SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and LORAAS DISPOSAL SERVICES LTD., CARMAN LORAAS AND BILL HUMENY, Respondents

LRB File Nos. 207-97 to 227-97, 234-97 to 239-97; January 5, 1998
Chairperson, Gwen Gray; Members: Don Bell and Carolyn Jones

For the Applicant: Larry Kowalchuk
For the Respondent: Noel Sandomirsky, Q.C.

Duty to bargain in good faith - Disclosure - Failure to disclose sale of assets to union at bargaining table constitutes failure to bargain in good faith - Employer's fear of vandalism to equipment, even if based upon reasonable belief, does not justify failure to disclose.

Technological change - Definition - Closure - Decision to close vacuum truck division was technological change within meaning of *The Trade Union Act.*

Unfair labour practice - Dismissal for union activity - Employer's rationale for deciding which employees would be laid-off and which would be retained not convincing - Employer retained junior and less experienced employees - Employer did not meet standard imposed by s. 11(1)(e) of *The Trade Union Act.*

Unfair labour practice - Unilateral change - Employer implemented decision to close vacuum truck division thereby changing terms and conditions of employment without bargaining collectively with union - Employer violated s. 11(1)(m) of *The Trade Union Act.*

***The Trade Union Act*, ss. 11(1)(c), 11(1)(e), 11(1)(m) and 43.**

REASONS FOR DECISION

Background

Gwen Gray, 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").

On June 23, 1997 the Union filed applications for monetary loss and reinstatement for Henry Franke, 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 Hassman, 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.*

The Board issued an interim Order with respect to these applications on July 15, 1997 which required the Employer to disclose certain documents to the Union and to meet with the Union with respect to the laid-off employees. The interim Order also required the resumption of collective bargaining for a first agreement and prohibited Loraas from making any further unilateral changes to the existing terms and conditions of employment or from taking any further steps to remove or relocate bargaining unit work, pending the hearing of the final application.

Preliminary Matters

The parties requested that the Board reserve its jurisdiction to make any remedial Orders arising out of these applications until the parties have the benefit of reviewing the Board's Reasons for Decision and its declaratory Orders. In addition, during the hearing of the matter, it came to light that Ms. James had been offered to be reinstated to an office position. In light of the Employer's offer to reinstate Ms. James, the Board directed the parties to enter into negotiations to resolve any outstanding issues with respect to her reinstatement. The application with respect to Ms. James was then adjourned *sine die*. In the event that settlement is not possible, either party may refer the application relating to Ms. James to the Board for determination upon providing notice to the other party.

Facts

Loraas operates a solid and liquid waste disposal business in the cities of Saskatoon and Regina. The company is owned by two brothers, Bruce and Carman Loraas. Carman Loraas manages the company's operations in Regina, which employed 45 employees in January, 1997. Eight of the employees were drivers in the vacuum truck division. Vacuum trucks are used to haul liquid waste, including oil and oil products, industrial waste and other similar products.

On May 30, 1997, Loraas entered into an agreement to sell the assets of its vacuum truck division to SEDA International for $1.37 million. The agreement took effect on June 13, 1997 at midnight at which time SEDA took possession of the various assets, including all of Loraas's vacuum trucks. Loraas notified the vacuum truck division employees of the sale when the employees appeared for work on June 14, 1997. Drivers who were not scheduled for work on June 14, 1997 were called to come in to the office by Carman Loraas and informed of the sale. Seven drivers were laid off on June 14, 1997. On July 4, 1997, two office staff were laid off as a consequence of the reduced office work relating to the closure of the vacuum truck division. An eighth driver, Henry Palmier, was retained on staff by Loraas.

Carman Loraas explained to the Board that he and Bruce had discussions starting in the summer of 1995 about the need to review all aspects of their operations in order to reduce their workloads. This review included an assessment of the success of the vacuum truck division which operated only in

Regina. The discussions continued until November of 1996 when the brothers made the decision to look for a buyer of the assets of the vacuum truck division. In November of 1996 Loraas approached SEDA International to see if it would be interested in acquiring the assets. SEDA was approached by Loraas prior to the Union's application for certification and prior to Carman and Bruce Loraas becoming aware of the Union's organizing campaign in late January of 1997 which occurred when they received the application for certification from the Board.

The Union and Loraas commenced negotiations for a first collective agreement on June 3, 1997. According to Ms. James, who is a member of the Union's bargaining committee, there was no mention made at the bargaining meeting by the Employer of its plans to close the vacuum truck division. The June 3, 1997 meeting was the only bargaining meeting held before the sale of assets took effect. On June 12, 1997, the Union took a strike vote among the members of the bargaining unit, but it did not serve Loraas with any notice of strike as is required by s. 11(6) of the *Act*.

Carman Loraas testified that although he wanted to advise the Union of the sale, he was unable because he had undertaken to not disclose the sale in his agreement with SEDA. This undertaking was apparently sought by SEDA after Carman Loraas had informed SEDA that Loraas was experiencing problems with vandalism to its equipment which it attributed to the organizing of the Union.

The Board heard a great deal of evidence relating to the alleged vandalism to vacuum trucks and other Loraas equipment. It is sufficient for our purposes to note that Carman Loraas conceded on cross-examination that he was not accusing members of the bargaining unit of deliberately vandalizing the equipment. Although the losses were considerable, there was no evidence from which one could conclude that employees were deliberately destroying company property. In fact, a variety of causes were given by employees for the damage that did occur. Where employees were at fault, they readily acknowledged responsibility to Loraas at the time of the incidents. Other equipment damage was likely caused by poor maintenance and the poor state of repair of the equipment which had been brought to the attention of the proper management personnel.

As a consequence of the sale of the vacuum trucks, Loraas also contracted out the collection of waste motor oil which work formerly had been performed by members of the vacuum truck division. According to Carman Loraas, this decision was made because Loraas no longer owned a truck that

could haul the waste oil. Loraas still owns the collection tanks that customers use to store the waste oil. For similar reasons, Loraas also contracted out the liquid waste disposal work it had performed at the RCMP depot.

On July 1, 1997, for reasons unrelated to the sale of the vacuum truck division, Loraas also ended its collection of cardboard and waste office paper and directed its customers to Cosmo Industries. Bruce Loraas testified that this decision was taken for economic reasons.

Both Carman and Bruce Loraas denied that the decisions made to sell the assets of the vacuum truck division and other related decisions were motivated by anti-union animus. They insisted that the sale and other changes were implemented for business reasons and that the timing of the implementation of the changes was merely coincidental with the Union's strike notice and bargaining activity. Carman Loraas indicated that the return on investment in the vacuum truck division was 11% compared to a return on investment of 22% in the solid waste division.

On cross-examination, Carman Loraas agreed that he may have made statements to the effect that if a union came in, he would close down the business. He testified that he may have made such statements in the heat of the moment which he later regretted.

In this regard, Denise Shillingford, Office Manager, gave evidence that, after an attempt some years ago by the Teamsters Union to organize Loraas, Carman Loraas asked her to inform him if she heard rumours of a union coming in. According to Ms. Shillingford, Carman Loraas told her that if the union came in, he couldn't afford to keep the vacuum trucks.

There was also some suggestion in Ms. Shillingford's testimony that Bernie Sebastian, Sales Manager for Loraas, had deleted documents off the computer system following the Board hearing on the interim application in this matter. The suggestion was that Mr. Sebastian removed letters in which he had indicated to customers that their rates were being increased due to the Union's presence at Loraas. Mr. Sebastian had sent a letter to that effect to the RCMP.

With respect to the two office workers, Carman Loraas testified that Ms. James and Ms. Hassman were laid off on July 4, 1997, while two more junior clerks were retained. Neither Ms. James' nor Ms.

Hassman's work prior to the sale of the vacuum truck division was dependent on the continued operation of that division. Mr. Loraas explained that Ms. James was let go because she did not enjoy doing dispatch work, which was the work she would have to perform if she had been retained on staff. One junior clerk resigned around the time of the hearing and her position was subsequently offered to Ms. James on August 14, 1997 at a pay rate of $7.75/hour. Prior to her lay-off, Ms. James was making $11.64/hour. Attached to the letter offering Ms. James the position was a job description for dispatcher/secretary position. Ms. James testified that she had never seen a job description for this position before and that as far as she knew the job description and the rate of pay had not been negotiated with the Union.

Carman Loraas also acknowledged on cross-examination that the driver that was retained on staff, Mr. Palmier, was a junior driver. He explained that Mr. Palmier was retained because he had experience working with portable toilets and was willing to perform such work. No effort was made by Carman Loraas to determine if other drivers would be willing to perform the work in question.

Mr. Quartly, Mr. Wood, Mr. Carroll, Mr. Lissel, Mr. Franke, and Mr. Mayer, all vacuum truck drivers, gave evidence with respect to their lay-off from Loraas and their subsequent efforts to obtain other employment. Mr. Carroll and Mr. Lissel obtained employment with SEDA - Regina who secured Loraas's contract at Federated Co-operative Refinery. Mr. Quartly is now engaged in farming; Mr. Wood and Mr. Mayer were unemployed at the time of the hearing; and Mr. Franke was setting up his own business. All testified that they received pay in lieu of notice in accordance with *The Labour Standards Act* and received no other assistance from Loraas in their job searches.

Thomas Beingessner, Chief Shop Steward, testified that the sale of the vacuum truck division also affected employees other than the truck drivers and office staff. He indicated that two mechanics were left with little work to do; another welder is less busy than he is used to and questions if he will be retained by the company. One driver has been reassigned to perform different work. In addition, Mr. Beingessner testified that the company has also contracted out coffee room cleaning and lawn care since the Board's interim Order was issued on July 15, 1997.

Loraas called two company mechanics and Mr. Latournas, Operations Supervisor, to testify with respect to the equipment damage that occurred in the time leading up to the sale of the vacuum truck

division. As indicated, the value of this evidence is minimal given Carman Loraas's testimony that he did not accuse the drivers of deliberate vandalism.

Relevant Statutory Provisions

The applications allege violations of ss. 11(1)(a), (c), (e), (m) and 43 and request Orders under ss. 5(d), (e), (f), and (g). The provisions relating to the alleged violations 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;*
> >
> > *(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 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.*

Arguments

Counsel for the Union argued that s. 43 of the *Act* applies to the removal of part of a business, such as occurred in this instance. He pointed out that the Board determined in *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, that the 1994 amendment to the wording of s. 43(1)(c) of the *Act* which added the words "or relocation outside the appropriate unit" to the phrase "the removal by an employer of any part of the employer's work, undertaking or business" now applies to situations in which there is a cessation, as opposed to a transfer, of work. Although the Court of

Queen's Bench quashed the decision of the Board [see (1996), 146 Sask. R. 224 (Sask Q.B.)], counsel argued that the Board's decision was not overturned on the interpretation placed on the word "removal".

Counsel further argued under s. 43 of the *Act* that a significant number of employees were affected by the removal of the vacuum trucks, notably the drivers and two office staff who were laid off, three office workers whose work was reassigned, one driver reassigned, two welders with reduced work loads, for a total number of approximately 17 out of a workforce of 45. This exceeds the 20% figure set by Sask. Reg. 171/72 as the significant number in a bargaining unit of this size. As such, counsel argued that Loraas was required to give notice of the sale to the Union at least 90 days in advance of the sale.

The Union noted that Loraas did not seek the protection of s. 43(12) of the *Act* which permits employers to apply to the Board for relief from the requirements of s. 43 of the *Act* where the Board is satisfied that the change must be implemented promptly to prevent permanent damage to the employer's operation.

As a remedy under this heading, the Union seeks an Order under s. 43(5) of the *Act*.

With respect to the violations alleged under s. 11(1)(c) of the *Act*, the Union relies on the series of Board decisions relating to the obligation of Loraas to disclose those decisions already made that will impact on employees during the course of the collective agreement that is under negotiations.

The Union also alleged that Loraas violated s. 11(1)(m) of the *Act* by changing the terms and conditions of work for a number of members of the bargaining unit. In this regard, it asserts that the lay-offs, reassignments of work, and reduction of work for welders and washers, constituted changes in terms or conditions that were admittedly not negotiated with the Union. The Union argues that there was no evidence that such changes were justified on the "business as before" interpretation that is applied to s. 11(1)(m) of the *Act* as there was no evidence that such changes had occurred prior to the Union becoming certified as the bargaining agent.

The Union asserted in its applications that the seven employees who were laid off were terminated for union activity. Under s. 11(1)(e) of the *Act*, the burden of proof that the employee was discharged for

good and sufficient reason rests on the employer. The Union argues that Loraas cannot meet this onus by relying on reasons that otherwise constitute an unfair labour practice - i.e. the violation of ss. 11(1)(c) and 43 of the *Act*.

In the alternative, the Union asks the Board to consider the facts surrounding the sale of the vacuum truck division and conclude from those facts that the sale was motivated by anti-union animus. In this regard, the Union points to the hasty manner in which the decision to sell was implemented, without regard for the customers of the business; the letter telling a customer that the Union was to blame for the price increase; the absence of economic reasons for abandoning the vacuum truck division; the comments made by the owner to one employee after the last organizing drive to the effect that the vacuum truck division would be sold if a union came in.

The Union does not directly challenge the sale as a sham but points out to the Board that the vacuum truck division's main customer is now served by two former employees of Loraas who have been engaged by SEDA - Regina. In the Union's eyes, the deal between Loraas and SEDA is questionable.

Finally, in regard to s. 11(1)(a) of the *Act*, the Union argues that the Employer undertook the sale in order to undermine the employees' confidence in their decision to join a union. The Union points to evidence from Ms. James, in particular, who expressed her doubts, after being laid off from her position, about the wisdom of having organized the Union.

As a remedial Order, the Union requests that declarations be issued with respect to each alleged violation of the Act and that a further hearing be convened to address the specific remedies that should flow from the Board's declaratory Orders. In this regard, it was agreed between the parties at the hearing that the issue of remedies would be left for a determination following the Board's initial rulings.

Counsel for Loraas urged the Board to find as a matter of fact that the decision to sell the assets of the vacuum truck division was made prior to the Union's organizing campaign. In light of this evidence, the Union's allegations under ss. 11(1)(a) and (e) of the *Act* cannot be sustained because there is no evidence that the decision to close the vacuum truck division was motivated by anti-union animus. Counsel pointed out that the only direct evidence of anti-union animus was Ms. Shillingford's testimony that Carman Loraas told her at the time of the Teamster organizing drive that "if a union comes in the

vacuum trucks will be gone - it would not be profitable to keep them." He pointed out that on cross-examination, Ms. Shillingford acknowledged that she had been asked to prepare financial information relating to the profitability of the vacuum truck division at that time and that she was aware that it was less profitable than the solid waste division. Counsel noted that these comments were made by Carman Loraas before the organizing drive of the Applicant and, in that sense, are too remote and too innocuous to have a bearing on these applications.

Counsel argued that no evidence was led by the Union with respect to its allegations under s. 11(1)(c) of the *Act*. With respect to s. 11(1)(m) of the *Act*, counsel argued that Loraas was justified in not disclosing the sale of the vacuum truck division to the Union because it feared that its equipment would be tampered with prior to its sale should employees be advised of the sale. He argued that this was a reasonable inference for Loraas to draw from the rash of accidents that occurred between March and May of 1997.

In relation to the alleged violation of s. 43 of the *Act*, the Employer argues that s. 43 of the *Act* does not apply to the cessation of part of a business. Counsel noted that the proper interpretation of s. 43 of the *Act* is before the Court of Appeal in the *Acme Video* case, *supra*. He doubted if the Board's interpretation of s. 43 of the *Act* was correct and argued that the Legislature would not have masked such a significant change in the interpretation of s. 43 of the *Act* by adding the phrase "or relocation" to s. 43(1)(c) of the *Act*.

Analysis

The Board must address the following issues on these applications:

(1) Did Loraas fail to bargain in good faith as required by s. 11(1)(c) of the *Act* by failing to disclose the sale of the vacuum truck division to the Union in bargaining? If so, can its failure be excused?

(2) Was Loraas required to provide the Union with notice of technological change within the meaning of s. 43 of the *Act*?

(3) Did Loraas terminate the employment of the nine employees in violation of ss. 11(1)(a) and (e) of the *Act*, that is, were the terminations made for good and sufficient cause?

(4) Did Loraas unilaterally alter rates of pay, hours of work or other conditions of employment without bargaining the changes with the Union contrary to s. 11(1)(m) of the *Act*?

In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd.*, [1997] Sask. L.R.B.R. 787, LRB File No. 266-97, the Board summarized an employer's obligation to disclose certain decisions to a union in the course of collective bargaining. The Board stated as follows, at 811:

> *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.*

(1) Did Loraas fail to bargain in good faith as required by s. 11(1)(c) of the *Act* by failing to disclose the sale of the vacuum truck division to the Union in bargaining? If so, can its failure be excused?

The evidence indicated that the parties were engaged in collective bargaining for the purpose of arriving at their first collective agreement. A meeting was held between the parties for the purpose of bargaining on June 3, 1997. Ms. James testified that Loraas did not inform the Union at that meeting that it had made a decision to sell the assets of the vacuum truck division to SEDA International. As well, Carman Loraas admitted in his testimony that no disclosure was made to the Union or the employees prior to the sale. Carman Loraas justified the failure to disclose the impending sale based on his fear that employees of Loraas would vandalize the equipment, which led SEDA to insist that Loraas not disclose the sale to anyone, including the Union.

The Board finds that Loraas failed to bargain in good faith by refusing to disclose the sale to the Union prior to its occurrence. The *Act* requires the employer to disclose on its own initiative decisions that have been made that will be implemented during the course of the agreement and that will impact on the bargaining unit. Such disclosure is the cornerstone of bargaining in good faith.

In this instance, Loraas claimed that employees had vandalized its equipment in the period between March and May of 1997. When this evidence was reviewed on cross-examination of Carman Loraas and on examination-in-chief of the drivers for Loraas, it became abundantly clear that Loraas' claim was exaggerated beyond reasonable belief. There was no basis for the claim and it was an unfortunate attack on the integrity of the employees of Loraas who had served Loraas faithfully for many years. Loraas argued that it was not required to prove the truth of the claim, but was only required to prove that it had a reasonable basis for believing that employees might vandalize the equipment if it disclosed the details of the sale to the Union.

The Board finds that such a fear, even if based on reasonable belief, does not justify a failure to disclose to the Union decisions that Loraas has already made. If an employer was permitted to pick and choose the topics that are required to be disclosed to the union based on fear of vandalism or other similar concerns, the union's ability to effectively negotiate a collective agreement would be seriously undermined. In circumstances where an employer fears that disclosure will result in the destruction of its property by angry employees, it has a number of alternate strategies that it can pursue besides refusing to disclose the information. For instance, the employer could request the services of the Labour Relations, Mediation and Conciliation Branch of the Department of Labour to provide advice and assistance in raising the concerns with the union. The employer could also seek a meeting with the union staff representatives in advance of the negotiating committee in order to have an informal discussion of the employer's concerns. In essence, the employer must be willing to treat the union as an equal and responsible partner in the bargaining relationship and must not act on paternalistic assumptions that are destructive of that relationship.

In this instance, Loraas created a difficult climate for first agreement collective bargaining by failing to disclose its decision to sell the vacuum trucks and by suggesting that its basis for failing to disclose the decision was related to culpable conduct on the part of its long standing employees. The Union and its members are rightly suspicious of Loraas' motives, given that the sale came on the heels of the Union's strike vote. Whether or not Loraas acted with anti-union animus in deciding to sell the vacuum trucks, the Board finds that its conduct in failing to disclose the sale of the assets to the Union at the bargaining table constitutes a failure to bargain in good faith.

(2) Was Loraas required to provide the Union with notice of technological change within the meaning of s. 43 of the *Act*?

The Board held in *Acme Video*, *supra*, that the technological change provisions contained in s. 43 of the *Act* apply to a permanent closure of part of a business. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Limited et al.*, [1997] Sask. L.R.B.R. 749, LRB File No. 266-97, the Board affirmed its decision. The matter was reviewed by the Court of Queen's Bench in the *Acme Video* case, *supra*, but the interpretation placed on s. 43(1)(c) of the *Act* was not quashed by the Court. Instead, the Court held that the Board failed to make a crucial finding that the Employer in that instance decided to "to cease or remove or transfer or deal in any respect with any part" of the Employer's business, at 231.

In this instance, Carman and Bruce Loraas testified as to the process they went through in arriving at their decision to close the vacuum truck division. The decision was made for personal reasons relating to their workloads. Economic factors, that is, the rate of return on investment, also played a role in deciding which part of the overall business they were prepared to close. In this instance, Loraas did decide to close a portion of its operations, being the vacuum truck division. It implemented its decision by selling some of the assets of the division to SEDA International, by laying off the drivers and two office workers, and by contracting out various other incidental portions of the work performed by the vacuum truck division. Both parties agreed in their arguments that 20% or more of the employees in the bargaining unit were affected by the decision to close the vacuum truck division.

In these circumstances, the Board finds that the decision to close the vacuum truck division was a technological change within the meaning of s. 43(1)(c) of the *Act* - that is, it was a "removal or relocation outside of the appropriate unit by an employer of any part of the employer's work, undertaking or business." As such, Loraas was required to give 90 days advance notice to the Union and the Minister of Labour under s. 43(2) of the *Act*. The evidence indicated that the Union did not become aware of the closure of the vacuum truck division until June 14, 1997, the day that employees were advised of the closure by Loraas. The Union filed its application claiming that Loraas failed to give notice of the technological change on July 4, 1997, which is within the 30 day time period required by s. 43(5) of the *Act*.

(3) Did Loraas terminate the employment of the nine employees in violation of ss. 11(1)(a) and (e) of the *Act*?

There are two aspects to this part of the Union's application. First, the Union argues that Loraas bears the onus of establishing that the employees who were laid off were terminated for good and sufficient cause under s. 11(1)(e) of the *Act*. Since the reason for their lay-off, that is, the closure of the vacuum truck division, was improperly implemented under ss. 11(1)(c) and 43 of the *Act*, the permanent lay-offs cannot be justified under s. 11(1)(e) of the *Act* as being for "good and sufficient" cause.

The second aspect of the Union's argument is that Loraas discriminated against employees with a view to discouraging activity in the Union by its method of selecting employees for lay-off. There was evidence that a junior, less qualified truck driver was retained by Loraas and that two junior, less experienced office staff were retained by Loraas.

With respect to the first aspect of the Union's argument, the Board is troubled by the coincidence of the strike vote and the lay-off. In the eyes of the Union's members, it must appear to them to be a clear message from Loraas that they are losing their jobs because they joined the Union.

Having heard the evidence of Loraas, however, we are not convinced that this was the message Loraas intended the decision to convey to its employees when it made its decision to sell the assets of the vacuum truck division. We accept that the sale of the assets of the vacuum truck division was in the works prior to the certification of the Union. In addition to the testimony provided by Carman and Bruce Loraas, the Board also draws this conclusion from the size of the sale, which was in excess of $1 million, and from the time that it reasonably would take to finalize legal agreements, obtain financing, conduct searches and make other similar arrangements that go into concluding such a sale. As a result, the Board finds Loraas's decision to close the vacuum truck division, which is alleged to be a discriminatory response to the union activity engaged in by the employees, lacks the ability to be so motivated because it was made prior to Loraas's becoming aware of the Union's organizing drive. Although it may be concluded that the lay-offs were not for "good and sufficient reason" because they resulted from the implementation of a decision of Loraas that otherwise constitutes an unfair labour practice under ss. 11(1)(c) and 43 of the *Act*, there is an insufficient connection between the decision to

close and the lay-off to satisfy the Board that the closure decision itself was discriminatory under s. 11(1)(a) or (e) of the *Act*.

With respect to the second aspect of the Union's argument, however, the Board is of the view that Loraas's evidence is less than convincing with respect to the manner of selecting employees for lay-off. This aspect of the decision to close the vacuum truck division was made on or about June 14, 1997. Although the lay-offs flowed from the decision to close the vacuum truck division, the selection of employees who would be laid off was reached at a time when Loraas was aware of the union activity. In this sense, there is a nexus between the union activity and Loraas's decision to select certain employees for lay-off.

The Union established that employees or some of them had been engaged in union activity in three forms: the organizing effort, the negotiations on June 3, 1997 and the strike vote on June 10, 1997. Subsequently, Loraas selected certain employees for lay-off but its rationale for deciding which employees would be laid-off and which would be retained was not convincing. Loraas kept a junior and apparently less experienced and qualified driver on staff; it also retained two junior and less experienced office staff. Loraas did not inquire of the staff who were selected for lay-off if they were willing to perform the work that was ultimately allocated to more junior staff. The Board finds that Loraas did not meet the standard imposed on it by s. 11(1)(e) of the *Act* - that is, it did not establish that it had good and sufficient reason for terminating the employment of the particular employees who were selected for permanent lay-off. The presumption contained in s. 11(1)(e) of the *Act* therefore applies and the Board must find that Loraas violated s. 11(1)(e) of the *Act*.

There is no doubt that this sale would impact on the bargaining unit and would result in some permanent lay-offs, which is why the Board requires the employer to bargain the closure with the union both under s. 11(1)(c) and s. 43 of the *Act*. The particular configuration of who would have been laid off, but for the discriminatory action of Loraas, is a matter to be addressed in the remedial portion of these applications. It is also intertwined with the remedial orders that may be issued as a result of our findings under ss. 11(1)(c) and 43 of the *Act*.

(4) Did Loraas unilaterally alter rates of pay, hours of work or other conditions of employment without bargaining the changes with the Union contrary to s. 11(1)(m) of the Act?

Section 11(1)(m) of the *Act* provides for a statutory freeze of wages, hours of work and other conditions of employment during the first collective agreement period. In past decisions of this Board, s. 11(1)(m) of the *Act* has been interpreted as prohibiting the employer from altering its pre-certification employment practices. This "business as before" rule permits the employer to defend a charge under s. 11(1)(m) of the *Act* by demonstrating that the changes which it unilaterally implemented are consistent with its pre-certification employment practices.

The Union alleges that Loraas violated s. 11(1)(m) of the *Act* by changing its method of operations and by transferring work out of the bargaining unit which resulted in the lay-off of the vacuum truck drivers. These changes significantly impacted on the terms and conditions of work of the nine employees who were subject to permanent lay-off. Loraas did not lead evidence with respect to its past practices which would suggest that it was relying on the "business as before" rule with respect to the implementation of the lay-offs, the contracting out of work, and the rearrangement of office staff and the Board, therefore, has no evidence from which it can conclude that Loraas's decision to sell the assets of the vacuum truck division, in so far as it impacted on terms and conditions of employment, was implemented in a manner consistent with Loraas's pre-certification practices. The evidence clearly indicated that no bargaining took place with respect to the implementation of the changes.

We conclude from the evidence that Loraas did violate s. 11(1)(m) of the *Act* by implementing the decision to close the vacuum truck division and thereby changing the terms and conditions of employment for employees in the bargaining unit without bargaining collectively with the Union with respect to the changes.

Conclusion:

The Board makes the following findings:

(1) Loraas failed to bargain in good faith as required by s. 11(1)(c) of the *Act* by failing to disclose the sale of the vacuum truck division to the Union in bargaining, and its failure cannot be excused based on its alleged fear of vandalism to its equipment;

(2) Loraas was required to provide the Union with notice of technological change within the meaning of s. 43 of the *Act*, as the closure of the vacuum truck division did constitute a "removal or relocation outside of the appropriate unit of a part of the employer's work, undertaking or business";

(3) Loraas terminated the employment of the nine employees in violation of s. 11(1)(e) of the *Act*, in that it discriminated against employees with a view to discouraging union activity in the manner that it selected employees for lay-off;

(4) Loraas unilaterally altered rates of pay, hours of work or other conditions of employment without bargaining the changes with the Union contrary to s. 11(1)(m) of the *Act*.

The parties requested at the outset of the hearing that the Board reserve its jurisdiction to make Orders, other than declaratory Orders outlined above. In order to facilitate a further hearing on the remedial aspect of this application, the Board asks Loraas to submit a written plan for rectifying the violations outlined above pursuant to s. 5.1 of the *Act*. The plan shall be submitted to the Board, with a copy provided to counsel for the Union, within 10 days of the date these Reasons are received by counsel for Loraas. The Board reserves its jurisdiction to make further Orders. A further hearing will be conducted to address the rectification plan submitted by Loraas and the remedial Orders sought by the parties at a time to be set by the Board Registrar after consultation with both parties.

PETER WEBER, Applicant and GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 206C BINDERY, Respondent

LRB File No. 307-97; January 6, 1998
Vice-Chairperson, James E. Seibel; Members: Don Bell and Donna Ottenson

For the Applicant: Peter Weber
For the Respondent: Ted Koskie

Duty of fair representation - Contract administration - Union provided accurate information to employee at time that information requested and no basis for grievance - In any event, under the circumstances, union neither knew nor should have known that employee wanted a grievance filed - Board holds that union did not act in manner that could be characterized as arbitrary, discriminatory or in bad faith.

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

REASONS FOR DECISION

James Seibel, Vice Chairperson: Graphic Communications International Union Local 206C Bindery (the "Union") has been designated by this Board as the bargaining agent for a unit of employees at Printwest Communications Ltd. ("Printwest"). Peter Weber filed an application which alleged 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 with respect to a grievance concerning his classification at Printwest.

Section 25.1 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.*

Mr. Weber testified that he has been employed by Printwest for approximately nine years. He gave a handwritten note dated June 10, 1997, to Brad Kells, Chapel Chairperson, which requested information regarding his classification. The note read as follows:

> *Article 28.04 [of the collective agreement] states that the $1.00 per hour night scale only applies to full-time employees and part-time apprentices. Could you please find out for me which one of these I am since I have been given this premium for my entire employment.*

Mr. Kells responded to him verbally, and by a note dated June 17, 1997, to the effect that Mr. Weber was classified as a "Part time Bindery #3." The note read as follows:

> *It is my understanding that you are classified as a Part time Bindery #3 and that the company recognizes you as such. And if you have any further questions I would be happy to look in to them for you.*

Mr. Weber was "unhappy and confused" with this reply from Mr. Kells, which should have been apparent to him. Mr. Weber understood that the part time bindery #3 position was not among those classifications that were entitled to receive shift differential under the collective agreement; yet, he had been receiving shift differential for as long as he could remember. As a result, because Mr. Kells was on holidays on June 23, 1997, Mr. Weber contacted counsel for the Union, Mr. Koskie, who agreed to look into it. In early August, 1997, he followed up with a further call to Mr. Koskie who advised him that Dan Decker, President of the Local, was the person to contact. Mr. Weber did not speak to Mr. Decker about the matter prior to filing this application, although they were co-workers and he had the opportunity to do so.

Mr. Weber filed as an exhibit in these proceedings a copy of a "Group Benefits ID Card" dated effective August 1, 1997 that he had received from Printwest, which identified him as a full-time employee. He could not recall when he had received it and had not provided the document to the Union before the hearing of this matter.

Mr. Weber said that he received no communication from the Union about this matter after his last conversation with counsel for the Union. He stated that while he had not specifically asked Mr. Kells, the Union, or counsel for the Union to file a grievance regarding his classification, it was his opinion that they knew he was dissatisfied with his apparent classification as part-time bindery #3 and should have known that he was expecting the Union to do something about it.

In cross-examination, Mr. Weber admitted that although he had sought Mr. Kells' assistance with respect to other matters since August, 1997 and prior to the hearing of this matter, he had never raised this particular matter any further with Mr. Kells. Mr. Weber agreed that despite his classification he often worked full-time hours and that Printwest had been paying the shift differential to all employees regardless of classification and the strict wording of the collective bargaining agreement. He also admitted that his classification had recently been changed by Printwest to that of a full-time employee eligible to apply for membership in the Union, but that he had not discussed this with anyone from the Union.

Mr. Kells testified that when he received the June 10, 1997 note from Mr. Weber, he consulted with Steve Wasylowich, Shop Foreman and Ed Jones, Shop Steward, both of whom agreed with his proposed reply. He said that he personally discussed it with Mr. Weber on June 17, 1997 and asked him if he was satisfied with the reply. He said that Mr. Weber responded in a non-committal manner and walked away from him. He stated that Mr. Weber never asked him to file a grievance nor ever again raised the issue with him, although he had ample opportunity to do so, having consulted with him about other matters since that time and prior to this hearing.

Mr. Decker also testified. He stated that although casual and part-time employees, including Mr. Weber, were not entitled to become Union members, the Union has undertaken to bargain with Printwest on their behalf and to represent them with respect to grievances. These non-members pay an "assessment" to the Union which is calculated at a lower rate than the dues paid by Union members. He stated that it was common in the industry for casual employees to be excluded from union membership.

Mr. Decker further testified that to his knowledge Mr. Weber had not asked himself or any other Union officer to file a grievance on his behalf with respect to the matter of his classification. He confirmed that Mr. Weber had not contacted him to discuss the matter although they worked together. He said that he had just recently learned that Printwest had indeed re-classified Mr. Weber as a full-time employee and that steps were being taken to enrol him as a member of the Union.

Mr. Weber presented a straightforward argument that the Union had not satisfied the requirements of the duty of fair representation because it had not filed a grievance with respect to his classification. Mr. Weber argued that the Union should have known that he was dissatisfied with the reply from Mr. Kells

which purported to set forth Printwest's position and that he wanted the Union to grieve. He confirmed that if there was any error in the advice as to his classification in June, 1997, it did not cause him any monetary loss.

Counsel for the Union argued that Mr. Weber had never requested the Union to grieve and the Union could not reasonably have drawn such an inference from his actions. Counsel also argued that upon the basic principles that govern the duty of fair representation, Mr. Weber had not established a violation of s. 25.1 of the *Act* in any event.

In several recent decisions, the Board has enunciated the general principles which pertain to applications under s. 25.1 of the *Act*. Although not an exhaustive list, these include: *Gilbert Radke v. Canadian Paperworkers Union*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92; *Mary Banga v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93; *Gordon Basaraba v. Saskatchewan Government Employees' Union*, [1994] 3rd Quarter Sask. Labour Rep. 216, LRB File No. 086-94; *Gordon Johnson v. Amalgamated Transit Union*, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96; and *Ron Marttala, Ron Mulholland and Marshall Desjarlais v. Regina Civic Middle Management Association*, [1997] Sask. L.R.B.R. 556, LRB File No. 337-96.

In assessing the Union's conduct, the Board must determine whether the Union acted in a manner that was arbitrary, discriminatory, or in bad faith. The Board concisely summarized the general approach to such applications in *Laurence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, at 71-72:

> *This Board has discussed on a number of occasions the obligation which rests on a trade union to represent fairly those employees for whom it enjoys exclusive status as a bargaining representative. As a general description of the elements of the duty, the Board has indicated that it can do no better than to quote the principles outlined by the Supreme Court of Canada in the case of Canadian Merchant Services Guild v. Gagnon, [1984] 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.*

The terms "arbitrary," "discriminatory," and "in bad faith," which are used in the legislative description of the kind of conduct on the part of a trade union which is to be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:

> *... 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 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.*

This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:

> *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.*

On the facts of the present case the Board is satisfied that the Union did not act in a manner that could be characterized as arbitrary, discriminatory, or in bad faith. No one was called to testify on behalf of Printwest who might have clarified exactly when Mr. Weber's classification was changed to full-time, but based on the evidence before the Board, being the Group Benefits ID Card, it appears that the change was made effective August 1, 1997. This being the case, the information provided to Mr. Weber by Mr. Kells on June 17, 1997, was accurate at that time and there would have been no basis to found a grievance.

In any event, while we understand that Mr. Weber was dissatisfied and frustrated with the reply from Mr. Kells regarding his classification, given the provision of Article 28.04 of the collective agreement, it cannot be said that on all the evidence the Union did not answer his request in a timely manner, genuinely attempt to be helpful, or fail to be accessible and open to any further requests for information from Mr. Weber. Nor can it be said that the Union knew or should have known that Mr. Weber requested or intended to request that the Union file a grievance regarding the situation. And, of course, Mr. Weber himself took no steps to follow up with the Union.

The evidence is that since sometime in August, 1997, Mr. Weber had information that Printwest considered him a full-time employee, but he did not provide the Union with this information until the hearing. The evidence also disclosed that Mr. Weber has not suffered any monetary loss as a result of any of these events and that the Union has undertaken to ensure that he is enrolled as a member upon his making application.

Accordingly, the Board finds that the Union has not violated s. 25.1 of the *Act* and that the application will be dismissed.

The Board commends both Mr. Weber and counsel for the Union on the fair and professional manner in which they conducted the proceedings before the Board.

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, Applicant and THE GOVERNMENT OF SASKATCHEWAN (EXECUTIVE BRANCH), Respondent and SASKATCHEWAN GOVERNMENT EMPLOYEES' UNION, Intervenor

LRB File No. 018-97; January 12, 1998
Chairperson, Gwen Gray; Members: Terry Verbeke and Gloria Cymbalisty

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

Practice and procedure - Interested party - Board holds that most important test in granting intervenor or interested party status to certified union is whether existing bargaining agent's rights could be affected by application before Board - Board confirms earlier decision granting interested party status to existing bargaining agent.

RULING ON INTERESTED PARTY STATUS OF SASKATCHEWAN GOVERNMENT EMPLOYEES' UNION

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Professional Institute of the Public Service of Canada ("PIPSC") filed an application to be certified as bargaining agent for all employees of the Government of Saskatchewan ("Employer") who are employed in positions classified as Management Level 1 through 9 and Professional Level 1 through 9, except those excluded by *The Trade Union Act*, R.S.S. 1978, c. T-17 (LRB File No. 018-97).

Subsequent to filing the certification application, PIPSC filed with the Board an unfair labour practice application against the Employer for interfering with PIPSC's organizing campaign (LRB File No. 031-97). At the same time, PIPSC filed an application for an interim Order restraining the Employer from engaging in certain conduct until such time as the unfair labour practice application is determined. The Board granted intervenor status to the Saskatchewan Government Employees' Union ("SGEU") with

respect to the unfair labour practice application. It also granted an interim Order which restrained the Employer from engaging in certain conduct pending the hearing of the applications in Reasons issued on March 6, 1997.

It was agreed between all parties to bifurcate the hearing of the certification application. The first branch of the hearing dealt with the issue of the appropriateness of a unit comprised of some or all of the middle managers employed by the Employer. The Board issued Reasons for Decision dated July 15, 1997 which held that a middle management unit is an appropriate unit. SGEU participated in this aspect of the hearing. However, it was expressly agreed prior to the hearing that SGEU's status as an intervenor or interested party on the second branch of the hearing would be reserved for further argument.

The second branch of the certification application will define the precise boundaries of the bargaining unit, both in terms of its interface with the SGEU unit and its interface with persons who are truly managers and are therefore excluded from the provisions of the *Act*. The parties did not resolve the issue of SGEU's status on the second branch of the certification application and requested that the Board rule on the issue before proceeding further with the certification application. A hearing for this purpose was conducted on September 16, 1997.

Arguments

Mr. Wilson, counsel for PIPSC, argued that SGEU has no standing to intervene in the application. He noted that in its earlier ruling the Board found that SGEU did not represent employees in the ML-PL series. He also noted that SGEU did not claim to have support cards signed which would give it status as a competing certifying union, particularly under Regulation 17 of *Sask. Reg. 163/72*, which sets out the procedure for a competing union to intervene in an application for certification. Counsel argued that, at best, SGEU's claim to 497 positions in the ML-PL series is based on the negotiations between it and the Employer with respect to a scope review process that was halted by the Board's interim Order. PIPSC took the position that the ML-PL positions cannot be included in the SGEU agreement unless SGEU obtains support from a majority of the employees who are being added to its bargaining unit. PIPSC also took the position that the conditions under which the Board allowed SGEU to intervene in the interim Order are no longer present: first, the Board found that no employees in the ML-PL series

were ever within SGEU's bargaining unit; and second, the Board has decided the policy issue of whether a middle management unit is appropriate in the government setting. Relying on a Board decision in *Health Sciences Association of Saskatchewan v. Regina District Health Board*, [1995] 3rd Quarter Sask. Labour Rep. 131, LRB File Nos. 025-95 & 118-95, counsel for PIPSC argued that the only parties with an interest in defining the parameters of a particular bargaining unit are the applicant Union and the Employer. In this case, PIPSC noted that the Employer did not dispute the appropriateness of the proposed bargaining unit. PIPSC informed the Board that it had agreed with the Employer to access an alternate procedure for determining which positions in the ML-PL series are managers and out of scope of PIPSC's proposed unit. PIPSC argued that it is permissible for the employer and a trade union to agree to scope and to have the matter ratified by the Board as a matter of course. With this agreement with the Employer secured, PIPSC argued that its application will be delayed and frustrated by SGEU's continued participation in the hearings.

Mr. Engel, counsel for SGEU, argued that the Board's earlier ruling on the standing of SGEU to participate in these proceedings remains in force. SGEU claimed that many or all of the classifications which PIPSC seeks to represent fall within the scope of the bargaining unit assigned to SGEU or within the agreements reached between SGEU and the Employer with respect to the scope of the bargaining unit. Counsel pointed out to the Board that SGEU's certification Order permits the parties to define the parameters of the bargaining unit when it states: "incumbents of positions within a class as may from time to time be excluded by agreement between the parties." SGEU argued that the terms of its certification Order permit it and the Employer to alter the scope of the certification Order without applying to the Board for an amendment. SGEU also took the position that its agreement with the Employer to conduct a scope review is no different in kind than PIPSC's agreement with the Employer to negotiate the managerial exclusions to its proposed unit separate from the normal Board process. Both are concerned with the upper boundaries of their respective bargaining units and both seek to define who is or is not excluded based on the definition of "employee" which is set out in the *Act*. SGEU claimed that it has a significant interest in the PIPSC application as a result of its scope review agreement with the Employer and on this basis, justifies its claim for intervenor status. In support of its position, SGEU referred the Board to the Supreme Court of Canada decision in *CUPE v. CBC* (1992), 91 D.L.R. (4th) 767 (S.C.C.).

Mr. Bogdasavich, Q.C., counsel for the Employer, took no position with respect to the dispute between PIPSC and SGEU.

Analysis

The primary concern of the Board in determining intervenor or interested party status is a concern with fairness: see *Regina Police Association v. Regina Board of Police Commissioners and City of Regina,* [1994] 1st Quarter Sask. Labour Rep. 86, LRB File Nos. 159-93 & 160-93, at 90. Middle management bargaining units are relatively uncommon in Saskatchewan. As outlined in the Board's Reasons dated July 15, 1997, a few such units have existed since the 1970's in the civic administration of Regina, in the universities, and in the senior officer ranks of fire and police services. Recently, a middle management unit was certified in the civic administration of Saskatoon.

Despite their relatively small numbers, it is the experience of this Board that disputes frequently erupt over the respective boundaries of the middle management units and, for want of a better word, the general bargaining units. When faced with a certification application for a middle management unit, or with a scope dispute related to the interface between a middle management unit and a general unit, the Board practice is to give notice of the applications to all unions who are certified to represent any of the employees of the Employer and to allow the certified unions to participate in the hearings before the Board. This approach ensures that all bargaining agents who are potentially affected by the Board's determination on a particular application have an opportunity to appear and make representations to the Board with respect to its interest. On some occasions, the certified union does not oppose the description of the applicant's bargaining unit; on other occasions, the description is vigorously opposed as an encroachment on the existing unit. In our view, the important test in determining if intervenor or interested party status is granted to a certified union is whether the existing bargaining agent's rights could be affected by the application before the Board.

This procedure has been formalized most clearly in cases dealing with the creation of new positions by an employer who is operating in a multiple bargaining unit setting. In *Service Employees' International Union, Local 333 v. St. Paul's Hospital (Grey Nuns') and Health Sciences Association of Saskatchewan,* [1991] 2nd Quarter Sask. Labour Rep. 78, LRB File Nos. 130-90, 205-90, 003-91 & 004-91, the Board held as follows, at 80:

> *The Board realizes that in the past Employers have applied for an order transferring a classification from one unit to another and, while the application was pending, treated the position as though the Board had already ordered the transfer. Regardless of how this practice arose, it is in the best long-term interest of all parties if it is no longer followed. In our view, in light of the addition of Section 5(m) to the Act in 1983; and in light of the Board's willingness to expeditiously hear these applications outside the open period, there is no longer any need to resort to this form of unilateral action.*
>
> *If negotiations fail, or time does not permit the parties to negotiate the issue fully, employers can obtain a ruling from the Board in a timely fashion under Sections 5(j), (k) and (m). This process is more in keeping with the objects of the Act to encourage labour relations stability and harmony through collective bargaining rather than a practice based upon unilateral employer action, conflict and unfair labour practice applications.*
>
> *The Employer assigned the position in question into the HSA without first bargaining the same with SEIU. When the matter first came to SEIU's attention, the position was already being treated by the Employer as being within the HSA unit. By recognizing the HSA as the representative of the Occupational Therapist without the agreement of the SEIU and before it obtained an order from the Board, the Employer breached its obligations under Section 11(1)(c) of the Act and is accordingly guilty of an unfair labour practice.*

The *St. Paul's Hospital* case, *supra*, demonstrates that the Board views the interests of certified unions in a multiple bargaining unit situation as being sufficiently strong and clear so as to give rise to the requirement that the employer negotiate the placement of new positions with **all** bargaining agents. For the same reasons as expressed in the *St. Paul's Hospital* case, *supra*, that is, labour relations stability and harmony, it is important for all parties who will be affected by the creation of a middle management bargaining unit to participate in hearings that determine the parameters of that unit. The original certification Order will provide the basis for determining all future disputes that may arise between the certified unions, particularly those disputes that involve the assignment of new positions between or among the competing bargaining units.

The present application, which will potentially result in the creation of a multiple bargaining unit environment in executive government, gives rise to different concerns than those dealt with by the Board in the *Regina District Health Board* case, *supra*. In that instance, there were no existing bargaining relationships between the employer and the intervening unions in home care and client assessment service units of the health district, and the application for certification would not result in

the creation of a multiple bargaining unit institution. The intervening unions in that case were not certified bargaining agents of some or all of the employees of the home care service.

In this case, SGEU has been the certified bargaining agent for an "all employee" unit from 1945. The parameters of its bargaining unit have been the subject of negotiation and discussion with the Employer for some time, as was outlined in the Board's July 15, 1997 decision. These discussions have the same legitimacy as the discussions now being engaged in between the Employer and PIPSC with respect to the upper parameters of PIPSC's middle management unit. In our view, the Board would be remiss in its obligations if it were to deny intervenor status to SGEU.

For these reasons, the Board confirms its earlier decision that SGEU has status to participate in the PIPSC application for certification as an interested party.

