the parties are engaged in honest, albeit tough, exchanges, the Board will not intervene to tip the balance of bargaining power from one party to another. The Board is not concerned with the content of the proposals put forward by either side except when the content of the proposals indicates bad faith bargaining. In this instance, we find that the Employer's responses to the Union proposals and its entire bargaining stance to date demonstrate a lack of willingness to bargain a workplace adjustment plan as is required by s. 43 of the *Act*.

Bargaining collectively with respect to a workplace adjustment plan carries with it the same degree of effort that is expected when parties are negotiating a collective agreement. A simple exchange of proposals is insufficient to satisfy the duty to bargain. It is necessary for the parties to engage in a serious, determined and rational discussion of the proposals that are put forward, including discussions of the economic or other justifications for objecting to the proposals and of alternatives to the rejected proposals. Such bargaining must occur before the technological change can be effected under s. 43(10) of the *Act*, which states:

> *43(10) Where a trade union has served notice to commence collective bargaining under subsection (8), the employer shall not effect the technological change in respect of which the notice has been served unless:*

> *(a) a workplace adjustment plan has been developed as a result of bargaining collectively; or*
>
> *(b) the minister has been served with a notice in writing informing the minister that the parties have bargained collectively and have failed to develop a workplace adjustment plan.*

To the date of hearing, REAL had failed to engage in collective bargaining to the extent that is required by s. 43(10) and it had certainly not reached a point to permit it to serve the Minister with a notice that it has bargained collectively and has failed to reach a workplace adjustment plan.

**4. Did the Union fail to execute a formal collective agreement at the operations table?**

Both parties are required to commit an agreement arrived at through collective bargaining to writing as part of their overall duty to bargain collectively. In this instance, the Union agrees that the parties reached a tentative agreement on June 4, 1997 with respect to the operations table which subsequently was ratified by the Union's members and REAL's Board of Directors. The Union has been unwilling to sign the formal agreement forwarded by the Employer to it because it disputes the accuracy of the Employer's document. There is no evidence that the Union is relying on insignificant errors in the document in order to avoid signing the formal agreement for improper purposes.

In these circumstances, the Board does not find the Union to be in violation of its duty to bargain collectively. If the parties are unable to agree to the formal wording, they may refer the matters in dispute to arbitration pursuant to the grievance and arbitration provisions contained in their agreement or in the *Act*. The agreement reached on June 4, 1997 is binding on the parties. The Board's remedial Order which is designed to redress the Employer's failure to bargain collectively with respect to this agreement will reopen bargaining on this agreement with respect to issues relating to the closure of the Casino and its effect on the operations unit. The Order will not otherwise disturb the matters agreed to in June, 1997.

**5. Did the Employer discipline employees for engaging in strike activity?**

The Union alleges that the Employer disciplined employees for engaging in strike activity which took the form of attending work without wearing the required uniforms. There is no dispute that the Union's activity constituted strike activity. The issue for the Board to determine is whether the Employer's response, which took the form of sending employees home without pay when they attended at work without a uniform, constituted improper discipline within the prohibition contained in ss. 11(1)(a) and (e) of the *Act*. REAL argued that its response constituted a defensive lock-out, not improper discipline.

Employees are entitled to engage in strike activity without fear of being disciplined or discriminated against by the employer for having participated in strike activity so long as the strike is timely within the parameters set out in ss. 11(6) and 44(2) of the *Act*. Likewise, employers are entitled to engage in a lock-out if it is timely within the parameters of ss. 11(7) and 44.

Lock-out activity is defined in s. 2(j.2) of the *Act* as follows:

> *2 In this Act:*
>
> *(j.2) **"lock-out"** means one or more of the following actions taken by an employer for the purpose of compelling employees to agree to terms and conditions of employment:*
>
> *(i) the closing of all or part of a place of employment;*
> *(ii) a suspension of work;*
> *(iii) a refusal to continue to employ employees;*

In *Retail, Wholesale and Department Store Union v. Pepsi-Cola Beverages (West) Ltd.*, [1997] Sask. L.R.B.R. 696, LRB File No. 166-97, the Board held that the definition of lock-out contained in the *Act* is an exhaustive definition, that is, an employer is only permitted to engage in the three forms of activity set out in the definition. In this instance, the Employer claims to have engaged in the third form specified in s. 2(j.2) - the refusal to continue to employ employees.

The Union argued that an employer who purports to lock-out employees, in addition to confining his activity to one of the three forms of lock-out specified in s. 2(j.2), must act for the purpose of compelling employees to agree to terms and conditions of employment. In the absence of such a purpose or intent, the employer's action would not constitute a "lock-out" within the meaning of the *Act*.

In response, REAL argued that the purposive element can be demonstrated by offensive or defensive lock-out activity. An offensive lock-out occurs when an employer initiates a labour dispute by locking-out employees for the purpose of pressuring employees to accept the employer's bargaining proposals. A defensive lock-out occurs when an employer responds to strike activity by effecting a lock-out. A defensive lock-out can be designed to resist strike activity by using measures that are proportional to the strike activity or it can be designed to escalate the labour dispute in order to put economic pressure on the union and its members.

The Board concludes that the Employer's activity in this instance did constitute a lock-out. REAL engaged in one form of activity that is permitted by s. 2(j.2) - a refusal to continue to employ employees - that was a direct response to the strike activity engaged in by the Union. The purpose of the Employer's response was to resist the strike activity by compelling Union members to attend work in uniform or suffer a loss of pay. The use of such tactics is part and parcel of a normal labour dispute, all of which is designed to bring economic and other pressure to bear on each side in order to arrive at an agreement.

In this instance, although we have found that the Employer failed or refused to bargain collectively with the Union with respect to the casino table and its s. 43 obligations on the implementation of the closure, we do not find that the use of the defensive lock-out *per se* constituted a violation of the *Act*.

**Summary of Board Findings**

On LRB File No. 256-97, the Board holds that the Employer violated s. 11(1)(c) of the *Act* by failing to disclose the significant aspects of the agreement it negotiated with SGC-SLGA to the Union at the operations and casino bargaining tables. The Board makes no finding with respect to the allegation that the Employer also violated s. 11(1)(a).

On LRB File No. 266-97, the Board has already made a finding that the closure of the Casino constituted a technological change. In these Reasons, the Board finds that the Employer failed to bargain collectively with respect to the closure as is required by s. 43 of the *Act*.

On LRB File No. 279-97, the Board finds that the Union did not refuse to bargain collectively by failing to execute the formal operations agreement.