KEITH CHESTON, Applicant and SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Local 539 C-1, Respondent and SHERWOOD CO-OPERATIVE ASSOCIATION LIMITED, Employer

LRB File No. 171-96; January 15, 1998
Chairperson, Gwen Gray; Members: Bob Todd and Don Bell

For the Applicant: Keith Cheston
For the Respondent: Paul Guillet
For the Employer: Dale Hallson and Bill Evitts

Duty of fair representation - Contract administration - Board holds that union put its mind to members' divergent interests in arriving at grievance settlement - Union did not act in manner that was discriminatory, in bad faith or arbitrary.

Duty of fair representation - Contract administration - Board holds that union acted in cursory manner by implementing grievance settlement without considering applicant's position or seeking his input into calculation of hours - Union violated duty of fair representation.

Duty of fair representation - Remedy - Board orders union to consult with applicant on calculation of hours - If through consultation union persuaded that past calculation incorrect, Board encourages union and employer to refer matter to grievance mediation process - If through consultation union persuaded that past calculation incorrect and matter not referred to grievance mediation process or no resolution reached through grievance mediation process, Board orders union to refer matter to arbitration, have carriage of arbitration and bear its share of costs of arbitration.

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

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: Keith Cheston filed an application alleging that the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 539 C-1 (the "Union") failed to fairly represent him in a grievance related to the calculation of his seniority. The Union did not file a Reply to the application but it did appear to defend the matter. Sherwood Co-operative Association Limited (the

"Employer") was not named in the application but was given notice of it and a representative of the Employer did attend the hearing.

Facts

Mr. Cheston has worked as a grocery clerk with the Employer since January 9, 1984. In December, 1993, he applied for and was appointed to a full-time grocery receiver position. His appointment to the position was grieved by five other grocery clerks, four of whom had a greater seniority than Mr. Cheston. All were listed on the part-time seniority list which calculated seniority according to paid hours.

Prior to this dispute, Mr. Cheston did not have a particularly happy relationship with the Union. Some time in the past, he had been taken to task by the President of the Union for working overtime and banking hours. Mr. Cheston responded to the criticism with a harshly worded letter. He also testified that he had been poorly received at Union meetings; he felt unwelcome at such meetings due in part to his attempt to have a Local assessment changed. Mr. Cheston generally went on with his work life with as little to do with the Union as possible. He felt the Union was not receptive to hearing dissenting points of view.

On June 27, 1995, Mr. Cheston was informed that he was being replaced as full-time grocery receiver by Scott Schienbein as a result of a grievance settlement arrived at between the Employer and the Union. Mr. Schienbein had been second on the seniority list at the time Mr. Cheston was appointed full-time receiver and was the most senior part-time employee who grieved Mr. Cheston's appointment. Mr. Cheston then reverted to the part-time position. His seniority was credited with all hours worked in the full-time position, resulting in total seniority hours of 13,539. This calculation placed Mr. Cheston in third place on the part-time seniority list. Prior to his appointment to the full-time position, he had occupied the fifth position on the seniority list. At this point, Mr. Cheston assumed that the grievance was finalized and he would not be affected in any other manner. He had not been involved in the grievance or settlement discussions between the Employer and the Union.

On June 18, 1996, Mr. Cheston received a notice from Ken Krug, Controller of the Employer, which indicated that seniority hours for part-time grocery clerks were being adjusted by crediting four of the

five most senior grocery clerks with 1,760 seniority hours. This adjustment resulted in Mr. Cheston's placement on the seniority list changing from the fourth spot to the fifth spot. In the period between June, 1995 (when the settlement was first reached) and June, 1996, one part-time grocery clerk had passed Mr. Cheston on the seniority roster. When Mr. Cheston inquired why the changes were made, he was provided with a copy of the grievance settlement documents which set out the agreement on seniority adjustment resulting presumably from the improper awarding of the receiver position to Mr. Cheston.

Mr. Cheston understood that the adjustment that was made to the seniority hours of the other four employees was based on a formula that credited the employees equally with the hours Mr. Cheston worked while assigned to the full-time position that were in excess of his regular part-time hours. These were assessed at 16 hours per week based on his work hours in the last six months of 1993. In relation to the five most senior grocery clerks, the effect of the adjustment on Mr. Cheston was the same as would have occurred had his seniority hours been reduced by the number of hours that he worked during his full-time employment in excess of the hours he would have been assigned to work as a part-time employee.

The precise terms of the grievance settlement were as follows:

> *The following terms will represent the conditions of settlement between the Sherwood Co-operative Association Limited and the Retail, Wholesale and Department Store Union, Local 539 respecting a grievance filed by Scott Schienbein for posting Number 80-93.*
>
> 1. *Scott Schienbein will assume the position described above, effective the week of the 27th August 1995.*
>
> 2. *The incumbent, Keith Cheston, will be given notice immediately that the week of the 27th August 1995, he will be placed on the Food Schedule as a part time employee.*
>
> 3. *Keith Cheston will be given credit for all hours worked and placed on the schedule accordingly.*
>
> 4. *On the 27th August 1995, Mark Kohut, Scott Schienbein, Kevin Burrell, Dean Hodge and Kelly Kainz will be credited equally for the hours they would have earned had Keith Cheston not been awarded posting number 80-93 initially. This figure will be arrived at by subtracting the hours Keith Cheston worked from what he would have worked had he not received this position.*

5. *There will be no retroactivity for pay or welfare benefits for the grievor.*

6. *Scott Schienbein agrees to enroll on the Advanced Training Course and participate in the 8.30 program for the receivers position.*

7. *Scott Scheinbein's ninety day qualifying period will commence when he assumes the receiver position.*

8. *All grievances specifying this posting will be withdrawn.*

Mr. Cheston presented a grievance related to the seniority adjustment in writing to Ron Powchuk, Grocery Manager, and took it up with him in the presence of the shop steward on June 24, 1996. After several discussions with the Union staff representative in which Mr. Cheston sought to have the Union process his grievance, the grievance was allowed to lapse and no further action was taken on it.

Mr. Cheston also complained that the Union's grievance committee was biased because it included two members who benefited from the outcome of the grievance settlement. The two members were Bernie Burrell and Kevin Burrell, who are husband and wife. Ms. Burrell, Recording Secretary of the Local and member of the Joint Board of the Union, was involved in the settlement discussions with the Employer; Mr. Burrell, Vice-President of the Local and also a member of the grievance committee, did the calculation of hours that resulted in the adjustment of 1,760 hours to his own seniority, along with the seniority of four other employees.

It was unclear from the evidence if the change in Mr. Cheston's seniority relative to other senior grocery clerks affected his hours of work. This determination is difficult to make because the collective agreement permits employees to restrict their availability to work. Prior to his appointment to the full-time position, Mr. Cheston regularly restricted his availability in spring and fall in order to permit him to carry on his farming operations. After receiving notice of his reversion from full-time to part-time work, Mr. Cheston requested that his status revert one week earlier than scheduled in order that he could focus on harvest. On cross-examination, he indicated that when he went from full-time to part-time he stated his availability as being from 6 am to 10:00 pm every day, except during seeding and harvest when he was not available for work. Any reduction in the hours that Mr. Cheston received through the seniority system may have been caused either by the self-imposed restriction on available hours or by the change in Mr. Cheston's position on the seniority roster.

Witnesses for the Union explained the process that was followed to arrive at the settlement regarding the grievance over the appointment of Mr. Cheston to the full-time grocery receiving position and the resulting rearrangement in the seniority hours assigned to some of the part-time grocery clerks. Kevin Hesse, President of Local 539, explained that the assignment of hours of work to part-time employees was one of the most contentious issues facing the Union. It resulted in a grievance over the issue of "most available hours". An arbitration decision of Prof. Dan Ish, Q.C. was issued on January 12, 1995 which resulted in the average part-time employee being assigned between 27 and 33 hours per week.

Mr. Hesse explained that when Mr. Cheston was appointed to the full-time position, the Union filed the grievance on behalf of employees who had more seniority hours than Mr. Cheston in such a manner that it forced the Employer to either settle the grievance by appointing the employee with the greatest number of seniority hours, or by agreeing that Mr. Cheston was properly appointed because he was the first hired. This finessing of the grievance was designed to force the hand of the Employer on part of the contentious issue of "most available hours". If the Employer argued that Mr. Cheston was most senior, due to his earlier start date, the Union would have withdrawn the grievance. The proper interpretation of the seniority provision for part-time employees was contentious within the Union and even within members of the same family within the Union.

The Employer and the Union referred the grievance related to Mr. Cheston's appointment to the full-time position to grievance-mediation through the Labour Relations, Conciliation and Mediation Branch of Saskatchewan Labour. As a result of this effort, the grievance was settled on the terms set out above. Mr. Hesse explained that a credit of seniority hours was given to those grocery clerks who were close in seniority hours to Mr. Cheston, in accordance with paragraph 4 of the settlement agreement. This step was taken in order to restore the seniority roster to the position it would have been in had Mr. Cheston not been improperly promoted to the full-time position.

Mr. Hesse testified that the process of implementing Point #4 in the settlement document was delayed due to a lack of cooperation from the then Human Resources Manager, Mike McPherson. The calculations were finally completed about one year after the settlement was reached by the new Human Resources Manager, Ken Krug in conjunction with Mr. Burrell. Mr. Hesse described the seniority adjustments as an attempt by the Union and Employer to put the seniority list back into the proper "pecking" order; that is, to undo the effects on other employees of the improper promotion of Mr.

Cheston to full-time status and the resulting increase in his part-time hours and seniority standing. The results were, according to Mr. Hesse, a rough estimate of where various employees would have been on the seniority roster had Mr. Cheston not been improperly appointed to the full-time position. Part of the assumption made by the Union in the formula agreed to was that Mr. Cheston would continue to restrict his available hours of work as he had done prior to accepting the full-time appointment. On cross-examination, Mr. Hesse agreed with Mr. Cheston's suggestion that it would have been a more reasonable assumption to conclude that Mr. Cheston's personal circumstances had changed such that he would not have restricted his hours during the period in question, given the fact that he had sought full-time employment with the Employer during the period in question.

With respect to Mr. Cheston's grievance related to the change in his seniority placement, Mr. Hesse indicated that the grievance committee did not accept Mr. Cheston's complaint as a grievance as it arose from a settlement that had already been reached between the Union and the Employer. Mr. Hesse indicated that an employee has no ability to initiate a formal grievance without the approval of the grievance committee.

Mr. Hesse was unaware that Mr. Cheston did not receive a copy of the settlement agreement until June, 1996. Mr. Hesse understood that during the meeting on June 27, 1995 when Mr. Cheston was informed that he was being removed from the full-time position as a result of the settlement of the grievance, Mr. Cheston asked Debbie Minion, Chief Shop Steward, to leave the meeting. As a result, Mr. Cheston may have prevented Ms. Minion from providing him with the details of the settlement agreement. Mr. Hesse agreed that Mr. Cheston should have been provided a copy of the settlement agreement.

Ms. Burrell also testified as to the Union's handling of the posting grievances. Ms. Burrell indicated that she had written up the grievances related to the filling of the full-time grocery receiver position deliberately without reference to seniority because of the debate over the proper method of calculating seniority for part-time employees. Ms. Burrell indicated that had the Employer insisted that seniority was based on date of hire, the Union would have withdrawn the grievances. Ms. Burrell indicated that she was aware that Mr. Cheston knew of the grievances because he had engaged in a heated exchange with another employee over the posting. In addition, Ms. Burrell testified that grievance reports are given at monthly meetings of the Local, the implication being that Mr. Cheston could have obtained information relating to the grievances filed against his appointment by attending the Union meetings.

On cross-examination, Ms. Burrell agreed that as a result of the grievance settlement her husband did benefit from the settlement agreement by being one of the five employees who were credited with seniority hours. Ms. Burrell participated in grievance committee meetings where the agreement was finalized. Mr. Burrell eventually was involved with Mr. Krug in calculating the hours that would be credited to the five employees in accordance with the settlement agreement.

Ms. Burrell was also unaware that Mr. Cheston was not provided a copy of the settlement agreement in June, 1995 as she understood that he was to have been provided with one at the meeting on June 27, 1995 when he was informed of the grievance settlement by Mr. Powchuk, Mr. McPherson and Ms. Minion.

Ms. Burrell also indicated that the grievance committee did not accept Mr. Cheston's complaint as a grievance. She explained that the committee was unsure as to what Mr. Cheston was trying to achieve as the change in seniority hours came about as a result of the settlement of the grievances filed when Mr. Cheston was appointed to the full-time position. Ms. Burrell stated that if Mr. Cheston disagreed with the grievance filed earlier, he should have attended the Union meetings to discuss the matter. Otherwise, she felt the grievance settlement was fair and could not be contested by the Union by filing Mr. Cheston's complaint as a grievance.

In response to questions posed by Mr. Cheston, Ms. Burrell defended the Union's practice of responding to members concerns verbally, as opposed to writing letters. She explained that the executive of the Union and the grievance committee members are all working people, not full-time union representatives, and did not have time to answer all inquiries in writing.

Ms. Minion testified with respect to the meeting held on June 27, 1995 with Mr. Cheston, Mr. Powchuk, Mr. McPherson and herself in attendance at which time Mr. Cheston was informed of the grievance settlement. Ms. Minion indicated that Mr. McPherson explained to Mr. Cheston that Ms. Minion was in attendance to represent Mr. Cheston at which point Mr. Cheston indicated that he did not want Ms. Minion to attend the meeting. Ms. Minion was aware that Mr. Cheston was given a document by Mr. McPherson during the meeting, which she assumed was the settlement agreement. On cross-examination, Ms. Minion indicated that she did not give Mr. Cheston the settlement agreement because he kicked her out of the meeting.

In rebuttal, Mr. Cheston called Mr. McPherson to testify as to the June 27, 1995 meeting. Mr. McPherson recalled that no one was asked to leave the meeting and that Ms. Minion attended during the entire time. Mr. McPherson testified that he did not give a copy of the settlement agreement to Mr. Cheston at the meeting. Mr. Cheston had indicated that he asked Mr. McPherson why Ms. Minion was at the meeting, but denied asking her to leave.

Arguments

Mr. Cheston argued that, as far as he was aware in June, 1995, he had been removed from his full-time position and reverted to the part-time seniority list in accordance with a grievance settlement reached between the Union and the Employer. He was informed at that time that his full-time hours would be credited to his part-time seniority roster giving him a total of 13,539 hours and placing him in third place on the part-time grocery clerk seniority roster. Approximately one year later, Mr. Cheston was advised that five other grocery clerks would be credited with 1760 seniority hours, with the result that Mr. Cheston's position on the seniority roster was changed from third to fifth. The Union refused to file Mr. Cheston's complaint as a grievance and did not take steps to have it processed through the grievance procedure. Mr. Cheston argued that the process of settling the original grievance was unfair to him; that he was not made aware of the terms of settlement until one year after the settlement was reached, and that the grievance committee was biased because two members of the committee would gain, either directly or indirectly, from the settlement. Mr. Cheston asks the Board to find the Union in breach of its duty to fairly represent him and to order it and the Employer to refer his grievance to arbitration.

Mr. Guillet reminded the Board of the debate that was taking place among members of the bargaining unit over the calculation of seniority for part-time workers when Mr. Cheston was appointed to the full-time position. Mr. Guillet remarked that Mr. Cheston must have gone to work with earplugs if he didn't understand that his appointment to the full-time position was the subject of heated debate between two camps - one which wanted seniority for part-time workers based on date of hire with the adoption of an "available hours" system for assigning hours according to seniority, and the second which wanted seniority based on hours worked or paid. Mr. Guillet pointed out that Ms. Burrell, who Mr. Cheston accused of personal bias, actually supported Mr. Cheston's appointment to the full-time position based

on the interpretation of seniority as date of hire. Ms. Burrell would have withdrawn the grievances had the Employer agreed to the date of hire as the method of calculating seniority.

The Union argued that Mr. Cheston was aware of the grievances and had opportunity through the regular monthly meetings of the Union to make his views known to the grievance committee. The Union in good faith settled the grievance with the Employer through the process of grievance mediation. In part, the settlement was intended to restore the part-time grocery clerks' seniority placement, as best as could be achieved, by attempting to estimate where each of the six senior employees would have been but for Mr. Cheston's improper appointment to the full-time position.

With respect to the failure of the Union to provide Mr. Cheston with a copy of the settlement agreement, Mr. Guillet argued that Mr. Cheston failed to take advantage of the Union's presence at the June, 1995 meeting when he questioned Ms. Minion's attendance. Mr. Guillet encouraged the Board to accept the evidence of Ms. Minion over the evidence of Mr. McPherson and conclude that Ms. Minion was asked by Mr. Cheston to leave and that she left the meeting before she advised Mr. Cheston of the terms of the settlement.

Mr. Guillet finally argued that Mr. Cheston has not suffered any loss as a result of the settlement. He indicated that prior to Mr. Cheston's appointment to a full-time position, he ranked fifth on the seniority roster. Following his reappointment to the part-time roster, he was ranked third and was ahead of one employee who previously exceeded him in seniority. Mr. Schienbein was removed from the roster when he obtained the full-time position which normally would have left Mr. Cheston in the fourth position. Following the implementation of the settlement agreement, Mr. Cheston was placed in the fifth position, with one employee who previously had followed him in seniority being bumped ahead of him. Mr. Guillet argued that the change occurred because of the restrictions placed by Mr. Cheston on his hours of work and would have occurred in the ordinary course of scheduling. Additionally, Mr. Guillet argued that Mr. Cheston can rectify the difference in seniority by making himself more available for work.

Statutory Provisions

Section 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 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.*

Analysis

The essence of Mr. Cheston's complaint relates to the process used by the Union to settle the grievance of another employee, namely Mr. Schienbein. Had this grievance gone forward to an arbitration, Mr. Cheston, as the successful incumbent to the posted position, would have been notified and entitled to participate in the hearing. The practice of requiring notice of arbitration be given to employees who may be affected by the outcome of an arbitration and whose interests are adverse to the position taken by the Union in the arbitration proceeding was recognized by the Supreme Court of Canada in *Hoogendoorn v. Greening Metal Products* (1967), 67 CLLC 14,064 (S.C.C.) and is generally followed by arbitrators: see Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed., para. 3:1210.

The question for the Board to determine, however, is whether the Union, when it entered into the settlement agreement respecting Mr. Schienbein's grievance, acted in a manner that was discriminatory, in bad faith or arbitrary in relation to Mr. Cheston. In our view, there are two aspects to consider. First, did the Union act in a manner that was discriminatory, in bad faith or arbitrary by entering into the settlement agreement? Second, was there discrimination, bad faith or arbitrary treatment in the manner in which the agreement was implemented by the Union?

Within the context of the *Act* which grants exclusive status to a trade union for the dual purposes of negotiating the terms of a collective agreement and negotiating the settlement of disputes and grievances that arise under the terms of the agreement, carriage of a grievance is the responsibility of the trade union and is not vested in the individual employee. This authority extends to decisions to initiate, carry forward, settle or arbitrate any particular grievance. The value of granting exclusive authority to a union to settle a grievance was discussed by the British Columbia Labour Relations Board

in *Rayonier Canada (B.C.) Ltd. v. International Woodworkers of America, Local 1-217 et al.*, [1975] 2 Can. LRBR 196, at 203-4:

> *First, while arbitration is the ultimate mode of settlement of grievances, it is expensive, takes time, and consumes the energy and attention of the parties. For that reason, it is preceded by a grievance procedure which is designed to clear up as many claims as possible without need for arbitration. The grievance as it is taken through the various stages is carefully considered by representatives of the union and management at ascending levels of authority. Experience shows that this procedure resolves informally the vast majority of disputes arising under the agreement and in doing so plays a major role in securing the benefits of collective bargaining for the employees. But the institution can function successfully only if the union has the power to settle or drop those cases which it believes have little merit, even if the individual claimant disagrees. This permits the union to ration its own limited resources by arbitrating only those cases which have a reasonable prospect of success. But even if the employee were willing to finance the union's share of arbitration himself, this would not protect management from the cost of having to defend against frivolous grievances. Such protection for the employer is a necessary quid pro quo from the union if the latter expects management to be reasonable in conceding those other claims which are well-founded, rather than attempt to wear down the union by making it take every case to arbitration to get relief. It is important as a matter of industrial relations policy that a union must be able to assume the responsibility of saying to an employee that his grievance has no merit and will be dropped.*
>
> *There is a second group interest in the settlement of grievances which applies even to cases which might succeed in arbitration. While a grievance may originally be brought by one individual, it is not unusual for it to involve a conflict with other employees as well as with the employer. Occasionally, this is true even in the facts of a particular case, but more often it arises from the implications of the general interpretation of the agreement upon which the particular grievor is relying. By necessity, a collective agreement speaks obliquely to many new and unforseen problems arising during the course of its administration. Rather than relying on the arbitrator's interpretation of the vague language of the agreement drafted a long time ago, it is normally more sensible for the parties to settle that type of current problem by face-to-face discussions in the grievance procedure, with the participation of those individuals who are familiar with the objectives of the agreement and the needs of the operation and are thus best able to improvise a satisfactory solution. Again, if the employees are to have the benefit of this process and of the willing participation of the employer in it, the law must allow the parties to make the settlement binding, rather than allowing a dissenting employee to finesse it by pressing his grievance to arbitration. As Archibald Cox put it:*
>
> > *Allowing an individual to carry a claim to arbitration whenever he is dissatisfied with the adjustment worked out by the company and the union treats issues that arise in the administration of a contract as if there were always a "right" interpretation to be divined from the instrument. It discourages the kind of day-to-day co-operation between company and union which is normally the mark of sound*

> *industrial relations - a dynamic human relationship in which grievances are treated as problems to be solved and contract clauses serve as guideposts. Because management and employees are involved in continuing relationships, their disposition of grievances and the arbitrator's rulings may become a body of subordinate rules for the future conduct of the enterprise... When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside tribunal. Cox, Law and the National Labour Policy, (1960) at pp. 83-84.*

The "zone of fairness and rationality" is defined in s. 25.1 of the *Act* as the absence of bad faith, discrimination and arbitrary treatment. These three aspects of the duty of fair representation were elaborated on by this Board in *Glynna Ward v. Saskatchewan Government Employees' Union*, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88 as follows, 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.*

In the present case, the Union was faced with a real dilemma when Mr. Cheston was appointed to the position of full-time grocery receiver. If seniority for part-time employees was calculated on the basis of date of hire, Mr. Cheston had been properly appointed to the position. On the other hand, if seniority for part-time employees was calculated based on some version of hours worked, Mr. Cheston was appointed out of sequence and inappropriately. Mr. Cheston did not dispute this analysis. The Union had to determine if the Employer was taking the position that Mr. Cheston was properly appointed based on his date of hire seniority. If so, the Union then had a political decision to make - did it support the date of hire approach to part-time seniority or did it prefer the hours of work formula? Ms. Burrell

testified that she would have dropped the grievance had the Employer indicated that Mr. Cheston's appointment was based on his seniority. At some point, the Employer must have indicated to the Union that it was not justifying Mr. Cheston's appointment based on his seniority and the parties then engaged in grievance mediation which resulted in the settlement agreement.

In the process of settling the matter, the Union had to consider the interests of three separate groups of employees, that is, the grievor, Mr. Schienbein, the incumbent, Mr. Cheston, and all other part-time grocery clerks. The settlement agreement addressed all three interests in various ways: Mr. Schienbein was appointed to the full-time position, without any retroactive pay; Mr. Cheston was given notice of his removal from the position and was permitted to apply the hours he had worked as a full-time employee to his part-time seniority hours; and other senior employees were credited equally with the hours they would have earned had Mr. Cheston not been improperly appointed to the full-time position. The settlement was designed to effect a form of rough justice among all three interests by attempting to place them all, as near as possible, in the position they would have been in but for the improper appointment of Mr. Cheston to the full-time job.

On these facts, the Board does not find that the Union acted in a manner that was discriminatory, in bad faith or arbitrary when it entered into the settlement agreement. The Union put its mind to the divergent interests of its members, including Mr. Cheston, and arrived at a workable solution to the problem. It may not have arrived at the best solution, but it was a solution that the grievance committee found to be an acceptable compromise.

In our view, Ms. Burrell's participation in the settlement meetings did not invalidate the settlement. Although her spouse, Mr. Burrell, would benefit from the results of the settlement, Ms. Burrell demonstrated no personal animosity toward Mr. Cheston; on the contrary, she was prepared to support his appointment to the position if the Employer agreed that he was the most senior part-time grocery clerk. Her ability to benefit from any increase in her husband's seniority as a result of the settlement agreement did not influence her to take a position contrary to the interests of Mr. Cheston. Ms. Burrell impressed the Board as being a conscientious union representative who took seriously the interests of all union members.

It was unfortunate that at the time of Mr. Cheston's removal from the full-time position, he was not made aware of the exact terms of the settlement agreement. It was even more unfortunate that the final resolution of the crediting of seniority hours to the other five grocery clerks was not resolved until approximately one year after Mr. Cheston had returned to the part-time grocery clerk roster. Both the Employer and the Union bear responsibility for these failures. The implementation of the settlement agreement, particularly the crediting of seniority hours to other part-time grocery clerks which is set out in paragraph 4 of the agreement, was undoubtedly complex and required someone who had knowledge of the scheduling arrangements in the grocery clerk position to perform the calculations. The evidence indicated that the grievance committee assigned this task to Mr. Burrell, who completed the calculations with Mr. Krug. Given that Mr. Burrell would benefit from the calculations made, it would have been wiser for the Union to devise a method of obtaining the input of all grocery clerks who would be affected by the calculation to avoid any suggestion that the calculation was motivated by self interest.

This aspect of the implementation of the settlement agreement gives rise to concerns on the part of the Board. Although the grievance committee was aware that the calculation of seniority credits for the five named grocery clerks would have a direct impact on Mr. Cheston's position on the part-time seniority roster, the committee did not seek his input into the calculation. Mr. Cheston had useful information to share with the Union and the Employer on this topic and had an interest equal to that of other grocery clerks in ensuring that the calculation was accurate and fair.

In our view, the Union acted in an arbitrary fashion when it implemented paragraph 4 of the settlement agreement without considering the position of Mr. Cheston or seeking his input into the calculation. It acted in a cursory manner and did not take reasonable care on a matter of some considerable importance to Mr. Cheston. The grievance committee in the end may not have agreed with Mr. Cheston's calculations of seniority hours, but, at least, was required to consider his position in arriving at an hourly figure with the Employer.

In summary, the Board finds that the Union violated its duty of fair representation when it arrived at an agreement with the Employer on the hours that should be credited to the grocery clerks named in paragraph 4 of the settlement agreement without seeking input from Mr. Cheston. This finding is not intended to invalidate the terms of the settlement agreement; it remains intact. It does, however, require

the Union to consult with Mr. Cheston respecting his calculation of the hours he worked as a full-time employee less the hours he would have worked as a part-time employee had he not been appointed to the full-time position. If, as a result of this consultation with Mr. Cheston, the Union is persuaded that the calculation made by the Union and the Employer in June, 1996 was incorrect, the Board would encourage the Union and the Employer to refer the matter back to the grievance mediation process to determine if a resolution is forthcoming; failing which, the Union is directed to refer the matter to arbitration in accordance with the arbitration provisions in the collective agreement. The Union shall have carriage of the arbitration on behalf of Mr. Cheston and shall bear its share of the costs of the arbitration.

Mr. Cheston's application is granted to the extent outlined above. Mr. Cheston and Mr. Guillet need to be complimented on the straightforward and helpful manner of presenting their evidence and arguments before this Board.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 296, Applicant and ATLAS INDUSTRIES LTD., Respondent

LRB File No. 011-97; January 19, 1998
Chairperson, Gwen Gray; Members: Bob Todd and Judy Bell

For the Applicant: Garry Kot and Gunnar Passmore
For the Respondent: Richard Elson

Construction industry - Unionized employer engaged in both construction and non-construction work - *The Construction Industry Labour Relations Act, 1992* is concerned with any employer who does construction work and does not exclude employers based on fact that preponderance of work falls outside definition of construction.

Construction industry - Unionized employer engaged in both construction and non-construction work - Must be nexus between fabrication of sheet metal systems and installation or maintenance of such systems to bring work within definition of construction.

Duty to bargain in good faith - Construction industry - Unionized employer's refusal to accept province wide collective agreement between union and representative employers' association constitutes refusal to bargain in good faith.

***The Construction Industry Labour Relations Act, 1992*, ss. 2 and 4.**
***The Trade Union Act*, s. 11(1)(c).**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Sheet Metal Workers' International Association, Local 296 (the "Union") filed an application in which it alleged that Atlas Industries Ltd. ("Atlas") had engaged in an unfair labour practice by refusing to apply the terms of the collective agreement negotiated between the Union and the Construction Labour Relations Association of Saskatchewan Inc. (the "CLR"), a representative employers' organization, to its work. The Union stated that it was certified as the bargaining agent for the employees of Atlas on December 2, 1974 and that Atlas is subject to the

provisions contained in *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11 (the "CILRA").

In its reply, the Employer admitted that it was subject to a certification Order issued on December 2, 1974, but denied that it was engaged in the construction industry as that term is defined by s. 2 of the CILRA. The Employer denied that it failed or refused to bargain collectively with the Union.

Evidence

Mel Peters, President of Atlas, testified that he and four other partners formed Atlas in 1974 from the ashes of another company known as A.L. Charlebois Limited ("ALC"). Mr. Peters joined ALC as a roofer in 1961 and, as such, was a member of the Construction and General Workers Union. Between 1962 and 1974, Mr. Peters worked as a welder for ALC and spent the majority of his time working at ALC's fabrication shop. A small amount of his time was spent on-site performing maintenance and installation work on sheet metal systems that had been fabricated by ALC. As a welder, Mr. Peters was a member of the Union.

ALC was involved in roofing work, painting, installation of tile ceilings and industrial insulation, plumbing and sheet metal and steel fabrication. At times, ALC would hire upwards of 250 employees with 25 or so employed in the fabrication end of the business. ALC was subject to four certification Orders: the applicant Union, the International Union of Heat and Frost Insulators and Asbestos Workers, the International Association of Painters and Allied Trades and the International Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. ALC also voluntarily recognized the Construction and General Workers Union. Shop employees were included in the various craft unions, along with the construction site workers.

ALC went into receivership or bankruptcy in 1974 at which time the business was taken over by receivers. Atlas bought the assets of ALC. However, Atlas confined its business to roofing, sheet metal fabrication and steel fabrication. It no longer performed plumbing, tile, insulating or painting work. Atlas was certified by the applicant Union on December 2, 1974 for a unit described as "all sheet metal workers and sheet metal welders." It was also certified by the Construction and General Workers Union on the same date.

Between 1974 and 1979, Atlas employed four to five sheet metal workers who worked on galvanized iron, and 15 to 20 sheet metal workers in its shop performing fabrication work. The fabrication workers would spend approximately 90 to 95 percent of their time in the shop with the remaining time spent on maintenance and installation in the field. Generally, shop employees were not engaged on construction sites. During this period, Atlas applied the construction agreement to all sheet metal workers in its employ based on legal advice Atlas received at that time.

In 1979, the first *Construction Industry Labour Relations Act* (the "1979 CILRA"), being S.S. 1979, c. C-29.1, was enacted. Pursuant to the 1979 CILRA, the sheet metal workers at Atlas were covered by the terms of an agreement concluded between the Union and the Saskatchewan Construction Labour Relations Council Inc., which was designated as the employers' representative organization under the 1979 CILRA. The 1979 CILRA was repealed in 1983. Mr. Peters testified that Atlas was not approached by the Union to bargain a collective agreement during the period from 1983 to 1996.

Atlas also changed its business direction in the early 1980's by selling its roofing assets and ending its on-site construction work. It refocused its work on custom fabricating, producing equipment such as alfalfa dryers, semi-trailer truck decks, screw conveyors, and dust collectors. Although Atlas did not perform typical construction work at construction sites, such as the fabrication and installation of heating, ventilation and air conditioning sheet metal systems, it was involved in the installation of industrial equipment or supports for equipment. For instance, it had performed custom framing using structural steel at potash mines, power facilities, and alfalfa dehydration plants. Atlas had also fabricated and installed screw conveyors.

Currently, Atlas employs nine employees who work exclusively at its shop. Another employee is engaged in welding maintenance work at a chemical plant using approximately five percent of his time; a second employee performs maintenance work at a meat processing plant using approximately 60 to 70 percent of his time.

Mr. Peters stated that since the implementation of CILRA, he has not been contacted by the CLR, nor is Atlas a member of the organization. Mr. Peters sought legal advice concerning the application of the CILRA to Atlas's business and was advised that it did not apply because he was not engaged in

construction work. Mr. Peters testified that he is prepared to meet with and negotiate an agreement with the Union but he does not consider Atlas to be bound by the agreement entered into between the Union and the CLR.

Gunnar Passmore, Business Agent for the Union, testified that the Union served notice to bargain on Atlas by letter dated March 15, 1993. The letter advised Atlas that it would be represented in bargaining by the CLR under the provisions of the CILRA. It was forwarded by registered mail and an acknowledgment of receipt card indicated that the letter was received by Atlas on March 25, 1993. Mr. Passmore testified that the Union is certified for approximately ten contractors who fabricate sheet metal products for clients, similar to the work performed by Atlas. In its provincial agreement with CLR, the Union has negotiated a separate schedule to the agreement dealing with shop employees. However, in cross-examination, he acknowledged that these contractors are also engaged in heating, ventilation and air conditioning installation work at construction sites.

Mr. Passmore pointed out that the trade jurisdiction of sheet metal workers is set out in *The Apprenticeship and Trade Certification Act*, S.S. 1984-85-86, c. A-22.1, s. 81(1) which reads as follows:

> *81(1) In this section, "trade" means the trade designated in accordance with Part II as "sheet metal worker trade", and includes the constructing and fabricating with sheet metal of 10 gauge or lighter of any article or thing and the installing, maintaining, altering and repairing of any such article or thing.*

He also testified that he saw employees of Atlas installing a dust collecting system at a steel plant in Sutherland in March, 1997.

Mr. Peters was called back for further questioning during which it was established that particular employees performed the following work:

(1) One employee works 50 percent of his time at Intercon Packers where he is responsible for changing the conveyor lines to stainless steel. He is also responsible for the conveyor line

maintenance. At the shop, he builds conveyors for the Intercon plant. This employee also performs steel fabrication work and welding;

(2) Another employee performs work as a steel fabricator and welder. He builds semi-trailer truck decks and performs custom shearing and forming;

(3) A third employee performs pressure welding and general fabricating. As a qualified sheet metal worker, he also performs lay-out work for the dust collector systems fabricated by Atlas. This employee performs on-site work at the plant where he works installing stainless steel pipe;

(4) The fourth employee is a welder and works on materials from 10 gauge to three inches thick. He has worked on alfalfa plant equipment, but he does not install the equipment;

(5) Four other employees are also welders and make steel trusses for electrical installations. They spend approximately five percent of their time installing various pieces that have been fabricated in the shop, such as dust collectors. They fabricate semi-trailer truck decks, screw conveyors and the like;

(6) The ninth employee is a helper; and

(7) The tenth employee performs work as a welder but mainly prepares steel for use in installations.

Arguments

Mr. Elson, counsel for Atlas, argued that Atlas is not engaged in the construction industry within the meaning of the CILRA. As such, the collective agreement negotiated between the Union and the CLR does not apply to Atlas. Atlas, however, acknowledged that it remains bound by the bargaining relationship with the Union and it is prepared to negotiate a collective agreement with the Union. Counsel pointed out the definition of "construction industry" in s. 2(e) of the CILRA and noted that the

type of work described therein relates to real property, not to chattels such as flat bed truck trailers. Counsel argued that the primary focus of the work performed by Atlas should determine its status as a construction employer. If the work is primarily focused on fabrication of items that are not affixed permanently to real property then the work is not construction work within the meaning of the CILRA. Counsel referred the Board to *Construction and General Workers Union, Local 890 v. Work Force Construction Ltd. operating as Quadra Construction*, [1988] Fall Sask. Labour Rep. 39, LRB File No. 206-87. He also referred the Board to the Alberta Labour Relations Board decision in *Burnco Rock Products Ltd. and General Teamsters, Local 362* (1993), 20 CLRBR (2d) 208 which held that the delivery of pre-mixed concrete to a construction site was not construction work within the definition of "construction" contained in s. 1(g) of the *Labour Relations Code*, S.A. 1988, c. L-1.2.

Atlas did not view the shop portion of the agreement between the Union and the CLR as indicating that fabrication work was generally accepted to be "construction". Atlas noted that the contractors who fell under the shop agreement also engaged in heat, ventilation and air conditioning work and routinely bid on construction jobs. Applying the "primary focus" test set out in the *Work Force* decision, *supra*, if fabrication work is incidental to construction, and construction is the primary focus of the employer's work, then both fall under the scheme of the CILRA.

Mr. Kot argued that Atlas is involved in construction work. It employs sheet metal workers and welders and performs work that is considered to be construction work. This includes the installation of equipment that has been fabricated by Atlas and maintenance work performed by sheet metal workers on site of another employer. Mr. Kot referred to the definition of construction contained in the CILRA and urged the Board to find that Atlas was engaged in construction work.

Statutory Provisions

The Board must consider the following provisions contained in the CILRA:

> *2. In this Act:*
>
> > *(e) "construction industry":*
> >
> > > *(i) means the industry in which the activities of constructing, erecting, reconstructing, altering,*

remodeling, repairing, revamping, renovating, maintaining, decorating or demolishing of any building, structure, road, sewer, water main, pipeline, tunnel, shaft, bridge, wharf, pier, canal, dam or any other work or any part of a work are undertaken; and

(ii) includes all activities undertaken with respect to all machinery, plant, fixtures, facilities, equipment, systems and processes contained in or used in connection with a work mentioned in subclause (i);

...

(p) "trade division" means all unionized employers in a sector or sectors of the construction industry that are:

(i) in a trade; or

(ii) in an identifiable class or group of unionized employers in a trade;

...

(r) "unionized employee" means an employee who is employed by a unionized employer and with respect to whom a trade union has established the right to bargain collectively with the unionized employer;

(s) "unionized employer" means an employer in a trade division with respect to whom a trade union has established the right to bargain collectively on behalf of the unionized employees in that trade division:

(i) pursuant to an order of the board made pursuant to clause 5(a), (b) or (c) of The Trade Union Act; or

(ii) as a result of the employer's having recognized the trade union as the agent to bargain collectively on behalf of those unionized employees.

...

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.

...

9(1) The minister may determine a trade division to be an appropriate trade division for the purposes of this Act.

The Ministerial Order which established the sheet metal trade division was issued by the Minister of Labour on December 2, 1992.

Analysis

This case poses the interesting question of whether all or any of the aspects of fabricating work in the sheet metal trade are covered by the terms of the CILRA. This determination is made somewhat complex by the evidence which indicates that the employees of Atlas, as a group, are engaged in both construction and non-construction activities, with the fabricating end of the sheet metal business being the primary focus of their work. They fabricate systems that are used in industrial and commercial settings, such as dust collector systems, conveyor systems, industrial dryers and the like, as well as items that clearly have no relationship to the construction industry, such as semi-trailer flat beds. On some occasions, they install the systems that they have fabricated at their customers' plant or site. They also perform maintenance work at such sites. One employee in particular is employed more than half his time upgrading a conveyor system for a meat packing plant.

As stated in s. 4 of the *CILRA*, its purpose is to implement a system of province-wide bargaining between all unionized employers in a trade division and a trade union. It achieves this goal by requiring unionized construction employers to bargain through a representative employers' organization, the fruits of which bargaining apply to all unionized construction employers and the unionized employees in a trade division. Under the CILRA structure, the stability of the unionized construction sector is enhanced by restricting the use of strikes and lock-outs to the period surrounding the negotiation of the provincial agreement and by standardizing labour costs for all unionized construction employers.

In this context, it would appear that the statutory definition of "construction industry" which is contained in s. 2(e) of the CILRA is deliberately broad in its scope in order to ensure that all aspects of the industry benefit from the stabilizing effects of the CILRA. The definition includes construction,

renovation, maintenance, decorating and demolishing various structures or works and, "all activities undertaken with respect to all machinery, plant, fixtures, facilities, equipment, systems and processes contained in or used in connection" with these works.

The Board has not had an opportunity to consider the definition of "construction industry" in its previous decisions either under the 1979 CILRA or the CILRA version. The Ontario Labour Relations Board, however, has dealt with a situation similar to the present one in *Ridsdale Steel Fabricators Inc.* [1987] OLRB Rep. (Apr.) 601. In that instance, the employer operated a custom steel fabricating shop which produced steel products for manufacturing companies, including parts for fans, oil filtration units, industrial dust collection systems and brackets for the furniture industry. Some of the products were installed by the customer while others were installed by the employer's employees. The Ontario Board reviewed its case law on the topic of mixed construction and non-construction work and concluded as follows, at 603-604:

> *9. In Ethier Sand & Gravel Limited, [[1979] OLBR Rep. Oct. 962], one of the issues before the Board was whether or not the application for certification before the Board was properly brought under the construction industry provisions of the Act. In dealing with that issue, the Board said in part at paragraphs 8 and 9 that:*
>
> > *. . . Where an employer is engaged in the construction and non-construction activities with the same work force, the Board has held that such mixed activities do not fall within the meaning of "construction industry" in section 1(1)(f) and that such an employer is not an employer as defined in section 117(c) of the Labour Relations Act. See the John Harvie Limited case [1969] OLRB Rep. April 145; and the Canadian Pittsburgh Industries Limited case, Board File No. 15984-69-M.*
>
> *In Ethier Sand & Gravel Limited, the Board did not have before it an employer that operated a fabricating shop, a mode of operation that is common in the sheet metal business. Further, both of the decisions cited as authority for the proposition that an employer who engaged in construction and non-construction activities with the same work force is not an employer in the construction industry were made prior to the enactment of the Labour Relations Amendment Act Statute of Ontario, 1979, (No. 2) c. 85, section 39 which introduced what is now clause (c) of section 117 of the Act and defined who is an "employee" in the construction industry for the first time. Prior to that, as for example in its John Harvie Limited, [1969] OLRB Rep. April 145 and Canadian Pittsburgh Industries Limited, Board File No. 15984-69-M decisions, the Board had excluded shop, yard and other off-site employees from the bargaining units*

> *when considering applications for certification under the construction industry provisions of the Act.*
>
> *10. Clauses (b) and (c) of section 117 of the Labour Relations Act define "employee" and "employer" in the construction industry as follows:*
>
> > *(b) "employee" includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining unit with on-site employees;*
> >
> > *(c) "employer" means a person who operates a business in the construction industry, and for the purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;*
>
> *Nowhere in the Act is it stipulated that a person must operate a business that is engaged solely or even primarily in the construction industry. Nor has the Board required that a person's business be operated solely or primarily in the construction industry in order for that person to be an employer in the construction industry (see, The Board of Education for the City of Windsor, [1983] OLRB Rep. May 831 and the Board decisions cited therein at paragraph 10). Similarly, there is no requirement that an employee perform a majority or any part of his work on a construction site in order to be an employee in the construction industry. It is sufficient for an employee to be "commonly associated in his work or bargaining [unit] with on-site employees". Consequently, it is not correct, in our view, to say that an employer engaged in construction and non-construction activities with the same work force cannot be an employer in the construction industry.*

The definition of "unionized employee" in the CILRA is relatively unhelpful in determining if the Legislature intended the provisions of the CILRA to apply to employees who are not directly working on the construction site. The definition does not distinguish between shop and on-site employees, nor does it give any specific guidance as to when an employee who performs both shop and on-site work would be considered a construction employee. Similarly, the definition of "construction industry" does not require that the employer be engaged solely or primarily in the construction industry, nor does it specifically address the situation where a unionized employer is engaged in both construction and non-construction work.

The Board must turn to other factors in order to determine the issue. In this instance, the industry practice of including shop employees in the province-wide sheet metal trade division agreement indicates that the industry views the work performed by shop employees as part of the construction industry. No differentiation has been made between shop and site employees who are engaged in the sheet metal trade.

Counsel for Atlas argued that the Board should distinguish between sheet metal employers who operate fabrication shops primarily in conjunction with on-site construction projects and sheet metal employers whose primary focus is custom fabrication, with a small emphasis on on-site installation and maintenance. There may be some merit to this sliding scale approach to the definition of construction which would place a unionized employer under the CILRA umbrella only where the primary focus of its work is construction activity. On the other hand, however, it is a distinction that may lessen the stabilizing features of the CILRA scheme. It could result in non-CILRA employers undercutting the bids of CILRA employers based on lower wage costs which may result from the non-CILRA employers' ability to enter into a contract on their own with the Union. It may also result in job tensions where non-CILRA employees work side-by-side with higher paid CILRA employees, all performing similar work. In addition, the Board would need to devise some criteria for determining when an employer is sufficiently engaged in construction activities so as to place it under the umbrella of the CILRA. This may result in an employer moving in and out of the CILRA umbrella depending on its particular mix of work at any one time.

The CILRA describes "construction industry" in terms of activities, not in terms of the primary or principal work performed by a business or enterprise. It is concerned with any employer who performs construction work and does not exclude employers from the operation of the CILRA based on the fact that a preponderance of their work falls outside the definition of the "construction industry". In our view, the overriding purpose of the CILRA which is to bring stability to the unionized construction sector would be jeopardized if employers who are engaged in construction work, such as installation and maintenance work, are excused from the provisions of the CILRA based on an assessment of the primary focus of their work.

However, it is clear under any interpretation of the term "construction industry" that manufacturing of sheet metal systems, in and of itself, is not "construction". There must be some nexus between the fabrication of sheet metal systems and the installation or maintenance of such systems to bring the work within the statutory definition. In this instance, the evidence indicates that Atlas is engaged in the installation of sheet metal systems and in the maintenance of those systems. As such, it is a unionized employer in the sheet metal trade division under the terms of the CILRA and is required to apply the terms of the collective agreement entered into between the Union and the CLR to its sheet metal workers and sheet metal welders. Atlas's refusal to accept the collective agreement constitutes a refusal to bargain in good faith in violation of s. 11(1)(c) of *The Trade Union Act* and an Order to that effect will issue.

INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, LOCAL 739, Applicant and MARCHUK DECORATING LTD., Respondent

LRB File No. 009-97; January 26, 1998
Chairperson, Gwen Gray; Members: Donna Ottenson and Don Bell

For the Applicant: Angela Zborosky
For the Respondent: Susan McGillivray

Arbitration - Deferral to - Issue of interpretation of "unionized employer" is particularly assigned to Board by *The Construction Industry Labour Relations Act, 1992* - Issues of unilateral mistake and abandonment arise from certification order issued by Board - Issues better determined by Board than by arbitration.

Construction Industry - Collective agreement - Abandonment - Board finds that union did not abandon bargaining rights - Employer represented state of affairs to union that would not cause union to take further steps to enforce collective agreement.

Duty to bargain in good faith - Certification order is binding on employer unless and until rescinded by Board or stayed or quashed on judicial review by Courts - Employer cannot by unilateral declaration relieve itself from obligation to bargain collectively - Employer breached obligation to bargain in good faith by maintaining position that not bound by certification order.

***The Trade Union Act*, ss. 2(b) and 11(1)(c).**
***The Construction Industry Labour Relations Act, 1992*, ss. 6 and 14.**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The International Brotherhood of Painters and Allied Trades, Local 739 (the "Union") was certified to represent painters, painter apprentices and foremen employed by Marchuk Decorating Ltd. ("Marchuk") on May 25, 1987. On January 27, 1997, the Union filed an unfair labour practice application which alleged that Marchuk refused to recognize the Union as the bargaining agent for its painters; that Marchuk refused to follow the terms of the collective agreement negotiated between the Union and the Construction Labour Relations Association of Saskatchewan Inc. (the "CLR"), a representative employers' organization designated under the provisions of *The*

Construction Industry Labour Relations Act, 1992; and that Marchuk refused to bargain collectively with the Union with respect to the settlement of grievances.

In its Reply Marchuk stated that it agreed to voluntarily recognize the Union in 1987 when it bid on work at the Co-op Upgrader Industrial Project in Regina on the express representation that the Union recognition would be limited to that project. Marchuk further alleged that the Union abandoned any bargaining rights that it may have had by its failure to take any steps to represent employees since 1987. Marchuk also alleged that it responded to the grievance filed by the Union and denied that it failed to negotiate with respect to the grievance.

A hearing of this matter was held in Regina on May 26, 1997, at the conclusion of which the Board gave an interim oral ruling to the effect that the Union has not abandoned its bargaining rights and Marchuk is obligated to negotiate with the Union with respect to the grievances filed. The Board also indicated that it would issue Reasons and an Order.

Evidence

Bruce McDonald testified that he was business manager when the Union applied to be certified for Marchuk. Mr. McDonald subsequently retired from his position with the Union. The certification application for Marchuk was signed and filed by Mr. McDonald on March 25, 1987. As indicated, the Order was issued by the Board on May 25, 1987. Mr. McDonald had no specific recollection of the application, nor of any discussions he may have had with Marchuk at the time. He did indicate, however, that if the Union had agreed to a "spot site", meaning a project agreement only, he would have approached Marchuk to sign a project agreement and would not have applied for the certification Order.

With respect to collective bargaining, Mr. McDonald noted that in 1987 the parties were operating under a provincial agreement which had been negotiated under the structure of *The Construction Industry Labour Relations Act* (the "CILRA"), S.S. 1979, c. C-29.1 [repealed 1983-84, c. 2, s.3]. An agreement was negotiated in 1990 between painting contractors and the Union, but as it was not negotiated under the auspices of the CILRA, each contractor was required to sign the agreement. Mr. McDonald did not recall Marchuk signing the 1990 agreement. Subsequently, in 1992 the CILRA was re-enacted in the form of *The Construction Industry Labour Relations Act, 1992* (the "1992 CILRA"),

S.S. 1992, c. C-29.11. Bargaining was again conducted on a province-wide basis between the Union and painting contractors and resulted in the settlement of a collective agreement for the period 1994 to 1996. The Union gave notice to bargain to each of its unionized employers; it also provided copies of the agreement to the unionized employers.

Subsequent to the 1994 negotiations, the Union forwarded a letter to Marchuk dated July 5, 1994 which read as follows:

> *I would like to bring to your attention the Section of the new Construction Labour Relations Act that now affects your firm. The signing of the Agreement by the C.L.R. and President of the Painters Asso. (copy enclosed) has the same effect as if you had signed it.*
>
> *I will expect to have remitted on behalf of each and every employee in your employment the regular dues, assessments, pension, health and welfare, training fund, and building trade deductions to this office by the 15th of July 1994, or a reason why such contributions are not being made.*
>
> *Thank you for your co-operation in this matter.*

Mr. McDonald testified that he followed up on the letter with a phone call to Marchuk and he also had a meeting with Patrick Marchuk in Regina. A second letter was then sent from the Union to Marchuk which read as follows:

> *As I had explained to you in July of 1994 the new Construction Labour Relations Act affects your firm.*
>
> *The signing of the Agreement by the C.L.R. and President of the Painters Asso. (copy enclosed) has the same effect as if you had signed it.*
>
> *The Local will waive the three hundred dollar initiation fee for your present employees, provided the dues and all benefits are received by the 15th of November.*

When Mr. McDonald did not receive a response to the letter, he arranged to meet Mr. Marchuk in late October or November, 1995 in Regina to straighten up the matter before his retirement in December, 1995. The Saskatchewan Local of the Union then merged with the Manitoba Local and is now serviced out of Winnipeg by Mr. Sedor and Mr. Beddome.

Mr. McDonald indicated that Marchuk is primarily a commercial painting contractor, not an industrial contractor, who may perform some residential work as well.

On cross-examination, Mr. McDonald acknowledged that the Union did not take steps to have Marchuk abide by the agreement during the period between 1987 and 1994. This period coincided with the chaos that reigned in the unionized construction sector as a result of the repeal of the CILRA. Mr. McDonald indicated that the Union could have brought an unfair labour practice against Marchuk during this period for failing to recognize the Union and failure to apply the collective agreement, but, at that time, Marchuk could also form a spin off company and operate without a union. The Union did not have sufficient funds to bring such applications and Mr. McDonald admitted that he was probably "too nice a guy" with Marchuk. Mr. McDonald indicated that Marchuk was not successful in obtaining a bid at the Co-op Upgrader Industrial Project.

John Sedor, Business Manager and Organizer for the Union, testified that in September, 1996 he attended at a job site at SaskTel and found Marchuk employees working on a painting project. As a result, Mr. Sedor filed a grievance against Marchuk by failing to employ members of the Union. The grievance was dated September 26, 1996.

Mr. Beddome, Business Manager for the Union, testified that he was contacted by Mr. Marchuk after the grievance was filed by Mr. Sedor. Mr. Beddome wanted to discuss the grievance with Mr. Marchuk, however, Mr. Marchuk indicated that he was going to be away and would get back to the Union. The Union then received a letter from Marchuk's legal counsel, Dennis Ball, Q.C., which read as follows:

> *We act for Marchuk Decorating of Regina and have received a copy of your letter dated September 26, 1996 for reply.*
>
> *We would advise that our client denies the allegations contained in the union's grievance on the following grounds:*
>
> *1. Our client acknowledges that it was named in a certification Order issued by the Labour Relations Board almost nine years ago. However, the union has never made any attempt to exercise the rights which might flow from the certification Order, to bargain collectively with our client, or to represent any individuals doing work within the Painter Trade Division. As a result, the certification Order has clearly lapsed by the effluxion of time and is no longer of any force or effect. We believe that the Labour Relations Board would not*

now allow the Painters Union to attempt to reactivate the certification Order knowing full well that none of the individuals with whom our client has a longer term relationship support the union, or have ever supported the union, as their bargaining representative.

2. *Our client does not employ any employees within the scope of the bargaining unit represented by International Brotherhood of Painters and Allied Trades, Local 739. At the present time, our client has engaged one independent contractor to complete certain maintenance work under a contract with Dominion Construction. The relationship between our client and the contractor in question satisfies all of the traditional tests for determining whether a person is an independent contractor as opposed to an employee.*

3. *The work presently being done by Marchuk Decorating is being done under the Crown Construction Tendering Policy. That policy permits our client to employ one non-union individual. Even if the one person now employed on the project was an employee rather than an independent contractor, which is not the case, that individual would not be required to apply for and maintain membership in the union pursuant to the specific CCTA entered into between your union and the owner of the project.*

As we will be representing Marchuk Decorating in connection with any proceedings arising from your letter dated September 26, 1996 we trust that you will respond directly to us.

Mr. Beddome testified that he instructed his legal counsel, Angela Zborosky, to correspond with counsel for Marchuk in order to have the status of the Union's certification Order determined by the Board under s. 24 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "Act") which she did by letter on four occasions without receiving a response from counsel for Marchuk. The Union subsequently filed the application that is summarized above.

Mr. Marchuk testified that he owns Marchuk Decorating in partnership with his son. Mr. Marchuk contacted Mr. McDonald early in 1987 in order to discuss with him how Marchuk could become a unionized contractor in order to bid on the Co-op Upgrader project. Mr. Marchuk then met with Mr. McDonald and later, with John McLeod of the Building Trades Council. As a result of these meetings, Mr. Marchuk signed a little book which he understood to be a certification Order, although he was not quite sure what he had signed. Mr. Marchuk stated that he intended to be unionized only for the Co-op Upgrader project but he acknowledged that perhaps he had not shared his intention with Mr. McDonald.

Mr. Marchuk did receive a copy of the certification application from the Board but he took no steps to either understand the application or to appear at the hearing. He testified that he was too busy painting and that he assumed he had already signed it.

Mr. Marchuk did not recall receiving any notices to bargain, but he did recall receiving a copy of the 1994 collective agreement. He kept all materials that he received from the Union and could not find any documents regarding collective bargaining. However, during the period between 1987 and 1994, Mr. Marchuk was contacted by Mr. McDonald who inquired if Mr. Marchuk had any painters who should go into the Union. Mr. Marchuk indicated that the calls were informal and he responded to them by indicating that he had subcontracted his work. Mr. Marchuk did not recall receiving a notice to bargain prior to the 1994 round of negotiations. When Mr. Marchuk received the 1994 package of material from Mr. McDonald, he telephoned Mr. McDonald and told him that he did not think that he had any employees. He was not contacted again until October, 1995, at which time he received a similar package of materials. When he met with Mr. McDonald in Regina, he indicated that he had a couple of employees who worked part-time and another who worked on a piecemeal basis. He did not think that he was required to submit anything to the Union with respect to these employees because they were piece workers and contractors and he presumed that they could not belong to the Union.

Arguments

Angela Zborosky, counsel for the Union referred the Board to *International Brotherhood of Electrical Workers, Local 529 v. Bill's Electric City Ltd.*, [1996] Sask. L.R.B.R. 399, LRB File No. 061-96, where the Board held that a certified employer in the construction industry who refused to respond to the union's grievances or to recognize the union as the exclusive representative of its employees was guilty of a violation of s. 11(1)(c) of the *Act*.

With respect to Marchuk's claim that the certification Order was issued by mistake, counsel argued that the claim is not a valid defence as Marchuk has no role to play in the representation issue. Counsel also pointed out that the facts did not support the claim that the Union agreed to a spot certification. Counsel noted that in discussions with Mr. McDonald after the certification Order was issued, Mr. Marchuk did not raise the issue of mistake.

Counsel for the Union also disputed the factual foundation for the defence of abandonment which is relied on by Marchuk. Counsel noted that Mr. McDonald made regular inquiries of Mr. Marchuk concerning his work force and was consistently told that Marchuk was not employing painters. Marchuk did not respond to the Union's letters to bargain in 1993. During Mr. McDonald's meetings with Mr. Marchuk in 1995, the latter did admit that he was engaging employees, although he disputed that they would be in the Union. The Union relied on the Board's decision in *International Union of Operating Engineers, Local 870 v. Gunner Industries Ltd.*, [1996] Sask. L.R.B.R. 749, LRB File No. 160-96, where the Board held that a construction union which, among other things, attempted to ascertain whether the employer had any employees working within the union's craft jurisdiction and were repeated informed by the employer that there were none, was not guilty of abandoning its bargaining rights.

On the question of whether Marchuk had properly replied to the grievance filed by the Union, counsel for the Union argued that Marchuk's reply through its legal counsel was no reply at all because it denied that the Union represented employees of Marchuk. In addition, Marchuk did not respond to the letters written by counsel for the Union to Marchuk's solicitors seeking Marchuk's agreement to refer the question of the status of the certification Order to the Board under s. 24 of the *Act*. The Union argued that Marchuk's failure to respond to the request to have the issue determined by the Board constitutes a failure to bargain collectively.

For a remedial Order, the Union seeks a cease and desist Order, an Order requiring Marchuk to comply with the collective agreement, and an Order directing Marchuk to meet with the Union within 20 days of the date of the Order to consider the issues raised by the grievance.

Susan McGillivray, counsel for the Employer, submitted that it was clear that Marchuk sought certification with the Union only for the purpose of bidding on the Co-op Upgrader Industrial Project. Counsel argued that the certification Order was then issued as a result of unilateral mistake on the part of Marchuk, which the Union knew or should have known. Counsel submitted that the mistake was a mistake of fact, not law, and it results in the certification Order being nullified. In support of her position, counsel cited *Steeps Investments Ltd. et al. v. Security Capital Corp. Ltd.* (1976), 73 D.L.R. (3d) 351 (Ont. H. C.); *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 133 D.L.R. (4th) 550 (Ont. C.A.); and *Murphy's Ltd. v. Fabricville Co. Inc.; Beaumaris Real*

Estate Co. Ltd. et al. (1980), 117 D.L.R. (3d) 668 (N.S.S.C.), all of which hold that a mistake as to the term of an agreement, if known by the opposite party at the time the agreement is entered into, is subject to the equitable remedy of rectification with optional rescission. Counsel for Marchuk distinguished the *Gunner Industries Ltd.* case, *supra*, on the grounds that the mistake alleged by the employer in that instance was a mistake of law.

With respect to the issue of abandonment, counsel referred the Board to *International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 v. Wappel Concrete and Construction Ltd.*, [1984] Apr. Sask. Labour Rep. 33, LRB File No. 302-83 and *Morin v. Aim Electric Ltd. and International Brotherhood of Electrical Workers, Local 529*, [1985] Feb. Sask. Labour Rep. 27, LRB File No. 331-84, as authority for the proposition that inaction over a number of years by a certified union will result in an abandonment of a certification Order. Counsel argued that the same principle should apply to its certification Order as the Union took no steps to enforce the collective agreement with Marchuk when the Union knew or should have known that Marchuk was engaging employees and paying them rates in excess of the agreement. The employees being referred to in this instance being the piece workers and contractors that Marchuk acknowledged engaging to perform painting work. Counsel argued that the Union's contact with Marchuk was informal, ambiguous and inconsistent with the enforcement of its bargaining rights. Counsel contrasted the situation to the *Gunner Industries Ltd.* case, *supra*, where the union was more persistent in its dealings with the employer. Counsel also relied on the British Columbia Industrial Relations Council decision in *Quadra Control & Weigh Systems Ltd. v. International Association of Machinists and Aerospace Workers, Lodge 692* (1989), 6 CLRBR (2d) 237 where the Council held that the union had abandoned its bargaining rights after a period of five years.

Counsel also argued that the matter of the existence of the collective agreement could be determined by an arbitrator acting under the terms of the alleged agreement and the Employer's failure, if any, to abide by the agreement cannot constitute an unfair labour practice under s. 11(1)(c) of the *Act*. In support of its position, counsel relied on the Board decision in *Canadian Union of Public Employees v. Regina Health Board*, [1993] 2nd Quarter Sask. Labour Rep. 229, LRB File No. 106-93.

Statutory Provisions

The relevant statutory provisions include:

1) ***The Trade Union 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;*

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;*

2) ***The Construction Industry Labour Relations Act, 1992***

6(1) In addition to the powers conferred on it by this Act, the board has all the powers conferred on it by The Trade Union Act, and the orders of the board pursuant to this Act are enforceable in the same manner as orders of the board pursuant to The Trade Union Act.

6(2) In addition to any other order that it may make pursuant to this Act, the board may make orders:

> *(a) determining whether an organization is an employers' organization;*
>
> *(b) determining whether an employer is a unionized employer;*
>
> *(c) determining whether an employee is a unionized employee;*
>
> *(d) determining whether an unfair labour practice has occurred;*

> *(e) determining whether this Act is being or has been contravened;*
>
> *(f) requiring compliance with this Act, the regulations or any decision of the board with respect to a matter before the board.*

6(3) The board may determine any question of fact that is necessary to its jurisdiction.

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.*

Analysis

The Board finds that Marchuk's assertion of unilateral mistake is unfounded in the evidence. Mr. Marchuk claims to have negotiated an agreement with the Union in which Marchuk would be a unionized contractor for the purpose only of bidding and working on the Co-op Upgrader Industrial Project. On examination, however, he acknowledged that he may not have made his desire known to Mr. McDonald. Mr. McDonald has no specific recollection of any discussion with Mr. Marchuk regarding a spot certification; however, he did indicate that if such an agreement had been reached, he would not have applied for certification. Presumably, Mr. McDonald was aware of the Board practice of issuing construction certifications on a geographic, as opposed to a project, basis. Mr. Marchuk did not raise his understanding of the agreement in any of his discussions with Mr. McDonald. On these facts, the Board cannot find that there was a unilateral mistake or that if there was a unilateral mistake, that the mistake was known to the Union.

On the issue of abandonment, the Board finds that the Union did not abandon its bargaining rights with Marchuk. Mr. McDonald was in regular contact with Mr. Marchuk who continually asserted that he had no employees who would fall under the Union's jurisdiction. Whether Mr. Marchuk was deliberately misleading Mr. McDonald, or whether he misunderstood the obligations imposed on him by the certification Order, nevertheless, he represented a state of affairs to the Union that would not cause it to take further steps to enforce its agreement. In this situation, when the Union became aware of some activity on the part of Marchuk at SaskTel, it did take steps to encourage Marchuk to apply the agreement.

The contractual obligations of a collective bargaining relationship flow two ways - the union must actively monitor the workplace and ensure the employer is complying with the agreement; likewise, the employer must provide the union with accurate information so that it can assess whether or not action is needed to enforce the terms of the agreement. In this instance, Marchuk is blowing hot and cold on the topic of whether it engaged employees: on the one hand, it argued that it did not employ any person who would fall under the agreement; on the other hand, it seeks to apply the doctrine of abandonment to the Union because the Union did not challenge the legitimacy of the Marchuk's claim that it had no employees. During this period, the Union was attempting to assess the Marchuk situation and it finally managed to do so when it discovered employees of Marchuk at the SaskTel project.

On the question of whether the Board should defer this matter to the grievance and arbitration process, the Board declines to so defer. A determination of the applicability of a collective agreement in the construction industry to a particular employer is tightly woven around the determination of who is or is not a "unionized employer" within the definition of that term in the 1992 CILRA. If an employer is a "unionized employer" within the meaning of the 1992 CILRA, any agreement that has been reached between the union and the representative employers' organization applies to the employer by virtue of s. 14 of the 1992 CILRA. The interpretation of the phrase "unionized employer" has been commented on by the Board in *Saskatchewan Construction Labour Relations Council Inc. v. CLR Construction Labour Relations Association of Saskatchewan Inc. et al.*, [1994] 2nd Quarter Sask. Labour Rep. 190, LRB File No. 023-94 and decisions flowing from it. It is a matter that is particularly assigned to the Board under s. 6(2)(b) of the 1992 CILRA and one which is central to the overall implementation of the 1992 CILRA, responsibility for which primarily rests with the Board, as opposed to the arbitration process. In addition, the argument of unilateral mistake and abandonment are issues that arise from the

certification Order issued by this Board. In this context, it would be difficult to understand how a Board of Arbitration could decide that the certification Order was void as a result of unilateral mistake or abandonment. Both issues are better determined by the Labour Relations Board.

Finally, Marchuk claimed that it did respond to the grievance through the letter forwarded to the Union by counsel for Marchuk. This reply, however, raised issues that clearly challenged the legitimacy of the certification Order, both through the issues of mistake and abandonment. The Union in this instance argues that Marchuk's reply is no reply at all; while Marchuk argued that it did reply but in terms that the Union did not agree. It maintained that it was prepared to arbitrate the matter had the Union pushed the grievance forward.

In the *Bill's Electric City Ltd.* case, *supra*, the Board held that the employer committed an unfair labour practice under s. 11(1)(c) of the *Act* "by declining to enter into serious discussions with the union of the terms and conditions of employment which are to be applied to employees, by failing to respond to union requests for remittance of funds, and by ignoring the issues raised by the union in the grievance" (at 404). In *Saskatchewan Government Employees' Union v. SPI Marketing Group*, [1996] Sask. L.R.B.R. 150, LRB File No. 129-95, the Board held that an employer is not permitted to unilaterally determine that a dispute or class of disputes should not be subject to the grievance and arbitration provisions. In that instance, the employer refused to process a union policy grievance to arbitration on the grounds that the facts underlying the dispute did not give rise to a violation of the collective agreement. In *Canadian Union of Public Employees v. Regina Health Board, supra*, the Board held that the statutory duty to bargain in good faith during the term of a collective agreement is met by the employer acting in accordance with the grievance and arbitration provisions of the agreement. The Board stated, at 234:

> *In these circumstances the statutory duty to bargain in good faith respecting disputes and grievances is, by the freely negotiated agreement of the parties, and in complete accordance with the scheme of the Act, narrowed and funnelled into the grievance procedure.*

In *University of Saskatchewan v. University of Saskatchewan Faculty Association*, [1990] Spring Sask. Labour Rep. 30, LRB File No. 280-88, the Board held that an obstructive approach to the negotiations

of grievances which demonstrated no real intent on the part of the union to resolve the grievances constituted a failure to bargain in good faith.

In this situation, the evidence is not clear that Marchuk actually refused to bargain with respect to the grievance or that it obstructed the Union's ability to process the grievance. However, in its reply to the grievance, Marchuk raised issues regarding the validity of the Union's certification Order. It is been the position of the Board in past decisions that a certification Order is valid and binding on an employer unless and until it is rescinded by the Board, stayed or quashed on judicial review by the Courts: see *Saskatoon Typographical Union, Local 663 v. Armadale Publishers Ltd. (The Star Phoenix)*, [1978] June Sask. Labour Rep. 46, LRB File No. 013-77. When an employer asserts that a certification Order is no longer valid, it would seem to the Board that the employer has a corresponding obligation to seek an Order from the Board or a reviewing Court to sustain its assertion. Otherwise, it must consider itself bound by the Order and the consequences that flow from the Order. In this sense, an employer cannot, by unilateral declaration, relieve itself from the obligation to bargain collectively with a trade union. In these circumstances, where Marchuk had not sought an Order to rescind or set aside the Board's Order, the Board finds that the Marchuk has breached its obligation to bargain in good faith by maintaining the position in its reply to the Union's grievance that it is not bound by the certification Order.

The Board finds that:

1. Marchuk is bound by the certification Order issued to the Union on May 25, 1987;

2. Marchuk is engaged in work in the construction industry and is bound by the terms of the collective agreement entered into between the Union and the CLR, pursuant to s. 14 of the 1992 CILRA; and,

3. Marchuk committed an unfair labour practice by refusing to bargain in good faith with the Union with respect to the grievance filed by the Union.

As a remedial Order, the Board requires Marchuk to bargain collectively with the Union with respect to the grievance filed and to apply the terms of the collective agreement to the employees covered by the certification Order.

K. H., Applicant and COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION, LOCAL 1-S, Respondent and SASKTEL, Employer

LRB File No. 015-97; January 28, 1998
Chairperson, Gwen Gray; Members: Gerry Caudle and Judy Bell

For the Applicant: John Williams
For the Respondent: Angela Zborosky
For the Employer: Heather Janier

Duty of fair representation - Remedy - Board orders union and employer to proceed to arbitrate certain of member's grievances without challenging the jurisdiction of the arbitration board to hear and determine grievances on their merits due to conduct on part of union constituting breach of duty of fair representation.

Duty of fair representation - Remedy - Legal expenses - Board orders union to reimburse independent counsel for reasonable disbursements and hours reasonably spent preparing for and representing member at arbitration at same hourly rate as union pays counsel for arbitration work.

Duty of fair representation - Remedy - Legal expenses - Board orders union to reimburse member for legal expenses relating to grievance filing and handling and representation on remedial portion of application before Board.

Duty of fair representation - Remedy - Board directs employer, union and member to engage in grievance mediation for a period of 30 days from the date of receiving Board's order - Board appoints mediator and orders that mediator's fees and disbursements be paid equally by union and employer.

Duty of fair representation - Remedy - Legal expenses - Board holds that member entitled to representation by independent counsel in mediation process and orders union to reimburse member for all reasonable fees and expenses incurred in engaging independent legal counsel for mediation process.

***The Trade Union Act*, ss. 5(c), (d), (e), (f), (g), 25.1 and 42.**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Applicant filed an application for an unfair labour practice in which he alleged that the Communications, Energy and Paperworkers Union, Local 1-S (the "Union") failed to

fairly represent him in his grievances filed against his employer, SaskTel, including a discharge grievance. The Board heard the application and issued its Reasons for Decision on July 9, 1997 wherein it upheld the complaint of K.H. The Board reserved the question of remedy for a determination at a future date at the request of the parties to the application. These Reasons for Decision deal with the issue of the appropriate remedy and take into account the representations made by the parties at a hearing convened by the Board on October 17, 1997.

For a summary of the factual background of this dispute reference can be made to the Board's decision which is reported at [1997] Sask. L.R.B.R. 476.

Arguments of the Parties

Mr. Williams, counsel for K.H., argued that the Board has authority to order the reinstatement of and compensation for K.H. without referring the matter to arbitration. In support of this proposition, he referred to *Tim Turner v. The Retail, Wholesale, Bakery and Confectionery Workers Union, Local 461 of the R.W.D.S.U. et al.*, [1993] OLRB Rep. (Aug.) 811. In that instance, the Ontario Labour Relations Board held that it had the ability to order the reinstatement of an applicant under the provisions of *The Labour Relations Act* in circumstances where the termination of the applicant by the employer was a direct result of the union's mishandling of the grievance procedure. Counsel for SaskTel was unable to attend the hearing on October 17, 1997 and, although it did not request a postponement of the remedial portion of the hearing, in fairness to it, Mr. Williams requested that the Board adjourn the hearing to hear argument from all parties if the Board was inclined to apply the *Turner* decision, *supra*.

As an alternate argument, the Applicant argued that the Board should issue an Order directing the parties to refer his grievances to arbitration, with the Applicant being entitled to engage independent counsel at the Union's expense, and with the Union bearing its share of the cost of the arbitration, as it normally would. Counsel argued that the Union is in a conflict situation with K.H. as part, if not all, of the compensation claimed by K.H. may be assessed by an arbitrator to the Union.

Counsel also asked the Board to direct that any objections to the grievances be excluded from the arbitration. He asked the Board to refer all grievances to the arbitration board, including ones that had been withdrawn by the Union prior to K.H.'s termination. Counsel argued that the board of arbitration

could not properly deal with K.H.'s employment difficulties if only the discharge grievance was referred to arbitration. He also requested that the Board direct that the matter be referred to an arbitrator sitting without nominees and requested that the Board appoint the former Chairperson of the Board, Professor Beth Bilson, as chair.

The Applicant also requested that the Board make an Order directing the Union to reimburse K.H. for the costs of legal advice he was required to obtain as a result of the Union's failure to fairly represent him. Mr. Williams indicated that K.H. sought legal advice in 1995 which cost approximately $940.00. This advice related to an attempt by K.H. to have the Union consider his grievances with the Employer. In addition, K.H. has incurred legal costs in having Mr. Williams represent him at the hearing of the remedial portion of the matter. The Applicant represented himself at the hearing of the main application. Counsel referred the Board to *Stewart v. Saskatchewan Brewers' Bottle & Keg Workers, Local Union No. 340*, [1996] Sask. L.R.B.R. 386, LRB File No. 025-95, where the Board granted the applicant a portion of the costs of legal representation in a similar dispute with his union.

Ms. Zborosky, counsel for the Union, agreed with the Applicant that an Order should issue directing arbitration and excluding the technical objections. Counsel pointed out that the sharing of costs of an arbitration between the Employer and the Union is set out in the collective agreement and does not require an Order of the Board; similarly, she pointed out that the Employer and the Union can agree to refer the matter to a sole arbitrator.

With respect to the grievances that should be referred to arbitration, the Union noted that the Employer did not rely on all aspects of the alleged misconduct of K.H. in its termination documents. Counsel argued that the matters referred to arbitration should be restricted to those grievances that had some bearing on the final discharge.

The Union opposed any Order reimbursing K.H. for legal costs incurred in this matter. Counsel referred the Board to the Court of Appeal decision in *Labour Relations Board of Saskatchewan v. Saskatchewan Government Employees' Union and Laurence Berry* (1995), 131 Sask. R. 246 (Sask. C.A.). Counsel distinguished the *Stewart* case, *supra*, on the basis that it dealt with a "make whole" situation that did not involve a duty of fair representation complaint.

With respect to the compensation payable by the Union to independent counsel for K.H., the Union requested that the matter be left for discussion between the Union and counsel to ensure that the costs are reasonable.

No representations were made on behalf of SaskTel whose counsel was unable to attend the hearing.

Relevant Statutory Provisions

The Board must consider and apply the following provisions contained in *The Trade Union Act*, R.S.S. 1978, c. T-17:

> *5. The board may make orders:*
>
> . . .
>
> *(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*
>
> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
>
> *(e) requiring any person to do any of the following:*
>
> *(i) refrain from violations of this Act or from engaging in any unfair labour practice;*
>
> *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*
>
> *(f) requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice, or otherwise in violation of this Act;*
>
> *(g) fixing and determining the monetary loss suffered by any employee, an employer or a trade union as a result of a violation of this Act, the regulations or a decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or trade union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;*

> *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.*
>
> *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

In past decisions dealing with the duty of fair representation, the Board has not ordered the reinstatement of an employee who has been unfairly represented by his or her union. There may be an argument that ss. 5(e), (f) and (g), particularly with the amendments to those provisions in S.S. 1994, c. 47, permit the Board to make such an Order. However, in our view, this case does not present a factual situation that would readily lend itself to the making of such a direct Order from the Board. First, unlike the situation in the *Turner* case, *supra*, the Board cannot say with relative certainty that, but for the conduct of the Union, K.H. would not have been terminated from his employment. Second, the grievances raise issues related to the Employer's obligation to accommodate a person with known disabilities, and reinstatement, in and of itself, may not be the most appropriate remedy. In the Board's view, an arbitrator would be in a better position to judge the conduct of the Employer in relation to K.H. and design an appropriate remedy.

The Board will therefore follow its normal remedial path of ordering the Union and Employer to refer the grievances of K.H. to arbitration. In relation to which grievances are subject to the Order to refer to arbitration, the Board orders the Union and Employer to proceed to arbitrate the grievance filed in relation to the written warning given to K.H. on June 7, 1995 which was set out on page 2 of the Board's Reasons for Decision dated July 9, 1997; the grievances relating to the suspension of K.H. on October 23, 1995 and October 25, 1995 which are set out on pages 5 and 6 of the Board's earlier Reasons; the denial of sick leave benefits grievance filed with the Employer in November, 1995; and the grievance relating to the termination of K.H.'s employment which was filed with the Employer on February 5, 1996. The arbitrator or arbitration board will be selected in the manner set out in the collective

agreement, with K.H. having carriage of the grievance in place of the Union. The Union, however, shall be a party to the arbitration.

There was no real dispute regarding the need for K.H. to engage independent counsel to represent him at an arbitration hearing. It is accepted that the Union, in this instance, has a conflict of interest in relation to the Applicant. The Board, however, is concerned that duty of fair representation cases not be seen as a growth industry for the legal profession and to that extent, will set guidelines for fees that are payable by the Union to independent counsel. In this instance, independent counsel shall be reimbursed by the Union for hours reasonably spent preparing for and representing K.H. at the arbitration, and for all reasonable disbursements. Counsel for K.H. shall be paid at the same hourly rate of pay that the Union pays to its counsel for arbitration work. Any dispute over the reasonableness of the fees and disbursements charged by independent counsel may be referred by either the Union or the Applicant to this Board for determination. Our comments regarding counsel fees are not intended to reflect at all on the fees charged or representations made by counsel for K.H. Mr. Williams presented cogent, concise and helpful arguments to the Board on behalf of K.H. and his summary of legal expenses incurred to date by K.H. by all appearances were reasonable.

The question of reimbursement for legal fees incurred by K.H. in the course of pursuing his grievances against the Employer and his duty of fair representation against the Union are a more difficult matter. In *Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 193, LRB File No. 134-93, the Board ordered the Union to pay the legal expenses incurred by the Applicant in bringing his application before the Board. The decision was set aside by Gerein, J. in the Court of Queen's Bench reported at (1994), 127 Sask. R. 163 (Sask. Q.B.) at 172:

> *The substantive question in this instant was whether the Union had fairly represented Mr. Berry. The presence or absence of legal expenses played no role in the determination of that question. Legal expenses were incurred solely to obtain that determination. By compensating Mr. Berry for those expenses the Board in reality is awarding him costs, despite the assertions to the contrary. There is no authority in the Act to make such an award and having done so, in respect to past legal expenses, the Board exceeded its jurisdiction.*

The Saskatchewan Court of Appeal issued oral reasons agreeing with the decision of Gerein, J. (*supra*).

The *Berry* case was decided before the *Act* was amended in 1994 by S.S., 1994, c. 47 which amended s. 5(e) of the *Act* by adding s. 5(e)(ii), as set out above. Prior, s. 5(e) read:

> *5. The Board may make orders:*
>
> > *(e) requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice;*

Similarly, s. 5(g) was amended to expand the Board's jurisdiction with respect to the power to order the payment of monetary loss to enable the Board to make an Order for the payment of "monetary loss suffered by an employee . . . as a result of a violation of this *Act*, the regulations or a decision of the board." Under the old *Act*, monetary loss Orders could only be made where an employee was discharged in circumstances found to constitute an unfair labour practice or a violation of the *Act*.

In the *Stewart* case, *supra*, the Board set out an extensive review of the practice of awarding legal costs to applicants in other labour jurisdictions at 390 and concluded at 395 as follows:

> *We are of the view that, like the legislation which is the basis of the decisions of the Canada Labour Relations Board and the British Columbia Labour Relations Board, The Trade Union Act confers upon this Board broad powers to fashion remedies like the "make-whole" remedies described in those decisions. The powers granted to the Board in ss. 5(e) and (g), along with the general remedial power under s. 42, permit us a wide latitude in devising remedies which will address the losses suffered by applicants in the context of the objectives of The Trade Union Act.*
>
> *In this connection, it is perhaps helpful to think of legal expenses in terms other than the notion of "costs" as it is understood in connection with proceedings in civil courts. For reasons which have been alluded to earlier, this Board has never considered it appropriate to award costs in that sense of the term as part of the determination of applications under The Trade Union Act. This does not mean that there are not circumstances in which the expense of obtaining legal advice might not be part of an extraordinary "make-whole" remedy. In some cases, the essence of the infraction which is alleged by an applicant concerns the representation to which an employee is entitled under the Act. In this sense, granting some compensation for the use by an applicant of the services of a solicitor is more akin to compensation for a breach of fiduciary duty than to costs in their traditional sense.*
>
> *As counsel for the Union pointed out, this Board has expressed some reservations about the use of private counsel by employees in their dealings with a trade union. In Brent Liick v. Canadian Union of Public Employees, [1995] 3rd Quarter Sask. Labour Rep. 78, LRB File No. 237-93, the Board made the following comment at 102-103:*

> *As we indicated in the Berry decision, it is not unusual for an individual employee to seek the advice of private counsel, and it may in some circumstances be appropriate for a trade union to accept assistance from that source. As we have indicated above, however, it is the trade union which enjoys the exclusive right and obligation to represent employees in matters which concern their terms and conditions of employment, including issues related to disciplinary action. This severely restricts the role which may be played by private counsel. It is the trade union which retains control over the decisions concerning whether and how grievances should be pursued, not the individual employee or his counsel. The employee is bound by the decisions reached by the trade union or settlements reached with an employer; neither the employee nor counsel can exercise a veto over such actions or insist that the trade union comply with their demands.*

We would reiterate our view that an employee is not entitled to retain legal counsel to make representations every time the employee has a disagreement or difference of opinion with the trade union, or to present the bill for those legal services to the trade union as a matter of course.

We must also admit to a concern that we not encourage the view that proceedings before this Board can only be undertaken effectively when an applicant is represented by legal counsel. The Board makes considerable efforts to remain accessible to parties who are not represented by lawyers, and to conduct hearings in which a lay person can participate.

Nonetheless, there are, in our opinion, circumstances in which it is justifiable to consider a remedial order to assist an applicant with the expenses associated with legal representation. We expressed our view in our earlier Reasons for Decision that the circumstances which gave rise to this application are exceedingly unusual. As the British Columbia Board pointed out in the Kelland case, supra, not all cases in which a trade union has committed a breach of the duty of fair representation are cases in which that union has completely disqualified itself from further representation of the complainant. Similarly, not all cases in which an applicant wishes to raise complaints about defects in the procedures followed by a trade union are cases in which the applicant should be permitted to make use of legal services at the expense of the trade union.

The Board adopts the *Stewart* rationale and agrees that, in exceptional circumstances, employees may be reimbursed for the expenses they incurred in seeking legal representation prior to and during the hearing of an application under s. 25.1. In the present case, the Board is of the view that exceptional circumstances do exist to justify the payment of legal expenses incurred by the Applicant in dealing with his grievances and in making representations before this Board. The evidence before the Board indicated that the Applicant was suffering from a mental disability which rendered him ineffective in attending to his own employment problems. At 505 and 506, the Board stated:

> *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.*

It would appear to the Board to be a predictable outcome of the Union's failure to fairly represent K.H. that he would engage the services of legal counsel. K.H. was suffering from a disability that rendered him incapable of adequately representing himself or articulating his interests. K.H. engaged independent counsel initially to assist in the filing of grievances and the grievance handling and later, to represent his interests before the Board on the remedial portion of the matter. K.H. did represent himself before the Board during the main hearing, but this may have resulted more from an inability to pay for legal representation than from a desire to be unrepresented. In our view, the expenses K.H. incurred in obtaining advice and representation from Mr. Williams was a direct result of the Union's breach of its duty of fair representation, and such expenses are a monetary loss of the sort contemplated under s. 5(g) of the *Act*. The Union was aware that K.H. suffered from a mental disability and was impaired in his ability to represent himself in relation to the Union's processes. In these unique circumstances, the Board will order the Union to reimburse K.H. for the legal expenses incurred by him up to and including the hearing concluded on October 17, 1997. If the parties are unable to agree on the amount owing to K.H. the matter can be remitted to the Board for a final determination by either K.H. or the Union.

The Board was requested to order the arbitration to proceed without entertaining any preliminary objections as to timeliness, settlement, laches and the like that the Employer, but for the Board's Order,

might have raised with the arbitration board. The Board's authority to make such an Order was addressed by Chairman Ball in *Andrew Shepherd and Byron Rogers v. Saskatchewan Council for Crippled Children and Adult Employees Union et al.*, [1984] Feb. Sask. Labour Rep. 42, LRB File Nos. 248 to 251-83. In the *Shepherd and Rogers* case, the respondents raised as a preliminary objection to the jurisdiction of the Board its inability under *The Trade Union Act* to fashion an effective remedy should the Union be found in breach of its duty to fairly represent employees, particularly in light of the fact that any grievance relating to the matters would be out of time under the provisions contained in the collective agreement. The respondents argued that the Board could not order the arbitration to proceed as it did not have remedial authority to amend the time limits contained in the collective agreement. Then Chairman Ball responded to this argument at 46 and 47 as follows:

> *In the Board's opinion, Sections 5 and 42 of the Act taken together are wide enough to permit it to order that a grievance proceed to arbitration if and when a union breaches its duty of fair representation to a proposed grievor. Furthermore, the broad wording of Sections 5 and 42 of the Act do not confine the Board to making orders only with respect to parties who violate the Act. To be meaningful any order directing a review of the applicants dismissal would necessarily apply to the employer, who is already a party in this application. The actual procedure to be followed would depend upon the circumstances of the case. However, if a union has already demonstrated a failure to fairly represent employees in filing a grievance it would be unrealistic to expect it to be properly representative of those same employees in the ensuing arbitration process. For that reason any order could be structured so that the selection of a representative nominee to the Arbitration Board would be the privilege and responsibility of the employee rather than the union.*
>
> *If the Board should grant a remedy to the applicants in the circumstances of this case, it would not purport to amend, alter, or rectify the Collective Bargaining Agreement between the parties in any way. The agreement, including the mechanism contained therein for the resolution of disputes, would remain intact, unchanged and binding upon the parties. The Board would simply be exercising its statutory authority to make orders requiring compliance with The Trade Union Act. The remedy available to the applicants would have its origin in the statute and not in the Collective Bargaining Agreement.*

In all instances of a finding of a breach of the duty of fair representation, the union has compromised the grievance of the employee. The union may have failed to file the grievance within the time frame set out in a collective agreement or failed to process the grievance in accordance with the procedures set out in the collective agreement. It may have settled the grievance or withdrawn the grievance, as it did in the present case. In normal circumstances, the employer could successfully raise preliminary

objections to the jurisdiction of a board of arbitration to hear and determine the grievance based on the union's non-compliance with the provisions of the collective agreement, or legal doctrines such as laches, settlement, abandonment and the like.

The Board, however, has authority under ss. 5(c), (d), (e) and 42 to make an effective Order requiring the Union to properly represent the employee. In this instance, the Order will require the Union and Employer to refer the grievances to arbitration without challenging the jurisdiction of the arbitration board to hear and determine the grievances on their merits due to conduct on the part of the Union that constituted a breach of its duty to fairly represent K.H. Such an Order is necessary in order to permit the aggrieved employee to have his grievances heard by a board of arbitration in the manner they would have been heard but for the Union's breach of its duty of fair representation. In this instance, the grievances would not have been withdrawn and would have been referred to an arbitration board in a timely fashion. This is not to say that the arbitration board is without authority to consider the delay in processing a grievance as reason to assign a portion or all of a claim for monetary loss to the Union should the employee be successful before the arbitration board; it is not, however, a reason for refusing to hear and determine the employee's grievance.

As a final matter, the Board wishes to encourage the parties to consider resolving K.H.'s grievances without the need to proceed to arbitration. To this effect, we would direct the Employer, the Union and K.H. to engage in grievance mediation for a period of 30 days from the date of receiving the Board's Order. The Board appoints Mr. Fred Cuddington to act as mediator and directs that his fees and disbursements be paid equally by the Union and the Employer. If a resolution of the grievance is not achieved within the time set, the grievances shall be referred to arbitration. The mediator may apply to the Chairperson of the Board for an extension of the time required to conduct the mediation. K.H. is entitled to be represented in the mediation process by independent counsel and shall be reimbursed by the Union for all reasonable fees and expenses incurred in engaging legal counsel, which fees shall be calculated on the basis of the hourly rate charged by present counsel for the Union.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant and THE TROPICAL INN, OPERATED BY PFEIFER HOLDINGS LTD. AND UNITED ENTERPRISES LTD.

LRB File Nos: 305-97, 313-97, 374-97, 375-97 & 376-97; January 28, 1998
Chairperson, Gwen Gray; Members: Bruce McDonald and Terry Verbeke

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

Certification - Practice and procedure - Statement of employment - Board holds that persons who were offered employment with employer prior to date certification application filed but whose actual dates for commencing work were subsequent to filing date should not be included on statement of employment.

***The Trade Union Act*, s. 10.**

RULING ON PRELIMINARY MATTER

Background

Gwen Gray, Chairperson: The United Food and Commercial Workers, Local 1400 (the "Union") applied to be certified as the bargaining agent for employees at the Tropical Inn, North Battleford (the "Employer"). During the course of hearing evidence with respect to the statement of employment filed by the Employer, an issue arose with respect to the status of persons who were offered employment with the Employer prior to the date that the application for certification was filed, but who actually commenced work at a date subsequent to the filing of the certification application. The Union requested that the Board rule on whether or not such persons were "employees" at the time the application is filed, to avoid the necessity of the Union having to call evidence with respect to the date of hires of the employees in question. The Employer agreed that the Board could make this determination at this stage of the proceedings.

Arguments

Mr. Seiferling, Q.C., counsel for the Employer, argued that persons who are offered employment prior to the date that a certification application is filed with the Board, but who commence employment at

some subsequent date, have a sufficient connection to the workplace to justify their inclusion on the statement of employment. The purpose of s. 3 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "Act") is to permit employees to choose a bargaining agent to represent them in their employment. Such choice should be extended to persons who have been offered work, except in situations where it can be demonstrated that the employer has engaged new employees for the purpose of defeating the union's organizing campaign.

Mr. Plaxton, counsel for the Union, took the opposite position and argued that such persons should not be included on the statement of employment. Counsel referred the Board to *United Steelworkers of America v. Larcon International Inc.*, [1991] 2nd Quarter Sask. Labour Rep. 37, LRB File Nos. 158-90, 189-90 to 191-90, 235-90 & 246-90, where the Board held that six employees who were transferred to the employer's plant after the certification application was filed with the Board are not entitled to be included on the statement of employment because they were not "employed in the bargaining unit on the date that an application for certification [was] filed." Counsel cited three policy reasons supporting the Board's ruling in the *Larcon* case, *supra*: first, it avoids problems that could be caused by unscrupulous employers who will use such a hiring rule to "stack the decks" against the union; second, it is impossible for the union to know who are employees in a bargaining unit if such persons are included; and, third, the connection of such persons to the bargaining unit is too tenuous - they may be offered employment, but there is nothing to prevent the employer from withdrawing the offer.

Statutory Provisions

Section 10 of the *Act* provides 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.*

Analysis

On applications for certification, the Board consistently applies s. 10 of the *Act* by rejecting all evidence tendered after the date that a certification application is filed. This practice brings some finality to the

application for certification by confining the issue of the status of persons as employees and the issue of support for the union to a precise time frame. In addition, the selection of the filing date as the cutoff period for the determination of both issues serves to reduce the opportunities for artificially altering the make-up of the unit.

In the present case, the Employer sought to include on the statement of employment persons who were offered employment prior to the date the certification application was filed with the Board, but whose actual dates for commencing work were subsequent to the filing date. The Board holds that these persons should not be included on the statement of employment as they had not worked for the Employer on or before the day that the application for certification was filed.

There are a number of reasons for requiring persons to actually work at the workplace before including them on a statement of employment. First, it is difficult to define with any precision when a person has been offered employment. Does this occur when the employer advises the person that they have been selected for a position or when the person indicates that she or he agrees to accept the position offered by the employer? There may also be complications arising from any negotiations between the parties as to wages, working conditions, start dates and other aspects of the employment contract that result in the frustration of the relationship.