On LRB File No. 308-97, the Board finds that the Employer failed or refused to bargain collectively with the Union in violation of s. 43 of the *Act*.

On LRB File No. 321-97, the Board finds that the Employer did not discipline or discriminate against employees based on the exercise of their right to engage in strike activity.

**Remedies**

The Board issued an Order in this application prior to rendering its Reasons for Decision. This procedure was followed in order to allow the parties to gauge their respective positions before November 22, 1997, which was the date set for closure of the Casino.

The Order required the Employer to bargain collectively with the Union with respect to operations agreement by reopening the agreement reached on June 4, 1997, in order to address any proposals either party may make related to the lay-off of operations employees due to the closure of the Silver Sage Casino. It is the view of the Board that failure on the part of the Employer to disclose the SGC-SLGA agreement at the operations table cost the Union the opportunity of bargaining better lay-off, severance and similar provisions for its members in this unit. This opportunity can be restored by opening the operations agreement to the extent necessary to deal with the effect of the closure of Silver Sage Casino on the operations bargaining unit.

The Order also required REAL to bargain collectively with the Union with respect to the casino agreement which remains to be finalized.

Finally, the Order required REAL to bargain collectively with the Union with respect to a workplace adjustment plan relating to the closure of the Silver Sage Casino. The Board ordered the Employer not to effect the closure until it had complied with its obligation to bargain collectively in accordance with ss. 43(8), (8.1) and (8.2), and an agreement has been reached or notice provided to the Minister in accordance with s. 43(10). In the event that REAL is unable to lawfully operate the Silver Sage Casino in accordance with the Board's direction after November 22, 1997, it is required to continue to pay the employees of the Casino who are affected by the implementation of the technological change the wages and benefits they normally would earn if the Casino was able to remain open in accordance with the Board's directive to REAL.

In fashioning the remedies with respect to the failure of REAL to bargain collectively with the Union with respect to the workplace adjustment plan, the Board is requiring REAL to comply with the requirements set out in s. 43(10) of the *Act* which is quoted above. That is, an employer is not permitted under that provision to implement a technological change unless and until it has bargained collectively with the union. The employer is permitted by s. 43(10) to implement the change if the parties conclude a workplace adjustment plan. In the event that bargaining is not successful, the employer can implement the change after he has notified the Minister of the failure to reach a workplace adjustment plan. For bargaining to "fail", the parties must be at a genuine impasse, having exhausted all reasonable efforts to achieve a workplace adjustment plan. As indicated earlier, the obligation to bargain a workplace adjustment plan carries the same degree of effort as the negotiation of a collective agreement.

The Board was aware from remarks made by counsel for REAL at the hearing that it may not be possible for REAL to lawfully operate the Casino after November 22nd. If REAL does not have a gaming license or if its equipment has been removed in accordance with the agreement between REAL and SGC-SLGA, obviously REAL's ability to comply with the Board's Order not to effect the change until collective bargaining has concluded becomes problematic. To cover this possibility, the Board made an alternate Order that requires REAL to continue to pay wages and benefits to the Casino employees for the duration of the collective bargaining between REAL and the Union with respect to the workplace adjustment plan. The alternate Order is intended to address directly the consequences of REAL's breach of s. 43 by placing employees in the same position they would be in if it were possible

for REAL to comply with the requirement contained in s. 43(10) of the *Act* that it not implement the technological change until it has bargained collectively with the Union with respect to the workplace adjustment plan.

The Board reserved its jurisdiction to determine any disputes arising from its Order, including the calculation of wages and benefits that may become owing to employees.

**GARRY SHUBA, Applicant and GUNNER INDUSTRIES LTD. AND INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING, PORTABLE AND STATIONARY, LOCAL 870, Respondents**

LRB File No. 127-97; December 8, 1997

Chairperson, Gwen Gray; Members: Judy Bell and Bob Todd

For the Applicant: Garry Shuba
For the Employer: Dave McKay
For the Union: Neil McLeod

**Decertification - Interference - Employer gave each employee letter expressing anti-union attitude and threatening closure of business - Employer also contacted employee to inquire about support for rescission application - Board holds that employer inserted himself into rescission process in manner which prevents Board from determining employees' true wishes - Vote would not be reliable indicator of employees' desire to be or not be represented by union.**

***The Trade Union Act*, s. 9.**

## REASONS FOR DECISION

### Background

**Gwen Gray, Chairperson:** Garry Shuba filed an application with the Board to rescind the certification Order issued to the International Union of Operating Engineers, Local 870 (the "Union") on January 29, 1985. The history of the relations between the Union and Gunner Industries Ltd. (the "Employer") has already been set out by the Board in *International Union of Operating Engineers, Local 870 v. Gunner Industries Ltd.*, [1996] Sask. L.R.B.R. 749, LRB File No. 160-96 and *Herbert v. International Union of Operating Engineers, Local 870 and Gunner Industries Ltd.*, [1997] Sask. L.R.B.R. 112, LRB File No. 375-96. In LRB File No. 160-96 the Board found the Employer in violation of its obligation to bargain with the Union. In LRB File No. 375-96 the Board dismissed an application for rescission brought by Mr. Herbert on the grounds that it was brought outside the time frame specified in s. 5(k)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17.

In its reply, the Union claimed that the application was improperly influenced by the Employer and should be dismissed under s. 9 of the *Act*. At the hearing, the Union also disputed the accuracy of the Statement of Employment filed by the Employer. The Employer attended the hearing.

**Facts**

The Union and the Employer are parties to a collective agreement with an effective anniversary date of May 1st. The application for rescission was filed by Mr. Shuba on March 31, 1997 and fell within the 30-60 day rule set in s. 5(k)(i) of the *Act*.

The Employer is owned by Clint Kimmery. Mr. Kimmery made little attempt in the hearings before this Board to disguise his dislike of unions. In May of 1997, Mr. Kimmery distributed a resignation letter to employees in their paycheques threatening to cease operations on May 23, 1997. The letter stated as follows:

> *As a result of the operational problems we have experienced over the last few years, the involvement of union actions and just the general wear and tear, and lack of appreciation one contends with, dealing with employees and business bureaucrats, I am simply tired and want to stop banging my head against a brick wall.*
>
> *Many of you will never know or appreciate this frustration of feeling picked on from every direction, day in and day out, with very few moments of real enjoyment. The company employees have always come first, wages have been paid and followed by the company accounts payable and only after that, if there is anything left, have I ever paid anything to myself. Many times my personal needs have had to wait, and it has only been the last few years that the company has been in a better financial position maybe that some reimbursement for my years of effort has been available. Should you not believe this, then I invite you to get into your own business and make the sacrifices and financial commitment. Being in business is one of the scariest and loneliest twenty-four hour a day occupations you can chose. Your livelihood is on the line every day.*
>
> *This province and its current political attitudes, is not conducive or encouraging to small business needs. A union can make many unsubstantial promises of what they can do, and in the process their objective is to make the company into as big an oppressor as possible, using as many unverified leads as they can distort. The very nature of the certification process prevents the company from defending its self and legally stops all communications, this is absolutely "not democratic".*

*I have dedicated a good part of my life (many, many hours over the last twenty years) in the pursuit of a solid company that can provide realistic and secure promises of employment for you and for me.*

*When someone first gets hired by a company, the company is touted as the greatest operation going, however as the job (task) becomes routine, the company is eventually labelled as the oppressor and the villain to the employee, which further develops into a conspiracy.*

*The final conspiracy in our case has been the union ideas that would erode our ability to properly compete and maintain a cash flow to pay bills and expand. This operations ability to pay higher and higher rates of pay and benefits is limiting to the level of work being done.*

*In order to get into a higher pay range you have to continually expand into specialized operations, which takes money and time. This company has always been struggling to attain a higher level by continuously investing into specialized operations and equipment, which in fact has created an ability to pay higher rates and has broadened the security of employment. Yet there is only so much that can be accomplished and still exist.*

*Gunner Ltd., will cease to be a contractor of services effective May 23, 1997. The focus of Gunner Ltd. will be on equipment rentals and consulting to the construction industry at large.*

*As a result, basically only administrative employment will be required at Gunner Ltd.*

*It is our understanding that Mr. Larry Miller and Mr. Mike Sloan, will continue to be involved with some aspects of the various contracted services Gunner Ltd. would have performed.*

*You may want to contact them in regard to future employment, however, the opportunity of starting your own business is now dependent on what you want to do.*

*I want to thank you for the jobs you have done for me in the past and I truly hope your future is positive for you, and wish you the best of luck.*

*Could things have been different? This is the one thought I want to leave you with.*

Mr. Shuba acknowledged that he was aware that Mr. Kimmery did not like unions, but insisted that he was not influenced by Mr. Kimmery to file the application. He testified that after March 31, 1997, the date on which he filed the application, Mr. Kimmery asked him how he was doing - was he getting enough cards signed to which Mr. Shuba replied that it was none of Mr. Kimmery's business.

Rueban Gibson, a former employee of Gunner Industries, testified that he received a phone call at home on Easter Sunday, March 30, 1997 from Mr. Kimmery. Mr. Kimmery asked Mr. Gibson if he was going to sign a decertification card. Mr. Gibson replied that he had not thought about it and indicated in a general way that he would not sign a decertification card. Mr. Gibson was initially stunned by the phone call, then he became angry and decided to go visit the workplace where he found Mr. Shuba. Mr. Gibson confronted Mr. Shuba about the decertification efforts and told him that he did not have his support for the application. Mr. Gibson worked for two weeks in April for the Employer at the Co-op Upgrader in Regina and since then has found other work.

**Relevant Statutory Provisions**

The Board must consider the application of s. 9 of the *Act* to the facts set out above. Section 9 of the *Act* states 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.*

**Analysis**

In determining whether to grant a rescission vote, the Board must balance the democratic rights of employees to select a trade union of their own choosing, which is enshrined in s. 3 of the *Act*, against the need to ensure that the employer has not used coercive power to improperly influence the outcome of the democratic choice. In *Wells v. United Food and Commercial Workers, Local 1400 and Remai Investment Corp.*, [1996] Sask. L.R.B.R. 194, the Board described its approach to the balancing task as follows, at 197-198:

> *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 Section 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 United Food and Commercial Workers v. Remai Investment Corporation and Laura Olson, LRB Files No. 171-94 and 177-94, the Board made the following observation:*

> *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 from which the above quotation was taken, the Board went on to say:*

> *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, LRB File No. 225-89, 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:*

> *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 Corp., LRB File No. 162-87, the Board made a similar point:*

> *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 Section 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, 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.*

The Board finds that this application must be dismissed under s. 9 of the *Act*. The Employer inserted himself into the rescission process in a manner which prevents the Board from determining the true wishes of the employees in question.

Mr. Kimmery conducted himself in a manner that would improperly influence the making and the outcome of the application by giving each employee a copy of the letter which expressed in no uncertain terms his anti-union attitude and which threatened closure of the business. Although this letter was circulated to employees following the filing of the application, the Board can draw an inference from its existence that the Employer improperly interfered with the making of the application.

In any event, in this instance there is direct evidence that the Employer interfered with the making of the application. The evidence of Mr. Gibson demonstrates the efforts of Mr. Kimmery to influence the making of the application by soliciting support for the rescission application. The Board concludes that Mr. Kimmery was actively assisting Mr. Shuba in making the application for rescission.

The decision to rescind a certification Order is one that must be made by employees in an environment that has not been poisoned by an employer's anti-union attitude and behaviour. This environment is impossible to achieve at the Employer's place of business given Mr. Kimmery's conduct. As such, a vote of employees would not be a reliable indicator of their desire to be or not be represented by the Union.

Given this ruling, the Board will not decide the matters raised by the Union with respect to the accuracy of the Statement of Employment.

The Board will issue an Order dismissing the application.

## SASKATCHEWAN GOVERNMENT EMPLOYEES' UNION, Applicant and SASKATCHEWAN LIQUOR AND GAMING AUTHORITY, Respondent

LRB File No. 037-95; December 19, 1997
Chairperson, Gwen Gray; Members: Bob Cunningham and Gloria Cymbalisty

## SASKATCHEWAN LIQUOR STORE MANAGERS' ASSOCIATION, Applicant and SASKATCHEWAN LIQUOR AND GAMING AUTHORITY, Respondent

LRB File No. 349-96; December 19, 1997
Chairperson, Gwen Gray; Members: Bob Cunningham and Gloria Cymbalisty

For SGEU: Rick Engel
For SLGA: Brian Kenny
For SLSMA: Ralph Ermel

**Employee - Managerial exclusion - General principles - Board approaches question of whether individual is "managerial" from the perspective of whether individual's job responsibilities place individual in conflict of interest with any potential bargaining unit.**

**Employee - Managerial exclusion - General principles - Board finds that authority bestowed on managerial employee must be an effective authority - Not sufficient if individual can make recommendations but has no further input into the decision-making process.**

**Employee - Managerial exclusion - Board finds that liquor store managers do not perform managerial functions of a nature or degree that would require their exclusion from any bargaining unit.**

*The Trade Union Act*, s. 2(f)(i).