Second, persons who have been offered positions with commencement dates sometime in the future are usually unknown to the employees in the workplace and to the organizing union. Employers, generally, do not inform current employees of their intention to hire new staff in advance of the staff attending at the workplace. In the hospitality industry, such as the Employer, turnover in staff is frequent. It would seem enough of a challenge to a union's organizing drive to obtain an accurate list of those employees who are already employed at the workplace, let alone to keep track of those who have been offered employment but have not yet commenced employment. In our view, and from a labour relations point of view, a better balance is achieved by limiting the statement of employment to those employees who actually performed work at the workplace prior to the filing of the certification application. The union would have at least some opportunity for determining who is included within the scope of its proposed bargaining unit, although its knowledge will seldom be as accurate as the Employer's.

The third reason for restricting the statement of employment to those employees who have worked at the workplace before the certification application is filed is to avoid any temptation on the part of either party to artificially alter the statement of employment. The union is prevented from "salting" a statement of employment by sending its members to apply for positions during peak hiring periods; employers will be prevented from engaging new hires for the purpose of diluting the union's support.

Lastly, employees who are offered employment before a certification but who do not commence employment until a date subsequent to the date of filing have the same or less connection to the workplace as employees who are offered employment and commence work after the date the application is filed. The Board held in *Service Employees' International Union, Local 333 v. Metis Addiction Council of Saskatchewan Inc.*, [1993] 3rd Quarter Sask. Labour Rep. 49, LRB File No. 002-93, that such persons should not be included on the statement of employment, even though their employment commenced shortly after the application was filed. It would be difficult to justify on a rational basis why any distinction should be drawn between the two groups of employees. Both become "connected" to the workplace after the date the application was filed.

For these reasons, the Board is unwilling to change its policy of rejecting persons who start to work at the workplace subsequent to the date a certification application is filed from the statement of employment. Any such employees must be removed from the statement of employment. The Union agreed in this instance that one of the employees on its list of employees to be added to the bargaining unit would also be ineligible for inclusion on the statement of employment for the same reasons.

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 119, Applicant and ALBERTA INSULATION SUPPLY AND SERVICES LTD., Respondent

LRB File No: 368-97; February 11, 1998
Chairperson, Gwen Gray; Members: Donna Ottenson and Terry Verbeke

For the Applicant: Vince Engel
For the Respondent: Larry Seiferling, Q.C.

Certification - Statement of employment - Board holds that insulator foreman properly included on statement of employment.

Certification - Statement of employment - Board holds that helpers who perform work incidental to insulator's trade should be added to statement of employment

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

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Union applied to be certified for a bargaining unit comprised of "all insulators, insulator apprentices, insulator journeymen, insulator foremen" employed by Alberta Insulation Supply and Services Ltd. (the "Employer") on December 16, 1997. The Union estimated that there were 13 employees in the bargaining unit. The Employer filed a statement of employment indicating that there were 13 employees. The Union challenged the inclusion of Roy Steiger on the statement of employment, claiming that he was a superintendent. The Union also challenged the exclusion of Wendy Severin, an insulator helper. At the hearing, the Employer noted that a second helper, Henry Kantrud, was also employed at the time of the certification and argued that Mr. Kantrud's inclusion or exclusion from the bargaining unit should fall with the determination made with respect to Ms. Severin's position.

Facts

Bruce Brown, one of the partners of the Employer, testified on behalf of the Employer. He filed a weekly time sheet for the period December 14 to December 20, 1997 which indicates that 15 employees were on the payroll of the Employer. The Employer was engaged in insulating work at a Mobil oil battery station in the Swift Current district of Saskatchewan. It employed journeymen and apprentice insulators, as well as a foreman and two helpers. The foreman was engaged from the beginning of the project. The foreman, Roy Steiger, worked first on the tools. As the number of employees on the site increased, Mr. Steiger was assigned the duties of an on-site foreman. He spent his time supervising the work of other employees, dealing with the owner, and carrying out measurements of work performed. Mr. Brown testified that Mr. Steiger was not responsible for hiring, laying off or firing employees. Mr. Steiger would get his instructions directly from Mr. Brown and would communicate them to the employees on the site.

With respect to Wendy Severin and Henry Kantrud, Mr. Brown testified that both performed work related to the insulators trade - they cut bands and put insulation wrap on steam lines, in addition to performing material handling work and general clean up. They took their instructions from the journeymen insulators on the site. Neither Ms. Severin nor Mr. Kantrud are registered apprentices in the insulators' trade.

Ms. Severin testified with respect to the work performed by her and Mr. Kantrud on the site and she agreed with Mr. Brown's evidence that the work was that of an insulator's helper. She also testified that Mr. Steiger appeared to be the boss on the site and that he had hired her and laid her off. Ms. Severin testified that she was laid off from her position in the last week and she suspects it was due to her and her boyfriend's involvement in the Union.

Mr. Andrien Visser, the boyfriend of Ms. Severin, also testified. He noted that Mr. Steiger appeared to be more like a job superintendent than a foreman. According to Mr. Visser, Mr. Steiger looked after the safety concerns on the job with the owner, was responsible for laying off staff and otherwise ran the job. He also noted that Mr. Steiger was responsible for calculating the extra costs on the job. Mr. Steiger laid off Mr. Visser on two occasions on the same day. Mr. Visser believed that the lay-off was related

to Mr. Steiger's view of Mr. Visser's role in organizing the Union. Mr. Visser is a union member from Alberta.

On cross-examination, Mr. Visser agreed that he had a discussion with Mr. Steiger and another employee concerning wages on December 15, 1997. He agreed that his lay-off was effected some 6 or so weeks subsequent to the Union's organizing drive. He was cross-examined with regard to the normal role of a foreman on a unionized construction site. In this instance, he thought Mr. Steiger played a larger role for the Employer than would a journeyman foreman.

Both parties agreed that the insulation trade is not a mandatory trade under *The Apprenticeship and Trade Certification Act*, S.S. 1984-85-86, c. A-22.1.

Relevant statutory provisions

The Board must consider and apply the following provision contained in s. 2(f)(i) of *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.*

Analysis

The Board finds that the foreman, Mr. Steiger, should remain on the statement of employment and that Ms. Severin and Mr. Kantrud should be added to the list. With respect to the foreman position, the

Board set standard units in the construction industry in *Constructions and General Workers' Local Union No. 890 v. International Erectors & Riggers, a Division of Newbery Energy Ltd.*, [1979] Sept. Sask. Labour Rep. 37, LRB File No. 114-79 which included in each designated trade the position of foreman. The duties typically performed by a foreman include the day to day supervision of a construction crew, including the assignment of work and reporting on the progress of work to management. Although Mr. Steiger performs supervisory work, he does not possess or exercise authority to hire, fire, lay-off or otherwise discipline the construction employees. Accordingly, the Board finds Mr. Steiger to be an employee within the meaning of s. 2(f)(i) of the *Act*.

Ms. Severin and Mr. Kantrud were originally excluded from the statement of employment by the Employer on the basis that they performed labourer's work. The Union claimed that both were insulator's helpers. As the trade is not a mandatory trade, persons with on the job experience can qualify to write the journeyman examinations after working for a certain number of hours.

This Board in *Newbery Energy Ltd., supra,* held as follows with respect to the "helper" position:

> *At the special hearing, representations were made by a number of unions with respect to classifications of employment which are common to more than one trade such as helpers, welders, and riggers. The representations, in most cases, suggested that these classifications be specifically mentioned in the unit descriptions. The Board has declined to do so because, to do so would defeat the purpose of the Board in defining the new unit descriptions. It is the view of the Board that these and similar classifications of employment are incidental to the trade in question and when the work so performed is incidental to the trade, the person performing the function will naturally fall into the trade unit with which the work is connected.*

In this instance, the standardized bargaining unit describes the trade as including "insulators". This term is broad enough to include helpers who perform work that is incidental to the trade. The work performed by Ms. Severin and Mr. Kantrud was clearly incidental to insulator's work and they ought to be added to the statement of employment.

The Board will direct that a vote be taken among the employees in the standard insulator's bargaining unit. The voters' list will contain the names of the employees on the statement of employment, along with the names of Ms. Severin and Mr. Kantrud.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2067, Applicant and THE POWER CORPORATION OF SASKATCHEWAN (SASKPOWER), Respondent

LRB File No. 312-97; February 16, 1998
Chairperson: Gwen Gray; Members: Judy Bell and Gerry Caudle

For the Applicant: Rick Engel
For the Respondent: Brian Kenny

Arbitration - Deferral to - Board finds that essence of union's complaint concerns possible breach of collective agreement - Board defers to grievance and arbitration system to avoid duplication of decision-making on same issue.

REASONS FOR DECISION

Gwen Gray, Chairperson: The Union applied for an unfair labour practice in which it alleged that SaskPower has violated ss. 11(1)(a) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17, by unilaterally altering the terms of a negotiated medical plan. SaskPower gave notice to the Applicant and the Board that it opposed the application both on its merits and on the preliminary objection that the Board should defer its jurisdiction to an arbitration board. This ruling deals with the preliminary objection.

Facts

No viva voce evidence was led with respect to the factual underpinnings of the Union's application prior to the Board making its determination on the preliminary matter. However, in oral arguments, counsel for the Employer and the Union were in essential agreement over the facts that led to the Union's application.

SaskPower and the Union agreed to a medical services plan in the last round of bargaining. The plan was incorporated by reference into the collective agreement. A letter of agreement was also negotiated with respect to the essential features of the medical services plan. The Union alleges that the agreement required SaskPower to pay the full costs of the plan. In September, 1997, SaskPower advised the Union that the insurer had notified SaskPower of a need to increase the premiums for the plan based on its first

year of claim experience. SaskPower and the Union attempted to negotiate a resolution to the issue; however, none was forthcoming. In the end result, SaskPower decided to cover the costs of the additional premiums until November 1, 1997 at which time it reduced plan coverage to 80% of the costs of insured medical services.

The Union also filed a grievance in which it alleges that SaskPower has violated the terms and conditions of the collective agreement by unilaterally altering the medical plan coverage. This grievance has not proceeded to arbitration, although the parties have agreed to an arbitrator and are in the process of agreeing to dates to hear the arbitration.

Arguments of the Parties

Mr. Kenny, counsel for SaskPower, argued that the Board should defer its proceedings to the Board of Arbitration as the issue raised by the Union in its unfair labour practice would require this Board to determine if SaskPower had violated the collective agreement. As this matter is also before the Board of Arbitration, there is no labour relations purpose in having two bodies determine the matter. In SaskPower's view, it is more appropriate to have the matter determined by a Board of Arbitration. Alternatively, counsel for SaskPower argued that the Board could defer to arbitration while retaining jurisdiction to deal with any matters arising in the unfair labour practice application that are not dealt with or decided by the Board of Arbitration.

The Union alleges that SaskPower's conduct in unilaterally changing the terms of the medical benefits plan came at a time when the parties were set to enter into contract renewal bargaining. It alleges that the motives for engaging in such conduct were to undermine and circumvent the bargaining authority of the Union prior to the commencement of renewal bargaining. Counsel argued that the timing of the change was designed to upset the balance of bargaining in the current round of bargaining and that it was a bomb shell thrown at the Union to disrupt the Union's strength at the bargaining table. In counsel's words, the announcement of the change in benefit coverage changed the chips at the bargaining table and forced the Union to revisit a bargaining matter that it thought it had obtained in the last round. The Union also drew an analogy between Board decisions which hold that a unilateral implementation of improved wages or benefits during collective bargaining constitutes a violation of ss. 11(1)(c) and (m) and a unilateral reduction in wages or benefits during the same period. Finally,

counsel argued that SaskPower's conduct has created a hostile climate for the commencement of renewal bargaining by its conduct in making the unilateral change. The conduct has irritated the membership of the Union and made them less willing to engage in productive, peaceful and collaborative bargaining.

Analysis

The Board is of the view that it should defer its jurisdiction to the Board of Arbitration. The Union's complaint centres on SaskPower's conduct in altering the terms of a negotiated provision contained in its last collective agreement. It would seem to this Board to be impossible to determine the unfair labour practice allegations without deciding if SaskPower has breached the medical service plan provisions contained in the agreement or letter of agreement. The issue is precisely the issue that the Board of Arbitration has been asked to determine. In our view, it is appropriate to avoid duplication of decision-making on the same issue and to defer to the grievance and arbitration system when the essence of the Union's complaint concerns a possible breach of the agreement. The Board of Arbitration is in a position to provide an effective remedy to the alleged breach and can do so in an expeditious manner.

For these reasons, the Union's unfair labour practice application will be dismissed.

GORDON JOHNSON, Applicant and AMALGAMATED TRANSIT UNION, LOCAL 588, Respondent and CITY OF REGINA, Employer

LRB File No: 091-96; February 17, 1998
Chairperson, Gwen Gray; Members: Bruce McDonald and Brenda Cuthbert

For the Applicant: Cam McCannell
For the Respondent: Angela Zborosky
For the Employer: James McLellan

Duty of fair representation - Remedy - Board orders union and employer to proceed to arbitrate member's grievance on the basis that it is a timely grievance.

Arbitration - Deferral to - Board holds that issue of quantum of damages and apportionment thereof between union and employer is best left for determination by arbitration board.

Duty of fair representation - Remedy - Legal expenses - Board orders union to reimburse independent counsel for reasonable disbursements and hours reasonably spent preparing for and representing member at arbitration at same hourly rate as union pays counsel for arbitration work.

Duty of fair representation - Remedy - Legal expenses - Board declines to make order with respect to legal expenses incurred by member in Board processes - Union did not completely disqualify itself from further representation of member and member was not incapable of presenting case to union, union membership or Board.

Duty of fair representation - Remedy - Board directs employer, union and member to engage in grievance mediation for a period of 30 days from the date of receiving Board's order.

Duty of fair representation - Remedy - Legal expenses - Board holds that member entitled to representation by independent counsel in mediation process and orders union to reimburse member for all reasonable fees and expenses incurred in engaging independent legal counsel for mediation process.

The Trade Union Act, ss. 5(c), (d), (e), (f), (g), 25.1 and 42.

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: Gordon Johnson filed an unfair labour practice application against the Amalgamated Transit Union, Local No. 588 (the "Union") which alleged that the Union had failed to fairly represent him by failing to process his discharge grievance to arbitration. The Board granted Mr. Johnson's application in Reasons issued on January 14, 1997. At the same time, the Board reserved its jurisdiction to determine the remedy to be ordered. The Board, constituted with a different Chairperson, conducted a hearing on October 7, 1997 to determine the remedial Order.

For a summary of the factual background of this dispute reference can be made to the Board's decision which is reported in *Gordon Johnson v. Amalgamated Transit Union, Local 588 and City of Regina*, [1997] Sask. Labour Rep. 19.

Arguments

Counsels for Mr. Johnson and the Union agreed that the Board should order that the discharge grievance be referred by the Union and the City of Regina (the "Employer") to arbitration; that Mr. Johnson be entitled to engage legal counsel at the Union's expense; that Mr. Johnson be permitted to take the place of the Union in relation to the carriage of the arbitration, including the selection of arbitrators; and that the Board order the arbitration of the grievance without any objections being raised with respect to timeliness and other similar objections arising from the Union's failure to process the grievance.

In addition, Mr. McCannell, counsel for Mr. Johnson, argued that the Board apportion damages between the Employer and the Union with respect to the losses incurred between the time of Mr. Johnson's termination and his reinstatement. In this regard, counsel argued that the Board is in a better position to judge the Union's liability for its breach of s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "Act"). Counsel also sought payment of Mr. Johnson's legal costs for bringing the duty of fair representation application.

Ms. Zborosky, counsel for the Union, argued that an arbitration board is in the best position to judge any apportionment of damages after it determines if the grievance is sustained. If the grievance is dismissed, then there are no damages to be apportioned. Counsel also pointed out that the issue of mitigation requires determination and this Board does not have an evidentiary basis to determine if Mr. Johnson properly mitigated his loss.

Mr. McLellan, counsel for the Employer, opposed the request to have the Board apportion damages between the Employer and the Union for the same reasons argued by the Union. Counsel also opposed any Order by the Board that would restrict the Employer from raising preliminary objections to the jurisdiction of the arbitration board to hear and determine the dispute, such as delay, laches and the like.

Relevant statutory provisions

The Board must consider the following provisions which are contained in the *Act:*

> *5. The board may make orders:*
>
> ...
>
> *(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*
>
> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
>
> *(e) requiring any person to do any of the following:*
>
> > *(i) refrain from violations of this Act or from engaging in any unfair labour practice;*
> >
> > *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*
>
> *(f) requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice, or otherwise in violation of this Act;*
>
> *(g) fixing and determining the monetary loss suffered by any employee, an employer or a trade union as a result of a violation of this Act, the regulations or a decision of the board by one or more persons, and requiring those persons to pay to that employee,*

> *employer or trade union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;*
>
> *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

There is no dispute that the proper remedial order is an Order requiring the Union and the Employer to refer the grievance of Mr. Johnson to arbitration. The Board's power to make such an Order is set out in ss. 5(c), (e) and 42 of the *Act*. In *Shepherd and Rogers v. The Saskatchewan Council for Crippled Children and Adults Employees Union et al.*, [1984] Feb. Sask. Labour Rep. 42; LRB File Nos. 248-83 to 251-83, the Board addressed its remedial authority arising from a union's breach of the duty of fair representation and concluded as follows, at 46-47:

> *In the Board's opinion, ss. 5 and 42 of the Act taken together are wide enough to permit it to order that a grievance proceed to arbitration if and when a union breaches its duty of fair representation to a proposed grievor. Furthermore, the broad wording of ss. 5 and 42 of the Act do not confine the Board to making orders only with respect to parties who violate the Act. To be meaningful any order directing a review of the applicants dismissal would necessarily apply to the employer, who is already a party to this application. The actual procedure to be followed would depend upon the circumstances of the case. However, if a union has already demonstrated a failure to fairly represent employees in filing a grievance it would be unrealistic to expect it to be properly representative of those same employees in the ensuing arbitration process. For that reason any order could be structured so that the selection of a representative nominee to the Arbitration Board would be the privilege and responsibility of the employee rather than the union.*
>
> *If the Board should grant a remedy to the applicants in the circumstances of this case, it would not purport to amend, alter, or rectify the Collective Bargaining Agreement between the parties in any way. The agreement, including the mechanism contained therein for the resolution of disputes, would remain intact, unchanged and binding upon the parties. The Board would simply be exercising its statutory authority to make orders requiring compliance with the Act. The remedy available to the applicants would have its origin in the statute, and not in the Collective Bargaining Agreement.*

When ordering the parties to proceed with the arbitration of Mr. Johnson's grievance, the Board is attempting to put Mr. Johnson back to the position he would have been in but for the Union's violation of its statutory duty. On the evidence summarized by the Board in its Reasons for Decision, but for the Union's violation, it is clear that Mr. Johnson's grievance would have proceeded to arbitration in a timely fashion. The Board will therefore order the parties to arbitrate the grievance on the basis that it is a timely grievance. The Board explained its rationale for making such Orders in *K.H. v. Communications, Energy and Paperworkers Union, Local 1-S et al.*, [1998] Sask. L.R.B.R. 75; LRB File No. 015-97 as follows, at 84:

> *In all instances of a finding of a breach of the duty of fair representation, the union has compromised the grievance of the employee. The union may have failed to file the grievance within the time frame set out in a collective agreement or failed to process the grievance in accordance with the procedures set out in the collective agreement. It may have settled the grievance or withdrawn the grievance, as it did in the present case. In normal circumstances, the employer could successfully raise preliminary objections to the jurisdiction of a board of arbitration to hear and determine the grievance based on the union's non-compliance with the provisions of the collective agreement, or legal doctrines such as laches, settlement, abandonment and the like.*
>
> *The Board, however, has authority under s. 5(c), (d), (e) and s. 42 of the Act to make an effective Order requiring the Union to properly represent the employee. In this instance, the Order will require the Union and Employer to refer the grievances to arbitration without challenging the jurisdiction of the arbitration board to hear and determine the grievances on their merits due to conduct on the part of the Union that constituted a breach of its duty to fairly represent K.H. Such an Order is necessary in order to permit the aggrieved employee to have his grievances heard by a board of arbitration in the manner they would have been heard but for the Union's breach of its duty of fair representation. In this instance, the grievances would not have been withdrawn and would have been referred to an arbitration board in a timely fashion. This is not to say that the arbitration board is without authority to consider the delay in processing a grievance as reason to assign a portion or all of a claim for monetary loss to the Union should the employee be successful before the arbitration board; it is not, however, a reason for refusing to hear and determine the employee's grievance.*

The Employer's position that it is entitled to rely on jurisdictional issues such as delay or violations of mandatory time limits to prevent an arbitration board from hearing Mr. Johnson's grievance on its merits is a justifiable position if the arbitration had proceeded in a normal fashion. However, in this instance, arbitration is the remedy ordered by the Board to correct a statutory breach; it is designed to cure the harm suffered by the employee as a result of the Union's breach. As stated in the *K.H.* case, *supra*, however, the inability of the employer to prevent the arbitration of the employee's grievance on

grounds of delay or missed time limits, does not mean that an arbitration board cannot deal with the issue of delay in its remedial order by apportioning the damages between the Union and the Employer.

In this case, Mr. Johnson requested that the Board undertake an apportioning of the damages. The Board declines to take this step. The arbitration board that is convened to hear Mr. Johnson's grievances will determine if his employment was terminated in violation of the collective agreement. Until this issue is determined (setting aside the question of Mr. Johnson's claim for legal fees spent on his application), it cannot be said that Mr. Johnson has suffered any damages that are compensable by either the Employer or the Union. If the arbitration board upholds his termination, no wage loss damages are payable. The issue of quantum of damages and the apportionment thereof between the Union and the Employer are, in our opinion, best left for determination by an arbitration board.

With respect to the claim for monetary loss related to legal fees incurred by Mr. Johnson in bringing the application for an unfair labour practice under s. 25.1 of the *Act*, the Board addressed this issue in the *K.H.* case, *supra*, and held that in exceptional circumstances such claims will be allowed. In that instance, the applicant was suffering from a mental illness which impaired his ability to represent himself in relation to his employment problems. However, the Board generally adopts a cautious approach to claims for damages of this nature. In *Stewart v. Saskatchewan Brewers' Bottle & Keg Workers, Local Union No. 340*, [1996] Sask. L.R.B.R. 386, LRB File No. 025-95, the Board reviewed the practice in other jurisdictions and concluded as follows, at 395:

> *We are of the view that, like the legislation which is the basis of the decisions of the Canada Labour Relations Board and the British Columbia Labour Relations Board, the Act confers upon this Board broad powers to fashion remedies like the "make-whole" remedies described in those decisions. The powers granted to the Board in ss. 5(e) and (g) of the Act, along with the general remedial power under s. 42 of the Act, permit us a wide latitude in devising remedies which will address the losses suffered by applicants in the context of the objectives of the Act.*
>
> *In this connection, it is perhaps helpful to think of legal expenses in terms other than the notion of "costs" as it is understood in connection with proceedings in civil courts. For reasons which have been alluded to earlier, this Board has never considered it appropriate to award costs in that sense of the term as part of the determination of applications under the Act. This does not mean that there are not circumstances in which the expense of obtaining legal advice might not be part of an extraordinary "make-whole" remedy. In some cases, the essence of the infraction which is alleged by an applicant concerns the representation to which an employee is entitled under the Act. In this sense, granting some compensation for the use by an applicant of the*

services of a solicitor is more akin to compensation for a breach of fiduciary duty than to costs in their traditional sense.

As counsel for the Union pointed out, this Board has expressed some reservations about the use of private counsel by employees in their dealings with a trade union. In Brent Liick v. Canadian Union of Public Employees, [1995] 3rd Quarter Sask. Labour Rep. 78, LRB File No. 237-93, the Board made the following comment, at 102-103:

> *As we indicated in the Berry decision, supra, it is not unusual for an individual employee to seek the advice of private counsel, and it may in some circumstances be appropriate for a trade union to accept assistance from that source. As we have indicated above, however, it is the trade union which enjoys the exclusive right and obligation to represent employees in matters which concern their terms and conditions of employment, including issues related to disciplinary action. This severely restricts the role which may be played by private counsel. It is the trade union which retains control over the decisions concerning whether and how grievances should be pursued, not the individual employee or his counsel. The employee is bound by the decisions reached by the trade union or settlements reached with an employer; neither the employee nor counsel can exercise a veto over such actions or insist that the trade union comply with their demands.*

We would reiterate our view that an employee is not entitled to retain legal counsel to make representations every time the employee has a disagreement or difference of opinion with the trade union, or to present the bill for those legal services to the trade union as a matter of course.

We must also admit to a concern that we not encourage the view that proceedings before this Board can only be undertaken effectively when an applicant is represented by legal counsel. The Board makes considerable efforts to remain accessible to parties who are not represented by lawyers, and to conduct hearings in which a lay person can participate.

Nonetheless, there are, in our opinion, circumstances in which it is justifiable to consider a remedial order to assist an applicant with the expenses associated with legal representation. We expressed our view in our earlier Reasons for Decision that the circumstances which gave rise to this application are exceedingly unusual. As the British Columbia Board pointed out in the Kelland case, supra, not all cases in which a trade union has committed a breach of the duty of fair representation are cases in which that union has completely disqualified itself from further representation of the complainant. Similarly, not all cases in which an applicant wishes to raise complaints about defects in the procedures followed by a trade union are cases in which the applicant should be permitted to make use of legal services at the expense of the trade union.

In our view, this case does not present an exceptional circumstance to bring Mr. Johnson within the rule set out in the *Stewart* case, *supra*. The Union's executive committee was found by the Board in its Reasons for Decision to have acted in a supportive fashion toward Mr. Johnson and actively urged the membership of the Union to support the arbitration of his grievance. They followed the procedures which were set out in their constitution for approving the referral of a grievance to arbitration. However, the Board found that this method was arbitrary and resulted in a breach of the duty of fair representation.

In these circumstances we cannot conclude that the Union placed itself in a position of completely disqualifying itself from further representation of Mr. Johnson. Similarly, unlike the *K.H.* case, *supra*, it is not a situation where Mr. Johnson was incapable of representing his case to the Union, to the Union membership or to this Board. As indicated in the *Stewart* decision, *supra*, the Board processes are intended to be utilized by persons without legal training. The Board will take steps both prior to a hearing and during a hearing to ensure that an employee's complaint is fairly put to the Board and that the hearing is conducted in a fashion that takes into account the lack of legal training and familiarity with Board processes. As a result, no Order will issue with respect to any expenses incurred by Mr. Johnson in the Board processes.

With respect to the arbitration of the grievance, the Union and Mr. Johnson agreed that he shall be entitled to engage legal counsel at the Union's expense. The parties also agreed that Mr. Johnson shall stand in the place of the Union with respect to the selection of an arbitrator, and other similar decisions related to the processing of the grievance to arbitration. The Union, however, remains a party to the grievance as it has an interest in the proceedings, both as a party to the collective agreement and as a party that may be affected by the remedial orders of an arbitration board.

In the *K.H.* case, *supra*, the Board addressed the issue of payment of independent counsel's legal fees as follows, at 80:

> *There was no real dispute regarding the need for K.H. to engage independent counsel to represent him at an arbitration hearing. It is accepted that the Union, in this instance, has a conflict of interest in relation to K.H. The Board, however, is concerned that duty of fair representation cases not be seen as a growth industry for the legal profession and to that extent, will set guidelines for fees that are payable by the Union to independent counsel. In this instance, independent counsel shall be reimbursed by the Union for hours reasonably spent preparing for and representing*

> *K.H. at the arbitration, and for all reasonable disbursements. Counsel for K.H. shall be paid at the same hourly rate of pay that the Union pays to its counsel for arbitration work. Any dispute over the reasonableness of the fees and disbursements charged by independent counsel may be referred by either the Union or K.H. to this Board for determination. Our comments regarding counsel fees are not intended to reflect at all on the fees charged or representations made by counsel for K.H. Mr. Williams presented cogent, concise and helpful arguments to the Board on behalf of K.H. and his summary of legal expenses incurred to date by K.H. by all appearances were reasonable.*

The Board will make a similar order in this instance with respect to legal fees.

As a final matter, the Board wishes to encourage the parties to consider resolving Mr. Johnson's grievance without the need to proceed to arbitration. To this effect, we would direct the Employer, the Union and Mr. Johnson to engage in grievance mediation for a period of 30 days from the date of receiving the Board's Order. The Board appoints Terry Stevens, Executive Director, Labour Relations, Mediation and Conciliation Branch, Saskatchewan Labour, or his delegate, to act as mediator. If resolution of the grievances is not achieved within the time set, the grievances shall be referred to arbitration. The mediator may apply to the Chairperson of the Board for an extension of the time required to conduct the mediation. Mr. Johnson is entitled to be represented in the mediation process by independent counsel and shall be reimbursed by the Union for all reasonable fees and expenses incurred in engaging legal counsel, which fees shall be calculated on the basis of the hourly rate charged by present counsel for the Union.

CONSTRUCTION AND GENERAL WORKERS UNION, LOCAL 180, Applicant and SASKATCHEWAN WRITERS GUILD, Respondent

LRB File No: 361-97; February 17, 1998
Chairperson, Gwen Gray; Members: Donna Ottenson and Terry Verbeke

For the Applicant: Bob Lyons
For the Respondent: Larry Seiferling, Q.C.

Bargaining unit - Appropriate bargaining unit - Board policy - Although all employee unit more appropriate, geographical unit sufficiently appropriate to permit collective bargaining.

Employee - Status - Board holds that writer-in-residence is not employee - Granting body controls funds and local community controls hiring of writer-in-residence and chooses projects to be undertaken.

Employer - Definition - Employer exerts sufficient control over funding and administration of magazine to be identified as employer of magazine's prose editor.

***The Trade Union Act*, ss. 2(f), 2(g) and 5(a).**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Union applied to be certified for a bargaining unit comprised of all employees of the Saskatchewan Writers Guild employed between the 49th and 51st parallels. The Union claimed that there are five employees in the bargaining unit. The statement of employment filed by the Saskatchewan Writers Guild claimed that there are seven employees in the bargaining unit applied for by the Union. The employees in dispute included the *Grain* prose editor and the writer-in-residence.

Facts

Mary Drover, executive director of the Guild, gave evidence regarding the structure of the Guild and its programs. The Guild is a non-profit organization of writers that receives the bulk of its funding

for various projects through Saskatchewan Lotteries and the Saskatchewan Arts Board. Its main office is in Regina. In addition to the executive director, the Regina office employs a program director, an office administrator, a bookkeeper, a communications officer and an education administrator. The executive director is responsible for the work performed by the employees in the Regina office and she in turn reports directly to the Guild's Board of Directors. Employees in the Regina office perform functions of general programming nature for the Guild.

In addition to general programming functions that are performed out of the Regina office, the Guild also acts as an umbrella organization for *Grain* magazine, Saskatchewan Playwrights Centre and Writers/Artists Colonies.

Grain magazine employs an editor, business manager and prose editor. The editor reports directly to the Board of Directors of the Guild and she operates quite independently of the executive director. The editor and business manager of Grain are located in Saskatoon and, as a result, fall outside the unit applied for by the Union. The prose editor works out of her home in Regina. She is paid an annual sum for performing the duties of a prose editor. No employment deductions are made from the sum and she also performs other freelance editing work. *Grain* is funded through a grant from the Canada Council and from the Guild's general funds. The general programming division of the Guild provides *Grain* with information, advice, funding and accounting services.

The Saskatchewan Playwrights Centre has its own Board of Directors to whom its two employees report. The employees of the Centre work in Saskatoon and do not fall within the Union's proposed unit. Similarly, the employee of the Writers/Artists Colonies reports to a committee who in turn reports to the Guild's Board of Directors. The employee is also located in the north half of the Province, outside the Union's proposed bargaining unit.

In addition to the three arms length organizations that are described above, the Guild also is involved in applying for grants to support writers-in-residence programs in various communities in Saskatchewan. Grants to support the program are available annually from the Saskatchewan Arts Board. The program director of the Guild is responsible for organizing the grant application, locating a community for the writer to reside and developing a community based project review committee. The community committee interviews, short lists and decides which writer it will engage

through the program. It also reviews the programs undertaken by the resident writer during the term of the residency. The terms of such appointments vary from 9 months to one year. The writer enters into a contract with the Guild in which the Guild undertakes to pay the writer a bi-monthly sum in return for the writer agreeing to perform literary awareness activities in the community on a half-time basis. The writer agrees to spend the remaining time pursuing his or her own art. The Guild does not make employment deductions from the amounts paid to the resident writers, nor do they issue T-4 receipts at the end of the year. The writer is permitted to engage in other work during his or her term as resident writer. Currently, there is one resident writer under contract with the Guild who performs his work in the City of Swift Current. The Guild has included the resident writer on its statement of employment.

Relevant Statutory Provisions

The Board must consider the following provisions contained in *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.*
>
> *(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;

(g) "employer" means:

(i) an employer who employs three or more employees;

(ii) an employer who employs less than three employees if at least one of the employees is a member of a trade union that includes among its membership employees of more than one employer;

(iii) in respect of any employees of a contractor who supplies the services of the employees for or on behalf of a principal pursuant to the terms of any contract entered into by the contractor or principal, the contractor or principal as the board may in its discretion determine for the purposes of this Act;

and includes Her Majesty in the right of the Province of Saskatchewan

5 The board may make orders:

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

Arguments

Mr. Seiferling, Q.C., counsel for the Guild, argued that the Board had to either find that all seven persons named in the statement of employment are employees or hold that the bargaining unit applied for by the Union is not an appropriate unit. According to the Guild, the contracts under which the writer-in-residence and the prose editor work are ones that can be subject to collective bargaining. They define work to be performed in exchange for a contract price. The terms of the

contracts can be the subject of collective bargaining. The Guild argued that if the two positions are excluded from the bargaining unit, they would form a tag end group that would unfairly be denied the right to join a trade union of their own choosing.

Mr. Lyons, business agent for the Union, argued that the Union would not be able to bargain with respect to the terms of the contract of the writer-in-residence as those terms are set, by and large, by the terms of the Saskatchewan Arts Board grant. On this view, there would be no ability on the part of the Guild to agree to terms other than those set by the funding agency. A similar argument was made with respect to the prose editor as her contractual agreement is developed between *Grain*, which is an independent organization with an arm's length relationship to the Guild. The Union argued that, given the structure of the Guild, it would be inappropriate to include the writer-in-residence and the prose editor as employees of the Guild.

Analysis

The Board finds that, although the bargaining unit may not be the most appropriate unit, it is an appropriate unit within the meaning of s. 2(f)(i). Geographically defined bargaining units are common in the construction industry, due in part to the structure of the locals of trade unions and their territorial jurisdiction. However, outside of construction, it is more common to describe a bargaining unit as an "all employee" unit at a particular site or sites. In our view, it would be more appropriate for the Union in this instance to apply for an all employee unit of the Guild within the province or at its office in the City of Regina. However, the unit applied for is sufficiently appropriate to permit collective bargaining on a rational basis.

It remains to be determined if the writer-in-residence and prose editor are employees of the Guild. In our view, the prose editor is clearly an employee within the meaning of the *Act*. She performs editing work for *Grain* and is paid for such work. The terms of her contract with *Grain* could be the subject of collective bargaining. Although she is employed by *Grain*, the Guild exerts sufficient control through its Board of Directors over *Grain*, its funding and administration, to permit it to be identified as the employer under the *Act*

The writer-in-residence is a different matter. The contractual relationship between the writer and the Guild, while it has some of the indicia of employment, is a performing artist's contract and grant. The Guild acts as a conduit of funds from the Arts Board and other funding agencies to the communities who wish to enjoy the services of a resident writer. The community is responsible for selecting the writer and for reviewing on a regular basis the programs offered by the writer to the community. A portion of the funds paid to the resident writer must also be viewed as a grant to permit the writer to develop his or her own works.

In our view, it would be difficult to subject the terms of the writer-in-residence grant to collective bargaining under *The Trade Union Act*. The granting body controls the bulk of the funds used to pay the artist. The local community committee controls the hiring of the artist and decides the projects to be undertaken by the artist. The primary purpose of the artist-in-residence program is to help the arts flourish in local communities by enabling artists to work in a community. Although the Guild and the resident writer have a contractual relationship, in our view, it is not an employment relationship that can be easily subject to collective bargaining. The Board therefore finds that the writer-in-residence is not an employee within the meaning of s. 2(f)(i), (i.1) or (iii) of the *Act*.

As the Union did not file majority support in the proposed bargaining unit, the Board directs that a vote be conducted among the employees listed on the statement of employment, excluding the writer-in-residence.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant and ARGUS GUARD AND PATROL LTD., Respondent

LRB File No. 292-97; February 19, 1998
Vice-Chairperson, James Seibel; Members: Gerry Caudle and Ken Hutchinson

For the Applicant: Corinne Jamieson
For the Respondent: Colin Clackson

Bargaining unit - Appropriate bargaining unit - Community of interest - Board not convinced that security guards at hospital have sufficient community of interest distinct from other security guards employed by employer - Board holds that unit composed only of security guards at hospital not appropriate unit.

***The Trade Union Act*, ss. 2(a), (b), 5(a), (b), (c) and 37.1.**

REASONS FOR DECISION

Application

James Seibel, Vice-Chairperson: The United Food and Commercial Workers, Local 1400 (the "Union") filed an application pursuant to ss. 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17, to be certified as the bargaining agent for a unit of employees of Argus Guard and Patrol Ltd. (the "Employer") employed as security personnel working at Saskatoon City Hospital ("SCH"). The unit applied for is as follows:

> *all employees employed by Argus Guard and Patrol Ltd., at the City Hospital of Saskatoon, in the Province of Saskatchewan except: The Branch Manager, Operations Manager, and Field Managers constitutes an appropriate unit of employees for the purpose of bargaining collectively.*

Neither the statement of employment nor the exclusions sought were contested and the only issue at the hearing was whether or not the unit applied for is an appropriate unit for the purposes of bargaining collectively.

Background

The Union is certified as the bargaining agent for other security firm employees as follows:

- May 16, 1995 - for all employees of the Employer in locations south of the 51st parallel ("Argus South Unit");
- January 19, 1995 - for all employees of Group 5 Security Corporation in the Province of Saskatchewan;
- March 1, 1991 - for all employees of Intelicom Ltd., operating under the business names of Trojan Security Services, Associated Fidelity Investigators and K 9 Security in the Province of Saskatchewan;
- April 24, 1991 - for all employees of Inner-Tec Security Consultants Ltd. operating under the business name of Inner-Tec Security Services, in the Province of Saskatchewan ("Inner-Tec Unit"); and
- April 30, 1991 - for all employees of Metropol Security in the Province of Saskatchewan.

Evidence adduced at the hearing disclosed the following background information:

- The Argus South Unit is comprised of five or six employees located at sites in Moose Jaw and Regina;
- In Saskatoon, the Employer employs approximately 65 security guards located at approximately 30 customer locations, including 13 employees at SCH;
- The Employer's local line of authority in Saskatoon is from the Saskatoon Area Manager with an Operations Assistant, and then to the Field Managers;
- The security guards at St. Paul's Hospital ("St. Paul's") in Saskatoon are part of the Inner-Tec Unit;
- Tony Elliott, an employee of the Saskatoon District Health Board, is in charge of security for both St. Paul's and SCH; and
- The Union has recently signed a Letter of Understanding on behalf of the Argus South Unit ratifying a contract with the same terms and conditions as that which applies to the InnerTec Unit.

Union's Evidence

Glenn Stewart, Union Representative, testified that he handled the organizing drive at SCH and previously of the Argus South Unit employees. He said that it is difficult to organize security firms because their employees are located at diverse sites in various cities and across the province. In order to successfully organize the employees, he said that the Union had to "get lucky" and run into an employee who was knowledgeable about the company. This is often difficult, he said, because many of the firms' contracts and employees are temporary, citing, for example, security guards working various special occasion functions. He said that the Union could not find an employee of Argus in Saskatoon with this kind of knowledge of the Employer's operations.

Mr. Stewart testified that with respect to some of the units described above, including the Argus South Unit, the organizing drives were begun after employees responded to newspaper advertisements placed by the Union. Contact was made with the SCH guards through guards employed by Inner-Tec at the St. Paul's site.

Mr. Stewart said that the Union wanted to target SCH because the Employer's contract there was month-to-month and if it lost the contract the security guards would lose their jobs, but if the Union were certified to represent the unit, then the guards would be secure if the contractor changed.

He said that while the Employer sends the guards to SCH, Mr. Elliott controls their destiny, stating that he "decides who will stay and who goes." He said that Mr. Elliott does the scheduling, gives orders, can change the guards' duties and can discipline the guards.

Mr. Stewart said that the security guards at SCH were a distinctive group from the guards employed at the Employer's other sites as follows:

- They are a stable group rarely exchanging with guards at other sites; and
- They are trained specifically for duties at SCH, including transfer of bodies to the morgue, and patient restraint techniques;

Linda Zbetnoff, a security guard employed by the Employer for the past four years, also testified. Initially she spent a few months at the Saskatoon Exhibition grounds site, but has since been continuously located at SCH, with the exception of a few short stints, one at the Star Phoenix newspaper and a couple at the Saskatoon Centennial Auditorium. At SCH, she is one of four "senior" guards who are paid a higher hourly wage than the others.

She stated that her duties at the Exhibition location, where she mainly patrolled various buildings, including, for example, the Casino and the racetrack barns, were different than at SCH. At SCH, she said the bulk of her routine duties consist of locking and unlocking doors at prescribed times and inside and outside patrol. However, she is also required to accompany staff taking bodies to the morgue and, when necessary, to restrain agitated patients.

The security guards at SCH work shifts and, with the exception of the parking attendant guard, rotate through the inside patrol, outside patrol, and information guard duties. To her knowledge the guards at SCH do not commonly work at other sites, and guards who usually work at other locations do not commonly work at SCH except in a temporary replacement capacity.

She claimed that Mr. Elliott was in charge of the discipline of the guards at SCH rather than the Employer's Manager, Mark Donlevy. However, in cross-examination she admitted that she had never been disciplined by Mr. Elliott nor had she been present when he had disciplined anyone else. And, she agreed that Mr. Donlevy was the "final arbiter" of any disputes or other issues. While she claimed that Mr. Elliott hired and fired the SCH guards, she admitted that her only basis for this statement was that he had told her so. If a guard at SCH has any questions regarding payroll or terms and conditions of employment they direct these to the Employer.

In addition to the routine duties, or "standing orders", established by the Employer, Ms. Zbetnoff stated that Mr. Elliott assigned, and could change, the guards' duties. But she admitted that clients at other locations serviced by the Employer could also assign duties to the guards.

Five of the guards located at SCH have been there between four and ten years. According to Ms. Zbetnoff it was not common for guards located at SCH to transfer to work at other sites likely because they may not get paid as much depending on the terms of the contract between the Employer and other

customers. However, she said that since October, 1997, when Mr. Elliott arrived at SCH, perhaps five guards had left for various reasons, but she did not intimate that any of those persons had done so because of Mr. Elliott. They had all been at SCH for a year or less and would not have been in the senior guard category.

Employer's Evidence

Mr. Donlevy started with the Employer in March, 1996, as a field manager. He has been the Saskatoon Area Manager since January, 1997. He described his job duties as the hiring, training and discipline of guards, establishing the "standing orders" or routine duties at each location, quality control and customer service. He has an Operations Assistant who aids in day-to-day operations, scheduling and office duties. The Field Managers act as evening managers, inspect the various sites, deal with problems the guards may have as they arise and also perform some guard duties. The Field Managers report directly to him.

The Employer has 65 guard employees in Saskatoon located at approximately 30 customer locations. Thirteen of these employees are located at SCH. Mr. Donlevy testified that there was nothing that set apart the guards at SCH from the guards employed at any other site: they have the same hours of work, are paid in the same manner, have the same benefits, work under the same supervisory structure, receive the same basic training and require the same general qualifications, and are advanced in the job the same way.

According to Mr. Donlevy, Mr. Elliott is considered by the Employer to be "the customer" at SCH and, while all of the Employer's customers may make additions to the basic standing orders established by the Employer, they do not schedule the guards. The exception is SCH, where Mr. Elliott does the scheduling. Mr. Donlevy said that Mr. Elliott asked to do guard scheduling when he took over supervision of security at the site for the Saskatoon District Health Board in October, 1997, on the understanding that he would turn it back to the Employer when he became more familiar with his duties. He denied both that Mr. Elliott did any disciplining of guards at SCH and that he had the authority to hire and fire the guards; he said that if Mr. Elliott has a problem with a guard, he informs Mr. Donlevy and he then deals with the situation.

As part of their training, the Employer sends new hires to as many different sites as possible to gain varied experience. When a guard is initially sent to work at SCH, he said, Mr. Elliott does not decide whether or not the person will remain; rather, if Mr. Elliott perceives a problem, Mr. Donlevy attempts to correct the situation, but if a guard is removed from the site he maintained that that was his decision, not Mr. Elliott's. However, he said the Employer will consider the opinion of any of its customers as to whether they consider a guard to be suitable for their location or not, and he asks for input from all customers. According to Mr. Donlevy it is common for guards to work at various sites for holiday relief, to fill in for guards on sick leave and to work on short notice if a guard fails to show up for work.

The Employer entered in evidence the payroll records for eight guards who worked regularly at SCH for some time in 1997, which indicated when they had worked at other customer locations during that period of time. Also entered in evidence was a record indicating the job site placement of eight guards at SCH at the date of this application for certification from the period September 12, 1996 to September 12, 1997, and the Job Time Sheets for the SCH contract for the period from December 29, 1996 to December 27, 1997 indicating the dates and hours worked by all guards who had been at the site. Mr. Donlevy said that these two documents indicated the "transiency" of many of the guards at SCH. The Job Time Sheets appear to indicate that 27 individuals worked as guards either temporarily or intermittently during 1997, in addition to the guards who worked there for all or a significant portion of that time.

Mr. Donlevy stated that he visits the SCH site about once a month and, other than establishing the standing orders, he does not direct the SCH guards on a daily basis. He agreed that Mr. Elliott could amend the standing orders, but said that any customer may do so.

He also admitted that the guards at SCH perform a few tasks that are different from those performed by guards at other sites; but he said that every customer site has unique requirements, while the basic duties are the same. While agreeing that the guards at SCH may receive some additional on-site training in handling agitated patients, he claimed that was no different than on-site training they would receive at other locations as necessitated by any unique characteristics of the site. As an example, he mentioned dealing with aggressive patrons at a bar or hotel.

With respect to the wages paid to the guards at SCH, he said these were determined by the terms of the contract with SCH. Four of the SCH guard positions have a higher wage rate specified by the contract - this is an anomalous situation. Ms. Zbetnoff holds one of these "senior guard" positions.

Union's Argument

Ms. Jamieson, counsel for the Union asserted that the unit applied for was an appropriate unit, if not the most appropriate unit. There is a sufficient community of interest among the guards at SCH indicated by, *inter alia*, the following:

- Training received and duties performed that are not done by other guard personnel;
- Daily scheduling, control, and discipline of the guards at SCH by Mr. Elliott rather than by Argus managers;
- Initiation of new duties by Mr. Elliott;
- The guards at SCH have little contact with other employees at other sites or with Argus managers; and
- The wage scale for the guards at SCH is determined by the contract for that site.

It was argued that certification of this unit would not disadvantage the lateral mobility of other guards - movement of guards between SCH and other customer sites is minimal in any event and could not be considered an impediment to the company's administration. If more interchange was required in the future, any associated problems could be resolved. Counsel argued that certification of the unit would greatly enhance the job security of the guards. She said that site specific units in the security services industry have been expressly recognized by the legislature in s. 37.1 of the *Act* designating them as what she called "protected sites".

According to counsel, if the Employer lost the contract at SCH, s. 37.1 of the *Act* would ensure that the guards would not lose their jobs but would continue in employment with any new security contractor. It was stated that certification of this unit would not lead to undue fragmentation; the handful of employees south of the 51st parallel are already certified and management has agreed to accept a contract on the same terms as that in place for the employees of Inner-Tec. The Argus South Unit, though small, has been proven viable. Although the Board's policy expresses a preference for larger all-

employee units, the *Act* allows for certification of an appropriate unit even though it may not be the most appropriate unit.

It was said that it is extremely difficult to organize an employer with employees spread out at so many different locations. Counsel referred to the decision of the Board in *Hotel Employees & Restaurant Employees Union, Local 767 v. Regina Exhibition Association Ltd.*, [1986] Oct. Sask. Labour Rep. 43, LRB File No. 015-86, where the Board certified a unit comprising only the employees of the concessions department, a unit which included about two-thirds of all employees of the employer's food services department. Counsel submitted that the case recognized that, while in certain circumstances a unit of all employees would be the most appropriate, it may not be capable of being organized by the union and that the Board will exercise its discretion to balance the employees' right to organize against inconvenience or instability caused to the employer by certification of a smaller unit.

Counsel referred to the Board's recent decision in *Saskatoon 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, respecting the board's statement that the purpose of the *Act*, as expressed in s.3 of the *Act*, is to grant rights to employees to bargain collectively through unions of their own choosing. Counsel argued that to deny certification in the present case would be to ignore the primary purpose of the *Act*.

Employer's Argument

Mr. Clackson, counsel for the Employer, conceded that the issue was whether the unit applied for was an appropriate unit, but argued that it was not, given the size of the proposed unit in relation to the total number of guard employees in the Saskatoon area, and the fact that there was nothing unique about the group of employees in the proposed unit.

Counsel referred to the Board's decisions in *Canadian Union of Public Employees, Local 3287 v. Gabriel Dumont Institute of Native Studies and Applied Research Inc.*, [1997] Sask. L.R.B.R. 8, LRB File No. 192-96, and *Hotel Employees and Restaurant Employees, Local 767 v. Courtyard Inns Ltd.*, [1988) Winter Sask. Labour Rep. 51, LRB File No. 116-88, as expressions of the Board's preference for larger and fewer bargaining units in a work place.

Counsel argued that certification of the proposed unit would lead to a disparity in wages and benefits, administrative problems, impairment of the lateral movement of employees between jobsites and overall instability in the Employer's industrial relations. The viability of the proposed unit was questioned; it represents only 20 per cent of the total number of Saskatoon area employees. The Argus South Unit, while small, represented all employees in the southern half of the province. Piecemeal certifications would create a situation where the Employer would be forced to bargain with several different representatives.

It was pointed out that the Board has never certified a specific customer site in the security services industry and that the Argus South Unit is the smallest in geographical description. The Union has certified several security firm all-employee province-wide units, but did not attempt to employ the same organizing techniques in Saskatoon. It was argued that the community of interest is amongst the Employer's total Saskatoon area workforce, not the guards at SCH. Accordingly, the unit is not appropriate for stable industrial relations and efficient collective bargaining.

Union's Argument in Reply

In reply, counsel for the Union addressed only one point: that certification of the proposed unit would lead to disparity in the wages and working conditions among the Employer's Saskatoon area employees. It was argued that the legislature has implicitly contemplated and ratified such a situation occurring as a result of the effect of s. 37.1 of the *Act*.

Statutory Provisions

Provisions of the *Act* to be considered include the following:

> *2. In this Act:*
>
> > *(a) "appropriate unit" means a unit of employees appropriate for the purpose of bargaining collectively;*
> >
> > *(b) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining*

agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;

5. The board may make orders:

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

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

(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;

*37.1(1) In this section, "**services**" means cafeteria or food services, janitorial or cleaning services or security services that are provided to:*

(a) the owner or manager of a building owned by the Government of Saskatchewan or a municipal government; or

(b) a hospital, university or other public institution.

37.1(2) For the purposes of section 37, a sale of a business is deemed to have occurred if:

(a) employees perform services at a building or site and the building or site is their principal place of work;

(b) the employer of employees mentioned in clause (a) ceases, in whole or in part, to provide the services at the building or site; and

(c) substantially similar services are subsequently provided at the building or site under the direction of another employer.

37.1(3) For the purposes of section 37, the employer mentioned in clause (2)(c) is deemed to be the person acquiring the business or part of the business.

Analysis

In the *Regina Exhibition* decision, *supra*, the Board described certain factors which were relevant in considering the appropriateness of a proposed unit. It stated, at 44-45:

> *Although the most appropriate unit would likely be an all employee unit, the Board's responsibility is not to approve only the most appropriate unit, but to approve any unit that is appropriate. When determining whether a proposed unit is appropriate for the purpose of bargaining collectively no single test can be applied by the Board. Weighing against a finding of appropriateness in this case are the fact that senior management, record keeping and personnel policies are common to all employees; the adverse effect certification would have on employees' ability to move from one division to the other with common terms and conditions of employment; and the possibility of industrial instability.*
>
> *On the other hand, factors in this case that support a finding of appropriateness are: the lack of any substantial interchange of employees and product between the unit applied for (which comprises employees in concessions) and other employees in catering; the fact that for operating purposes the employer has divided its business into concession and catering divisions which would mean a minimum of inconvenience and disruption to the employer; the viability of the proposed unit for collective bargaining purposes; and the difficulty of organizing an all employee unit in a previously unorganized industry comprised largely of part-time and casual employees who are traditionally difficult to organize.*
>
> *The last mentioned factor is particularly important in this case. An all employee unit may not be a reasonable organizational requirement if it is likely to prevent organization at all. The fundamental purpose of The Trade Union Act is to recognize and protect the right of employees to bargain collectively through a trade union of their choice, and an unbending policy in favour of larger units may not always be appropriate in industries where trade union representation is struggling to establish itself. It would make little sense for the Board to require optimum long term bargaining structures if the immediate effect is to completely prevent the organization of employees.*

The issue was also addressed in the *Courtyard Inns* case, *supra*, at 51:

> *The Board has frequently stated that there is no single test for determining whether a proposed unit of employees is appropriate for the purpose of bargaining collectively. Rather, the Board considers a number of factors, including whether the proposed unit would be viable, whether it would contribute to industrial stability, whether groups of employees have a particular community of interest, whether the proposed unit would interfere with lateral mobility among employees, historical patterns of organization in the particular industry, and other concerns of the employees, the union and the employer.*

> *No two cases are exactly the same, but it is fair to say that outside of the construction industry the Board has generally preferred larger and fewer bargaining units in each workplace, with one all employee unit often considered ideal.*

Accordingly, the lists of factors mentioned in these decisions are not exhaustive of the matters that the Board may and should consider - each case must be assessed on its own merits. Indeed, any factor is relevant if it is related to the viability or rationality of the proposed unit for collective bargaining purposes.

While there is little doubt about the Board's conception of the purpose of the *Act* set forth in s. 3 of the *Act* and described in numerous decisions of the Board, that purpose is effected by the coherent and rational application of the policy objectives of the *Act*. These objectives are most often, but not always, complementary. As stated in the *Regina Exhibition* case, *supra*, at 4:

> *In effect, the Board is compelled to choose between two competing policy objectives; the policy of facilitating collective bargaining, and the policy of nurturing industrial stability by avoiding a multiplicity of bargaining units. Where the Board is of the view that an all employee unit is beyond the organization reach of the employees it is willing to relax its preference for all employee units and to approve a smaller unit.*
>
> *This does not mean however, that the Board will certify proposed bargaining units based merely on the extent of organizing. Every unit must be viable for collective bargaining purposes and be one around which a rational and defensible boundary can be drawn.*

In the present case, the Board has not been convinced that a unit of all the Employer's guard employees in the Saskatoon area is beyond the organizational capability of the Union. The Union did not attempt to use the same methods and techniques as it has used to organize the certification of much larger all-employee units of security guards. The fact that several such units have been certified by the Union belies any assertion that the nature of the security services industry, or of this Employer's operation in particular, makes organization of an all-employee unit unreasonably difficult. This is not to categorically rule out that possibility in any particular case, but the Union has not adduced sufficient evidence to convince the Board that that is the case here.

It is clear that the historical pattern of organization of the security services industry indicates that bargaining units significantly larger than the one applied for in this case have been considered

appropriate. There is no evidence that a larger unit would unreasonably inhibit union organization. The Board is not convinced that the guards at SCH have a sufficient community of interest that is distinct from the rest of the Employer's guard employees that would make it inappropriate to include them in a larger unit. The Board has serious misgivings that finding this proposed unit to be appropriate would lead to piecemeal certification of tiny units and to industrial instability.

While the *Act* requires only that the Board determine that the proposed unit is an appropriate unit, to so find in this case would mean that virtually any unit of security guards at any discrete customer location would be appropriate. The Board also has serious concerns about the effect on the future status of excluded employees, and a serious potential for an artificial disparity in wages, benefits and terms and conditions of employment between the excluded employees and those in the proposed unit. It is obvious, on the evidence, that lateral mobility of the employees would be impaired. Such considerations led the Board to dismiss the applications in *Gabriel Dumont Institute*, *supra*, *Health Sciences Association of Saskatchewan v. Prince Albert Community Clinic*, [1987] April Sask. Labour Rep. 45, LRB file No. 008-86 and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Centre of the Arts*, [1995], 4th Quarter Sask. Labour Rep. 52, LRB File No. 175-95.

Accordingly, the Board concludes that the proposed unit is arbitrary and not appropriate in the circumstances.

Finally, the Board does not agree with counsel for the Union that s. 37.1 of the *Act* has application to the present case. That section addresses the issue of the deemed sale of a business for the purposes of a s. 37 of the *Act* transfer of obligations when certain types of services provided to government institutions cease to be delivered by one employer and are subsequently delivered by another employer. The section is not related to the issue of the appropriateness of the proposed unit in this case.

The application is therefore dismissed and an Order will issue accordingly.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and ACME VIDEO INC., Respondent

LRB File Nos: 148-97 & 170-97; February 25, 1998
Chairperson, Gwen Gray; Members: Donna Ottenson and Judy Bell

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

Duty to bargain in good faith - Disclosure - Union's demand for disclosure must relate to bargaining matters at hand and employer's response can be assessed by determining if it facilitates or hinders union in developing rational, informed response to employer's bargaining position.

Technological change - Duty to bargain in good faith - Workplace adjustment plan - Disclosure - Union's request for detailed information did not relate to any proposal made by union or employer with respect to workplace adjustment plan - Employer not required to comply with union's request for disclosure.

Technological change - Duty to bargain in good faith - Workplace adjustment plan - Approach to determining if parties have bargained collectively and failed to conclude a workplace adjustment plan should be similar to approach taken under s. 11(1)(m) of *The Trade Union Act* - Must be objectively discernible signs that further bargaining not fruitful and that bargaining difficulties so entrenched that no point in trying to achieve anything further by that route.

Technological change - Duty to bargain in good faith - Workplace adjustment plan - Parties reached a point in efforts to bargain workplace adjustment plan where further negotiations not productive - Employer's efforts at bargaining genuine and bargaining at hopeless point - Employer entitled to give Minister notice and implement technological change under s. 43(10) of *The Trade Union Act*.

***The Trade Union Act*, ss. 2(b), 5(d), 5(e), 5.1, 11(1)(c), 11(1)(m), 42 and 43.**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Union was certified as the bargaining agent for employees of Acme Video Inc. (the "Employer") on May 10, 1995. The Union filed an application for an unfair labour practice alleging that the Employer had failed to bargain collectively with respect to the implementation

of a technological change contrary to ss. 11(1)(a),(c) and 43 of *The Trade Union Act*, R.S.S. 1978, c. T-17. At the same time, the Union requested the Board to issue an interim Order requiring that certain employees be reinstated by the Employer and directing the Employer to bargain collectively with the Union. The Employer filed a reply to the application in which it alleges that it has complied with the requirements of s. 43 of the *Act* in implementing a technological change.

A hearing of this matter took place on July 11, 1997 at which time the Union advised the Board that it would proceed on its unfair labour practice, and withdrew its allegations of a premature introduction of a technological change. The Union then focused its case on the allegations of a breach of ss. 43(8), (8.2), (8.3) and (10) and 11(1)(c).

Facts

Mr. Mark Hollyoak, Union representative responsible for the Acme Video employees, testified that the Union received notice of technological change from the Employer on February 28, 1997. The notice advised that 70% of the warehousing business carried on by the Employer in its Regina warehouse would be relocated to Ontario effective June 1, 1997 and that eleven employees in the bargaining unit would have their employment terminated as a result. The notice was also forwarded to the Minister of Labour.

After receiving notice of technological change, the Union forwarded the Employer a letter dated March 25, 1997 requesting that the parties engage in collective bargaining with respect to the proposed technological change in accordance with s. 43 of the *Act*. The Union's letter also proposed changes to the collective agreement and requested that the Employer provide the Union with information pertaining to the technological change. The contents of the letter, although lengthy, bear repeating:

> *Pursuant to s. 43(8) of The Trade Union Act, please accept this a formal notice to commence collective bargaining for the purpose of developing a workplace adjustment plan. Our committee is prepared to meet immediately and request dates for the commencement of that bargaining. We reference s. 43 (8.1) of The Trade Union Act.*
>
> *The following are our proposals pursuant to s. 43(8.2) of The Trade Union Act.*
>
> *As an alternative to the proposed technological change, we propose that the Acme Video/Star Movie Centre in Regina remain open, the work done by employees remain in Regina, and that all employees be retained to incorporate efficiencies into that*

operation. We have a number of proposals which we will detail for you in that regard when we commence collective bargaining and once we receive the particulars we are requesting.

We also propose the following provisions to be added to amend the existing collective agreement:

1. *In the event the Employer lays off and/or terminates any employee as a result of a decision to reduce the workforce and/or close part or all of the Acme Video/Star Movie Centre operation, employees will be placed on a salary continuance plan which will provide full wages and benefits until the employee is eligible to retire with full pension.*

2. *The Employer shall not close the Acme Video/Star Movie Centre operation before the year 2001. "Close" shall be defined as a reduction of employees of more than 30 percent of the employees employed as of February 28, 1997.*

3. *Should the Employer close the Acme Video/Star Movie Centre after the year 2001 and the Employer re-establishes a warehousing or movie centre operation of any kind in the Province of Saskatchewan within 10 years of that closure, the Employer accepts and acknowledges that this collective agreement shall apply as the minimum terms and conditions of employment for all employees and shall give 100 days' notice to the Union prior to commencement of warehousing operations or movie centres in the Province of Saskatchewan.*

4. *Effective March 25, 1997, there shall be a freeze in hiring any new employees in all operations owned and/or operated, leased and/or operated on contract with Acme Video/Star Movie Centre in the Province of Saskatchewan until such time as all employees affected by the technological change are placed in jobs equivalent in wages and benefits as well as hours of work through the Job Action Centre Program.*

5. *In all operations and places of business encompassed in article 4 above which are not unionized, employees affected by the technological change shall be placed in all new positions and/or vacancies in preference to any other person through the Job Action Centre Program and employees shall be placed in order of seniority, employee preference and shall receive wages, benefits and hours of work equal to or better than their existing wages, benefits and hours of work.*

6. *Should employees need retraining in order to qualify for any of the positions referred to in article 4 or 5 above, and employees could achieve qualification with a maximum of two years retraining, the Employer through the Job Action Centre Program, shall pay all costs of that retraining and the employer shall maintain existing income and benefits until that retraining is completed.*

7. *At any time during the period from February 28, 1997 to July 1, 2000 should an employee elect to leave their present job to accept a job with the Company,*

the Company shall pay that employee severance pay equivalent to two months pay for each year of service with the Company.

8. *At any time during the period February 28, 1997 to July 1, 2000 should an employee elect to leave the service of the Company for any reason and/or should the Company lay off and/or terminate an employee for any reason, the Company shall pay the employee severance equivalent to two months pay for each year of service.*

9. *Any and all monies payable to an employee pursuant to this Agreement shall be paid to the employee on such dates and in such manner as that employee, after receiving financial counselling through the Job Action Centre Program, chooses and so directs the Company.*

10. *Should an employee through the Job Action Centre Program, be placed in a job which receives less pay, fewer benefits and/or fewer hours than they were receiving on February 28, 1997, the Company shall pay to that employee the difference until three years have expired from the date of that placement.*

11. *All employees shall, in addition to any other monies payable pursuant to this Agreement and upon leaving their existing job, shall receive a monetary lump sum payment equivalent to all unused sick pay and vacation pay.*

12. *Should an employee be required to relocate outside Regina to accept any job required through the Job Act Centre Program or on their own initiative, the Company shall provide the following relocation expenses:*

    (a) *Four air fare packages for the employee and all affected family members to search for new accommodations in that new location.*

    (b) *Accommodation and meal allowances for all.*

    (c) *Real estate and legal fees to sell present property and to purchase new property.*

    (d) *One week with pay for the employee to arrange the move.*

    (e) *The additional cost of the difference between their existing home and a home of equivalent size and location in the new location.*

    (f) *$5,000.00 to cover cleaning cost, connection fees and other miscellaneous costs of the move.*

    (g) *All moving expenses.*

13. *The Company shall pay for all costs of a Union operated Employee Assistance Program to assist all employees and the members of their family in dealing with all aspects of the closure and its effect. Such a program shall commence and be available effective March 30, 1997.*

14. The Company shall provide the sum of $3,000.00 per employee affected for the Union to operate a Job Action Centre Program. The program shall commence effective April 1, 1997.

15. The Company agrees to co-operate with the Job Action Centre Program to the extent necessary to fulfil the obligations contained in this agreement including but not limited to:

(a) Providing all material on file on each employee.

(b) Providing job descriptions and information on all terms and conditions of employment for all vacancies, new positions and employment opportunities arising in any Company location as outlined in articles 4 and 5.

(c) Ensuring all management personnel co-operate in fulfilling the spirit and intent of this agreement.

16. The Union shall forward a weekly report on the operation of the Job Action Centre Program to a person designated by the Company and such person shall be responsible for all Company commitments pursuant to this Agreement and shall be designated the Company representative assigned to co-operate with the Job Action Centre Program.

17. The Company shall reimburse the Union for any and all costs the Union and its agents incur and that have been incurred in dealing with, handling and negotiating this agreement.

18. The Union reserves the right to bring forward additional proposals until this Agreement is ratified.

We are prepared to meet at any time to commence collective bargaining with respect to these proposals. We propose that bargaining commence the 28th day of March, 1997, at 9 a.m. in the Board Room located at 1233 Winnipeg Street, Regina, Saskatchewan.

Pursuant to our mutual obligations with respect to bargaining collectively under The Trade Union Act, we formally request the following information in order to allow us to understand your position and to effectively negotiate this workplace adjustment plan:

(i) Financial statements for the period January 1, 1991 to January 1, 1997 which identify all costs, income and profit with respect to Acme Video's operations in Saskatchewan and in particular, Star Movie Centre.

(ii) All tender letters and/or correspondence to and from Acme Video related to the technological change including but not limited to suppliers, customers, retail operations, warehousing companies, trucking and transportation companies, distribution warehouses and companies during the period January 1, 1995 to June 1, 1997.

(iii) 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 location is being transferred, leased, contracted, assigned, and/or given.

(iv) All correspondence, documents, studies, reports, memos, and minutes within the possession of anyone and/or sent to and/or from anyone in the employ of Acme Video/Star Movie Centre related to consideration of and the decision to effect this technological change during the period January 1, 1994 to March 27, 1997.

(v) All documents, correspondence, and memos as well as explanations for any and all plans with respect to the sale, lease, loan, transfer and/or operation of existing building, property, inventory, supplies, equipment and material contained within or on the property now utilized by Acme Video/Star Movie Centre in Regina.

(vi) A list of all suppliers and customers of products handled by the existing employees.

(vii) A list of all companies who handle produce for Acme Video/Star Movie Centre in the Province of Saskatchewan.

We, additionally, would like to know the answers to the following questions:

(i) Why are you proposing to effect this technological change?

(ii) What are the expected savings?

(iii) Are there plans for the closure of any retail outlets in Saskatchewan?

(iv) What have you spent on renovations, repairs, equipment replacement and technological improvements in the past five years related to the Acme Video/Star Movie Centre operation in Saskatchewan?

With respect to the information requested, we would like it no later than April 9, 1997. Your co-operation would be greatly appreciated in order to allow us to bargain collectively with you in good faith in a manner which demonstrates mutual respect for the irreparable harm, stress and fear to our members because of your proposed technological change.

The uncertainty and stress caused to the spouses and children is something we believe we have a mutual obligation to deal with immediately.

To ensure that this process is efficient, productive and expedient, you are further instructed that all written and verbal communication by anyone in your Company with respect to all matters regarding this technological change are to be directed solely to representative Mark Hollyoak.

We appreciate your kind co-operation and assistance in this matter.

The Union's request for bargaining was sent to the Employer on March 25, 1997, within the 30 day period required by s. 43(8) of the *Act*. The proposals were designed to result in the negotiation of a workplace adjustment plan, the contents of which are described in s. 43(8.2) of the *Act*. Mr. Hollyoak explained that the Union particularly wanted to explore alternatives to the proposed change and in order to explore those alternatives, it required extensive information from the Employer.

Mr. Hollyoak testified that the Union met with the Employer and was advised that the Employer's solicitor had advised the Employer that it was not required to meet with the Union, to negotiate changes to the collective agreement or to provide information to the Union of the sort requested in the Union's letter. Mr. Hollyoak indicated that the meeting lasted approximately one half hour and ended in Mr. Hollyoak reviewing the provisions of s. 43 of the *Act* with the Employer.

After the initial meeting, the Employer requested the appointment of a conciliator which is contemplated in s. 48(8.3) of the *Act*. The parties met two times with the conciliator, after which the Employer gave notice to the Minister that the parties had bargained collectively with respect to the technological change but failed to develop a workplace adjustment plan. The Employer then unilaterally implemented the technological change.

Mr. Hollyoak testified that there was no indication from the conciliator that negotiations were over. He further testified that the Employer had not indicated that it wanted to meet further with the Union or that it was willing to provide any of the information requested by the Union in its letter quoted above.

On cross-examination, Mr. Hollyoak acknowledged that Mr. Steinberg, owner of Acme Video, disclosed to the Union in the course of negotiating the first collective agreement that the warehouse operation would likely be relocated. Acme is involved in the distribution of videos and video games to mainly small accounts in all parts of Canada. Mr. Hollyoak indicated that the first agreement ran for a term of three years from July 1, 1996 to June 30, 1999. Mr. Hollyoak was uncertain as to why the Union in its letter requesting bargaining of the technological change requested the disclosure of financial information for a period that predated the certification Order.

Mr. Hollyoak acknowledged that the Union and Employer met on April 8, 1997 during which meeting Mr. Steinberg for the Employer told the Union that the company intended to move its distribution

centre to Ontario, that the move was not dictated by lack of efficiencies of the Union's members but rather by geography. The Employer advised the Union that the Ontario location put its warehouse operations in a location closer to its main markets thereby reducing shipping costs by avoiding having goods shipped to Regina only to be sent again to Ontario. Mr. Steinberg for the Employer told the Union that the move ought to have occurred two years prior but had been forestalled by the Employer out of his loyalty to Saskatchewan. Mr. Hollyoak agreed that the Employer advised the Union at the meeting that the pull to Ontario was finances - that the Employer could no longer absorb the extra costs.

With respect to the changes to the collective agreement which were proposed by the Union in its March 25, 1997 letter, Mr. Hollyoak did not agree with the suggestion of counsel for the Employer that the Employer was unwilling to amend the collective agreement. Mr. Hollyoak's recollection was that the Employer refused to discuss the proposed amendments and indicated that it had no obligation to meet with the Union and negotiate revisions to the agreement.

Mr. Hollyoak agreed that Mr. Steinberg set out in general terms the financial picture of the Employer and the financial rationale for the move. He acknowledged that Mr. Steinberg had indicated the amount spent on renovations in Saskatchewan over the past five years.

Mr. Hollyoak also testified on cross-examination that the application for an unfair labour practice was filed on May 6, 1997 in part in response to the loading of equipment and inventory in the Regina operations for shipping to the Ontario location.

The meetings with the conciliator were held on May 14th, 1997 and May 27, 1997. During this time, the Union forwarded a transition services proposal from the Hodgins Koenig Group to Mr. Steinberg for his consideration. Mr. Steinberg replied in writing to the effect that the costs of the service were beyond the means of the Employer to pay. Mr. Hollyoak agreed that Mr. Steinberg proposed to share the costs of sending employees whose jobs would be terminated to a workshop operated by SIAST.

Subsequently, a company proposal dealing with the technological change was submitted by the Union to its members without recommendation and was rejected by the membership of the Union. The Employer's proposal offered $100 per employee for vocational rehabilitation and a job search. The

Union's members voted on the proposal after the Employer sent its letter to the Minister of Labour indicating that no workplace adjustment plan had been reached by the parties.

Mr. Hollyoak agreed that the members of the Union who were affected by the technological change were finished work at the end of May, 1997.

Mr. Sorrel Steinberg testified for the Employer. He indicated that Acme Video has been in operation from 1983 and has operated a distribution system for videos and video games for small convenience stores, military bases, service stations and other similar small accounts throughout Canada. At one time, Acme also operated five retail stores in Regina but it has ceased to operate the stores as each rental lease came up for renewal due to the stiff competition from larger video stores.

Mr. Steinberg indicated that during the bargaining of the first collective agreement with the Union he mentioned more than once to the Union the likelihood of the relocation of the warehouse operation from Regina to another province. The agreement was concluded in November, 1996 and remains in place. Mr. Steinberg delivered the notice of technological change to the Union's office by personal delivery. The letter indicated that the Employer intended to relocate the eastern portion of its warehouse and distribution operations to Barrie, Ontario.

In preparation for the April 8, 1997 meeting with the Union, Mr. Steinberg prepared notes of the information he intended to impart to the Union and, at the meeting, he read verbatim from his notes. Mr. Steinberg told the Union why the Employer was relocating the work to Ontario and he outlined the financial savings that the company would achieve by the move. He denied telling the Union, as alleged by Mr. Hollyoak, that the Employer did not need to negotiate the change with it. Mr. Steinberg indicated to the Union that he was prepared to bargain and to do what it could do to deal with the impact on employees in Saskatchewan. However, Mr. Steinberg did not agree to the collective agreement amendments that were proposed by the Union in its March 25, 1997 letter. Mr. Steinberg testified that he did provide the Union with answers to the questions asked by it on page 5 of its March 25th letter. In particular, he answered why the company was proposing the change which included a discussion of the company's debt load; he outlined the expected savings; he dealt with the proposed changes in retail stores in Regina; and he outlined the renovation and improvement costs spent in Saskatchewan over the past five years.

The written text of the remarks made by Mr. Steinberg were as follows:

> *Response to RWDSU letter of March 25th*
>
> *The move to Ontario cannot be avoided. It is not in any dictated by lack of efficiency of union members. It is solely a function of geography. More than half of our dealers are east of the Manitoba border and the percentage increases every week. The population of the four western provinces is only 8 million which leaves 22 million Ontario east. Shipping charges will be reduced many tens of thousands of dollars because of the move. Union members know that all used product sold wholesale in Canada is shipped to the Toronto area. Now product is shipped back from eastern Canada, unpacked, repacked and shipped back to eastern Canada -- which is completely illogical, costly and unproductive. The change should have been made two years ago when business in Ontario started to expand. It was delay and the increased cost absorbed out of loyalty to our employees, to Regina and Saskatchewan. Such is the financial condition of the company that it is incapable of continuing to absorb the extra cost.*
>
> *We are unwilling and not required by any legislative enactment to amend the existing collective agreement. Items in your March 25th letter 1 to 18 will not be added to the current collective agreement.*
>
> *We do not agree that there is an obligation under The Trade Union Act to provide the material requested (i) to (vii).*
>
> *Additional questions*
>
> *(i) Why are you proposing to effect this technological change?*
>
> *To make it more likely that the company will survive. Our debt load is about $3.4 million, our interest and principal payments are $1,050,000. That amount is not currently being generated.*
>
> *(ii) What are the expected savings? Substantial.*
>
> *(iii) Retail outlets are likely to disappear as leases expire.*
>
> *(iv) What have you spent on renovations, repairs, equipment replacement and technological improvements in the past five years related to Acme Video/Star Movie Centre operations in Saskatchewan?*
>
> *The figure for Saskatchewan would exceed $100,000. Since Saskatchewan has not much over 3% of the population of Canada its obvious that most expenditures must occur outside of Saskatchewan.*

Mr. Steinberg confirmed Mr. Hollyoak's testimony with respect to the request for conciliation, the conciliation meetings, and the Employer's notice to the Minister of Labour. Mr. Steinberg indicated

that the Union has not responded to the offer made by the Employer through the conciliation process. He also confirmed that the eleven Regina employees were laid off on May 30, 1997 and that the Barrie plant opened on June 2, 1997.

On cross-examination, Mr. Steinberg indicated that he gave a proposal to the conciliator at the meeting on May 27, 1997. He acknowledged that he did not share his business research with the Union.

Relevant Statutory Provisions

The Board must consider the following provisions of *The Trade Union 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;*
>
> *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.

Arguments

Mr. Kowalchuk, counsel for the Union, argued that s. 43(8) permits the Union to request mid-term bargaining "for the purpose of developing a workplace adjustment plan", which under s. 43(8.2) may include provisions relating to alternatives to the proposed plan, amendments to the collective agreement, human resource planning, employee counselling and retraining, notice of termination, severance pay, early retirement options, and a bipartite process for overseeing implementation of the workplace adjustment plan. According to the Union, all of the matters listed in s. 43(8.2) are proper subject matters of bargaining once notice of technological change has been served. If the Employer refuses to bargain with respect to any of the matters listed in s. 43(8.2), it has committed an unfair labour practice under s. 11(1)(c) by failing to bargain in good faith. As a corollary, if the Employer refuses to provide information pertaining to each matter listed, the Employer has also committed an unfair labour practice under s. 11(1)(c) by failing to bargain collectively.

The Union argued that it is only able to explore alternatives to the proposed technological change if it understands the financial situation of the Employer by reviewing its financial records. It could not consider concession bargaining, for instance, if the Employer is unwilling to share financial information with the Union.

The Union also argued that the Employer cannot refuse to conclude a workplace adjustment plan without violating its obligation to bargain collectively. It cannot provide notice to the Minister of Labour under s. 43(10) before it has concluded collective bargaining. In this instance, the conciliator had not brought collective bargaining to a halt before the Employer served notice on the Minister of Labour that the parties had bargained collectively and had failed to develop a workplace adjustment plan.

The speech given by Mr. Steinberg to the Union did not, in the Union's view, meet the requirements of s. 43. Mr. Hollyoak testified that Mr. Steinberg said that he had no obligation to bargain collectively with the Union and no obligation to provide the Union with the information it requested. Counsel for the Union argued that Mr. Hollyoak's testimony was corroborated by the text of Mr. Steinberg's remarks which indicates that Mr. Steinberg said:

> *We are unwilling and not required by any legislative enactment to amend the existing collective agreement. Items in your March 25th letter 1 to 18 will not be added to the current collective agreement.*
>
> *We do not agree that there is an obligation under The Trade Union Act to provide the material requested (i) to (vii)."*

Counsel argued that those two statements constituted bargaining in bad faith.

Mr. Ball, Q.C., counsel for the Employer, argued that s. 43 requires the Employer to engage in frank and rational discussion of the proposed technological change with the Union but does not require the Employer to agree to a workplace adjustment plan. Counsel argued that, in this instance, the Employer was willing to meet with the Union, to engage in rational discussion, and to engage in conciliation. The Employer was upfront and honest in its dealings with the Union. The Employer viewed the Union's requests for information contained in paragraphs (i) to (vii) of its March 25th letter to the Employer as being unconnected to the technological change. Counsel pointed out to the Board that the March 25th letter is the Union's standard form letter which has not been tailored to deal with the technological change occurring at Acme. The Employer did propose a job counselling program for employees, it obtained information from SIAST relating to the program which it forwarded to the Union for consideration. It did not hear back from the Union with respect to the membership response to the proposal.

Counsel argued that s. 43 does not require an employer to do research to establish that it will save money from implementing a technological change. That savings could be achieved by locating the distribution centre closer to the company's main market is a matter of common sense.

Counsel submitted that collective bargaining does not take on a different meaning in s. 43. The obligation is the same throughout the *Act*. The Employer met the obligation by meeting with the Union,

by engaging in rational discussion and exchange of information, by engaging in conciliation, and by exchanging proposals for a workplace adjustment plan. The Union's long list of demands were irrelevant and absurd and were not required to be answered by the Employer.

Analysis

The central issue in this application is whether the Employer "bargained collectively with respect to a workplace adjustment plan" as is required by s. 43(8.1) of the *Act* once the Union has served notice on the Employer that it seeks to bargain with respect to a technological change. The Employer properly served notice on the Union that it intended to effect a technological change by relocating its distribution warehouse from Saskatchewan to Ontario. There is no dispute between the Union and the Employer that the relocation of the warehouse from the Regina location to Ontario constituted a technological change within the meaning of s. 43(1)(c) of the *Act:* see *United Food and Commercial Workers, Local 1400 v. Westfair Foods Ltd.*, [1991] 3rd Quarter Sask. Labour Rep. 45, LRB File No. 136-91.

"Bargaining collectively" is defined in s. 2(b) as "negotiating in good faith with a view to the conclusion of a collective bargaining agreement." The Board agrees with the position put forward by both the Union and the Employer in this case that collective bargaining has the same meaning under s. 43 as it does under other provisions of the *Act*, although its purpose is somewhat different. Under s. 43, the purpose of collective bargaining is to develop a "workplace adjustment plan", which, although it is not defined in the *Act,* has as its possible topics those items enumerated in s. 43(8.2) of the *Act.* A workplace adjustment plan may include agreements as to alternatives to the proposed technological change; it may amend the collective agreement; and it may address severance, retraining and other job loss issues.

Section 43 represents a significant expansion of the statutory requirement to bargain collectively. Prior to the introduction of s. 43, there were no provisions in the *Act* which would require an employer to bargain mid-term changes with the certified trade union. The technological change provisions are designed to expand the sphere of joint governance between a union and an employer by requiring collective bargaining when a technological change is being contemplated by the employer. The provision applies both mid-contract to permit the opening of the terms of a collective agreement to accommodate a workplace adjustment plan and during a period of renewal bargaining.

The Board has consistently held that the purpose of collective bargaining is to encourage and foster rational, informed discussion between the parties to a collective bargaining relationship. In *Canadian Union of Public Employees v. Saskatchewan Health-Care Association*, [1993] 2nd Quarter Sask. Labour Rep. 74; LRB File No. 006-93, the Board outlined its general understanding of the duty to bargain in good faith as follows at 83 and 84:

> *As this Board has had occasion to state in a number of different contexts, the duty to bargain which is imposed on both employers and trade unions under The Trade Union Act is one of the most significant, and one of the most enigmatic, aspects of the collective bargaining relationship in its legal sense. As we pointed out in our decisions in the Government of Saskatchewan case, supra, and also in a recent decision in International Brotherhood of Electrical Workers v. Saskatchewan Power Corporation, LRB File No. 256-92, when an allegation of an infraction under Section 11(1)(c) is brought before us, the Board is faced with the somewhat delicate task of evaluating the bargaining process to determine whether there is any employer conduct which endangers or threatens to subvert that process, while at the same time not intervening so heavy-handedly that the process ceases to reflect the strength, aspirations and historical relationship of the parties themselves. The distinction between process and substance has a will-o'-the-wisp quality at the best of times, but this is particularly the case where a tribunal is trying to discern whether conduct goes beyond the generous limits of the tolerable in collective bargaining, or whether it merely reflects a permissible exploitation of strength or skill by one party to gain advantage over the other.*
>
> *Canadian labour relations boards have largely resisted invitations from the parties to become more closely involved in assessing the legitimacy of bargaining positions or proposals in a substantive sense, and have limited their role almost exclusively to a critique of procedural issues.*
>
> *What is often quoted as the classic Canadian description of the duty to bargain may be found in the following statement of the Ontario Labour Relations Board in their decision in United Electrical, Radio and Machine Workers of America v. DeVilbiss (Canada) Ltd., [1976] 2 CLRBR 101, at 114:*
>
> > *Hence it is our belief that the duty ... has at least two principal functions. The duty reinforces the obligation of an employer to recognize the bargaining agent and, beyond this somewhat primitive though important purpose, it can be said that the duty is intended to foster rational, informed discussion thereby minimizing the potential for unnecessary industrial conflict.*
>
> *This description was quoted with approval in the decision of this Board in Energy and Chemical Workers Union v. Saskatchewan Power Corporation, LRB File No. 022-88. In Retail, Wholesale and Department Store Union v. Canada Safeway Ltd., LRB File No. 392-85, this Board shed some further light on the essential elements of the duty to bargain:*

> *It is well established that the duty to bargain collectively imposes an obligation on both parties to meet with the other side, to genuinely intend to resolve issues in the dispute and to make every reasonable effort to do so.*
>
> *The Board went on to observe in that case, however, that the duty, though it may require an effort to reach an agreement, does not impose "a duty to reach agreement." There are numerous decisions of this Board, as well as other boards, in which the implications have been explored of this distinction between the right not to agree to anything in particular, and the obligation to make an effort to reach agreement. Some of the issues which have been confronted in the course of this exploration have been the role of industrial conflict in bargaining, the difference between "hard bargaining" and "surface bargaining," and the extent to which parties may withdraw or alter positions taken in bargaining.*

In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Limited et al.*, [1997] Sask. L.R.B.R. 787 , LRB File Nos. 256-97, 266-97, 279-97, 308-97, and 321-97, the Board commented on its approach to determining compliance with the duty to bargain in good faith as follows at 821:

> *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."*

The present application alleges that the Employer failed in its duty to bargain collectively in two regards. First, it alleges that the Employer did not provide the Union with the information it required in order to negotiate a workplace adjustment plan. Second, it alleges that the Employer failed to fulfil the duty to bargain in good faith by making every reasonable effort to enter into a workplace adjustment plan with the Union before the Employer unilaterally implemented the technological change. The Board will consider each issue separately.

1. The Obligation to Disclose Information to the Union

The obligation to disclose information forms part of the duty to bargain in good faith. The Board set out the disclosure requirements in *Saskatchewan Government Employees' Union v. Government of Saskatchewan*, [1989] Winter Sask. Labour Rep. 52, LRB File Nos. 245-87 & 246-87, at 58 as follows:

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

In the *Government of Saskatchewan* case, *supra*, the Board found that the Government had failed to comply with the disclosure requirements. At 60, the Board concluded:

> *In the Board's view, the employers response . . . amounted to a practical refusal to provide the Union with any information at all. It did not disclose whether any decision had or had not been made that would significantly impact on the bargaining unit during the term of the collective agreement. It did not claim any confidentiality in planning, nor suggest that premature disclosure might have an adverse impact on the employer/employee relationship. In the Board's view, the response did not meet the standard of good faith expected of the parties at the bargaining table which includes an obligation to answer honestly when asked.*

The Board went on to hold in the *Government of Saskatchewan* decision that the Employer was not required to provide the Union with information that was within the Union's own knowledge, in that instance, the lists of employees employed in educational institutes certified with the Union. In addition, the Board did not require disclosure of information relating to the selection of employees for transfer out of the Union's bargaining unit. At 62, the Board stated:

> *Nevertheless, the Board is of the opinion that the information requested need not have been provided because it did not fall within the parameters respecting employer disclosure outlined above. More particularly, it was unrelated to existing terms and conditions of employment, it was not required to adequately comprehend a proposal or response at the bargaining table, and it was not something that could significantly impact upon the existing unit.*

The Board addressed the quality of an employer's response to a disclosure request in *Canadian Union of Public Employees v. Saskatchewan Health-Care Association*, *supra*, at 89 and 90:

> *This Board stated its view in the Saskatchewan and S.G.E.U. case (No. 264-87), supra, that the duty to disclose which is part of the overall duty to bargain does not require the provision of any particular information or of information in any particular form. In this case, the Employer may not have provided information which met the standard of usefulness the Union hoped for. The Employer did, however, cooperate in deciding what information was necessary to the process, and indicated a willingness to disclose further information when it becomes available. We therefore conclude that the Employer did not commit an unfair labour practice with respect to this aspect of the duty to bargain.*

In *National Labour Relations Board v. General Electric Company et al.* 418 F. 2d 736 (1969)(U.S.C.A. - 2nd Cir), the Court framed the disclosure test in the following terms:

> *The root question, as posed in the second Sylvania case, is whether the data "would significantly aid in the bargaining process." 358 F. 2d at 592. There can be no doubt that the information available would have assisted the Union here; GE committed an unfair labour practice in withholding it.*

Overall, in our view, the information requested to be disclosed must have some reasonable bearing on the union's ability to bargain intelligently with the employer. The demand must relate to the bargaining matters at hand and not amount to an overburdensome demand for information that may or may not be relevant. The employer's response to the union's request can be assessed by determining if it facilitates or hinders the union in developing a rational and informed response to the employer's bargaining position.

In this instance, the Union's request for information was contained in its March 25, 1997 letter to the Employer and consisted of two parts. The first requests numbered (i) to (vii) which are found on pages 4 and 5 of the Union's letter were sweeping in nature and the Employer refused to answer this group of questions. The Union justified its demand for the detailed information on the basis that it wished to discuss alternatives to the proposed technological change with the Employer.

It appears to the Board that the information requested by the Union in clauses (i) to (vii) is the type of information that would permit the Union to prepare an extensive business plan for the business in question. In some situations, the disclosure of information in this detailed fashion may be appropriate. For instance, if the Union or the Employer proposed concessions as part of a restructuring program to avoid a technological change, the Union might have a legitimate claim for requiring disclosure of some or all of the business information which the Union has requested in this instance. Existing financial and business information is essential for the Union to fully understand the economic impact of the concessions it may make. It is also foreseeable that such information would be required if the parties were in serious negotiations over a proposal for an employee buy-out or the use of employee investments in the business as an alternative to the technological change. Disclosure in those circumstances would be required in order to structure all of the agreements, loans and other financial instruments that are required to finalize a successful employee investment.

The difficulty which the Board has in the present case with the Union's request for detailed business information is that the request does not appear to relate to any proposal that the Union or the Employer made with respect to the workplace adjustment plan. Other than generally relating to the Union's desire to discuss alternatives to the proposed change, the request does not specifically address information needs of the Union that arise from the Employer's proposals or the Union's proposals. In our view, without more justification from the Union as to why the information was essential to its ability to bargain intelligently with the Employer, we agree with the Employer's position that it was not required to comply with the burdensome demands for disclosure contained in clauses (i) to (vii) of the Union's March 25, 1997 letter.

With respect to the second set of disclosure requests made by the Union in its March 25th letter, it is our view that the Employer provided answers to the questions posed when Mr. Steinberg read his remarks at the bargaining meeting on April 8, 1997, a copy of which remarks are repeated above. The questions related to the Employer's reasons for proposing the relocation of the warehouse from Regina to Ontario. The Employer's primary justification for the relocation of the warehouse was that it would be financially beneficial for the company to warehouse its inventory closer to its main market. Mr. Steinberg's answers in some areas were very general. For instance, when asked what are the expected savings, he answered "substantial". But in the context of assisting the Union to understand the Employer's reasons for relocating the warehouse, Mr. Steinberg's comments were sufficient.

The Board therefore finds that the Employer did not breach the duty to bargain collectively by failing or refusing to provide the Union with the information it required to bargain intelligently with the Employer.