### REASONS FOR DECISION

#### Background

**Gwen Gray, Chairperson:** The Saskatchewan Government Employees' Union ("SGEU") was certified to represent a unit of employees at the Liquor Board of Saskatchewan on March 19, 1945. In the application designated LRB File No. 037-95, SGEU applied to amend the latest certification Order

issued with respect to this unit by amending the list of positions excluded from the bargaining unit and by changing the name of the Employer from the Saskatchewan Liquor Board to Saskatchewan Liquor and Gaming Authority ("SLGA"), which is a successor employer to the Saskatchewan Liquor Board.

One of the changes requested by SGEU is to delete the position of liquor store manager (manager) from the list of positions excluded from the bargaining unit. These positions were originally included in the scope of the SGEU bargaining unit, however, the Employer applied to the Board for the exclusion of managers in LRB File No. 083-84 and the Board ordered the exclusion on September 5, 1984.

The Saskatchewan Liquor Store Managers Association (SLSMA) is a newly formed labour organization that has applied for certification for all managers employed by SLGA.

All parties agreed in a pre-hearing meeting with the Board to have the Board initially determine if managers are "employees" within the meaning of s. 2(f) of *The Trade Union Act*, R.S.S. 1978, c. T-17. SLGA took the position that managers exercise managerial functions that take them outside the definition of "employees", while SGEU and SLSMA took the opposite position. These Reasons are confined to the issue of whether managers are "employees".

**Facts**

The Board had the benefit of hearing from seven managers and Paul Weber, Vice-President of Operations of SLGA, all of whom gave evidence in a straightforward and helpful manner.

SLGA is a treasury board crown corporation consisting of three divisions - licensing, corporate services and operations. Liquor stores fall under the operations division which is headed up by Mr. Weber. Reporting to Mr. Weber are four regional managers, each of whom is responsible for a geographic region of the province. These regional managers are paid at the Management Level 8 pay grid and have overall responsibility for the operation of the liquor stores in their region.

Liquor stores are rated from level I to level V according to a number of factors. Level V stores are the large specialty stores and they are staffed by a Manager V and two Assistant Manager II's, along with a complement of full-time Clerk I's, part-time clerks and casual staff.

Level IVa stores operate with a Manager IVa, two Assistant Manager II's and a complement of Clerk I's, part-time clerks and casual staff.

Level IV stores are staffed with a Manager IV, an Assistant Manager I and a complement of full-time Clerk I's, part-time clerks and casual staff. In addition, some Level IV stores are "twinned" with another Level IV store and share one Manager V, with an Assistant Manager I in each store and a complement of full-time Clerk I's, part-time clerks and casual staff.

Level III stores operate with a Manager III and no assistant managers and a complement of Clerk II's or I's, part-time clerks and casual staff.

Level II stores operate with a Manager II and a complement of part-time clerks and casual staff. Similarly, Level I stores operate with a Manager I with a complement of part-time clerks and casual staff.

Within the system, there are 11 Manager V, two Manager IV, seven Manager IV, 13 Manager III, 14 Manager II and 33 Manager I positions assigned to a total of 80 stores. The system operates with approximately 77 managers due to the "twinning" of three sets of stores. The pay level of store managers is set by SLGA and progresses from an annual salary of $28,704 - $35,892 for a Manager I to $39,660 - $49,560 for a Manager V. All of the terms and conditions of employment and benefits are determined by SLGA without input from the store managers.

The job description for all levels of managers are identical and provides as follows:

> *Position:* *L.S. Manager V*
>
> *Illustrative Duties and Responsibilities:*

*Manages the activities associated with the operation of a liquor store; actively participates as an integral part of the Liquor and Gaming Authority management team; manages and supervises store staff including hiring, evaluating and documenting employee work performance and taking required action including employee discipline; manages the activities related to marketing, merchandising and retailing of beverage alcohol; manages product inventory and prepares related records; manages cash accounting and cash register operations and prepares related records; ensures store maintenance requirements are met; establishes objectives and prepares a store operating budget on an annual basis; ensures safety of staff and guards against losses; and performs other related duties.*

*Qualifications:*

- *grade 12, or higher (management training courses an asset);*
- *extensive experience as liquor store employee, plus significant supervisory experience and/or training;*
- *must possess necessary management skills to participate actively in management activities such as planning, organizing, controlling, training, motivating, appraising work performance, and communicating;*
- *must possess a thorough knowledge of the following areas:*
  - *product knowledge, including successful completion of basic product knowledge courses;*
  - *merchandising and display program policies and procedures;*
  - *principles and practices involved in customer service;*
  - *policies, procedures and practices involved in store security;*
  - *LINCS;*
  - *personnel policies and procedures and the Collective Bargaining Agreement;*
- *must have proven public relations and interpersonal abilities;*
- *proven ability to receive, give and implement instructions;*
- *superior knowledge of store accounting practices and store reports;*
- *demonstrated proficiency in operating cash register;*
- *ability to satisfy the physical requirements of the job;*
- *ability to analyze situations and make decisions.*

All managers exercise the same kind of authority within the workplace. However, the amount of time that each spends on matters related to the direction, scheduling and supervision of staff vary greatly from a Manager I who operates with a staff complement of little over one person year to a Manager V who operates with a staff complement of eight full-time employees, 15 part-time employees and two to 12 casual employees. The largest store had a sales volume of $9.372 million in the fiscal year ending March 31, 1996. In comparison, the smallest store had a sales volume of $300,000 in the fiscal year ending March 31, 1996.

In addition, assistant managers who are employed in the larger stores often have first line supervisory responsibilities for more staff than a Manager I, II and III. Assistant managers are included in the SGEU bargaining unit.

The primary functions of managers include:

(a) budget preparation and control;
(b) supervision of staff;
(c) scheduling of staff;
(d) selection of staff;
(e) first step grievance handling;
(f) imposition of discipline, with direction from regional manager and human resources;
(g) in-store staff training; and
(h) assignment of work.

**(a) Budget preparation and control**

With respect to budget preparation and control, all managers testified that they are responsible for planning the operating and capital budgets for their stores in each fiscal year. In addition, managers must estimate the operating revenues expected to be generated by their stores. The budget submissions are sent to regional managers who forward the budget up the chain of command for approval. The budget may or may not be changed after it has been submitted by the manager and there is no input by managers into the budget process once the budget has left their hands.