2. Duty to Bargain Collectively for the Development of a Workplace Adjustment Plan

The second aspect of the Union's application requires the Board to determine if the Employer "bargained collectively" for the purpose of entering into a workplace adjustment plan with the Union prior to implementing the technological change. In the *Regina Exhibition Association Ltd.* case, *supra*, the Board held as follows at 822:

> *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.*

It may be useful to expand on the analysis set forth in the *Regina Exhibition Association Ltd.* case, *supra.*. The Board interprets s. 43(10)(b) as requiring as a precondition to the unilateral implementation of technological change by the employer that the parties have "bargained collectively". If collective bargaining has not occurred, notice cannot be given to the Minister without which notice the employer is unable to implement the technological change. The Board then looks to similar provisions in the *Act* to determine what will constitute "collective bargaining" in the context of s. 43. In this instance, the Board notes the similarities between the unilateral implementation of a technological change, which is contemplated by s. 43(10)(b), and the unilateral implementation of a term or condition of employment during a no contract period which is permitted by s. 11(1)(m) of the *Act*. Both provisions require, as a precondition to unilateral employer action, that "collective bargaining" has been engaged in by the parties. Section 11(1)(m) of the *Act* provides as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > *(m) where no collective bargaining agreement is in force, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in an appropriate unit without bargaining collectively respecting the change with the trade union representing the majority of employees in the appropriate unit;*

The Board has commented on the conduct that will constitute "collective bargaining" under s. 11(1)(m) in several Board decisions. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. O.K. Economy Stores (a Division of Westfair Foods Limited)*, [1994] 2nd Quarter Sask. Labour Rep. 131, LRB File No. 039-94, the Board reviewed these decisions at 143 to 147 as follows:

> *In Retail, Wholesale and Department Store Union v. Canada Safeway Ltd., LRB File No. 392-85, the Board concluded that an employer may unilaterally implement changes in terms and conditions of employment under certain circumstances without running afoul of Section 11(1)(m) of The Trade Union Act. The Board did not purport in this decision to set out an exhaustive catalogue of the situations in which this action might be taken by the employer. It is clear from the decision that, in the circumstances of that case, the Board did place considerable weight on the economic justification put forward by the employer for the changes they had made.*
>
> *The Board drew back from stating that it was necessary for the parties to reach an "impasse" in bargaining before a unilaterally-introduced change could properly occur. After considering the notion of "impasse" in the context of the distinction in American jurisprudence between "mandatory" and "permissive" subjects for bargaining, the Board made the following comment:*
>
> > *There are a number of possibilities. For example, the requirement of an impasse could exist only with respect to negotiations on those particular subjects that are unilaterally changed. It could apply to negotiations in their global sense. Or (as counsel for both parties agreed in this case) it may have no place at all under Section 11(1)(m) of the Act. If that is so, then the only apparent precondition for legitimate unilateral change would be compliance with the duty to bargain collectively respecting the change before it is made.*
>
> *We interpret this statement as meaning that the Board did not find it necessary in the Canada Safeway case to reach a definitive conclusion about the place, if any, for a concept of "impasse" in relation to the meaning of Section 11(1)(m). The Board went on to make the following observation:*
>
> > *On the facts of this particular case the question need not be decided. The Board is of the view that whether or not it was necessary for the parties to reach an impasse in bargaining before changes could be unilaterally implemented, an impasse by any standard in fact existed prior to November 18, 1985.*
> >
> > *In Taft Broadcasting Company (supra) the NLRB described the concept of "bargaining impasse" as follows at p. 27,527:*
> >
> > > *An Employer violates his duty to bargain if when negotiations are sought or are in progress he unilaterally institutes changes in existing terms and conditions of employment. (5) On the other hand,*

> *after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals. (6) Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed.*

> *It is apparent that a bargaining impasse does not necessarily require a work stoppage, and that the presence of continuing communication between the parties does not necessarily mean that there is no bargaining impasse. In this case the parties have a mature bargaining relationship, with a history of over 35 years of successful negotiation during which strikes and lockouts have been non-existent. Nothing in the evidence indicated a history of anti-union animus on the part of the employer. As already indicated, the words and conduct of the employer satisfy the Board that it maintained a genuine desire to reach agreement with the union, and made every reasonable effort to that end. Although it communicated its positions on issues being negotiated to its employees, it continued to make the union the only avenue for settlement.*

In the decision in Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Dairy Producers' Co-operative Ltd., LRB Files No. 181-89 to 186-89, 238-89 and 239-89, the Board did not discuss the relevance of the notion of "impasse" so directly. The Board made reference to the sentiments expressed by Professor Weiler in the passage quoted above from Reconcilable Differences, and made the following comment:

> *The system of collective bargaining is based on the premise that the employer has the same degree of control over his bargaining resources as the employees have over theirs. Employees are not bound to accept the terms offered by their employers. They alone can decide what kind of contract terms they want, and then actively pursue those objectives with all the risks that may involve. Likewise, the employer is entitled to decide what terms and conditions he is willing to offer and equally pursue them, mindful of the risk that entails. The market place and economic forces will determine the successful party where they disagree.*

On the other hand, though there was no direct reference to or definition of a concept of "impasse," the Board did examine the course of bargaining between the parties, and came to the following conclusion:

> *Under the present circumstances, forcing the Employer to continue to bargain the wage proposals, as suggested by unions' counsel, would serve no purpose. The Employer has made its conditions clear: it is not prepared to pay any more money in wages to employees of the applicant locals than it has already agreed to pay to other employees who have accepted an agreement. To require further bargaining on the issue of wages would result in the Employer attending meaningless bargaining sessions with the union without any hope that it could move off its wage position, thereby risking exposure to an allegation of surface bargaining.*

The Board also stated clearly that the employer had put forward no justification based on economic necessity:

> *The Employer, although it met every other requirement contained in the above quote, did not detail the economic rationale for its wage proposal to the union. It candidly admits that its wage proposal did not hinge on economic necessity but rather on the decision that, under the circumstances, it refused to pay any more in wages to the applicant locals than it agreed to pay to the 7 locals who signed collective agreements.*

The Board went on to comment as follows:

> *Our obligation is therefore to determine whether or not the Employer has "bargained collectively" as that term is defined in Section 2(b) of The Trade Union Act. "Bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement.... Bargaining collectively does not impose a duty to reach an agreement, nor does it require either side to place its best offer on the bargaining table. Both parties have... an obligation to meet with the other side, to genuinely intend to resolve issues in dispute and to make every reasonable effort to do so.*
>
> ...
>
> *In circumstances such as the present, there is no obligation on the Employer to show that it has provided the Union with its best offer, hinging on economic necessity, prior to unilaterally implementing a proposal that it has bargained to the point of stalemate with the Union.*

In Construction and General Workers v. Midway Sales (1979) Ltd., LRB File No. 302-86, there was similarly no direct discussion of whether it is necessary to find a bargaining impasse in order to relieve an employer of culpability under Section

11(1)(m), or of what would constitute such an impasse. The Board did, however, note the number of meetings which had been held between the parties before making the following comment:

> *Fortunately, the employer's approach to collective bargaining and unilateral change has not been commonplace. Its failure to identify crucial issues at the outset, to tangibly justify the economic necessity of its proposals in the context of its business, to make every reasonable and honest effort to achieve agreement with respect to each change, and to provide the union with adequate prior notice of its intention to unilaterally alter the implied terms and conditions of employment so that the union could confer with its membership and respond in whatever fashion it considered appropriate, all indicate that the employer seriously misapprehended its position under Section 11(1)(m) of The Trade Union Act.*

In Canadian Union of Public Employees v. Town of Watrous, LRB File No. 128-93, the Board did mention the issue of impasse, but it is clear from the discussion in that case that the employer had explicitly argued that an impasse had occurred.

It is difficult from reading these cases to discern clear criteria set down by this Board which indicate when an employer is entitled to implement changes on a unilateral basis. Economic necessity apparently constituted one of the grounds for dismissing the application of the trade union in Canada Safeway, supra, and was included in the list of possible reference points in the Midway Sales decision, supra. In Dairy Producers' Co-operative, supra, though the Board did allude to the economic context, economic necessity was explicitly rejected as a universal requirement for legitimate unilateral action by an employer. The overall effect of these cases, in our view, is to suggest that, while economic necessity may have a persuasive effect as part of an explanation for unilateral implementation of changes, it is not essential in all cases that an economic justification be provided.

It is also somewhat difficult to use these decisions to formulate any clear definition of the notion of impasse by the Board.

On the other hand, it is equally difficult to read the jurisprudence of the Board as supporting a claim that it is a matter of open choice to an employer to resort to unilateral implementation at any time a need is identified for economic pressure, as long as bargaining in good faith has occurred.

At 150, the Board came to the following conclusion:

It is clear from careful reading of the Board decisions cited above, however, that the Board did regard it as necessary for the employer defending a unilateral implementation to establish, by some objectively discernible signs, that further bargaining would not be fruitful and that the bargaining difficulties are so entrenched that there is no point in trying to achieve anything further by that route. In the Canada

> *Safeway decision, supra, though the Board concluded that a finding of impasse might not be required, they also found that an impasse had occurred by any standards, which spared them the necessity of describing circumstances other than impasse which might meet the requirements. In the passage quoted from the Dairy Producers' Co-operative decision, supra, an important conclusion for the Board was that "forcing the parties to continue to bargain the wage proposals... would serve no purpose."*
>
> *In the Canada Safeway case, supra, the Board stated clearly that a strike or lock-out is not the only possible indication that bargaining has outlived its usefulness to a degree which will allow an employer to implement changes without reaching agreement with the union. The Board accepts that there may be circumstances where bargaining is not serving a useful function. In University of Saskatchewan Faculty Association v. University of Saskatchewan, LRB File No. 254-88, the Board said:*
>
> > *The parties may not be obliged to meet if all they are doing is clearly restating their respective positions, there is no hope of settlement, and continued dialogue would serve no useful purpose.*
>
> *It is our view that, even if the word impasse itself is suggestive of a set of criteria which are not contained in the Saskatchewan legislation, it is not open to an employer simply to elect unilateral implementation as a means of exerting pressure on a trade union, without the existence of a situation in which it is possible for the Board, as an objective observer, to conclude that the obstacles to further bargaining are so severe that the employer is justified in taking this step.*

In our view, a similar approach should be taken to s. 43(10)(b). In order for an employer to serve notice to the Minister under s. 43(10)(b) stating that the parties have "bargained collectively and have failed to conclude a workplace adjustment plan", the employer must be able to point to some "objectively discernible signs that further bargaining would not be fruitful and that the bargaining difficulties are so entrenched that there is no point in trying to achieve anything further by that route": *O.K. Economy Stores*, *supra*.

There are a number of factors to consider in the present case. First, the Union had been advised in bargaining meetings which led up to the conclusion of its current collective agreement that a relocation of the warehouse was likely during the term of the collective agreement. Presumably, this disclosure permitted the Union to consider what collective bargaining terms it would need in order to best protect the employees who may be affected by the relocation. Whether or not the Union was able to make headway in addressing this issue in its collective agreement would depend on a variety of factors, but, at least, the Union was aware of the issue and the need to develop a bargaining strategy to deal with the possible relocation. From the Employer's perspective, the Union has had two opportunities to negotiate

provisions with respect to the relocation of the warehouse, one of which occurred during a no contract period during which the Union could engage in strike activities.

A second factor to consider is the obvious distance between the Union's proposals, which are set out above, and the Employer's position. The Union's proposals which were contained in the March 25, 1997 letter were extensive and expensive. Not surprisingly, the Employer was unwilling to accept any of the Union's proposed amendments to the collective agreement. The Employer then initiated the conciliation process during which the parties met with a conciliator from the Labour Relations, Conciliation and Mediation Branch of Saskatchewan Labour. The discussions that occur during the conciliation process are not subject to any examination before the Labour Relations Board under s. 40 of *The Trade Union Act*. However, during the conciliation sessions, the Union forwarded directly to the Employer a proposal for transition services from the Hodgins Koenig Group which the Employer rejected on the basis of its cost, which appears from the proposal, at a minimum, to cost $2,000 for counselling and resume writing although the document does indicate that discounts are available for group projects. In turn, the Employer proposed directly to the Union that it share the costs of sending the eleven employees to a SIAST workshop to assist the terminated employees find other work at a cost of $43 per employee. A further offer was made by the Employer through the conciliator which the Union took to its members. The proposal was rejected, however, the rejection was not communicated to the Employer.

In the Board's opinion, one would be hard pressed to find a more dismal set of negotiations over what should in most circumstances be a matter of mutual concern for the Employer and the Union, that is, the permanent lay-off of eleven employees. The issues facing the respective bargaining teams were hardly complicated, nor were they unexpected. Yet, agreement on providing the most minimal assistance to the eleven employees eluded these two negotiating teams. They remained far apart in their bargaining proposals despite the intervention of a conciliation officer.

In our view, the parties had reached a point in their efforts to bargain a workplace adjustment plan where further negotiations would not be productive and where there would be little point in the parties continuing to meet to discuss the matters in dispute. On the evidence presented, we conclude that the Employer's efforts in bargaining were genuine and met the standard of good faith as we set out earlier.

As the bargaining reached a truly hopeless point, the Employer was entitled to give notice to the Minister and implement the technological change in accordance with s. 43(10).

The Board therefore dismisses the Union's application.

AMALGAMATED TRANSIT UNION, LOCAL 615, Applicant and SASKATCHEWAN ABILITIES COUNCIL, Respondent

LRB File No. 335-97; February 11, 1998
Vice-Chairperson, James E. Seibel; Members: Bob Todd and Terry Verbeke

For the Applicant: Deb Hopkins
For the Respondent: Colin Clackson

Practice and procedure - Particulars - Board holds that material fact, not evidence by which party intends to prove material fact, must be disclosed in application.

Practice and procedure - Particulars - Board holds that applicant need not identify which allegations of fact will be relied upon to support each particular allegation of violation of *The Trade Union Act* and that applicant need not identify which particular sentence(s) of s. 11(1)(e) of *The Trade Union Act* is alleged to have been violated.

Practice and procedure - Rules as to pleadings and particulars relating to civil libel and slander proceedings are not appropriately applied to proceedings before Board - Board must resist adoption of rigid procedural rules in interest of ensuring fair and expedient access to its process.

***The Trade Union Act*, ss. 5.3, 11(1)(a), (b), (c), (e), 19 and 42.**

REQUEST FOR PARTICULARS: REASONS FOR DECISION

James Seibel, Vice-Chairperson: The Amalgamated Transit Union, Local 615 (the "Union") filed an unfair labour practice application which alleged that the Saskatchewan Abilities Council (the "Employer") had violated ss. 11(1)(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, C. T-17. The Employer applied to the Board for an order for the provision of particulars by the Union respecting the application.

Pursuant to ss. 5.3, 19 and 42 of the *Act*, the Union applied to amend paragraph 5 of the application to add an allegation of the violation of s. 11(1)(e) of the *Act*. The Employer has also requested certain particulars regarding this amendment. Neither party disputed the jurisdiction of the Board to hear and determine these issues.

Paragraphs 4 and 5 of the application state:

> *4. The applicant alleges that unfair labour practices (or violations of the Act), have been and/or are being engaged in by the said Employer by reason of the following facts:*
>
> > *a. On August 6, 1997, a member of the Saskatchewan Abilities Council management team, Mr. Paul Jaspar, wrote a letter to the union informing them that there were going to be changes to one of the shifts. The letter went on to propose that an hours of work agreement be signed for the affected operator. Attached to the letter was a document entitled "Office Procedures Transportation" and a proposed averaging agreement (all attached hereto as Exhibit "A");*
> >
> > *b. On or about the same day, Mr. Jaspar approached a driver, Mr. Bob Jesse, and the driver agreed to shift changes, thinking that the changes would be only a temporary situation. Mr. Jaspar said that if he ended up being short on hours, that he could work them on the weekends, thus creating a six day week for Mr. Jesse. On the first day that he drove this shift, he was sent home one and one-half hours early but his shifts were otherwise of eight hours' duration;*
> >
> > *c. Other drivers, including Neale Dafoe, Ron Denis, and Rob Gossen had their regular eight hour shifts reduced as well;*
> >
> > *d. Another driver, Greg Hrabok, was reverted from full time status to part time status in August of 1997. Mr. Jaspar made anti-union comments to Mr. Hrabok;*
> >
> > *e. Mr. Jaspar made similar comments about the union to Mr. Tony Kocay, an Executive Board member;*
> >
> > *f. The union filed grievances on behalf of all the affected workers and the workers were paid their time as if they had worked. However, the union has an ongoing concern that the employer will make individual arrangements with employees without bargaining with the union. As well, Mr. Jaspar had a conversation with one of the drivers concerning the filing of the grievance that was intimidating and coercive in nature; and*
> >
> > *g. The Executive Board of the union became aware that one of the union stewards, Mr. Lyle Grand, was engaging in what the Board viewed to be conduct unbecoming a steward. By letter dated September 19, 1997, Mr. Bichel informed Mr. Grand that he was no longer a steward (attached hereto as Exhibit "B"). On October 6, 1997, the employer wrote a letter to Mr. Bichel accusing him of coercing and intimidating Mr. Grand (attached hereto as Exhibit*

> *"C"). The union views this action as an attempt to interfere with the administration of the union.*
>
> *5. The applicant Trade Union submits that by reason of the facts herein before set forth, the said Employer has been or is engaging in unfair labour practices (or violations of the Act), within the meaning of Sections 11(1)(a), (b) and (c) of The Trade Union Act, 1994.*

Sections 11(1)(a), (b), (c) and (e) of the *Act* provide as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > *(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;*
> >
> > *(b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; but an employer shall not be prohibited from permitting the bargaining committee or officers of a trade union representing his employees in any unit to confer with him for the purpose of bargaining collectively or attending to the business of a trade union without deductions from wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purposes of such trade union;*
> >
> > *(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;*
> >
> > ...
> >
> > *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or*

> *suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*

On November 21, 1997, counsel for the Employer filed a Demand for Particulars as follows:

> *The Saskatchewan Abilities Council hereby demands particulars from the Amalgamated Transit Union, Local 615, with respect to the following matters in the above noted application:*
>
> 1. *In respect of paragraph 4 d. of the Unfair Labour Practice Application, particulars as to the date, time and place where Mr. Jaspar made the alleged anti-union comments to Mr. Greg Hrabok.*
>
> 2. *Further in respect of paragraph 4 d. of the Unfair Labour Practice Application, particulars as to what the anti-union comments were which are alleged to have been made by Mr. Jaspar to Mr. Hrabok.*
>
> 3. *In respect of paragraph 4 e. of the Unfair Labour Practice Application, particulars as to the date, time and place where Mr. Jaspar made the alleged anti-union comments to Mr. Tony Kocay.*
>
> 4. *Further in respect of paragraph 4 e. of the Unfair Labour Practice Application, particulars as to what the anti-union comments were which are alleged to have been made by Mr. Jaspar to Mr. Kocay.*
>
> 5. *In respect of paragraph 4 f. of the Unfair Labour Practice Application, particulars as to which driver Mr. Jaspar had a conversation with concerning the filing of a grievance, and the date, time and place where the alleged conversation took place.*
>
> 6. *Further in respect of paragraph 4 f. of the Unfair Labour Practice Application, particulars as to what the comments were which were intimidating and coercive in nature, allegedly made by Mr. Jaspar.*

Counsel for the Union declined to provide the information requested and replied that the Union had fulfilled its obligation which she stated to be to describe the conduct complained of in detail sufficient for the Employer to know the case it is required to meet.

Just prior to the hearing of this application, counsel for the Union advised counsel for the Employer in writing of the identity of the individual driver referred to in the last sentence of paragraph 4(f) of the application.

The Board heard oral argument and has considered the written submissions filed by the parties.

Employer's Argument

At the hearing of this preliminary application, the Employer's request for further information was made much wider than as stated in the Demand for Particulars. It was argued that the respondent is entitled to sufficient particulars to enable it to thoroughly investigate the allegations and to know the case that must be answered. It was further argued that it was not enough for the Union to make factual allegations but that the Union should be required to identify which discrete facts contained in the application were to be relied upon to support each specific alleged violation of the *Act*.

With respect to the alleged violation of s. 11(1)(a) of the *Act*, counsel argued that it was not clear from the allegations contained in the application why the impugned comments and conversation were "anti-union", intimidating or coercive, and that the Union should be required to explain how the comments attract sanctions under the *Act*. This could only be done, it was argued, by requiring disclosure of not only the nature of the comments and conversations but of the verbatim statements made by each party thereto and a description of the context in which the statements were made or the conversation took place. Counsel for the Employer also asked for disclosure of the identity of any third parties present when the alleged transactions took place. Counsel argued that where a violation of the *Act* is alleged to be based on oral statements, the Board should apply what counsel stated was the superior court rule of pleading in cases of libel and slander such as to require verbatim statement of the comments complained of.

With respect to the alleged violation of s. 11(1)(c) of the *Act*, it was argued that the application contains no facts which could support the allegation and discloses no violation of that section of the *Act*. It was argued that those portions of the application alleging violation of s. 11(1)(c) should be struck.

Counsel for the Employer did not oppose the proposed amendment to paragraph 5 of the application to add an allegation of violation of s. 11(1)(e) of the *Act*, but argued that the clause contains reference to such numerous and varied matters that the Union should be required to identify which specific part of s. 11(1)(e) is alleged to have been violated. Counsel also asked for particulars of the "union activity" that the applicant would be seeking to prove.

With respect to each of the alleged unfair labour practices, it was argued that the Union should be required to particularly identify which discrete facts contained in the application would be relied upon to support each specific alleged violation.

Union's Argument

Counsel for the Union argued that an order of the Board directing that particulars be provided was not necessary. It was conceded that the applicant in an unfair labour practice application must include facts sufficient to support an allegation that the *Act* has been violated; however, it was argued that the Employer now had particulars sufficient to investigate the matter and know the case to be met.

Counsel argued that paragraph 4 of the application contains sufficient material facts to support the relief sought. While it was conceded that details of the time, date and place of events relevant to allegations of a nature similar to those in this case are commonly provided, it was argued that the particulars requested by the Employer go far beyond what is usually required, that the request was vexatious and unnecessary, and that the Employer was not entitled to "a dress rehearsal" prior to the hearing of the application.

Nonetheless, during argument, counsel provided additional particulars as to when the alleged comments were made by Mr. Jaspar, stating that they were made "in August when Hrabok's status was changed." Also, with respect to the allegations pertaining to s. 11(1)(e) of the *Act*, counsel stated that the "union activity" was the filing of grievances by Mr. Hrabok as referred to in paragraph 4(f) of the application.

It was argued that often a set of closely related facts supports multiple violations of the *Act*, as, for example, when the discharge of an employee for union activity, a violation of s. 11(1)(e) of the *Act*, may also constitute intimidation under s. 11(1)(a).

Counsel argued that disclosure in the application of statements or conversations verbatim is not necessary and would require that the person who completes the application under statutory declaration state under oath that those *exact* words were spoken by someone else in circumstances where they were not present and have no personal knowledge.

Analysis

The function of pleadings in civil proceedings is to define the issues in controversy, to give notice of the case the opposing party must meet, to aid the trier of fact in its investigation of the truth of the allegations and to form a record of the issues: See, McKeague and Voroney, *The Queen's Bench Rules of Saskatchewan: Annotated*, p. 158. Clearly the Board's process of application and reply are designed to fulfill a similar function while maintaining ease of access, flexibility and less formality in its process than exists in the superior courts. It is the result of a balancing of the interests of expedient decision-making and procedural fairness.

In proceedings before the Board there is no formal pre-hearing discovery process. Parties have sometimes attempted to take advantage of this, but the Board's general policy has been to discourage "trial by ambush" by encouraging pre-hearing disclosure on a voluntary basis which has served to alleviate some of the delay and confusion which may occur because of inadequate disclosure prior to hearing.

The Board requires that an applicant identify the basis of its case with reasonable particularity and precision. Indeed, Form 2, as prescribed for use in unfair labour practice applications by Saskatchewan Regulations 163/72, provides that paragraphs 4 and 5 state as follows:

> 4. *The applicant alleges that an unfair labour practice (or violation of the Act) has been and/or is being engaged in by the said _____ by reason of the following facts:_____*
>
> ***(Here state clearly and concisely all relevant facts indicating the exact nature of the practice or violation complained of.** Additional material in the form of Exhibits properly verified by statutory declaration may be included).*

> 5. *The applicant _____ (corporate or trade union) submits that by reason of the facts hereinbefore set forth the said _____ has been or is engaging in an unfair labour practice (or a violation of the Act) within the meaning of Section _____ of The Trade Union Act, 1972.*
>
> (Emphasis added.)

Given that the application is in the form of a statutory declaration, an applicant is well-advised to exercise care in its drafting. However, there is a wide variation in the composition of applications filed with the Board. The Board exercises considerable latitude in this regard and is mindful that it should not make rigid rules that unduly restrict access to its process while ensuring procedural fairness for all parties.

This is not to say, however, that a party is relieved of an obligation to sufficiently disclose its case so that the other party is not taken by surprise. As the Board stated in *International Brotherhood of Electrical Workers, Local 529 and 2038 v. Saskatchewan Construction Labour Relations Council, Inc.*, [1982] Oct. Sask. Labour Rep. 43, LRB File No. 323-82, 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.*

This principle was referred to in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Companies Inc.*, [1993] 1st Quarter Sask. Labour Rep. 25, LRB File No. 009-93, where the Board stated, at 257-58:

> *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.*

To this, the Board further added, 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, 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 objective of efficacy and timeliness in our proceedings.*

In the present case, the application alleges that the Employer or its agent made statements that were "anti-union". The identities of the maker and recipients of the statements have been disclosed but the application does not provide any precision as to when the statements are alleged to have been made or the nature or content of the statements beyond the vague assertions that they were "anti-union" or "intimidating and coercive". During the course of argument, counsel for the Union as much as conceded that it was not unusual for the Board to require that the time and place of the making of material statements be disclosed. Indeed, at the hearing, counsel for the Union verbally gave further

particulars as to when certain of the statements were made. In terms of enabling the Employer to investigate and to prepare its case, this would only seem reasonable in the circumstances.

On the other hand, counsel was adamant that no further particulars are required. We cannot agree. Given only the information contained in paragraph 4 of the application, it may not be possible for Mr. Jaspar to identify the material transactions or statements. The description of the statements as "anti-union" and "intimidating and coercive" with nothing further is simply too vague. What one person perceives to be intimidating may leave no impression on the memory of another, and further reasonable detail is required in order for the Employer to identify the crucial statements. With respect to paragraphs 4(d), 4(e) and 4(f) of the application, this must include the time when and place where the statements were made and the conversation took place with as much exactitude as possible, and a reasonably clear and concise description of the nature and content of the impugned statements themselves to the degree necessary to enable identification of the transactions in question.

As the Board stated in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Ltd.*, [1995] 2nd Quarter Sask. Labour Rep. 288, LRB File Nos. 246-94 and 291-94, at 292:

> *We cannot accept the argument of counsel for the Union that his obligation is only to outline the general nature of his allegation to the Employer in response to a request for particulars. Such a response must make it clear exactly what case the opposing party has to meet, and this includes allusion to facts which will be used in support of that case. Counsel for the Union was not obliged to give a detailed rundown of the evidence he would call. He should, however, have indicated what basic facts he would use to make out his allegation of discrimination, including the identity of employees whose circumstances would form part of his case. In our view, it would be inconsistent with the rules of procedural fairness to provide anything less.*

We do not agree that this requirement would demand that the person who completed the application would have to declare the absolute truth of the allegations as to what was said. Rather, the declaration required by Form 2 is:

> *That the submissions are, in so far as they are matters of fact, true to the best of [the declarer's] information, knowledge and belief, and, in so far as they are matters of opinion, are verily believed by [the declarer].*

This does not restrict any witness in their testimony except perhaps the declarer. The Board recognizes that the declarer is not necessarily the person or only person who may testify as to what was actually said. The requirements of the Regulations do not prevent an applicant from adducing evidence beyond simply reiterating the contents of the application. Form 2 requires clear and concise statement of "all relevant facts indicating the exact nature of the practice or violation complained of" - prolixity is not to be encouraged but sufficiency of detail is. Material facts, but not evidence, must be disclosed. Hence, a declaration of the exact words complained of verbatim is not necessarily required, but a reasonable description of the content and nature of the impugned statements is. This is not to say that a party may never be required to disclose statements verbatim -- each case must be individually assessed -- but in the present case, this is not necessary to fulfill the purpose of the pleadings or to ensure natural justice.

We do not agree with counsel for the Employer that the particulars must describe the context in which the statements were made; generally that is not required to identify the material transaction and is not relevant to the purpose of pleading. Perception is an individual matter and Mr. Jaspar will have his own perception of the context in which he spoke. What is required on an application to the Board is a statement of material facts which establish a basis for the allegations. A material fact is distinguished from the evidence by which a party intends to prove the material fact.

We also do not agree with counsel for the Employer that the Union must identify which discrete allegations of fact will be relied upon to support each particular allegation of violation of the *Act*, nor that the Union must identify which sentence or phrase in s. 11(1)(e) of the *Act* is particularly alleged to have been violated. In our view the application leaves no serious doubt on this issue. That aside, there may be situations where alleged multiple violations of the *Act* are so confusing that they will be scheduled separately for hearing as was done in *WaterGroup*, *supra*. We agree with counsel for the Union, however, that the issues in the present case, while several, do not approach the complexity of those in *WaterGroup*, where the Board found, at 258-59:

> *... The real problem that this application raises, and the real issue that the Board must determine, is how many unfair labour practices or issues can be combined into one hearing without producing confusion and perhaps a hearing too complex for effective decision making.*
>
> *The Board's policy on the number of unfair labour practices which a union may include in a single application has always been permissive but it has not been absolute or unlimited. When the Board is required to exercise its discretion, it essentially becomes a question of balancing the interests which are at stake. On the one hand, the*

> *Board must ensure that the respondent's right to prepare and present a defence is not prejudiced by the joining of a multitude of issues in one hearing. On the other hand, if the issues can conveniently be heard together, the Board must avoid putting the applicant to the unwarranted expense of separate proceedings. The Board must also be careful to avoid the possibility on inconsistent results, which may arise if issues which involve common questions of fact or law are not kept together for the purpose of hearing.*
>
> *When the Board does exercise its discretion and limit the number of issues that it will hear together, it will usually do so by ordering separate hearings, rather than severing part of an application, and requiring a new application to be brought. In other words, there is still only one application, but there will be several hearings.*
>
> *In this case, the Board has concluded that several important interests raised here, specifically the respondent's right to prepare and present a defence, and the Board's duty to ensure that the proceedings do not become so complex and confusing as to prevent effective decision making, require that the numerous issues raised by this application be separated for hearing. Although some of the allegations may involve overlapping questions of fact and/or law, they may also involve different principles of law or issues of fact that must be established by distinct testimony. To proceed with all of the matters raised in this application at once would likely lead to confusion on the part of the respondent, thereby prejudicing its ability to present a defence, and also to confusion on the part of the Board when it comes time to apply the evidence, or even the argument, to the appropriate issue.*

In our view, the present case does not present a similar problem. Further particulars respecting the alleged violation of s. 11(1)(e) are not required. With respect to the request by the Employer that the Board strike that part of the application alleging violation of s. 11(1)(c) of the *Act*, we decline to do so. The Union has alleged facts in the application sufficient to establish a basis to allege a violation of that provision. Whether the facts can be proven is an entirely different matter, but the Union is not required to set out the evidence by which it intends to prove those facts. No further particulars are required for the Employer to meet the allegation of violation of s. 11(1)(c) of the *Act*.

Finally, with respect to the application for particulars as a whole, we do not agree that the rules as to pleadings and particulars that apply to civil libel and slander proceedings in superior court are appropriate to proceedings before the Board. The sufficiency of the information contained in an application or reply must be assessed on a case by case basis. The Board must resist the adoption of rigid procedural rules in the interests of ensuring fair and expedient access to its process.

Accordingly, the Board will make an Order that:

1. Paragraph 5 of the application is amended to add reference to s. 11(1)(e) of the *Act*;

2. Within 10 days of the date of these Reasons for Decision, the Union is directed to provide the Employer with particulars as follows:

   a. With respect to paragraph 4(d) of the application, particulars of the date, time and place of the making of the comments to Mr. Hrabok and reasonable particulars of the content and nature of the comments;

   b. With respect to paragraph 4(e) of the application, particulars of the date, time and place of the making of the comments to Mr. Kocay and reasonable particulars of the content and nature of the comments;

   c. With respect to paragraph 4(f) of the application, particulars of the date, time and place of the conversation with Mr. Gossen and reasonable particulars of the content and nature of the conversation.

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

LRB File Nos: 018-97 & 031-97; March 2, 1998
Chairperson, Gwen Gray; Members: Judy Bell and Donna Ottenson

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

Remedy - Interim order - Board amends interim order to permit employer and union to apply letter of understanding to positions reclassified to management and professional level classifications - Board asks employer to file correspondence indicating persons and positions affected by ruling.

Remedy - Interim order - Board declines to amend interim order to enable union and employer to complete scope review process as would require employer to take side of that union in the dispute over boundaries between bargaining units.

Remedy - Interim order - Board orders employer to provide job descriptions and other information pertaining to work performed in disputed positions to both unions if requested by either union.

***The Trade Union Act*, ss. 5.3 and 42.**

REASONS FOR DECISION

Background:

Gwen Gray, Chairperson: The Professional Institute of the Public Service of Canada ("PIPSC") applied to be certified for a group of employees in the public service of Saskatchewan in the classifications known as the management level 1 to 9 and professional level 1 to 9 on February 7, 1997 (LRB File No. 018-97). PIPSC also applied for an unfair labour practice and sought interim and final orders preventing the Employer and the Saskatchewan Government Employees' Union ("SGEU") from continuing to conduct and implement a scope review process which had been negotiated between the Employer and SGEU. The Board issued an interim Order with respect to the unfair labour practice application on March 6, 1997, which reads as follows:

THE LABOUR RELATIONS BOARD, pursuant to ss. 5.3 and 42 of The Trade Union Act, hereby ORDERS that:

a) 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;

b) 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;

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

d) 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;

e) 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;

f) 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;

g) 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.

On July 15, 1997, the Board determined that a bargaining unit comprised of some or all of the middle managers employed by the Employer constituted an appropriate unit for collective bargaining. The Board also issued Reasons on January 12, 1998, granting intervenor or interested party status to the Saskatchewan Government Employees' Union ("SGEU") with respect to the hearing of the remaining portions of the certification application.

On November 24, 1997, the Employer sought directions from the Board as to whether certain employees in the Department of Highways who occupy positions that have recently been reclassified

within the management level and professional level series, but whose positions are also covered by a letter of understanding between SGEU and the Employer, should remain in the SGEU bargaining unit or be treated as falling outside the SGEU bargaining unit. This matter was heard January 16, 1998.

On February 11, 1998, SGEU filed a request with the Board to delete the first paragraph of the March 6, 1997 interim Order in order to permit SGEU and the Government to finalize the first part of the scope review process that entails the determination between the Employer and SGEU of whether particular positions are in or out of scope of the SGEU bargaining unit based on an agreed set of criteria. SGEU did not seek Board permission to implement the findings of its scope review. SGEU filed an Affidavit of Dorian Hassard in support of its application. This matter was heard by the Board on February 20, 1998.

These Reasons will address the issues raised by the Employer's November 24, 1997 request for directions to the Board and SGEU's February 11, 1998 request for an amendment to the March 6, 1997 interim Order.

1. Letter of Understanding #245

The essential facts of the main applications were set out by the Board in its March 6, 1997 and July 15, 1997 Reasons: see [1997] Sask. L.R.B.R. 133 and [1997] Sask. L.R.B.R. 530, respectively.

Mr. Bogdasavich, Q.C., counsel for the Employer, advised that a situation arose in the Department of Highways that created a conflict for the Employer between its obligation to follow the Board's March 6, 1997 interim Order and its obligation to comply with a letter of understanding #245 ("LU #245") entered into between it and SGEU. LU #245, which was entered into in July, 1995 before PIPSC filed its certification application, addresses the classification of positions in the interim period before the scope review is fully implemented. It provides as follows:

> ***Re:*** ***Classification of Positions Prior to Implementing the New In-Scope Class Plan***
>
> *The following conditions are established in order to enable classification of positions prior to the implementation of a new in-scope class plan. Therefore, these conditions are established as temporary measures and only apply to specific, current in-scope*

positions and new positions created following the establishment of this agreement. The conditions are:

1. *In instances where the Commission determines a position exceeds the intent of existing in-scope class specifications, but does not meet the out-of-scope criteria as defined by The Trade Union Act, such position will be classified using the Management and Professional class plan criteria.*

2. *Levels 1 to 8 of the Management and Professional plan salary structure will be converted to hourly rates and the appropriate monthly rates will be calculated based on the hours of work designation of the new class, as assigned by management. Annual increments of four percent (4%) will apply, subject to range maximum.*

3. *All other in-scope conditions of employment as per the PS/GE collective agreement apply.*

4. *The appropriate working title will be utilized for the class title and a new class number will be assigned.*

5. *Classification appeals will be heard by the Commissioners of the Public Service Commission.*

6. *Knowledge, skills and abilities (KSA's) may have to be established in certain circumstances where these new classes are utilized. These KSA's will be based on the Management and Professional class plan and the job description.*

7. *This letter of understanding is to remain in force and effect until such time as the scope review is completed and the new scope class plan is in place.*

In the Department of Highways, several in-scope positions have been reclassified into the management level and professional level class plan. The work performed has been determined to exceed the existing in-scope classification plan. Under LU #245, the positions would be reclassified using the management level and professional level class plan, but the positions would remain within the SGEU bargaining unit.

Counsel for the Employer pointed out to the Board that the statement of employment filed on LRB File No. 018-97 lists in schedule B 14 positions which are classified under the management level and professional level class plan but which are occupied currently by SGEU members in accordance with LU #245.

Mr. Engel, counsel for SGEU, noted that the position titles for the positions in question remain the same as they were under the SGEU agreement. However, the reclassification results in a change of pay for

the positions to reflect the increased scope of their duties. In all other respects, the employees fall under the SGEU agreement. The overall process of the scope review will result in a point rated system which will correspond to certain pay grids. LU #245 is merely an interim measure to deal with the wages to be paid to reclassified and new positions that fall under LU #245.

With respect to the positions that fall under LU #245, counsel for SGEU argued that the placement of those positions within the SGEU bargaining unit does not prejudice PIPSC's application for certification. The support calculation for PIPSC will be made on the basis of the support demonstrated by employees in its proposed bargaining unit who were employed both on the date the application for certification was made and the date the vote is held, if a vote is necessary.

Counsel argued that even if the positions in question were found by the Board to be included within the unit applied for by PIPSC, the employees would not be entitled to vote on the representation issue if they commenced employment in the position after the date the application was filed. Counsel argued that the Board should permit the status quo that was established between SGEU and the Employer prior to the certification application of PIPSC to remain in effect in order to avoid unnecessary disruptions to the employees in question.

Mr. Wilson, counsel for PIPSC, argued that the reclassification of any position into the management level and professional level class plan brings the position within the scope of the unit applied for by PIPSC. PIPSC opposes the use of LU #245 to permit SGEU to sweep management level and professional level positions into SGEU's bargaining unit. Counsel reminded the Board that the management level and professional level positions have always been out-of-scope of SGEU's bargaining unit. PIPSC also takes the position that the Government improperly accelerated the scope review process in conjunction with SGEU in order to interfere with PIPSC's organizing drive, which allegations are central to its unfair labour practice application (LRB File No. 031-97) and the interim Order, which instructed the Employer and SGEU to stop the scope review process in so far as it affects any persons in the bargaining unit applied for by PIPSC.

With respect to the prejudice to be suffered by PIPSC should the positions remain under the SGEU umbrella during the period before the bargaining unit for the middle managers is determined by the Board, PIPSC argued that giving SGEU such a toe-hold into PIPSC's potential membership has the

effect of undermining the credibility of PIPSC as a bargaining agent. PIPSC is also fearful that SGEU will argue that all of the reclassified or newly created positions fall within LU #245 and ought to be included in the SGEU unit in the interim. PIPSC urged the Board to direct the Employer to treat all reclassified and new positions that are classified in the management level and professional level series as outside the scope of SGEU's bargaining unit.

Board Ruling on LU #245

The purpose of the interim Order issued by the Board in these proceedings was to maintain, as best as possible, the status quo pending a final determination of the matters in dispute. The point of maintaining the status quo is to prevent harm to one party that may not be adequately remedied at a later time through the normal remedial processes available to the Board.

In the application for an interim Order brought by PIPSC, the focus of the Board's attention in its Reasons was on the problem caused by the proposed transfer of positions previously classified in the management level and professional level class plan and occupied by non-SGEU members into the SGEU bargaining unit. In the Reasons dated March 6, 1997, the Board stated at 140 as follows:

> *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.*

And, at 141 and 142, the Board continued as follows:

> *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.*

(emphasis added)

The Board does not appear to have dealt with the issue of SGEU members being moved into the proposed PIPSC bargaining unit as a result of reclassification. LU #245 was intended, in part, to deal with such movement of SGEU members to the management level and professional level class plan by maintaining their membership in SGEU while entitling them to new wage rates as set out in LU #245.

It would appear to the Board that the best solution is to attempt to maintain the status quo on all fronts pending the hearing of the final application. The Board's interim Order achieves that result for non-SGEU employees whose positions would otherwise have been transferred into the SGEU bargaining unit as a result of the scope review. However, SGEU members whose positions have been reclassified upwards into the management level and professional level series are faced with movement out of SGEU if we do not permit the Employer and SGEU to apply the terms of LU #245 in these circumstances. If, at the conclusion of the PIPSC certification application, the Board determines that the SGEU employees should remain in SGEU, they will have lost seniority, benefit coverage under SGEU's plans and the like and would have been without union representation for the interim period. This result places the employees at risk of suffering irreparable harm that could be avoided by permitting SGEU and the Employer to apply LU # 245 to these limited circumstances.

The Board, therefore, will amend the interim Order to permit the Employer and SGEU to apply the terms of LU #245 to positions which are or have been reclassified from SGEU positions to the management level and professional level class plan. The application of LU #245 is consistent with the treatment of the employees listed in schedule B to the statement of employment. That is, they remain SGEU members until such time as the certification application is finalized.

However, the SGEU employees who occupy such positions need to be identified as they arguably fall within PIPSC's proposed bargaining unit. We would ask the Employer to file correspondence with the Board indicating what additional persons and positions are covered by this ruling. At the hearing of the final application, the parties can address the question of whether or not the employees should be listed on the statement of employment or voters' list in the event a vote is ordered.

2. Request for amendment of the interim Order

SGEU applied to amend the Board's interim Order by deleting the first paragraph to enable SGEU and the Employer to complete the first stage of the scope review process which entails an analysis of the status of a number of positions in the management level and professional level class plan. Counsel for SGEU advised that there remains a number of positions that have not been assessed by the scope review committee. It would like to complete the process of the scope review in order to present its findings to the Board on the PIPSC application to support its argument concerning the description of the proposed bargaining unit. It opposes PIPSC's assertion that the dividing line between SGEU's bargaining unit and the proposed PIPSC unit should be at Level 1 of the management level and professional level series.

As explained to the Board by counsel for SGEU, the scope review process requires employees to complete questionnaires related to the work they perform. The position is then reviewed by a joint union-management committee at the department level who assess if the position should be in or out of SGEU's bargaining unit using criteria developed by SGEU and the Employer for determining if the position would be considered excluded from the bargaining unit under s. 2(f) of *The Trade Union Act*, R.S.S. 1978, c. T-17. The committee forwards its recommendation to a central committee who make the final decision. The central committee is comprised of an Employer representative and a SGEU representative. To date, the central committee appears to have decided that 497 positions ought to be included in the SGEU unit and that 772 positions ought to be excluded. A number of positions remain in dispute between SGEU and the Employer. SGEU is asking to be allowed to complete the review process for all positions but it is not seeking to be permitted to implement the review process by moving management level and professional level class plan members into its bargaining unit.

The Employer took no position with respect to SGEU's request. PIPSC opposed the request vigorously.

Without reciting all the arguments made in favour of and opposed to the application, it would seem to the Board that, in the context of a certification application, where there is a dispute between two unions over the parameters of the proposed bargaining unit, it is important that the employer play as neutral a role as possible in that dispute in order to avoid any suggestion or concern that it favours one union over the other. In disputes arising over the assignment of a particular position to one of two or more

bargaining units, the Board has consistently required employers to refer the matter to the Board for determination and not to engage in unilateral action by assigning a position to one of two unions. In *Service Employees' International Union, Local 333 v. St. Paul's Hospital and Health Sciences Association of Saskatchewan*, [1991] 2nd Quarter Sask. Labour Rep. 78, LRB File Nos. 130-90, 205-90, 003-91 & 004-91, at 80, the Board stated the rationale for prohibiting unilateral employer action as follows:

> *The Board realizes that in the past Employers have applied for an order transferring a classification from one unit to another and, while the application was pending, treated the position as though the Board had already ordered the transfer. Regardless of how this practice arose, it is in the best long-term interest of all parties if it is no longer followed. In our view, in light of the addition of Section 5(m) to The Trade Union Act in 1983, and in light of the Board's willingness to expeditiously hear these applications outside of the open period, there is no longer any need to resort to this form of unilateral action.*
>
> *If negotiations fail, or if time does not permit the parties to negotiate the issue fully, employers can obtain a ruling from the Board in a timely fashion under Section 5(j), (k) and (m). This process is more in keeping with the objects of The Trade Union Act to encourage labour relations stability and harmony through collective bargaining rather than a practice based upon unilateral employer action, conflict and unfair labour practice applications.*

In that instance, the Board held that the employer had failed to bargain in good faith when it assigned a new position to one of two unions without obtaining the agreement of the second union or an order of the Board.

In the present case, the scope review process requires the Employer to take one side or the other in the dispute over the proper boundaries to be drawn between SGEU's bargaining unit and PIPSC's proposed bargaining unit. Although the scope review process preceded the application for certification and was entered by SGEU and the Employer for legitimate collective bargaining reasons, its continuation at this point would place the Employer in the untenable position of appearing to favour one union over the other depending on the outcome of the negotiations with SGEU.

Our comments are not intended to prevent the Employer from raising any arguments before this Board on the appropriateness of the proposed bargaining units or the delineation of the SGEU unit from the proposed unit. The Employer has a legitimate interest in how collective bargaining is structured at its

workplaces. However, this does not extend to permit the Employer to engage in processes outside of Board hearings with one union that impact on or potentially impact on a second union.

We do think that SGEU's concerns can be addressed at least in part by requiring the Employer to provide job descriptions and other information pertaining to the work performed by various positions that remain in dispute to either union if such information is requested. This information would permit SGEU or PIPSC to form their own view of the status of any position that may be in dispute and will provide the basic data for making representations before this Board. When responding to such requests, the Employer shall be directed to provide a copy of its response to both SGEU and PIPSC.

The Board therefore declines for the reasons stated to remove paragraph 1 from its interim Order. It will, however, issue an Order under s. 5.3 directing the Employer to provide information on disputed positions to both Unions.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant and TROPICAL INN, OPERATED BY PFEIFER HOLDINGS LTD. and UNITED ENTERPRISES LTD., Respondent

LRB File Nos. 374-97, 375-97 & 376-97; March 4, 1998
Chairperson, Gwen Gray; Members: Bruce McDonald and Terry Verbeke

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

Practice and procedure - Interim order - Termination during organizing drive - Request to proceed on final, as opposed to interim, application - Board directs that interim application be heard as final application cannot be expedited.

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Union applied to be certified for the employees of the Tropical Inn (the "Employer") in North Battleford on September 24, 1997 (LRB File No. 305-97). The Union also filed two unfair labour practice applications. The first unfair labour practice application, which is designated as LRB File No. 313-97 and was filed on October 3, 1997, alleges that the Employer interfered with the Union's organizing drive in various fashions, contrary to ss. 11(1)(a), (e), (g), (o) of *The Trade Union Act*, R.S.S. 1978, c. T-17. The second application, which is designated as LRB File Nos. 374-97, 375-97 and 376-97 and was filed on December 22, 1997, alleges that Judy Anderson, an employee at the Tropical Inn, was improperly suspended by the Employer from her employment contrary to ss. 11(1)(a), (e) and (o) of the *Act*. Board hearings were conducted on January 26th to 29th in Saskatoon and resumed on March 2nd and 3rd.