Once the budget has been approved, managers are expected to monitor the budget by reviewing the monthly budget statements and explaining in quarterly reports any significant budget variance.

**(b) Supervision of staff**

There are features of the liquor store system that make the supervision of staff a less onerous task than may occur in other retail settings. Employees tend to be long serving, know their jobs well and are able to perform their work with little or no day-to-day supervision. Another factor which contributes to the relative ease of supervision is the long standing relationship between the SLGA and SGEU. SGEU's predecessor was the first certified union in Saskatchewan. In addition, the management personnel of SLGA have primarily been promoted from the Union ranks and are familiar both with the personalities and the roles of management and Union in this setting.

There are features of the collective bargaining agreement between SLGA and SGEU that minimize the decision-making influence that managers have over the working lives of their employees. With respect to hours of work for part-time employees, the parties have agreed to a system of allocating hours that allows part-time employees to select shifts according to their seniority and availability. Once all available shifts have been selected by the part-time employees in order of seniority, the manager is then able to assign the remaining shifts to casual workers.

The role of the manager in hiring new employees is also somewhat diluted by the collective agreement provisions which require the filling of permanent vacancies through province-wide posting of positions and which entitles senior qualified candidates to be placed in the vacancies. The only significant hiring opportunities arise with respect to the hiring of casual workers. Casual workers are not covered by the terms of the collective agreement until they have worked 150 hours, at which time they automatically become classified as part-time workers and begin to enjoy the benefits of the agreement, particularly, the seniority provisions. This aspect of the manager's functions will be discussed later in these Reasons.

All managers are responsible for the day-to-day supervision of staff. Manager V's supervise a significant number of employees with the assistance of two assistant managers. The managers described their supervisory role in terms of coaching employees in the various aspects of their work. At all store levels, managers spend some part of their day performing duties that are similar to the duties performed by SGEU members. They also monitor the work performed by employees and document work performance problems.

Managers also prepare performance appraisals and probationary appraisals for all staff. Probationary appraisals are used to determine if an employee will be retained in a permanent position. Performance appraisals are used to determine salary increments and may influence promotion opportunities. Managers complete forms that have been supplied by SLGA and then meet with the individual employee to discuss the evaluation. If an employee disagrees with the performance appraisal, she is entitled to appeal the appraisal to another level of management in SLGA.

There was evidence that some managers have experimented with different forms of conducting a performance evaluation, however, the essential task remained the same and resulted in the same labour relations consequences for the employees.

Managers generally work an eight hour day shift from Monday to Friday. In the larger stores where two shifts are scheduled, the manager does not have direct supervision over a portion of each day's work and would rely on the assistant manager or full-time Clerk I or II to provide direction to employees and to supervise work performance.

In smaller stores, where a six day operation is in effect, managers are replaced by a Clerk I on the day the manager is not scheduled to work. Clerks also replace managers in the smaller stores when the manager is absent due to vacation or other reasons.

As indicated, the amount of time spent by each manager on day-to-day supervision varies enormously depending on the size of the store and the number of employees. A Manager I would seldom work with another employee although he or she would still be responsible for monitoring employees' work performance and for completing performance appraisal forms. A Manager V would spend considerably more time in the supervision of staff, and assigns some of these functions to the assistant managers.

**(c) Scheduling of staff**

All managers are responsible for establishing and maintaining work schedules for all staff. As indicated above, a manager's scheduling discretion has been curtailed by collective bargaining provisions which

require the assignment of hours to part-time employees based on a system generally referred to as the "most available hours" system. After establishing the roster of shifts for full-time employees, the manager posts the remaining available shifts for part-time employees to self-select in order of seniority. Any remaining available hours are assigned to casual workers. Unscheduled hours are assigned according to seniority.

Managers can use their discretion in the scheduling of casual hours. Casual staff are used as a pool of possible permanent employees. After they have worked a total of 150 hours, they become classified as part-time employees and are entitled to the benefits of the collective agreement. The decision to permit a casual employee to reach 150 hours rests with the manager.

The managers testified that they use the 150 hour period to evaluate the work of the casual employee. If they are not pleased with the work performance they will not call the casual employee back to work additional shifts, in effect, terminating their casual employment. Some managers testified that they would discuss shortfalls in work performance with the casual worker and provide them an opportunity to improve before deciding if the employee will be permitted to reach the 150 hour requirement.

In addition, managers are responsible for vacation scheduling, approving certain short-term leaves of absence, assigning overtime by seniority, and approving vacation carry-overs. In relation to overtime, the evidence indicated that overtime is not a significant factor in the hours of work of any store.

Again, the complexity of the scheduling function varies depending on the size of the store, hours of operation and number of employees.

**(d) Selection of staff**

We have described above how the hiring function is curtailed by the provisions of the collective agreement with respect to the filling of permanent vacancies. The manager is responsible for initiating staffing requests to human resources which then bulletins the vacancy throughout the store system. The two most senior, qualified applicants are then interviewed for the position by the manager with a representative of the human resources branch in attendance. Usually, the senior applicant is offered the

position, however, there was one example provided where a senior applicant was denied a promotion to assistant manager.

The hiring of casual employees is conducted in a more informal manner. Managers keep resumes that are left at the store by individuals who are looking for work. When a decision is made to hire a casual employee, the manager selects a number of candidates to interview from the collection of resumes. Interviews are generally conducted by the manager with a representative of the human resources branch or the regional manager present. The choice of candidates for the position is generally left in the hands of the manager.

There was some dispute in the evidence as to the ability of the managers to hire casual staff without the approval of the regional manager, both in terms of the decision to hire a casual employee and the selection of casual employees. The policy manual specifies that no new casual employees are to be hired without prior consultation with the regional manager. In practice, some regional managers are consulted about the need to hire casual workers while others entrust both the decision to hire and the selection of a casual worker to the manager. Overall, managers advised their regional manager of a plan to hire more casual workers. On one occasion, the selection of a casual worker was vetoed by a regional manager based on the application of a conflict of interest policy.

**(e) First step grievance handling**

It was the consensus of the managers who testified that they have the authority to represent SLGA in Step 1 of the grievance procedure established under the collective agreement with SGEU. The managers had experience in investigating grievances and on some occasions, provided written responses to grievances. The evidence indicated that managers consult with and receive assistance from their regional manager and the Human Resources Branch in relation to the handling of grievances. In some instances, the responses to grievances are decided at the SLGA and letters are prepared for the manager to sign. In other instances, the manager would draft the initial response. Managers are also responsible for the implementation of SLGA's anti-harassment policy and take similar steps to investigate and report on instances of harassment.