On March 2nd, the Union filed an application to amend LRB File Nos. 374-97 to 376-97 to include facts and matters in the application relating to the termination of Ms. Anderson's employment on February 2, 1998. At the same time, the Union filed in its application a request for an interim order reinstating Ms. Anderson to her position with the Employer pending the final determination of the applications. Counsel for the Employer requested that the Board proceed by using the hearing time already assigned to the main applications to hear evidence and argument with respect to the matters

raised in the Union's application filed on March 2, 1998. March 9th, 10th, 30th and 31st have been assigned to hear the various applications. These Reasons relate only to the Employer's request to hear the matter as a final, as opposed to an interim, application.

Board Decision

The matters raised by the Union in its interim application are serious in nature. The application is also unusual in that the termination in question occurred when an application is already pending before the Board in relation to the Employer's conduct toward the same employee. The activity complained of also arises in the course of an organizing campaign by the Union during which period the Board is generally cognizant of the need to ensure that a work environment is not tainted by employer anti-union animus.

In some circumstances, the Board will refuse to hear an application for an interim order because the parties have agreed to expedite the hearing of the final application. See *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Limited et al.*, [1997] Sask. L.R.B.R. 667, LRB File No. 266-97.

In the present instance, however, the hearing of the applications will extend over the course of the month. In our estimation, given the number of issues that are outstanding both on the certification application and the unfair labour practice applications, it is unlikely that the hearings will be concluded by March 31, 1997. Although we appreciate that the hearing of the interim application will result in the duplication of evidence for both parties, in these circumstances, where it is not possible to expedite the final hearing of the application, the Board does not consider it appropriate to delay a hearing of the interim application.

The interim application will be heard by the Board on March 10, 1998 commencing at 9:30 a.m.

CHAUFFEURS, TEAMSTERS AND HELPERS UNION, LOCAL 395, Applicant and RURAL MUNICIPALITY OF LAJORD NO. 128, Respondent

LRB File No: 334-97; March 5, 1998
Chairperson, Gwen Gray; Members: Carolyn Jones and Don Bell

For the Applicant: Ray Gergely
For the Respondent: Donna Sigmeth

Employee - Managerial exclusion - Foreman of rural municipality - Board holds that inappropriate to exclude foreman from bargaining unit - Foreman's functions are of supervisory but not managerial nature - Duties performed by foreman do not place him in conflict of interest with other employees.

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

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Chauffeurs, Teamsters and Helpers Union, Local 395 (the "Union") applied to be certified for a bargaining unit consisting of "all employees and foreman employed by the Lajord Rural Municipality #128 except the office administrator and office secretary and any other management above the rank of foreman." The Rural Municipality of Lajord No. 128 (the "Employer") replied to the application and opposed the inclusion of the foreman in the bargaining unit. A hearing was scheduled for January 5, 1998 but at the request of the Employer was adjourned on that date to January 12, 1998.

Evidence

Larry Moffatt has worked as foreman for the Employer for approximately 15 years. His main function is to supervise the work of the public works employees on a daily basis. Mr. Moffatt meets his crew at the shop in the morning to assign their day's work. He also fills in for employees who are away from work. After assigning work, Mr. Moffatt makes rounds to each work site to check the progress of work and to deal with problems that arise, such as equipment breakdowns.

In relation to the hiring function, Mr. Moffatt testified that he has recommended the hiring of casual staff but, generally, all hiring decisions are made by the Employer. He participates on occasion in hiring interviews. He also attends the Employer's council meetings and has been asked for his input into decisions on recalls, hirings and negotiations with other employees. Final decisions on hiring and wages are made by the Employer.

Mr. Moffatt has a minor role in the discipline of employees. He will give verbal admonishments to employees who are late for work. For more major incidents, the matter is relayed to the Reeve or Council where a decision is made with respect to the employee in question.

Mr. Moffatt does not decide the schedule of work but is asked for his recommendations on the work schedule, which is ultimately decided by Employer. The work projects are determined by the Employer based on the available funding and the needs of the rural municipality.

Mr. Moffatt attends council meetings where he reports on the progress of public works projects and receives instructions from the Employer. He also reports on the state of equipment, equipment needs and the like but has no authority to order equipment on his own initiative. Mr. Moffatt can make decisions in an emergency situation without contacting the Reeve, such as in the case of a road flooding in the spring, but his general practice would be to discuss all matters with the Reeve before taking action. Mr. Moffatt's ability to make decisions in an emergency situation are similar to all other employees, who would also be expected to take action to prevent greater harm.

Greg Kelly, Councillor of the Employer, has been an elected councillor for 20 years. The Employer consists of six councillors and a Reeve. The Employer employs an administrator, one office person, the public works foreman and public works staff. Mr. Kelly explained that the Employer is governed by *The Rural Municipality Act*, 1989, S.S. 1989-90, c. R-26.1, which requires most decisions to be made by the Council. For instance, the termination of employees is a decision that must be made by Council.

With respect to the foreman position, Mr. Kelly testified that Mr. Moffatt was hired as a foreman in 1982 or 1983. He is paid on a monthly basis while public works employees are paid on an hourly basis. Mr. Kelly testified that the Employer relies quite heavily on the foreman as councillors are busy farmers

who can only devote part-time hours to their duties as councillors. In that regard, the Employer gives Mr. Moffatt directions which they expect him to carry out.

Mr. Kelly indicated that the Employer meets in the winter to plan the public works for the upcoming year. Mr. Moffatt attends these meetings and outlines to the Employer the work that needs to be done. The Employer, however, makes the decision as to what projects will be carried out.

With respect to the Employer's labour relations, Mr. Kelly testified that Mr. Moffatt has recommended the hiring of temporary workers, who are used in the summer months to mow grass. The Employer listens to Mr. Moffatt's recommendations on probationary staff. Mr. Kelly also noted that the Employer consults with Mr. Moffatt regarding the wages paid to staff. Mr. Moffatt is the only full-time employee in public works; all the remaining staff are seasonal employees. According to Mr. Kelly, the foreman plays a role in deciding who will be laid off and when, although the pattern of lay-off is pretty much established by the seasonal nature of the work. Mr. Kelly acknowledged that only the Employer can impose discipline or termination on an employee. Mr. Moffatt or the Reeve could deal with minor matters or matters of an emergency nature but their decisions would need to be confirmed by Council.

Mr. Kelly was unsure what the Employer would do if Mr. Moffatt was to be included in the bargaining unit as it requires someone to manage the public works on a day-to-day basis. He thought that the inclusion of Mr. Moffatt in the bargaining unit may change the nature of the discussions that the Employer has with Mr. Moffatt in their meetings.

Arguments

Mr. Gergely for the Union argued that the working foreman should be included in the bargaining unit. He noted that other certification orders dealing with rural municipalities included the working foreman. He also argued that it would be difficult to obtain a collective agreement without the foreman being included. Mr. Gergely noted that Council meetings are open to the public and the minutes of the meetings are open to public review. The role of Mr. Moffatt in these meetings, therefore, is not confidential in nature.

Ms. Sigmeth, counsel for the Employer, argued that the foreman is not an employee within the meaning of the *Act*. She argued that the fact that the Employer operates within the confines of *The Rural Municipalities Act* removes many areas of decision-making from management employees to the Employer. However, she argued that this fact does not prevent Mr. Moffatt from being considered an out-of-scope employee. Counsel noted that Mr. Moffatt was hired as a foreman to be the front line manager. His recommendations to the Employer on hiring and wages can affect the economic livelihood of the employees and there is an inherent conflict between his duties and membership in the bargaining unit. Counsel noted the role Mr. Moffatt plays in council meetings and notes that this role would be curtailed if he was included in the bargaining unit.

Statutory provisions

The relevant statutory provision that this Board must consider is s. 2(f)(i) of *The Trade Union Act* R.S.S. 1978, c. T-17 (the "Act") which defines "employee" 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.*

Analysis

The factors considered by the Board in determining if a person is an "employee" within the meaning of the *Act* were set out by the Board in *Saskatchewan Government Employees' Union v. Saskatchewan Liquor and Gaming Authority; Saskatchewan Liquor Store Managers' Association v. Saskatchewan Liquor and Gaming Authority*, [1997] Sask. L.R.B.R. 836; LRB File Nos. 037-95 & 349-96 at 854:

> *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 the present case, the evidence indicates that the foreman does not possess the authority to discipline or discharge employees. His ability to influence the labour relations of the Employer is limited to making recommendations which may or may not be acted on. He has no formal authority for determining wages or other working conditions for the employees. His primary duty is to supervise the work of other employees to ensure that the projects assigned to the public works staff are carried out in accordance with the Employer's instructions. The position is similar to a construction foreman or lead hand.

In *Service Employees Union, Local 336 v. Town of Leader*, [1978] Mar. Sask. Labour Rep. 46, LRB File No. 551-77, the Board found that a town foreman was included in a bargaining unit for the following reasons, at 47:

> *With respect to other full-time employees, Steinke had no power to hire or fire and, indeed, did not participate at all in the choice of the employees. With respect to part-time or temporary employees, Steinke's own evidence was that he had to get authority from a member of Town Council before he could hire such employees. He therefore had no real authority with respect to other employees except day to day supervision of them and mere supervision alone does not take a person out of the meaning of employee under s. 2(f)(i) of the Act.*

The Board has come to the same conclusion in the present case. The foreman's functions are of a supervisory, but not managerial, nature. The duties performed by the foreman do not place him in a conflict of interest with other employees and it would be inappropriate for the Board to exclude him from the bargaining unit.

As the Union has filed majority support, a certification Order will issue shortly.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 296, Applicant and DAYCON MECHANICAL SYSTEMS, Respondent

LRB File No: 260-97; March 13, 1998
Chairperson, Gwen Gray; Members: Gloria Cymbalisty and Don Bell

For the Applicant: Gunnar Passmore
For the Respondent: Kevin Lang

Practice and procedure - Applicant had no opportunity to withdraw application prior to hearing due to contradictory positions taken by employer - Applicant's request to withdraw application is not abuse of Board's process - Board holds that applicant may withdraw application prior to final determination by Board.

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Union applied to be certified for its standard bargaining unit with Daycon Mechanical on August 19, 1997. Daycon Mechanical Systems (the "Employer") replied to the application by indicating that there were no employees in the bargaining unit sought to be certified by the Union. The Board conducted a hearing on November 3, 1997 at which time a dispute arose over whether the Employer had hired sheet metal workers on the Corrine and Moosomin sites on August 19, 1997. The Union took the position that the Employer had not engaged workers at those sites while the Employer took the opposite position. The hearing adjourned to permit the Employer to file certain affidavit material with respect to the employees employed by it at the locations in question on the day in question. Once the affidavit material was filed, the Union applied to the Board to withdraw its application for certification. The Employer opposed this application. The Board requested written argument from both parties on the question of whether or not the Union can withdraw its application for certification.

Arguments

The Employer argued that there would be no prejudice to the Union should the Board decline to permit the Union to withdraw its application. The Employer notes that an application has been filed

by the Millwrights Union and until that application is heard, the Sheet Metal Workers Union could not reapply to the Board for certification. The Employer also argued that presumably the employees of Daycon have now decided to join the Millwrights Union and therefore, do not wish to be represented by the Sheet Metal Workers Union. It was also argued that the Board should not permit the Union to withdraw its application for the sole purpose of avoiding an adverse ruling by the Board.

The Union argued that the application for certification by the Millwrights Union has no bearing on this application as the units applied for cover different bargaining units, being the millwrights bargaining unit and the sheet metal bargaining unit, both of which are separate and identifiable trades. The Union complained that the Employer caused the current problem by filing an incorrect statement of employment with the Board that did not list the employees who the Employer claims were working at the Corrine and Moosomin sites. The Union notes that had it received an accurate statement of employment, it would have withdrawn its application in a timely fashion.

Analysis

The Board is of the view that an applicant to an application before it may withdraw its application prior to a final determination being rendered by the Board where there has not been any abuse of the Board's processes.

In this instance the Union filed for certification based on information known to it. Apparently, from the material filed by the Employer, the Union's information was incorrect. It is not uncommon in the construction industry for the Union to be less than completely aware of the names of all of the employees working for an employer in the Province. To ensure that the majority of such employees have signed up with the Union, the Board requires the Employer to file an accurate statement of employment listing all of the employees who are working in the trade in question. The Employer, in the present case, indicated in its statement of employment that no employees were employed in the sheet metal trade during the period in question. At the hearing, it took a different position and argued that it did have employees working in the sheet metal trade, other than the ones known to the Union. In these circumstances, the Union had no opportunity to withdraw its application prior to a hearing of the matter because of the contradictory positions taken by the Employer

The Board does not find that the Union's request to withdraw its application is an abuse of the Board process and will grant its request to withdraw the application for certification.

With respect to the Employer's comments regarding the Millwrights Union, the Board would draw the Employer's attention to *Construction and General Workers' Local Union No. 890 v. International Erectors & Riggers, A Division of Newbery Energy Ltd.*, [1979] Sept. Sask. Labour Rep. 37, LRB File No. 114-79, in which the Board established standard bargaining units for the construction industry. Both the millwrights trade and the sheet metal trade are identifiable crafts in the construction industry. The statement of employment that is required to be filed with respect to either bargaining unit is one that identifies employees by the predominant craft in which they work for the Employer.

AMALGAMATED TRANSIT UNION, LOCAL 588, Applicant and WAYNE BUS LTD., Respondent

LRB File Nos: 285-97 & 286-97; March 17, 1998
Vice-Chairperson, James Seibel; Members: Gerry Caudle and Don Bell

For the Applicant: Gary Bainbridge
For the Respondent: Robert Watson

Unfair labour practice - Discrimination - Suspension for union activity - Board finds that employer's reasons for suspending union shop stewards and negotiators not coherent or credible - Employer did not establish good and sufficient reason for suspensions - Employer committed unfair labour practice within meaning of s. 11(1)(e) of *The Trade Union Act.*

Unfair labour practice - Remedy - Monetary loss - Award - Board orders employer to make employees whole for loss suffered as result of wrongful suspensions.

***The Trade Union Act*, ss. 11(1)(e) and 26.2.**

REASONS FOR DECISION

Background

James Seibel, Vice Chairperson: The Amalgamated Transit Union, Local 588 (the "Union") filed an unfair labour practice application alleging violations of ss. 11(1)(a), and (e) of *The Trade Union Act*, R.S.S. 1978, c. T-17, and a monetary loss application arising out of the suspensions imposed upon two employees, Bryan Mellor and Ray Kennedy, by Wayne Bus Ltd. (the "Employer").

The Employer's offices and main garage are located at 140 - 4th Avenue East in Regina (the "Premises") from which the Employer conducts several operations including a local delivery company, a bus sales company, a fleet of school buses, and the provision of drivers and minor repair services for the City of Regina's ParaTransit system which provides bus and van transportation for persons with disabilities.

The Union was designated as the bargaining agent for a unit of employees of the Employer comprising all ParaTransit bus and van operators by a certification Order dated February 8, 1996. At present there are approximately 48 employees in the unit. At all material times, Mr. Mellor and Mr. Kennedy were members of the bargaining unit and of the Union's negotiating committee, and were shop stewards.

Mr. Mellor still works for the Employer, but Mr. Kennedy's employment was terminated on August 30, 1997. His termination is the subject of arbitration proceedings under s. 26.2 of the *Act.*

The ParaTransit service had been operated by Western Superior Bus Lines until mid 1995 when that company was purchased by the Employer. The Employer obtained a new contract with the City of Regina in the spring of 1996. Mr. Mellor and Mr. Kennedy had both been employed by Western Superior Bus Lines, Mr. Mellor since January, 1994 and Mr. Kennedy since January, 1995, and they continued as drivers for the Employer.

The Union began organizing in the fall of 1995 in response to a request for assistance from Mr. Kennedy. The application for certification was filed with the Board in November, 1995. Certification was obtained in February, 1996 and in March, 1996, both Mr. Mellor and Mr. Kennedy, along with Jerry Loomer, were elected as shop stewards and members of the Union bargaining committee. Mr. Loomer was replaced by Flo Smith in the spring of 1997. The Union's bargaining committee throughout has been comprised of the three members plus John McCormick, Local President and a representative of the International Union.

The negotiating committees first met in May, 1996, to establish the parameters for subsequent negotiations. The first bargaining meeting took place in June, 1996. There were approximately ten meetings of a day or so each over the next eight months. Mr. Mellor and Mr. Kennedy attended all of the meetings. The Union was frustrated with what it perceived to be the slow progress of negotiations and a strike vote was held on February 5, 1997. A positive strike mandate was obtained. One more bargaining session was held after this. At the end of the meeting the Union advised the Employer of the result of the strike vote.

On April 10, 1997, the Union applied to the Board pursuant to s. 26.5 of the *Act* for assistance in concluding a first contract (LRB File No. 130-97).

On May 23, 1997, the Employer filed an unfair labour practice application which alleged that the Union had failed or refused to bargain collectively in violation of s. 11(2)(c) of the *Act* (LRB File No. 163-97).

Both applications were heard by the Board on June 17, 1997. The Board issued an Order and Reasons for Decision in *Amalgamated Transit Union, Local 588 v. Wayne Bus Ltd.*, [1997] Sask. L.R.B.R. 507, LRB File Nos. 130-97 & 163-97, appointing a Board agent to assist the parties in concluding a first contract and to report to the Board. The applications were accordingly adjourned. Following the report by the Board Agent in December 1997, the Union applied to have the City of Regina declared a related employer under s. 37.3 of the *Act* (LRB File No. 363-97), and in January, 1998, an application for rescission was filed (LRB File No. 004-98).

The events which led to the suspensions of Mr. Mellor and Mr. Kennedy occurred on the evening of June 18, 1997. The Union alleged that they were imposed for the purposes of coercion and intimidation with a view to discouraging activity in the Union and participation in the collective bargaining process including the first contract assistance process established by the Board. The Employer responded that the suspensions are unrelated to such activity and were levied for good and sufficient reason.

Union's Evidence

Both Mr. Mellor and Mr. Kennedy testified. Mr. Kennedy was responsible for initiating the organizing drive and was primarily responsible for gathering support for the Union in the fall of 1995. Mr. Mellor later became involved in the Union when he and Mr. Kennedy were elected as shop stewards and members of the bargaining committee, positions which they still hold. Both men attended all bargaining with the Employer, all appearances at the Board and all but one of the sessions with the Board agent.

Shortly after the application for certification was filed the Employer held meetings in its conference room with groups of ParaTransit drivers. Brad Hertz, President, Rollie Kuntz, General Manager, and Brent Stroh, Office Manager, were present at the meeting attended by Mr. Kennedy. The drivers were told that management was "upset" about the certification application, that the company had not been given a chance to show what it could do for them and that signing a union support card was neither fair nor reversible. His impression was that management preferred that the application had not been made.

As a shop steward, Mr. Kennedy said that he had occasionally accompanied other employees when they were called to meet with management, and had taken up some of their individual problems with Mr. Kuntz. There was and is no grievance procedure in place.

The ParaTransit drivers work shifts, starting as early as 6:45 am or ending as late as 12:30 am. Because of this, all drivers are issued keys to access the Premises, including the garage but not the administrative offices. The main reason for this is so that drivers can check for schedule changes during off hours or on weekends as such changes can be made on 18 hours notice. Also, a driver may return to retrieve something forgotten on a bus or in the staffroom. Sometimes they will just drop in to visit with someone else they may not have seen for a while. There are no written or verbal policies or procedures for the use of the keys or conditions for accessing the Premises outside of office or work hours. No one has ever been disciplined for doing so.

The Employer arranged a barbecue for the afternoon and evening of June 18, 1997, to coincide with the last day of work for the school bus drivers before the summer holidays. A notice was posted in the staffroom inviting the school bus drivers to arrive first, as awards were to be presented and then it was to be opened up to the rest of the employees, including the ParaTransit drivers and mechanics. Certain representatives of the City of Regina were also invited to attend.

The barbecue was set up on the lot in front of the ParaTransit garage. The large doors were opened and tables placed inside. Pop and beer were distributed free of charge self-serve style from a tub; there was no system to limit consumption and no posted allowance. A summer student working in the mechanics' shop, Jay, was seconded to keep the tub replenished.

Mr. Mellor and Mr. Kennedy arrived shortly after their shifts ended at 6:00 pm. There were approximately 100 to 150 people in attendance. People came and went throughout the early evening. Representatives of management, including Mr. Hertz, Mr. Kuntz, Mr. Stroh, and Greg Finch, ParaTransit Co-ordinator, were in attendance; they had all left by about 7:45 pm. Around that time, Jay replenished the tub with beer. Between about 8:00 pm and 9:00 pm, only some eight persons remained: Mr. Mellor, Mr. Kennedy, Ron Perrault (a ParaTransit driver), Daryl Potts (a school bus driver), Bill Spetz and three or so other mechanics. They were all gathered around Mr. Spetz's pickup truck at the edge of the lot. Mark Huculak, Shop Supervisor (Head Mechanic), and the student, Jay, were cleaning

up; the barbecue was moved inside, the tables were cleaned off and the overhead doors to the garage were closed.

Mr. Spetz said something to the effect that it was time to go and he and the other mechanics proposed that they continue on at another establishment. Mr. Mellor, Mr. Kennedy and Mr. Perrault all declined as they had to work in the morning. Mr. Potts also declined. The four decided to continue their visiting inside the ParaTransit garage. One of the group -- neither Mr. Mellor nor Mr. Kennedy could recall who -- used his key to gain entry. The tables were still set up and the tub of beer was still there. It was a pleasant evening so the group opened one of the big overhead doors and sat at a table. Mr. Mellor thought he had perhaps one or two more beers and Mr. Kennedy believed he had no more than three. Between all of them they thought they consumed perhaps ten cans of beer. They remained for one and one-half to two hours, closed the overhead door, turned off the lights, locked up and left by about 11:00 pm.

Mr. Mellor said that while they were there another driver came in, had a can of pop and left. He was not cross-examined on who or when this was and neither was Mr. Kennedy asked about it in chief or on cross-examination. Neither could recall when Mr. Huculak left the Premises or if he left before their group.

Nothing was said about any of this until the following Monday morning, June 23, 1997 when Mr. Kuntz spoke to Mr. Mellor and Mr. Kennedy separately in the garage. He asked what had happened after the barbecue because, he said, he had heard that people went back into the building. Mr. Mellor and Mr. Kennedy readily admitted that they had and that they had consumed some beer. Mr. Kuntz said that about four dozen beer were missing and he asked whether anyone had "borrowed" or taken any. Mr. Mellor and Mr. Kennedy denied this and told him that only ten cans or so had been consumed. Nothing was said at this time about entering the Premises after hours without authorization. It seemed to Mr. Mellor that Mr. Kuntz was most concerned about "Mr. Hertz's beer" being missing. When asked who else was with him, Mr. Mellor refused to say. Mr. Kennedy did not recall being asked, but said that Mr. Kuntz advised he was going to investigate further. They were not asked, or invited, to reimburse the Employer for the beer they consumed.

Nothing was heard until Wednesday, June 25, 1997, when Mr. Finch spoke to both Mr. Mellor and Mr. Kennedy. Neither of them recalled Mr. Kuntz being present during the meetings.

According to Mr. Mellor, Mr. Finch told him he had to do something that he considered silly. He said that Mr. Hertz was upset about the missing beer and Mr. Finch had been instructed to give Mr. Mellor a one-day suspension. Mr. Mellor said that he was given a letter to that effect but could not now locate it.

According to Mr. Kennedy, Mr. Finch reviewed his disciplinary record with him, advised him he was being suspended for five days as a result of the events of June 18, 1997 and handed him the following letter:

> *The Company has reviewed your employment conduct and job performance. Your record, which includes the following, is unacceptable.*
>
> 1. *December 20, 1995 - Refusal to co-operate and follow instructions regarding the order of pick ups on your schedule.*
>
> 2. *January 23, 1996 - Customer rudeness in dealing with Mr. George Thomson. Letter from customer filed with Wayne Bus Ltd. on February 14, 1996.*
>
> 3. *January 31, 1996 - Knowingly backed into another vehicle and failed to remain at the scene to advise the owner of the vehicle, nor did you report the accident to the Company or Police.*
>
> 4. *February 16, 1996 - Refusal to follow instruction as per your schedule regarding pick ups at Pioneer Daycare. Also, there was some concern from staff at the Daycare in difficulties they have had in dealing with you.*
>
> 5. *March 29, 1996 - Failure to use safety belts and wheelchair brakes when loading passengers.*
>
> 6. *July 9, 1996 - Failure to answer radio for 1/2 hour thus resulting in lost revenue to the Company.*
>
> 7. *April 3, 1997 - Failure to report to work on time due to sleeping in.*
>
> 8. *April 13, 1997 - Using Regina Paratransit vehicle for your own personal use prior to the start of your shift. As you knew personal use is prohibited. This resulted in being suspended without pay for April 14th and 15th 1997.*
>
> 9. *May 12, 1997 - Refusal to follow instructions, boarding and transporting an unscheduled passenger.*
> *May 13, 1997 - Questioning the order of your schedule contrary to policy and in an uncooperative manner. These incidents resulted in a one day suspension.*

> *10. June 18, 1997 - Entering Company building without authority, not on work time and consuming beer owned by the Company without authorization.*
>
> *Your employment conduct and work performance are unacceptable to the Company. As a result you are suspended, without pay, for the following days: June 27, June 28, July 3, July 4, and July 5, 1997.*
>
> *If your employment conduct and work performance do not improve (including you not repeat any conduct similar to that described above), or if you engage in further work misconduct, or do not properly perform your job, you will be subject to lengthier suspensions or termination. Govern yourself accordingly.*
>
> *If you wish to discuss this matter further, or you can establish the above details are not accurate, please discuss it with me.*

All of Mr. Kennedy's prior discipline had been imposed since the application for certification was made. None was the subject of an unfair labour practice application, nor was either prior suspension taken to arbitration under s. 26.2 of the *Act*. Mr. Kennedy said he believed at this point that his job was in jeopardy.

Employer's Evidence

Mr. Kuntz and Mr. Finch testified on behalf of the Employer. Mr. Kuntz has been the General Manager for the past two years. Mr. Finch started with the Employer in May, 1995 as a part-time ParaTransit driver. He was promoted to ParaTransit Co-Ordinator in February, 1997 on a part-time basis, and went full-time on June 1, 1997. His duties include the supervision of the ParaTransit drivers.

Mr. Kuntz confirmed that after the certification application was made management held meetings with the ParaTransit drivers, the purpose of which was to advise them of their rights and to make sure they knew what they were signing. They were told that they should not feel pressured to sign and that they would not necessarily have an opportunity to vote on the issue. He claimed that the Employer neither encouraged nor discouraged union membership. Mr. Finch stated that he attended such a meeting alone with Mr. Hertz and Mr. Kuntz in Mr. Hertz's office, he said, "just to make me aware of the application [for certification] - not to tell me what decision to make."

In cross-examination, Mr. Kuntz admitted that the reaction of Mr. Hertz to the certification application and later to the news of the strike mandate was one of "shock and disbelief", whereas he himself was

"surprised and disappointed" by the same two events. And, while the Employer thought that negotiations were progressing, after the Union made the application for first contract arbitration in April, 1997, it became "concerned" by the Union's refusal to continue bargaining and took the position that the Union was acting in bad faith. Mr. Kuntz admitted that while certain important provisions had been agreed to in bargaining, including union recognition, management rights and a grievance and arbitration procedure, the position of management was that there was no agreement until everything was agreed to.

Mr. Kuntz claimed he had no knowledge of Mr. Kennedy's involvement in organizing the Union before reading about it in the present application. He did admit, however, that shortly after certification, Mr. Mellor advised that both he and Mr. Kennedy were shop stewards. And, as a member of the Employer's negotiating committee, he was aware that they were the chief negotiators for the Union.

Mr. Finch said that during the organizing campaign he was not approached by either Mr. Mellor or Mr. Kennedy, but after certification he became aware of Mr. Kennedy's activity in the Union. When asked who he thought were "union activists" after certification, he named five people including Mr. Mellor and Mr. Kennedy.

Mr. Finch identified the notice posted for the employees advising of the June 18, 1997 barbecue. It read as follows:

> *June 1997 is the beginning of a new era for Regina Catholic schools and Wayne Bus Ltd. All the Regina Catholic schools will be going to an alternate school year beginning in August of 1997.*
>
> *As a result of this change, we will be having our year-end BBQ on June 18th. We request that all school bus drivers attend this years BBQ as Brad, Rollie and Diana would like to thank you all for the past year.*
>
> *Agenda is as follows:*
>
> *4:45 - 5:15 pm All school bus drivers attend for year end wrap up. Diana, Rollie and Brad will make presentations to all school bus drivers.*
>
> *5:15 - 7:30 pm Doors open to Paratransit employees for BBQ and refreshments.*

Mr. Kuntz said that the reason for listing the time frames for the event was because the Employer was concerned lest anyone should drink and drive, and by limiting the time of the event it hoped to limit consumption of alcohol. He himself had left by about 7:30 pm, and at that time no one remained in the building. Perhaps ten or twelve people were hanging around outside. He could not recall whether any of them were still drinking beer. Before he left he instructed Mr. Huculak, and Jay to do a brief cleanup, leave the major cleaning for the morning, and to lock up.

He could not recall when he last saw beer being added to the tub, but admitted that Jay later confirmed that he had added beer to the tub before he left and that fewer remained the next morning. When asked why Jay would do this if the social event was over, Mr. Kuntz replied, "maybe panic"; when asked why Jay would panic, Mr. Kuntz said he didn't know.

Mr. Finch said that the employees would have known the barbecue was over when clean up started about 7:30 pm. On leaving, he noticed a group of employees standing by a pickup truck which included at least Mr. Mellor, Mr. Kennedy, Mr. Perrault, and Brian Michel, Jay and Cy from the shop. He said that he did not advise Mr. Kuntz of this until September, 1997. He saw Mr. Huculak come out of the shop, walk up to the group at the pickup, and speak to Jay. Mr. Stroh and some other people were walking to their vehicles. Mr. Finch thought that the last time he saw the beer tub being added to was about 6:30 pm, however, he noticed that beer remained in it when he left at 7:45 pm.

Mr. Kuntz was off work for two days following the barbecue. He said that when he returned on Monday morning, June 23, 1997, he was told by Mr. Hertz that Mr. Mellor and Mr. Kennedy had entered the garage after the barbecue and had drank some beer. Apparently, they had been seen by Mr. Huculak. According to Mr. Kuntz, Mr. Huculak did not implicate anyone else. When he confronted Mr. Mellor and Mr. Kennedy that day, they readily admitted what they had done, but denied knowing anything about a large quantity of beer being missing. He claimed that when he asked Mr. Mellor who else was there with him, he refused to say. At about the same time, he questioned Jay, Mr. Spetz, and Mr. Michel, from whom he said he got no additional information about anyone else who might have been with Mr. Mellor and Mr. Kennedy. However, on cross-examination he admitted that he had only asked them if they saw anyone else in the building, and neglected to ask them if anyone else remained behind outside when they left. He said "I guess I asked the wrong questions." He said that all ParaTransit drivers have keys to the building so they can check for schedule changes during off hours.

He was not aware that any had ever taken any beer or other company property. However, in cross-examination, he admitted that a person might come in for a cup of coffee or to visit with another driver they had not seen for a while, and the company overlooked this. He admitted that there were no written policies or procedures for after hours entry and that "it has been pretty free."

According to Mr. Kuntz, both he and Mr. Finch met with each of Mr. Mellor and Mr. Kennedy on June 25, 1997. They reviewed Mr. Kennedy's discipline record and advised him of his five day suspension. He was handed the above letter. Mr. Mellor was interviewed and given an Incident Report which he was asked to sign. The material portions of that document are as follows:

> *Bryan Mellor did enter Wayne Bus shop and garage area at 140 4th Avenue East, Regina, SK June 18, after a social function on the premises. Bryan was not scheduled to work at this time and was not authorized to be in building at this time. While he was inside shop and garage area Bryan Mellor did consume beer owned by Wayne Bus Ltd. the official function was over and the beer was no longer available for consumption.*
>
> *Any further actions such as above, or any other actions that result in Bryan Mellor being considered for disciplinary action will result in suspension without pay or termination. As a result of this incident, Bryan Mellor will be suspended without pay for 1 (one) day June 26th 1997.*

Mr. Kuntz claimed that the first he became aware that others may have been present that night with Mr. Mellor and Mr. Kennedy was when he read the following reference in the Union's application herein, which he received on September 9, 1997:

> *Three of the employees who are members of the Union and one employee who was not a member, decided to stay at the shop and continue to visit. These four employees had approximately two to three beer each and then left the shop, locking up after themselves.*

As a result of this, he spoke again to the shop staff who he said then named Mr. Perrault and Mr. Potts as having been outside the garage with Mr. Mellor and Mr. Kennedy on the night of June 18, 1997.

He subsequently interviewed Mr. Perrault and Mr. Potts. Mr. Kuntz claimed that Mr. Perrault told him that while the four of them were standing around outside, a door went up on the garage and "someone" suggested they go in for a beer - this person was not identified. Following the interviews, a one-day suspension was imposed upon each of Mr. Potts and Mr. Perrault by letters dated September 19, 1997.

Neither had a prior disciplinary record. Mr. Perrault's suspension has been disputed under s. 26.2 of the *Act*; Mr. Potts is not a member of the bargaining unit. Mr. Perrault has allegedly written a letter to the Union advising, inter alia, that he does not want the arbitration to proceed. There was no objection to the entry of this letter in evidence through Mr. Kuntz, but it is to be noted that Mr. Perrault was not called to testify.

Mr. Kuntz and Mr. Finch said that the decision as to the discipline to be imposed upon Mr. Mellor and Mr. Kennedy was made jointly by themselves with Mr. Hertz and Mr. Stroh. Mr. Finch stated that during their deliberations, Mr. Hertz did not express concern about beer being missing, but rather about the fact that the employees could have been in an accident or stopped by the police, although he claimed that these considerations did not form part of the reasons for discipline, with respect to which he did not articulate any reasons beyond their being in the building after hours.

Mr. Finch was instructed to compose the letter to Mr. Kennedy and the Incident Report for Mr. Mellor prior to meeting with them. It should be noted that he also said that Mr. Kennedy's one day suspension in May, 1997, had originally been three days, but was subsequently reduced (prior to June 18, 1997) when it was determined that he "was not totally to blame" for the incident in question.

Neither Mr. Kuntz nor Mr. Finch were asked either in direct or cross-examination whether Mr. Mellor or Mr. Kennedy were disciplined as a result of reasons proscribed by s. 11(1)(e) of the *Act*. None of Mr. Hertz, Mr. Perrault, Mr. Potts, Mr. Huculak or any of the mechanics or shop staff were called to testify.

Union's Argument

Counsel for the Union submitted that the primary purpose of s. 11(1)(e) of the *Act* is to discourage actions that have a "chilling effect" upon Union members and supporters. Once it is demonstrated that there has been activity on behalf of the Union or in the exercise of a right under the *Act*, followed by discipline, the presumption arises that that activity is the reason for the discipline. The onus then shifts to the Employer to prove that it was not motivated by anti-union animus. It is not sufficient for the Employer to show that there is a plausible reason for the discipline unrelated to the activity, but rather it must demonstrate that it was unaffected by any kind of anti-union animus. In this regard, counsel

referred to the Board's decision in *United Steelworkers of America v. Eisbrenner Pontiac Asuna Buick Cadillac GMC Ltd.*, [1992] 3rd Quarter Sask. Labour Rep. 135, LRB File Nos. 161-92, 162-92 & 163-92.

In asking the Board to consider the evidence of anti-union animus, counsel said that the whole history of the relationship between the parties must be examined. It was submitted that evidence of union activity or exercise of rights under the *Act* in this case included the following:

- the organizing drive;
- the certification application;
- actions performed in the office of shop steward;
- collective bargaining;
- the strike vote;
- the reply to the Employer's unfair labour practice application; and
- the application for first contract arbitration.

It was submitted that evidence of anti-union animus was demonstrated or may be inferred by the following:

- the meetings held with groups of employees and with Mr. Finch alone following the application for certification;
- the history of the bargaining and the Employer's attitude that "nothing is agreed to unless everything is agreed to";
- the reaction of management to the certification application and the strike vote, as one of shock and disappointment;
- the unfair labour practice application by the Employer very soon after the Union's first contract arbitration application;
- the "shoddy" investigation of the June 18, 1997 incident and the fact that only two of the four employees involved were disciplined prior to this application being made;
- the discipline immediately following the June 17, 1997 hearing before the Board attended by both Mr. Mellor and Mr. Kennedy;

- the magnitude of Mr. Kennedy's suspension;
- the failure by the Employer to produce Mr. Hertz and Mr. Stroh for cross-examination; and
- the recent application for rescission.

Counsel urged the Board to consider all of the evidence in the context that there was no collective agreement in place, Mr. Mellor and Mr. Kennedy were relatively inexperienced in their capacities as shop stewards and negotiators, and although the relationship between the parties is in its infancy, it has not been untroubled. Counsel for the Union also filed a written argument for the Board's consideration.

Employer's Argument

Counsel for the Employer argued that there was no evidence of coercion or intimidation to ground a violation of s. 11(1)(a) of the *Act*.

With respect to the Union's argument that the suspensions would have a "chilling" effect on these and other employees, it was argued that the fact that the Union had not as yet pressed for a hearing of the s. 26.2 arbitration of Mr. Kennedy's termination or Mr. Perrault's suspension, demonstrated that it was not serious about this assertion.

He said that there was no evidence of union activity between June 18, 1997 and June 25, 1997 when the suspensions were levied. Indeed, counsel submitted that the evidence left serious doubt as to whether Mr. Mellor or Mr. Kennedy could be said to ever really have been involved in either the certification process or, subsequently, in the exercise of duties customarily performed by shop stewards.

Counsel submitted that to find a violation of section 11(1)(e) of the *Act* the Board must determine that the union activity formed part of the Employer's reasons for imposing the suspension. He argued that the fact that other persons had not been disciplined who had taken a role in organizing the union, or subsequently as a shop steward or member of the occupational health and safety committee, was evidence that the suspensions of Mr. Mellor and Mr. Kennedy were in no way suspect. Also, the evidence showed that the Employer had been neutral during the organizing campaign; the Union had not alleged an unfair labour practice with respect to the meetings with the employees.

He questioned the motives of the Union in making the application, arguing that because it had waited nearly three months before doing so it was apparent that it was a device to suit the Union's own strategy. The Employer had bargained in good faith and a substantial number of key provisions had been agreed to - this was evidence that the Employer's motives in the suspensions were pure. Mr. Mellor and Mr. Kennedy had an obligation to act in good faith and honestly towards the Employer and in their actions of June 18, 1997 had not done so. The discipline was justified and imposed for good and sufficient reason. Indeed, they had admitted their wrongdoing. It was asserted that the Employer had not disciplined Mr. Perrault and Mr. Potts earlier because it was not aware of their involvement until September 9, 1997. Accordingly, there was no evidence of discrimination in the way the matter was handled and the discipline imposed.

Relevant Statutory Provisions

Relevant provisions of the *Act* include the following:

> *5. The board may make orders:*
>
> ...
>
> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
>
> *(e) requiring any person to do any of the following:*
>
> *(i) refrain from violations of this Act or from engaging in any unfair labour practice;*
>
> *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*
>
> *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;*

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.

26.2(1) Whether there is just cause for the termination or suspension of an employee may be determined by arbitration where:

> *(a) no collective bargaining agreement is in force;*
>
> *(b) the board has determined that a trade union represents a majority of employees in the appropriate unit;*
>
> *(c) the employee is terminated or suspended for a cause other than shortage of work; and*
>
> *(d) the termination nor suspension is not, and has not been, the subject of an application to the board pursuant to clause 11(1)(e).*

(2) Where an arbitration is conducted pursuant to subsection (1), it is to be conducted in accordance with section 26 or 26.3.

(3) The arbitrator shall determine any dispute respecting the application of this section.

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

The Board is often called upon to determine whether an employer has imposed suspension or discharge in violation of s. 11(1)(e) of the *Act*. The principles to be applied were most recently summarised in the Board's decision in *International Union of Operating Engineers v. Quality Molded Plastics Ltd.*, [1997] Sask. L.R.B.R. 356, LRB File Nos. 371-96, 372-96 and 373-96, where it was stated at 371-74:

> *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 case, it is clear that Mr. Kennedy was a key organizer for the Union, having made the initial request for its assistance in the fall of 1995, and that he continued, and despite his termination, continues to be, integrally involved in the Union's relationship with the Employer. While Mr. Mellor may not have been involved initially in the certification drive, he certainly became so, and has continued to be involved. Both men have been shop stewards and the chief union negotiators from the earliest days of the bargaining unit.

The Employer demonstrated its "concern" about the employees' interest in the Union soon after the application for certification was made. It seems rather disingenuous of the Employer to assert that its stance was neutral. Given the admission that management was shocked and disappointed to learn of the application, the motives for conducting what appear to have been involuntary meetings with the employees are suspect.

Activity by the Union, and by Mr. Mellor and Mr. Kennedy on the Union's behalf, has been continuous since that time: The election of local officers and shop stewards; active bargaining from April, 1996 to April, 1997; the strike vote; the application for assistance in concluding a first agreement; the reply to the unfair labour practice application by the Employer; the attendance at the hearing before the Board on June 17, 1997, and the subsequent sessions with the Board Agent.

And throughout it appears that the tension between the parties has steadily increased. When the Employer was advised of the Union's positive strike mandate, management's reaction was one of shock and disappointment, which in itself is not surprising. However, it is obvious that the Union was

frustrated with the progress of negotiations towards a first agreement; it had been nearly a year since they had begun. As it was entitled to do, it filed the application for first contract assistance. There was no evidence that the Union was reluctant to bargain before it made the application and the integrity of its choice of that response from its panoply of available remedies cannot be questioned in these proceedings. It was obvious that the Employer was not happy. Its response was to file an unfair labour practice application about a month later alleging a failure to bargain. Both applications were before the Board on June 17, 1997. Mr. Mellor and Mr. Kennedy attended the hearing. The board heard evidence in the present proceeding that on that date the Board indicated that appointment of a Board agent would be the likely result. The Employer's application was adjourned.

The next day brought the events of the company barbecue and the aftermath culminating in the suspensions.

The Employer took the position that everyone should have known when they should leave the barbecue. While it indicated a time frame for the gathering, the notice of the barbecue cannot be said to impose a rule or order that all employees must leave the Premises at exactly 7:30 p.m. Amid the camaraderie and frivolity of a year-end party it may be expecting too much of employees to assume that they will divine such a rule from the invitation as posted. If an employer is going to supply alcoholic beverages to its employees without a system to control or monitor consumption, regardless of the time frame of the event, it literally invites the possibility that some employees, or even invited guests, may exercise less than perfect judgment immediately afterwards.

We doubt that the Employer thought that the employees would know that 7:30 pm was the hard and fast time to vacate the Premises. When management left the Premises, ten or twelve employees remained behind. If management was serious about ensuring that there was no continuation of socializing on the Premises, it would not be unreasonable to expect that they would have remained until all employees were gone, or least provide an unambiguous direction to those who remained that they were to leave.

The Employer's witnesses also were unable to explain why Jay would have replenished the beverage tub near the end of the time frame for the event. Mr. Kuntz does not appear to have questioned him about it let alone provided an explanation.

By all accounts there was no policy for the use of keys to the Premises by the ParaTransit drivers nor a protocol for entry after hours. Such procedures have not been instituted despite this incident. The Employer has not placed restrictions on employee access to the Premises.

The investigation by Mr. Kuntz shortly after the events in question was cursory. Despite the averment of great concern over "Mr. Hertz's beer" apparently being missing, tantamount to an assertion of theft, little real inquiry was conducted - there was certainly no focused attempt to ensure that all who may have been involved were identified. The Board has misgivings that the Employer was "wilfully blind" in its inquiries. Any measure of diligence would likely have resulted in Mr. Huculak or Jay or Mr. Spetz, or any of the other mechanics who were there, providing the information to ascertain that Mr. Perrault and Mr. Potts had remained behind with Mr. Mellor and Mr. Kennedy when the others left. Mr. Kuntz asserted in evidence, and Employer's counsel in argument, the seriousness with which the shortage was viewed, and the lack of good faith and honesty on the part of Mr. Mellor and Mr. Kennedy. Given this position, the investigation was less adequate than might have been expected.

While the Employer's witnesses testified that the imposition of the suspensions was a joint decision, Mr. Hertz did not testify. Given that he was described as shocked and upset by the Union's recent actions and personally upset about missing beer, his insight into the discovery of the events, the investigation and the discipline imposed would have been helpful to say the least. Although counsel for the Union alluded in argument to his failure to testify, no reason for the absence of his testimony was proffered by the Employer.

Mr. Finch had been instructed to compose the written documents imposing the discipline on Mr. Kennedy and Mr. Mellor before meeting with them on June 25, 1997. It appears that neither gentleman could have said anything during the interview to affect what was a fait accompli. When testifying about the reasons for the discipline, no mention was made of any apparent regard for the forthrightness with which they admitted their activity, nor, if the Employer's evidence is to be believed, for their apparent admissions of wrongdoing and regret for their actions.

By the same token, as Mr. Kuntz testified, Mr. Perrault and Mr. Potts did not come forward or admit their complicity in the incident until confronted some months later; this as well apparently bore no consideration by management.

Regardless of the fact that this is the only unfair labour practice application that has been brought by the Union against the Employer, it is clear that the relationship of the parties has been troubled and not without increasing acrimony. It is also apparent that the actions taken by the Union a short while before June 25, 1997 had been a source of consternation for the Employer. While it has not been suggested that prior to the incident in question, there had been any overt pressure exerted against Mr. Mellor or Mr. Kennedy by the Employer, or that any of Mr. Kennedy's prior discipline had been for other than just cause, there is no doubt whatsoever that they were extremely active on behalf of the Union for a long period prior to the incident.

With respect to the references by counsel for the Employer as to the relevance of the evidence regarding the Union's reference of Mr. Perrault's suspension and Mr. Kennedy's subsequent termination to arbitration under s. 26.2 of the *Act*, the Board addressed the relationship of that section with section 11(1)(e) of the *Act* 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 and 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.*

The Board confirmed this view in *Quality Molded Plastics, supra,* at 370 - 371. Accordingly, speculation as to the motives of the Union in addressing the situation in this manner is not appropriate or relevant to the present case.