There were instances referred to in the evidence where a grievance was resolved at the Step 3 level (CEO) by reducing a termination for theft to a 10 day suspension. There was no evidence relating to the ability of a manager to settle a grievance on behalf of the corporation. However, we assume from the evidence that a settlement could be made at Step 1 but that it would not be made by the manager without approval from the regional manager and the human resources branch.

Grievance handling is not a common experience for managers. Among the seven managers who testified, we heard testimony with respect only to two grievances. In smaller stores, grievances are a rare occurrence.

**(f) Imposition of discipline, with direction from regional manager and human resources**

The managers gave various examples of situations in which they were called upon to impose discipline or recommend that an employee be disciplined. They testified that they had the authority to issue verbal reprimands and corrections to employees for minor infractions, like lateness. They also were of the view that they had the necessary authority to respond to an incident that required an immediate response by sending a person home from work until an investigation was completed. In their opinion, assistant managers or Clerk I's or II's who are left in charge of a shift can exercise similar power when dealing with an emergency situation.

However, all managers indicated that they consult with their regional manager and recommend appropriate disciplinary responses to the regional manager when a more severe form of discipline is necessary. The final decision is made by the regional manager in consultation with the manager and the human resources branch. Usually, the disciplinary letter is drafted by the manager but is subject to approval and revision by the regional manager and human resources branch.

There is some variation in the degree of authority granted to managers by their regional managers. In one instance, a manager was authorized to decide appropriate discipline on his own. In that instance, he imposed a letter of discipline and a 60 day probationary period.

**(g) In-store staff training**

Managers are responsible for ensuring that staff members are properly trained. They perform some of the training themselves and assign aspects of the training to other staff members, including assistant managers. One manager participates in a SLGA committee that is responsible for preparing a province-wide training program on customer relations and store security.

The amount of training that is required varies according to the size of the store and the number of staff members. The large specialty stores require constant and on-going training while smaller stores function with less focus on staff training due to the small employee complement and the low turnover of staff.

**(h) Assignment of work**

All managers assign tasks to staff on a daily basis. In the larger stores, the assignment of work may be delegated to an assistant manager. Managers have developed different techniques for assigning work - some post lists while others meet with staff to decide on the assignment of work.

**Relationship with the management team**

The job description of a manager requires managers to "actively participate as an integral part of the Liquor and Gaming Authority management team." There is some evidence to suggest that managers are relied on in a consultative role in relation to the overall labour relations of SLGA. SLGA's bargaining committee includes a manager. In addition, managers are asked for suggestions with respect to matters that should be included in the bargaining proposals. However, they do not participate as a group in the formulation of the bargaining package between SLGA and SGEU.

There is also evidence which suggests that managers are consulted on other policy issues. Mr. Pawluk from the Saskatoon Circle 8 store participates in the SLGA committee formulating a staff training package for the entire system.

Some managers are also assigned responsibility for assisting and checking on franchise operations. In these instances, managers are the eyes and ears of SLGA to ensure compliance with corporation policies by the franchisee and to assist the franchisee in merchandising the products.

Managers meet on a regional basis and participate in training as a group along with assistant managers. Recently, managers and assistant managers attended training designed to focus their efforts on turning stores into "profit centres". Part of this training is designed to encourage managers to take initiatives in their own stores to boost sales and profits. In this regard, managers exercise some independent authority to arrange ad hoc displays in the stores and to encourage beverage testing in the store. One manager participated in arranging a wine tasting in his community.

There was some discussion about the ability of managers to influence corporate decisions with respect to store hours and seasonal operations. In one instance, the manager testified that he had discretion to decide store hours and to determine when a seasonal extension of hours would occur. All other managers felt the store hours were determined by the regional manager or SLGA and did not feel they had discretion to change the hours of operation. A memo from SLGA indicated that store operating hours can be extended by the store manager in consultation with the regional manager.

Overall, managers agreed that they have little input into corporate policy. They do not determine product or product lines, price or other costing matters. They have little input into the corporate decisions that result in the collective agreement between SLGA and SGEU; they have little or no input into their own wages and working conditions. Their contact point with SLGA is chiefly through the regional manager.

**Relevant statutory provisions**

The Board must determine if the managers are employees within the meaning of s. 2(f)(i) of the *Act* which states:

> *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.*

In 1984 when managers were determined to be excluded from the SGEU bargaining unit s. 2(f)(i) of the *Act* read as follows:

> *2. In this Act:*
>
> *(f) "employee" means:*
>
> > *(i) any person in the employ of an employer except any person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, any person who is an integral part of his employer's management or any person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer.*

**Arguments of the parties**

Mr. Ermel argued that managers have limited input into management decisions and policy and have no effective input into the working conditions of employees of SLGA. He noted that the Board's decision in *Professional Institute of the Public Service of Canada v. Government of Saskatchewan and Saskatchewan Government Employees' Union*, [1997] Sask. L.R.B.R. 530, LRB File No. 018-97, which recognized the "middle management" bargaining unit in government, narrowed the test for determining who is an employee under the *Act*. Managers, by comparison to regional managers, possess limited authority to affect the working lives of employees in the bargaining unit.

Counsel for SGEU argued that managers are at most supervisors, and do not possess the kind of authority that would justify their exclusion from a bargaining unit. He noted the change in definition of "employee" with the 1994 amendments, and the reversion back to the definition that existed prior to the exclusion of managers from the certification Order. Overall, SGEU took the position that managers do not exercise authority of a managerial nature and their exclusion from collective bargaining is not justified.

Counsel for SLGA noted that the *Act* does not contain provisions permitting the creation of supervisory bargaining units or middle management bargaining units. Therefore, he argued the Board must determine the employment status of the managers in the same manner it would determine the status of any position, that is, by determining if they are primarily responsible for performing managerial functions. Counsel pointed out that the primary issue to decide is whether managers would be in a conflict of interest if they were included in a bargaining unit. In this regard, SLGA argued that managers are the sole management personnel in the retail stores and have a significant responsibility for ensuring the proper workings of the retail system. As such, the managers should be excluded from any bargaining unit.

**Analysis**

In this application, the Board is required to determine if managers are "employees". This task involves an assessment of the primary responsibilities of the persons in question to determine if they actually exercise authority and actually perform duties that are of a managerial character. If managers are found to exercise such managerial functions, they will be excluded from the protection of the *Act*. If they do not perform such managerial functions, the Board will be asked at a further hearing to determine which bargaining unit is the most appropriate unit for the managers - a blended unit with SGEU, a partially blended unit, a separate unit with SLSMA or some other unit.

In the process of determining employee status, the Board's primary concern is to ensure that an arm's length relationship is maintained between union and management. Such a relationship is required in order for the collective bargaining relationship to work properly. In this regard, in order for a union to function as an effective representative of employees, its members cannot be subject to management

interference and must not be placed in a conflict arising from their job responsibilities and their union membership. Similarly, an employer requires its managers to preserve confidential information and to participate freely in management decisions without any hesitation caused by a competing loyalty to a trade union. The need for a clear delineation between employee and management was elaborated by the Ontario Labour Relations Board in *Chrysler Canada Ltd.*, [1976] O.L.R.B. Rep. Aug. 396, as follows, at para. 12:

> *The identification of management is fundamental to the scheme of collective bargaining as set out in the Labour Relations Act. What is contemplated is an arm's length relationship between the employees represented by a bargaining agent, on the one side, and the employer acting through management on the other side. The Act attempts to create a balance of power between these two sides by insulating one from the other. Employees, therefore, are protected from management interference and domination by the prohibitions against employer interference with trade union and employee rights. Management, by the same token, is protected by excluding from collective bargaining either persons exercising managerial functions, or persons employed in a confidential capacity in matters relating to labour relations. Collective bargaining rights, therefore, are not universal, but must be qualified by the need to preserve a countervailing force on the employer side.*

Similarly, the British Columbia Board in *The Corporation of the District of Burnaby v. Canadian Union of Public Employees*, [1974] 1 Can. L.R.B.R. 1, provided the following rationale for the statutory exclusion of managerial and confidential staff, 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 organizations as well. A 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's 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.*

Chair Sherstobitoff adopted the *District of Burnaby* rationale, *supra*, in *Westfair Foods Limited v. United Food and Commercial Workers International Union*, [1981] Feb. Sask. Labour Rep. 66, LRB File No. 085-80, where the Board concluded that department managers in a large grocery retail store were not employees within the meaning of s. 2(f)(i) of the *Act*. In that instance, the Board considered the managers' powers to hire, discipline, promote and demote, administer the collective agreement and grievances, conduct employee evaluation, direct the work force and exercise discretion in order to assess whether department managers were "employees".

The task of delineating "employee" status has been made more complex by the demand for and the expansion of "middle management" bargaining units. Middle management units are typically created from the ranks of the positions excluded from "all employee" bargaining units. The Board explored the rationale for middle management bargaining units in the *Professional Institute* decision, *supra*, as follows, at 548-549:

*In a number of jurisdictions, notably British Columbia and Ontario, the legislation explicitly permits the recognition of separate bargaining units for supervisory personnel. In other jurisdictions, labour relations boards have permitted the delineation of such units in accordance with their overall jurisdiction to determine what bargaining units are appropriate.*

*On the face of it, this may seem inconsistent with the requirement acknowledged by the same boards that a clear division be made between those who are employees, and those who are properly on the management side of the collective bargaining relationship, either because of their decision-making authority, or because they are privy to confidential information related to industrial relations. In the [Cowichan Home Support Society and U.F.C.W., Local 1518 (1997), 34 C.L.R.B.R. (2d) 121 (B.C.L.R.B.)] decision, supra, the British Columbia Board said this, at 27:*

> *First, a separate unit cannot be created under the heading of conflict of interest because that would result in a varying scale in regard to who is a manager. It is unacceptable to have a policy that would allow persons, performing the same functions, to be treated as "employees" where they are placed in a separate bargaining unit, but conversely, treated as "managers" where a separate bargaining unit is inappropriate. The Board in VGH rejected such a varying or sliding scale in regard to the management team concept for analogous reasons. Previously, if an individual did not fulfil the criteria of a "manager", then the employer was able to argue that an individual was a "near manager" and nonetheless excluded. This sliding scale of what constituted a manager under the management team concept, in effect, lowered the test for managerial exclusion. In this case, the effect would be to raise the test for managerial exclusion; and this would inevitably result in a policy that would be in conflict with the principles expressed in both VGH and Island Medical Laboratories Ltd., BCLRB No. B308/93, (1993), 19 CLRBR (2d) 161 (IML).*

*It will be noted that this comment was made in the context of the removal of a "management team" exclusion from the British Columbia legislation, similar to the amendment to the Act which eliminated the exclusion for a person "integral to management." It draws attention to a general point, however, which is that in determining who is an employee there must be a basic assignment of a position to the management or employee side of the line. Though there might be some subsequent question concerning what kind of unit would be an appropriate home for different groups of employees, it is not a matter of drawing persons who are actually managers into the circle of employees.*

In the context of the development of middle management units, it is important to clearly articulate how the Board will approach a determination of managerial exclusions. This Board shares the concern expressed in the *Cowichan Home* decision, *supra*, that Board decisions on managerial exclusions should not be premised on a sliding scale of managerial or near-managerial exclusions depending on the possible configurations of the bargaining units. That is, a person cannot be "managerial" in relation to one bargaining unit but an "employee" in a differently configured bargaining unit.

To avoid this sliding scale, the Board approaches the question of whether a person is "managerial" from the perspective of whether the person's job responsibilities place her in a possible conflict of interest with any potential bargaining unit. In order to make this determination, the Board focuses on job functions that require undivided loyalty and confidence in management, particularly in matters related to labour relations. Underlying the Board's assessment is the desire to maintain an arm's length relationship between management and union in order that both may function effectively in a collective bargaining setting.

In the *Cowichan Home* decision, *supra*, the British Columbia Board adopted a streamlined approach to the determination of managerial status by focusing on those job functions that clearly give rise to a conflict of interest between the individual's job responsibilities and her membership in a trade union. The British Columbia Board held as follows, at 147:

> *It serves no purpose, therefore, in relation to these new economic arrangements (or others) to have an over-inclusive definition of manager; however, at the same time, there is a need to have a more focused determination of the areas that are crucial to the preservation of the managerial role. This is important to the legislative scheme and to the parties themselves. We therefore affirm the Board's approach in the [Vancouver General Hospital and B.C.N.U. (1993), 18 CLRBR (2d) 161] that discipline and discharge, together with labour relations input, are the two most significant factors in determining managerial status - and thus exclusion from the Code definition of "employee".*
>
> *The original panel in [Westfair Foods Ltd. (Western Grocers Division) v. U.F.C.W., Local 777, BCLRB No. B217/95] proposed the elimination of all other criteria identified in [B.C. Ferry Corp. and B.C. Ferry & Marine Workers Union, [1979] 1 Can. LRBR 116]. We are largely in agreement with that suggestion, and are prepared to now limit the test further: the only other factor which materially assists the Board's s. 1(1) inquiry is the hiring and promotion of employees (and to this we expressly add demotion, to the extent that it is not captured by discipline and discharge). A common*

> *element to the factors now identified is that the exercise of such powers is capable of having a significant impact on the career of any employee.*

This approach is similar to the one adopted by this Board 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 where the Board concluded, at 59:

> *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.*

The job functions which the Board considers central to the finding of managerial status includes the power to discipline and discharge, the ability to influence labour relations, and to a lesser extent, the power to hire, promote and demote. Other job functions, such as directing the workforce, training staff, assigning work, approving leaves, scheduling of work and the like are more indicative of supervisory functions which do not, in themselves, give rise to conflicts that would undermine the relationship between management and union by placing a person too closely identified with management in a bargaining unit.

In assessing managerial authority, the Board considers the actual authority assigned to a position and the use of that authority in the workplace. Section 2(f)(i) of the *Act* excludes only persons "whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character" from the right to be represented by a trade union. As noted in past Board decisions, managerial functions that are claimed to justify exclusion from a bargaining unit must be genuine, not merely paper, powers. In this sense, the Board looks to the actual performance of work by the person whose status is in question to determine what managerial functions are actually performed. In *Service Employees International Union, Local 333 v. North Central District Health Board and Nirvana Pioneer Villa*, [1995] 4th Quarter Sask. Labour Rep. 124, LRB File No. 224-95, the Board indicated its preference to hearing direct evidence from an incumbent as to the actual performance of

managerial duties, as opposed to documentary evidence of a job description. In this instance, the Board had the benefit of hearing from managers at all levels of the system.

The authority bestowed on a managerial employee must also be an effective authority; it is not sufficient if the person can make recommendations, but has no further input into the decision-making process. In this regard, the Board recognizes that in most modern corporations managerial powers are no longer centralized in the executive suite. Generally, such powers are spread over several layers of management. Decisions related to labour relations are often made by a manager after consultation with her superiors, human resources personnel and on some occasions, legal counsel. Despite the trend to disperse managerial functions among different levels of management, it is not uncommon for an employer to require that certain decisions, such as the termination of an employee, be approved by senior management before being implemented by the person whose status is in question. However, this multi-layered approach to decision-making does not detract from the managerial status of the person in question if it can be demonstrated that the individual has an ability to make an effective determination. In the *Cowichan Home* decision, *supra*, the British Columbia Board explained the term "effective determination" as follows, at 149:

> *In our view, effective determination in the context of discipline means that at least in the majority of cases the sanction imposed by the person whose status is in question must be substantially the ultimate discipline imposed. We recognize that the grievance procedure itself inevitably leads to changes in the actual amount of discipline imposed - typically from negotiation and compromise which are essential elements of the grievance process. That is different from changes made by more senior persons, or where the person whose status is in issue merely has input into the decision-making process. In such circumstances, it cannot be said discipline was "effectively determined" by the original author of the sanction.*

Applying this criteria to managers, the Board noted that managers supervise in-scope employees, including in-scope supervisors, and have some ability to affect the working lives of those employees. Generally, however, managers manage by reference to policies set by SLGA, and they exercise little discretion with respect to the manner in which the work is performed. They prepare background work that is used to establish budgets, staff complements and labour relations policy, but they lack authority to actually determine such matters and have little influence over corporate decisions related to them. With respect to the negotiation of a collective agreement, managers have little input or influence.

In matters of discipline and discharge, managers are the eyes and ears of SLGA in the workplace and have significant responsibility for and over work performance. In addition, while such managers generally lack authority to institute discipline, except for minor admonitory discipline, they do report to management on employee problems and do recommend discipline or corrective measures, when needed. However, managers do not have authority to make effective determinations regarding discipline and discharge; rather, in our view of the evidence, they have authority to recommend discipline or discharge with the effective decision resting with the regional manager. The ability of managers to deal with an emergency situation by suspending employees pending an investigation of an incident is an accepted supervisory power within the store system, and is available to in-scope supervisors as well as managers. This emergency authority does not alter the overall assessment of the disciplinary authority bestowed on the manager.

With respect to the administration of the collective agreement, managers accept grievances, investigate work disputes and respond to grievances at Step 1. They are also responsible for ensuring implementation of employer policies related to anti-harassment, occupational health and safety, security, customer relations and the like. This work, however, is performed with and under the direction of the regional manager and human resources branch. Managers play an important role in funnelling human resource issues to SLGA through the regional manager; however, the level of authority of a manager in relation to collective agreement administration is not sufficiently effective to exclude the position from the definition of employee.

Managers do play an important role in the hiring of casual workers. This role is not insignificant in the overall scheme of the operations because casual hiring is the entry point for most new employees. In this regard, however, managers are required to consult with their regional manager with respect to the need to hire casual workers and to conduct the selection of such employees with assistance from the regional manager or human resources branch. Although there was some evidence that managers operated more independently in some instances with respect to the hiring of casual workers, this evidence was peculiar to one regional manager who had authorized such discretion. It also occurred in locations where casual work formed a relatively small part of the overall hours of work. This anomaly does not affect our overall view of the managerial authority to hire. Ultimately, we agree with the

description of hiring authority put forth by the representative of SLSMA that if push came to shove between a manager and regional manager over either the need to hire a casual employee or the selection of a casual employee, the regional manager would make the final determination.

We do not suggest by this summary that all managers perform this cluster of functions to the same extent. In the smaller stores, managers spend the bulk of their time performing work that is expected of the in-scope employees, that is, they largely perform hands on store work and spend relatively little time on supervisory tasks. As one progresses up the ladder to a Level V store, the manager performs duties that are more supervisory in nature. In some situations, the assistant manager in a Level IV or V store may have more supervisory responsibilities than a Manager I, II or III.

This variation among managers makes the assessment of their status as "employees" somewhat complex. However, the Board has determined, based on the criteria set out above, that managers do not perform managerial functions of a nature or degree that would require their exclusion from any bargaining unit. The Board will issue a declaratory order that managers are "employees" within the meaning of s. 2(f)(i) of the *Act*.

The Board Registrar will contact the parties with a view to setting further dates for hearing the remaining portions of both applications.