On this type of application we are not concerned with assessing whether Mr. Kennedy and Mr. Mellor were suspended for just cause, but rather, as stated in *Quality Molded Plastics Ltd., supra,* at 356:

> *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.*

And, of course, the Employer bears the considerable burden of proving that the suspensions were for good and sufficient reason untainted by consideration of the factors described. Here we find that the Employer's reasons for discipline of either gentleman are not coherent or credible in all the circumstances. And, given that Mr. Kennedy's most recent suspension had been reduced to one day, a five-day suspension is disproportionate by any standard. These two employees were the Union's chief negotiators and two of its three on-site representatives. There was no evidence that the employees who "escaped" discipline for some months had any history of union activity whatsoever. In all the circumstances, the suspensions might very well have a chilling effect on the employees in the bargaining unit.

The Board finds that the Employer has not established that there was good and sufficient reason for the discipline of either Mr. Kennedy or Mr. Mellor on June 25, 1997. The Employer has committed an unfair labour practice within the meaning of s. 11(1)(e) of the *Act* and orders that each of Mr. Kennedy and Mr. Mellor be made whole for all monetary loss suffered as a result of the suspension within 14

days of the date of the Order. The Board reserves its jurisdiction to make an Order with respect to the quantum of the loss in the event the parties are unable to agree.

SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 336, Applicant and SOUTH WEST DISTRICT HEALTH BOARD, Respondent

LRB File No: 168-97; March 17, 1998
Chairperson: Gwen Gray; Members: Gloria Cymbalisty and Tom Davies

For the Applicant: Ted Koskie
For the Respondent: Wayne Sakires

Health Care - *The Health Labour Relations Reorganization (Commissioner) Regulations* - Union security - Dues authorization cards - Formerly unrepresented employees statutorily swept into health service provider bargaining unit refuse to provide dues authorization cards - Board orders employer to deduct union dues, assessments and initiation fees from wages of employees who refuse to provide cards and to pay the same to union.

***The Trade Union Act*, ss. 11(1)(c), 32, 36 and 39.**
***The Health Labour Relations Reorganization Act*, ss. 8 and 10.**
***The Health Labour Relations Reorganization (Commissioner) Regulations*, s. 11.**

REASONS FOR DECISION AND ORDER

Gwen Gray, Chairperson: The Service Employees' International Union, Local 336 (the "Union") filed an unfair labour practice application alleging violations of ss. 11(1)(c), 32 and 36 of *The Trade Union Act*, R.S.S. 1978, c. T-17, by the South West District Health Board (the "Employer") which related to its failure to require employees of the District to sign dues authorization cards to permit the Employer to deduct and remit union dues, assessments and initiation fees to the Union.

The requirement to obtain such authorization cards arose as a result of the implementation of *The Health Labour Relations Reorganization Act*, R.S.S. 1978, c. H-0.03 and *The Health Labour Relations Reorganization (Commissioner) Regulations*, R.R.S. 1978, c. H-0.03 Reg. 1 (the "Dorsey Regulations"). Employees who formerly were members of other unions have been included in the health service provider bargaining unit which was assigned by the Dorsey Regulations and Board Order dated March 14, 1997 to the Union. In addition, employees of the Employer who were formerly unrepresented but whose positions fall within the scope of the health service provider bargaining unit, were swept into the bargaining unit as a result of the Dorsey Regulations.

In *Health Labour Relations Reorganization (Commissioner) Regulations - Interpretative Ruling #2*, [1997] Sask. L.R.B.R. 188, LRB File No. 152-97, the Board determined as follows, at 192-193:

> *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.*

As the Board in this instance indicated, if employees who are required to sign dues authorization cards refuse to do so, their employment may be terminated by the Employer under the combined effect of s. 11 of the Dorsey Regulations, and ss. 32 and 36 of *The Trade Union Act*. The Union's application in this instance requests that such action be taken by the Employer for those employees who refuse to sign. Normally, the Board would grant such an Order.

However, in this instance neither the Union nor the Employer desire to enforce this severe consequence on employees who were statutorily swept into the bargaining unit. They seek an alternate Order which would permit the Employer to deduct the dues required without the necessity of obtaining an authorization card.

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.*

Section 8 of *The Health Labour Relations Reorganization Act* prevents the Board from making an order that amends, varies or rescinds the Dorsey Regulations.

There is nothing in the Dorsey Regulations that addresses the issue of the provision of dues authorization cards. The Board in its earlier decision, directed that such cards be obtained from employees of the health districts who are now included in a bargaining unit but who formerly were unrepresented by a bargaining agent. The Employer, in this instance, is unable to require the employees in question to sign such cards and is therefore unable to remit the dues owing to the Union.

In these circumstances, pursuant to s. 10(2) of *The Health Labour Relations Reorganization Act*, **THE LABOUR RELATIONS BOARD ORDERS AS FOLLOWS:**

> (a) the South West District Health Board (the "Employer") is directed to deduct and pay in periodic payments out of the wages paid to those employees who are included in the health provider bargaining unit represented by the Service Employees' International Union, Local 336 (the "Union") and who refuse to provide an authorization card

permitting the Employer to deduct the union dues, assessments and initiation fees that are required to be paid by employees of the Employer to the Union in accordance with the collective agreement between the Employer and the Union, and ss. 32 and 36 of *The Trade Union Act*, to the person designated by the trade union to receive the same, the union dues, assessments and initiation fees of the employees, and the Employer shall furnish the Union with the names of the employees on whose behalf such deductions have been made;

(b) this Order shall be effective commencing the first pay period following the receipt of this Order by the Employer; and

(c) this Order and Reasons shall be attached by the Employer to the pay cheque and pay records of each employee affected in the first instance of the deductions being made by the Employer.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant and TROPICAL INN, OPERATED BY PFEIFER HOLDINGS LTD. AND UNITED ENTERPRISES LTD., Respondent

LRB File Nos. 374-97, 375-97 & 376-97; March 24, 1998
Chairperson, Gwen Gray; Members: Bruce McDonald and Terry Verbeke

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

Remedy - Interim order - Criteria - Balance of convenience - Board finds that risk of harm to employees' right to freely choose trade union outweighs risk of harm to employer.

Remedy - Interim order - Criteria - Undertaking as to damages - Board refuses to require union to file undertaking as to damages as precondition to granting of interim order.

Remedy - Interim order - Unfair labour practice - Dismissal for union activity - Board orders employer to permit Board agent to post schedule explaining Board's order and providing employees with information about their rights under *The Trade Union Act* throughout workplace until final determination made.

Remedy - Interim order - Unfair labour practice - Dismissal for union activity - Board orders parties to expedite hearing and directs dates for continuation of hearing.

Remedy - Interim order - Unfair labour practice - Dismissal for union activity - Board orders that dismissed individual be reinstated until union's main applications heard and determined.

The Trade Union Act, **ss. 5.3 and 42.**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The United Food and Commercial Workers, Local 1400 (the "Union") applied to be certified for a bargaining unit comprising all employees of the Tropical Inn, operated by Pfeifer Holdings Ltd. and United Enterprises Ltd. (the "Employer") in North Battleford on September 24, 1997 (LRB File No. 305-97). In the certification proceedings, the Employer claimed that Judy

Anderson, Director of Sales and Marketing, is a managerial employee and is not subject to *The Trade Union Act*, R.S.S. 1978, C. T-17. This position is disputed by the Union.

On October 3, 1997, the Union filed an unfair labour practice alleging that the Employer engaged in conduct during the organizing campaign that constituted violations of ss. 11(1)(a), (e), (g), (o) and 12 of the *Act* (LRB File No. 313-97). On December 22, 1997, the Union filed an application alleging that the Employer wrongfully suspended and threatened to discharge an employee, Ms. Anderson, for engaging in union activity (LRB File Nos. 374-97, 375-97 & 376-97). Hearings commenced on the applications on January 26, 1998 to January 29, 1998. Subsequent hearings of the Board were held on March 2, 1998 and March 3, 1998.

On March 2, 1998, the Union filed a further application seeking to amend LRB File Nos. 374-97 to 376-97 to include allegations relating to events that occurred subsequent to the filing of the application, namely, the termination of Ms. Anderson's employment on February 2, 1998. In addition, the Union is seeking an interim order requiring the Employer to reinstate Ms. Anderson pending a hearing of the application.

Counsel for the Employer did not oppose the amendment request and the Board therefore grants the Union's request to amend LRB File Nos. 374-97 to 376-97 to include the allegations contained in its March 2, 1998 application.

On March 4, 1998, the Board issued Reasons for Decision requiring the interim application be heard on March 10, 1998. At the hearing of the interim application, the Board ruled that the viva voce evidence which the Board heard on its previous hearing dates would be applied to the interim application except for the testimony of Ms. Anderson which has not yet been subject to full cross-examination.

The Board has heard evidence in chief and on cross-examination of Gary Pfeifer, Manager of the Tropical Inn and Lois Taylor, Comptroller of United Enterprises Ltd. with respect to the statement of employment. At the outset of the certification application there were over 30 names on the statement of employment which the Union disputed or questioned and twelve people whom the Union asserted should be on the statement of employment. The statement was filed with the Board on January 14, 1998, leaving insufficient time for the Board's pre-hearing process to effectively resolve the "ins and

outs" issues. In addition, the information requested by the Union from the Employer in the pre-hearing process had not been supplied at the time of the hearing. In an attempt to narrow the issues at the outset of the hearing, the Board directed the Employer to lead evidence with respect to the statement of employment. By March 9, 1998, 16 employees on the statement of employment remain in dispute. In addition, the Union wants to add four employees and the Employer wants to add one employee. The Employer also wants two additional managerial exclusions, being Anna Storgard, Banquet Manager, and Ms. Anderson.

Following the evidence of Mr. Pfeifer and Ms. Taylor, the Union commenced its evidence both on the certification application and the unfair labour practice applications (LRB File Nos. 305-97, 313-97 and 374-97 to 376-97). Glenn Stewart, Union Organizer, gave evidence in chief and cross-examination. Ms. Anderson began her evidence in chief on March 3, 1998. On March 9, 1998, Ms. Anderson's testimony was interrupted in order to permit the Union to call Vanessa Stead, a former employee of the Tropical Inn. Both parties agreed to accommodate Ms. Stead's testimony in the middle of hearing Ms. Anderson's testimony as Ms. Stead now resides in British Columbia. Ms. Stead finished testifying the morning of March 9, 1998. On March 10, 1998, the interim application was argued before the Board.

With its application for an interim order the Union filed affidavits deposed to by Ms. Anderson and Mr. Stewart. On March 10, 1998, the Employer filed affidavits deposed to by Mr. Pfeifer, Ms. Storgard, and Loretta Letendre, Manager of Bennigan's, a licensed facility in the Tropical Inn. Counsel for the Union indicated that the Union did not have sufficient time to file affidavits in reply to the affidavits filed by the Employer.

At the hearing of the interim application, counsel for the Employer requested that Ms. Anderson be excluded from the proceedings as she remains under cross-examination and is otherwise prevented from discussing her testimony. At the same time, counsel for the Union requested the exclusion of any witnesses who may give evidence on behalf of the Employer. The Board ordered the exclusion of all witnesses, with the exception of the instructing parties, on the basis that none of the witnesses should hear argument about versions of evidence that they or another witness may give in the main proceedings which were already under way.

Facts

The evidence heard by the Board and the affidavit material establish the following relevant facts:

(1) Judy Anderson was employed at the Tropical Inn on a full-time basis since the end of January or early February, 1997. Her primary responsibility was to arrange conventions, weddings and other functions for the Employer. Ms. Anderson's job responsibilities required her to send out promotional material to various potential clients; to meet with clients to discuss the details of the functions they wished to hold at the Tropical Inn; to complete function reports for use by the catering manager and the chef in preparing for the various functions; and to conduct follow-up meetings with clients to discuss the success of the function and to deal with the final accounts. Ms. Anderson also arranged special events or promotions for the restaurants and lounge in conjunction with the managers of those facilities;

(2) In August, 1997, Judy Anderson assisted in the Union's organizing drive by providing the Union with a list of names and phone numbers of employees working at the Tropical Inn;

(3) The Union commenced an organizing drive among employees of the Tropical Inn in September, 1997 culminating in its application for certification on September 24, 1997;

(4) On September 25, 1997, Doris Binette, Accountant and Front Desk Supervisor of the Tropical Inn, told Ms. Anderson that Mr. Pfeifer thought Ms. Anderson was too tense and that she was to take one and one half days off work.

(5) On October 1, 1997, Ms. Anderson commenced a stress leave from work which was to December 1, 1997 and later extended by her physician to December 15, 1997;

(6) On October 15, 1997, Mr. Pfeifer wrote a letter to Ms. Anderson in which he complained that she had made mistakes in handling four functions and he concluded that the mistakes were the result of her laziness or sloppiness. He further advised Ms. Anderson that her performance in the last two months was

substandard and abrasive and warned her that he would not discuss this matter again with her;

(7) On December 13, 1997, Ms. Binette attended at Ms. Anderson's home and advised her that Mr. Pfeifer wanted Ms. Anderson to take three weeks off without pay as there was nothing to do in her department. Ms. Anderson requested a letter from Ms. Binette stating the reasons why she would not be able to return to work on December 15, 1997;

(8) On December 16, 1997, Ms. Binette wrote to Ms. Anderson advising that the Employer required a further letter from Ms. Anderson's physician indicating that Ms. Anderson was fit for work and what kind of work she was fit to return to. The letter also advised that work was slow and that they would see Ms. Anderson on January 5, 1998. The letter also advised that they had noted a number of problems with Ms. Anderson's work which would need to be discussed with her before she returned to work;

(9) On December 22, 1997, the Union filed LRB File Nos. 374-97 to 376-97 in relation to the above refusal of the Employer to return Ms. Anderson to work following her stress leave;

(10) On January 5, 1998 Mr. Pfeifer wrote to Ms. Anderson detailing further complaints about Ms. Anderson's performance and stating as follows:

We are prepared to bring you back at your old position of Sales/Catering Manager on a probationary basis. . . .

We have also restructured some of the duties in the office at this time, so we only require you on a part-time capacity. As you know your predecessor held this job in a part-time capacity. But remember this part-time position is still probationary due to the aforementioned problems.

Please report to work at the Tropical Inn at 10:00 a.m. on January 6, 1998.

(11) Ms. Anderson returned to the workplace on January 7, 1998, at which time she was directed by Ms. Binette to work from a small desk in the general office as opposed to Ms. Anderson's normal office. Ms. Anderson worked sporadically from January 7, 1998 to the date of her termination on February 4, 1998, for reasons which are in dispute.

(12) From January 26, 1998 to January 29, 1998, Ms. Anderson attended the Labour Relations Board hearings in Saskatoon without requesting permission from the Employer to be absent from work;

(13) One of the issues in the certification application is whether Ms. Anderson is a managerial employee and thereby excluded from the definition of "employee" in the *Act*;

(14) Mr. Pfeifer requested a meeting with Ms. Anderson at the Tropical Inn on January 30, 1998, the day subsequent to the conclusion of the Board's first set of hearing dates on the certification application. In his affidavit, Mr. Pfeifer explained his reasons for meeting with Ms. Anderson following the Labour Relations Board hearing as follows:

> *I needed to confirm with her [Ms. Anderson] that she was indeed a manager on the property and that if employment was going to be available to her it was going to be in a managerial capacity. The meeting was not intended for any other purpose other than to indicate to her what I comprehended the job to be that she was hired to do. It is true that I told her I need a manager to do the work she was hired to perform and I needed her to discuss with me the responsibilities and duties of the job. If she was going to work for me, I needed to know what she was going to do, and how she preserved the performance of the duties.*

(15) Ms. Anderson and Mr. Pfeifer met again at 3:00 pm on January 30, 1998 at which time Ms. Binette was also present. At this time, Mr. Pfeifer asked Ms. Anderson if she was prepared to accept the position of assistant manager; if not, he offered to accept her resignation and provide her with a severance package;

(16) On January 31, 1998, a further meeting was held among Ms. Anderson, Ms. Binette and Mr. Pfeifer. Mr. Pfeifer presented Ms. Anderson a letter of resignation which Ms. Anderson refused to sign;

(17) On February 4, 1998, Mr. Pfeifer met with Ms. Anderson and presented her a letter of termination dated February 2, 1998. The letter indicated that Ms. Anderson was being terminated for failing to perform her job functions in a proper manner; and

(18) Prior to October 1, 1997, Ms. Anderson was paid at least $1660 per month.

Relevant Statutory Provisions

The Board considered the following provisions:

> *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.*
>
> ...
>
> *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.*

Arguments

Mr. Plaxton, counsel for the Union, referred the Board to its decisions 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; *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 and *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, for the principles applied by the Board in addressing applications for interim relief. In particular, counsel argued that the Union need only establish on an application for interim relief that it has a serious issue to be tried on the main application, that the Union will suffer irreparable harm if the application is not granted, and that the balance of convenience favours the Union, not the Employer.

Counsel noted that there is no dispute that Ms. Anderson was fired by the Employer during the course of the Board hearing applications alleging that the Employer committed violations of ss. 11(1)(a), (e) and (g) of the *Act* in relation to its treatment of Ms. Anderson. These allegations give rise, along with the allegations of improper termination, to the reverse onus clause contained in s. 11(1)(e) of the *Act* where the burden falls to the Employer to establish that it had good and sufficient reasons for the action taken.

With respect to the dispute as to Ms. Anderson's status as an employee, counsel referred the Board to *Saskatchewan Union of Nurses v. Kindersley Senior Care Inc.*, [1989] Winter Sask. Labour Rep. 47, LRB File No. 219-88, as authority for the proposition that the onus of proof is on the employer to establish that a person is not an employee as defined by the *Act*. Counsel also referred the Board to its recent decision in *Saskatchewan Government Employees' Union v. Saskatchewan Liquor and Gaming Authority; Saskatchewan Liquor Store Managers' Association v. Saskatchewan Liquor and Gaming Authority*, [1997] Sask. L.R.B.R. 836, LRB File Nos. 037-95 and 349-96, to demonstrate that the definition of manager is limited and may not include persons who exercise a minor power to hire employees. Counsel noted that the Board's remedial power in this instance could be found under ss. 5(e)(i) and (ii) of the *Act*, as opposed to s. 5(f) of the *Act*, in order to remedy the unfair labour practice.

Alternatively, counsel argued that on the date Ms. Anderson was fired, which was subsequent to the filing of the first unfair labour practice with respect to the Employer's treatment of Ms. Anderson, she was not a managerial employee. Counsel argued that the evidence indicated that Ms. Anderson's position had been made a part-time probationary position where she worked at a small desk if and when there was any work to do. The work assigned to Ms. Anderson during this period, according to counsel, included photocopying brochures and stuffing envelopes.

On the issue of irreparable harm, counsel for the Union argued that there was no case that was parallel to the one before the Board. He noted that in this instance, the employee was fired during a hearing of an unfair labour practice alleging employer interference in relation to other conduct the Employer had engaged in with respect to the employee. Counsel argued that the Employer's conduct amounts to an attempt to interfere with the Board's processes by trying to bully the employee into agreeing that she is a managerial employee on threat of dismissal when that issue is squarely before the Labour Relations Board on the certification application. Counsel also argued that the Employer's conduct sends a message to the remaining workers that if they get involved in the Union, the Employer will send them home on stress leave; when they file unfair labour practice applications, they will be returned to work at a small desk, be ignored, not be paid a salary; and finally, when they attend a Labour Relations Board hearing, they will be fired. Counsel noted that the evidence indicates that the Employer wanted Ms. Anderson to either agree that she was an assistant manager or be fired. When Ms. Anderson resisted this strong arm tactic, the Employer fired her for alleged incompetence, while having just offered her a position as assistant manager. Counsel argued that the Employer's tactics in this case are outrageous

and will impact on the remaining members of the bargaining unit unless an interim order is issued reinstating Ms. Anderson until the final determination is made and requiring the Employer to post a notice explaining the Board's order.

With respect to the affidavits filed by the Employer on the interim application, Mr. Plaxton argued that matters that are not based on the deponents' own knowledge cannot be relied on by the Board in making its determination.

Counsel for the Union also argued that the outcome of the unfair labour practice, at least with respect to ss. 11(1)(a), (e) and (g) of the *Act* does not depend on the employee status of Ms. Anderson; that is, even if she is ultimately found to be a managerial employee and is thereby excluded from the *Act,* the Employer can nevertheless be guilty of an unfair labour practice of interfering in the formation of a trade union or employees' rights under the *Act*. In support of this proposition, counsel referred the Board to *Saskatchewan Government Employees' Union v. Regina Native Women's Association*, [1986] July Sask. Labour Rep. 29, LRB File Nos. 335-85 to 342-85, and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Imperial 400 Motel,* [1993] 1st Quarter Sask. Labour Rep. 183, LRB File Nos. 226-92, 227-92 & 228-92.

Mr. Seiferling, counsel for the Employer, noted that the lead case in Saskatchewan on interlocutory injunctions is the decision of the Saskatchewan Court of Appeal in *Potash Corporation of Saskatchewan Mining Limited v. Todd et al.*, [1987] 2 W.W.R. 481 (Sask. C.A.), where the Court set four criteria for the issuing of interlocutory injunctions: (1) the right to relief must be clear; (2) the applicant must show a strong prima facie case and a strong possibility that it will succeed at trial; (3) the applicant must show that an injunction is necessary to prevent irreparable harm to it; and (4) that where any doubt exists, the balance of convenience must be determined between the applicant and the respondent. Counsel argued that the onus of proving the four elements rests on the party making the application for the extraordinary remedy.

In the present case where there is an issue as to the status of the person as an "employee", the Board has no jurisdiction to reinstate the person if its ultimate decision is that she is a manager. Counsel argued that the request for an interim order for reinstatement asks the Board to pre-judge the issue of managerial status.

Counsel also argued that the Union failed to demonstrate that it will suffer irreparable loss. He noted that the Union has applied for certification and is no longer in the middle of its organizing campaign. In this regard, the support for the Union is frozen as of the date the certification application was filed with the Board. Counsel noted that where the alleged harm can be remedied by the payment of money, such as the restoration of Ms. Anderson's wages, no interim order should issue.

On the question of the balance of convenience, counsel directed the Board to a passage in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 1 All E.R. 504, a decision of the House of Lords where Lord Diplock stressed the need for weighing the applicant's need for protection against the harm that could result to the respondent, if it is successful in the final determination. In particular, counsel argued that Lord Diplock's analysis of the need for the applicant to provide the respondent with an undertaking in damages should the applicant not succeed on the main application, is a significant factor in determining the balance of convenience. In the present case, counsel argued that unless the Union provides an undertaking to the Employer agreeing to reimburse the Employer for the costs associated with reinstating Ms. Anderson, in the event the Employer is successful on the main applications, the interim order should not be granted. Counsel referred to a decision of the Manitoba Court of Appeal and a decision of the House of Lords for the proposition that undertakings in damages are requisite part of every application for interlocutory relief.

Counsel also noted that the evidence before the Board both in terms of the admissible viva voce evidence and the affidavit evidence was in large part contradictory. He referred the Board to the *Potash Corporation* case, *supra*, for the proposition that the Board should only consider uncontradicted evidence in rendering its decision on the interim application.

Counsel also argued that under the 1994 amendments to s. 5 of the *Act*, particularly by the addition of s. 5(e)(ii) of the *Act*, the Board has considerably broader power to correct the harm done by any violation of the *Act* by ordering the party at fault to rectify the violation. The Employer took the position that if a vote is ordered among employees in the bargaining unit, the Board may make a rectification order that counteracts the harm done by the Employer's violation.

Finally, the Employer argued that at this stage in the proceedings there was no reason to conclude that Ms. Anderson's absence in the workplace would result in irreparable harm to the Union. He noted that

she has not been present in the workplace on a full-time basis since the first unfair labour practice application was filed in relation to the Employer's conduct toward Ms. Anderson. If her presence is required, the Employer argued that it would also have been required when the first application was filed.

The Employer also argued that it stands to suffer a loss if Ms. Anderson returns to work and fails to perform her work in accordance with the Employer's expectations. Mr. Pfeifer speculated that his business may be harmed by Ms. Anderson's conduct and his reputation damaged by her. He argued that he did not trust Ms. Anderson and should not be required to reinstate her to her former position.

Analysis

Section 5.3 of the *Act* empowers the Board with respect to any application or complaint made pursuant to the *Act* to make an interim order pending the making of a final order or decision. This provision codifies and expands the Board's previous power under the combined effects of ss. 5 and 42 of the *Act* to issue interlocutory relief.

Under s. 5.3 of the *Act*, the Board is not directed to proceed in any particular fashion to determine if an interim order should issue. However, the Board has tended to follow the path developed in the courts for issuing interlocutory orders, such as interim injunctions and stay of proceedings. As indicated, the Board is not required by the wording of s. 5.3 of the *Act* to apply the principles set out by in the *Potash Corporation* case, *supra*, or other pronouncements of the superior courts and is entitled to develop its own principles for permitting or refusing interim relief taking into account the purpose and scheme of the *Act*. In this regard, the Board shares the views expressed by the Ontario Labour Relations Board in *United Steelworkers of America v. Tate Andale Canada Inc.*, [1993] OLRB Rep. October 1019, at 1027-1028:

> *In the first place, we might observe that the Board is not a court; and there is no reason to expect that either its adjudicative or remedial approach should mirror that of a court. Civil practice may sometimes provide a useful analogy, but when the Act so clearly involves policy considerations, so systematically modifies common-law premises, and so clearly excludes judicial involvement, it would be curious for the Board to make common-law criteria a governing principle of interpretation. This is not to say that the Board's approach to dispute resolution will never resemble that of the courts; however, the criteria applied, and the result reached, are more likely to be*

> *based upon the scheme and purpose of the Act, the Board's own experience, and the norms and needs of the industrial relations community.*

The Ontario Labour Relations Board developed a two part test for determining whether an interim order will be issued under former s. 92.1 of the *Labour Relations Act*. The Ontario Board focused its inquiry on: (1) whether the main application reflects an arguable case under the *Labour Relations Act*, and (2) what labour relations harm will result if the interim order is not granted compared to the harm that will result if it is granted: see *United Food and Commercial Workers International Union, Local 175/633 v. Loeb Highland*, [1993] OLRB Rep. March 197.

Both parties in the present case argued on the basis of a version of the rules developed by the courts and adopted by this Board in other decisions. It is not necessary in this instance to decide if the Board should alter its approach to the manner of determining if an interim order should issue. However, in future proceedings, the Board may ask for argument on the merits of the Ontario approach.

In the *Pepsi-Cola* decision, *supra*, the Board discussed the criteria it applies to an application for interim relief in the following terms, at 443-445:

> *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 [(1994), 111 D.L.R. (4th) 385 at 410-411], 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.*

The rationale of the Supreme Court in adopting the lower threshold test of "serious question to be tried" as opposed to the threshold of "prima facie" case was explained by Beetz, J. in *Attorney-General of Manitoba v. Metropolitan Stores (MTS) Ltd. et al.*, [1987] 1 S.C.R. 110 (S.C.C.), at 130:

> *The limited role of a court at the interlocutory stage was well described by Lord Diplock in the American Cyanimid case, supra, at 510:*
>
> > *It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. These are matters to be dealt with at the trial.*

Similar reasoning was relied on by the Ontario Labour Relations Board in the *Loeb Highland* case, *supra*, for adopting the threshold test of whether the application raises an arguable case under the labour relations law. The Ontario Board stated, at 202:

> *Turning first to the idea of a threshold test with respect to the merits of the main application, we have some concern about applying a high level of scrutiny to that application at the time of a request for an interim order. To the extent that such scrutiny may imply a form of prejudgment of the final disposition of the main matter, it is not particularly compatible with the scheme for interim relief set out in the Act and the Board's Rules of Procedure. More specifically, the procedure for interim relief contemplated by the Board's Rules reflects the inherent necessity for expedition in these matters. To that end, evidence is filed by way of certified declarations which are not subject to cross-examination. Indeed, s. 104(14) of the Act and Rules 92 and 93 indicate the Board may not hold an oral hearing at all, but may receive the parties' arguments in writing as well.*
>
> *This means that the Board is not in a position to make determinations based on disputed facts. In these circumstances, it would normally be unfair for an interim order to be predicated to any significant extent on a decision with respect to the strength or weakness of the main case. That should await the hearing of the main application when the Board hears oral evidence and can make decisions with respect to credibility based on the usual indicia, in a context where the parties have a full right of cross-examination. This is particularly important in cases such as the section 91 complaint to which this application relates, where decisions are often based on inferences and the various nuances of credibility play a key role. In other words, the granting of interim relief in this context should usually be based on criteria which minimize prejudging the merits of the main application.*

In our view, the present application for interim relief will not result in a final determination of the matters in dispute, and does not depend on a pure question of law for its resolution. Under the

principles set out in the *RJR-MacDonald* case, *supra*, the threshold determination for the Board to make is whether there is a serious question to be tried. In this instance, the Union alleged that Ms. Anderson was terminated from her employment during the Union's organizing campaign and during Board hearings, contrary to the provisions of the *Act*. Although various issues are disputed between the Union and the Employer with respect to Ms. Anderson's status and the reasons for termination, it cannot be said that the application is frivolous or vexatious. This applies to both aspects of the applications related to Ms. Anderson, that is, the unfair labour practices and the issue related to her status as an "employee" under the *Act*. The Board need not engage in any detailed assessment of the evidence or the credibility of witnesses as those matters fall to be determined on the main applications.

The second aspect of the test requires the Board to determine if the Union will suffer irreparable harm if the application for an interim order is refused. In his affidavit, Mr. Stewart outlined facts which are known to the Board: first, the hearings had, at the time of the deposition, been heard by the Board on four days with a further six hearing days scheduled; second, Ms. Anderson's involvement in the Union's organizing drive was known to the Employer, at least since the filing of the unfair labour practice applications (LRB File No. 313-97); and third, the certification application may result in the Board ordering a vote among the employees in the appropriate bargaining unit. From these facts, Mr. Stewart drew the conclusion that if Ms. Anderson remains terminated pending the outcome of the final hearings, the termination will have a chilling effect on the Union's organizing drive and will compound the harm done by the Employer, which the Union believes is irreparable.

The affidavit of Mr. Pfeifer does not dispute the Union's claim of irreparable harm but asserts that the Employer would suffer irreparable harm if Ms. Anderson was returned to her position. In addition, Mr. Pfeifer asserts that the harm claimed by the Union can be remedied if and when the Board orders a vote.

In our view, the Union has demonstrated that it may suffer irreparable harm. The Board looks to the harm suffered by the Union, the employee in question and other employees, as well in the balancing of the competing claims, the harm that may be suffered by the Employer. Our focus, however, is not on the individual loss or economic loss, but on the harm that may be visited on the labour relations environment and which may impact on the Board's ability to make an effective order in the end result.

In this instance, the employees are involved in the process of selecting a bargaining agent. Although the application for certification has been filed, the matters raised in the application are such that a lengthy hearing is required before it will be determined if the Union will be certified as the bargaining agent. The application may very well result in the conduct of a vote among the employees in the bargaining unit. In these circumstances, the Board has recognized the need to ensure that employees can exercise their rights to join or not join a union without fear of retribution or reprisals, either from the employer or the union: see ss. 11(1) and (2) of the *Act*.

In *United Steelworkers of America v. Tate Andale Canada Inc.*, [1993] OLRB Rep. October 1019, at 1029, the Ontario Labour Relations Board outlined the harm done to a union's organizing campaign when a union supporter is terminated during the organizing campaign as follows:

> *Where interim relief if sought in connection with an unfair labour practice complaint, one must keep in mind the legal rights and administrative processes that the law is intended to protect; or to put it another way, the rights and processes which the impugned conduct may (and may not be intended to) undermine. In the context of a union organizing campaign, those rights include not only an individual right to choose without fear of reprisal, but also a correlative group right of self-organization, so that employees may establish a collective bargaining relationship in the manner contemplated by the statute. A remedial philosophy that focuses exclusively on repairing the harm to individual victims, and neglects the general assault on freedom of association, will inevitably fail to promote the statutory objective.*
>
> *If the employer's purpose were only to punish the individual worker for supporting the union, the law might well address the harm by restoring him/her to the job, and making up the income that s/he lost. But if the real object is to break the momentum of the organizing campaign, to eliminate an influential employee advocate, or to send a graphic message to other employees, the set-back to the employees' quest for a collective voice in the workplace may not be so easily remedied.*
>
> *It is not easy to calculate the value of the employees' "lost opportunity" to make a fair and free choice about trade union representation. It is not easy to repair an administrative process that depends for its efficacy on the free exercise of employee wishes. It is not easy to assess the value of lost leadership in the formative stages of an organization - although it is perhaps self-evident that a voluntary organization, be it a club, church or trade union, depends upon the zeal and commitment of its core members. However intangible these qualities of energy or commitment may be, a voluntary organization like a trade union cannot form or function without them - particularly in its early stages when workers may be unfamiliar with their rights, when the statutory freeze or "just cause protection" may not yet have been triggered . . . and employers may be more inclined to resist unionization, legally or illegally. For it is a sad fact of the industrial relations scene that almost fifty years after the employees' right to collective bargaining was entrenched in law, some employers continue to resist*

> *the exercise of those rights, or penalize employees who dare to do so. That is why section 111 of the Act preserves the anonymity of union supporters, lest their identification expose them to employer reprisals. If the Legislature had been confident that employees had nothing to fear, or Board remedies were a complete answer to illegality, it would not have shrouded the organizing process with such secrecy . . .*
>
> *A remedial approach that does not take into account these labour relations realities will necessarily be deficient, and to that extent ineffective, as either redress or deterrent.*

We agree with this assessment of potential harm arising from the Employer's impugned conduct to the rights of employees to freely select a trade union of their own choosing and find that it is irreparable in its nature through the normal remedial processes of the Board.

With respect to the balance of convenience, the Board weighs the harm that will be suffered by the Union, the employee in question and the employees as a group, particularly in relation to their statutory right to join a trade union of their own choosing, if no interim order is issued, against the harm that will be suffered by the Employer if an interim order is issued. We have outlined the harm to the Union, the employee and its members above.

In relation to the Employer's harm, it is concerned that the employee will not perform her duties, that she will conduct herself in a manner that will harm the reputation of the business and cause the Employer financial loss. In our view, the risk of Ms. Anderson failing to properly perform her job functions is minimal. She is aware of the Board application, the possibility of the Board upholding the Employer's position that she is a managerial employee or that her termination was not related to union activity. There is great incentive for Ms. Anderson to perform her duties properly and to the best of her ability. In addition, the cost to the Employer of reinstating Ms. Anderson can be minimized if the hearing of this matter is expedited.

In the Board's view, the risk of harm to the Union and the employees, particularly in relation to their right to freely choose a trade union, outweighs the risk of harm to the Employer if Ms. Anderson is reinstated on an interim basis until the matter is finally resolved.

In his argument, counsel for the Employer requested that the Union provide an undertaking of damages to the Board to cover the Employer's costs of reinstating Ms. Anderson in the event the Employer is

successful on its claims with respect to her. Counsel referred the Board to a number of court decisions on the matter, but failed to note that the Board had considered and rejected the request in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. O.K. Economy Stores*, [1994] 1st Quarter Sask. Labour Rep. 223, LRB File No. 039-94, as follows, at 230-231:

> *The Employer argued that an undertaking for damages is a condition of the granting of any injunction, and that the Board should insist on such an undertaking being made in this case, so that the Employer may be compensated for the damage incurred in the event its actions turn out to be legal. We should first say that our reading of the cases on this point suggests that an undertaking as to damages is not a precondition for the granting of an injunction in all cases, although the Board can of course make it a condition when it decides to grant an injunction.*
>
> *There are several reasons why it seems to us inappropriate to do so in this case. This Board does not grant awards of damages in the sense that term is understood in the civil courts. The remedies devised by the Board may have a compensatory aspect, but they are chosen with a view to how effectually they may support the overall purposes of The Trade Union Act. Unlike the parties to many legal proceedings in the courts, the Employer and the Union who are parties to this application have a collective bargaining relationship which long predates this application, and which will continue after the dust has settled in this dispute.*
>
> *It is open to the Board, in considering the main application, to decide whether any harm which may be suffered by the Employer as a result of the granting of this application for an injunction should be accorded relief at that time. If it is the view of the Employer - and it is a view they have expressed in another context - that this Board does not have the power to make such an order at a future time, then we fail to see what an undertaking for damages would accomplish, as such an undertaking must be based on the remedial powers of the tribunal which orders it.*

The *O.K. Economy* case, *supra*, was subject to an application for judicial review before Gerein J. who upheld the Board's decision and rejected the Employer's argument with respect to an undertaking for damages at (1994), 122 Sask. R. 59 (Sask. Q.B.), 68-69:

> *In this instance the Board declined to require of the union an undertaking as to damages. The employer now submits that the absence of such an undertaking requires that the injunction be quashed. I do not agree.*
>
> *Counsel for the employer made reference to F. Hoffman-La Roche & Co. AG et al. v. Secretary of State for Trade and Industry, [1974] 2 All E.R. 1128. That case contains a very useful explanation for requiring that a party provide an undertaking as to damages, but as its facts are clearly distinguishable from those before me, it serves no other useful purpose. I was also referred to Griffin Steel Foundries Ltd. v. Canadian Association of Industrial Mechanical and Allied Workers et al., (1978) 80 D.L.R. (3d)*

> *634. In that case the Manitoba Court of Appeal held at p. 644 that the practice in Manitoba was that "an undertaking as to damages must be required in the case of every interim and interlocutory injunction."*
>
> *In my opinion, it is otherwise in this province. Almost invariably an undertaking will be required, but there is no rule of law which mandates it. Whether an undertaking will be required is a discretionary matter dependent upon the circumstances. See Carbert et al. v. Farm Credit Corporation, [1993] 3 W.W.R. 198; Ollinger v. Saskatchewan Crop Insurance Corp., [1992] 4 W.W.R. 517; Loblaw Cos. v. Canada Safeway Ltd.(1969), 14 C.P.C. (3d) 426. . . .*
>
> *In the instant case the Board considered the context in which it was acting and more particularly the ongoing relationship between the parties. As well, it took into account the fact that it lacks jurisdiction to award damages; which restriction has been confirmed by this Court in Brandt Industries Ltd. v. United Steelworkers of America (1993), 104 Sask. R. 1. In these circumstances I am of the opinion that the failure to require an undertaking did not constitute either an error in law or an error which is patently unreasonable.*

It should be noted that the remedial powers of the Board were amended by the passage of S.S., 1994, c. 47 where s. 5(e) of the *Act* was expanded to permit the Board to "do anything for the purpose of rectifying a violation of this *Act*, the regulations or a decision of the Board." In addition, s. 5(g) of the *Act* was expanded to permit the Board to fix and determine the monetary loss suffered by an employer as a result of a violation of the *Act*, the regulations or a decision of the Board. However, there is no general provision in s. 5 of the *Act* which permits the Board to award monetary loss or costs to a party who is found not to be in violation of the *Act*, a regulation or Board decision. The Board's power to award damages is confined to a finding of a violation of the *Act*, regulations or Board decision. In this regard, we do not find that the 1994 amendments to the Board's remedial authority alter the Board's power with respect to its ability to award damages or costs to a party found to not have violated the *Act*, regulations or Board decision. The Board's decision in the *O.K. Economy* case, *supra*, is germane to this application. As a result, the Board refuses to require the Union to file an undertaking as to damages as a precondition to the granting of an interim order.

The final matter to address is the type of interim order that will be issued. Prior to October 1, 1997 Ms. Anderson was performing work which we have described above. She was assigned a specific office, which also contained her files, notes and other information she required to perform the tasks expected of her by the Employer. On her return in January, 1998, the assignment of work was changed, as well as the location of her work and the time she was expected to be on the premises to perform the work.

Our interest in reinstating Ms. Anderson on an interim basis is to restore the status quo as much as possible for the duration of the time that is required to hear and determine the main applications. It seems to this Board that this requires Ms. Anderson to be reinstated to the position she was employed in prior to October 1, 1997, on the same terms and conditions that then applied. In particular, the Board will order the Employer as follows:

(1) to reinstate Ms. Anderson within 24 hours of the Employer receiving a copy of the Board's Order and Reasons for Decision by facsimile transmission from the Board to the Tropical Inn, North Battleford;

(2) to permit Ms. Anderson to attend at work from 8:00 am to 5:00 pm, Monday to Friday, and to permit her to take two 15 minute rest periods per day and one 30 minute lunch break per day;

(3) to assign to Ms. Anderson sole use of the office in which she worked prior to October 1, 1997 which is marked as "Judy's office" in Exhibit E-45 filed by the Employer in these proceedings;

(4) to permit Ms. Anderson to perform the job functions and duties that were assigned to her prior to October 1, 1997;

(5) to pay Ms. Anderson, on a bi-weekly basis, the sum of $1660.00 per month and to provide Ms. Anderson with a written statement of the pay received and the deductions made from her pay with each bi-weekly paycheque; and

(6) to grant Ms. Anderson such leaves of absence without pay from work as are required by her in order to attend the hearings of the Labour Relations Board in relation to the matters now pending before the Board between the Union and the Employer. Ms. Anderson is directed to provide the Employer with at least 24 hours notice in writing of her intention to be absent from the workplace to attend the said hearings.

The Order will also contain a Schedule "A" which will explain the Board's Order to employees of the Tropical Inn and provide them with information on their rights under the *Act*. The Employer will be directed to permit a Board agent to post ten copies of the Board's Order and Schedule "A" in locations throughout the Employer's premises in places that are accessible to a majority of the employees. The

Order and Schedule will remain posted until a final determination is made with respect to the applications presently before the Board.

The Board will also require the parties to expedite the hearings. The dates of March 30, 1998 and March 31, 1998 have been set aside by the Board and the parties to continue the hearing.

Counsel for the Union is permitted by the Board to disclose the results of the interim application to Ms. Anderson, to provide her with a copy of the Board's Reasons, Order and Schedule "A", and to advise Ms. Anderson on the implementation of the Board's interim Order.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant and TROPICAL INN, OPERATED BY PFEIFER HOLDINGS LTD. AND UNITED ENTERPRISES LTD., Respondent

LRB File Nos. 374-97, 375-97 and 376-97; March 26, 1998
Chairperson, Gwen Gray; Members: Bruce McDonald and Terry Verbeke

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

Remedy - Interim order - Board issues addendum to clarify any misunderstanding resulting from Board's interim order.

ADDENDUM TO REASONS FOR DECISION ON INTERIM ORDER

Gwen Gray, Chairperson: The Board issued Reasons for Decision and an interim Order on March 24, 1998 in relation to the unfair labour practices filed by the United Food and Commercial Workers, Local 1400 (the "Union") against the Tropical Inn, operated by Pfeifer Holdings Ltd. and United Enterprises Ltd. (the "Employer) (see *United Food and Commercial Workers, Local 1400 v. Tropical Inn, operated by Pfeifer Holdings Ltd. and United Enterprises Ltd.*, [1998] Sask. L.R.B.R. 218). Counsel for the Employer wrote to the Board on the same date as follows:

> *We have your interim injunction in this matter.*
>
> *We have reviewed all of the material filed and have difficulty with an Order reinstating when no evidence was filed to support the Order. In particular:*
>
> *a) Where was there any evidence to indicate it was a 8:00 to 5:00 job with two 15-minute coffee breaks and one 1/2 hour lunch break?*
>
> *b) What happens to events booked by the Manager when she normally would attend outside of the hours you created? Is it overtime or can she just go home and leave the job?*
>
> *c) The office she used only be used by her. Does this mean that the owners of the property have no access to records she generates for the property that are in her office? Can Gary Pfeifer go in that office at all?*

> d) *If you find it management and therefore had no jurisdiction to make an interim or final order, can a damage order be made for the losses suffered by my client or is the Labour Relations Board's position that it is a cost my client has to absorb even if you had no jurisdiction to make any Order?*
>
> *It is not my purpose in writing to you to reargue the case. However, when we reconvene, perhaps you can advise us where you received the evidence upon which the Order is based and clarify our rights to losses.*

This Addendum to the Reasons for Decision will address the four points raised in the letter in order to clarify any misunderstanding that may exist as a result of the Order issued.

In its Order the Board required the Employer to reinstate Judy Anderson and "to permit Ms. Anderson to attend at work from 8:00 am to 5:00 pm, Monday to Friday, and to take two 15 minute rest periods per day and one 30 minute lunch break per day." The work schedule was included in the Order to ensure that Ms. Anderson was reinstated to a full-time position, as she occupied before October 1, 1997, and to ensure that she was permitted to be on the premises of the Employer for a regular full-time shift of work. The Order was not intended to prevent the Employer from requiring Ms. Anderson to perform overtime work in the same manner as it had prior to October 1, 1997. The rest periods set by the Board in its Order are in accordance with the requirements of *The Labour Standards Act*, R.S.S. 1978, c. L-1 and Regulations.

The Board also ordered the Employer to "assign to Ms. Anderson sole use of the office in which she worked prior to October 1, 1997 which is marked as "Judy's office" in Exhibit E-45 filed by the Respondent in these proceedings." The evidence indicated that Ms. Anderson's regular office had been occupied by another employee since January, 1998. The intent of the Board's Order was to restore Ms. Anderson to her regular office on the same basis she used it prior to October 1, 1997, without sharing it with another employee. The Employer's access to the office on the same basis and for the same purposes as existed prior to October 1, 1997, is unaffected by the Order except to the extent that it must assign the office to Ms. Anderson as opposed to assigning it to another employee.

The question of damages which is raised in paragraph (d) of Mr. Seiferling's letter was addressed in the Reasons for Decision issued on March 24, 1998 and will not be expanded on in this Addendum.

SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 333, Applicant and CALGARIAN RETIREMENT GROUP LTD., Respondent

LRB File No. 006-97; March 30, 1998
Chairperson, Gwen Gray; Members: Bruce McDonald and Gordon Hamilton

For the Applicant: Ted Koskie
For the Respondent: Ron Miller

Duty to bargain in good faith - Unilateral change - Change in employer's policy regarding handling of keys unrelated to union activity and insignificant from labour relations point of view - Employer not required to negotiate change with union prior to implementation.

Employer - Agent - Union established only tenuous link between anti-union employees and management - Board cannot conclude that anti-union employees acting as agents of management.

Unfair labour practice - Dismissal for union activity - Employee tendered resignation after incident resulted in abusive treatment by management - Manager testified that employee would not have been terminated for incident - Board holds that employer did not terminate employee and therefore no violation of *The Trade Union Act.*

Unfair labour practice - Dismissal for union activity - Employer did not have credible or coherent reason for dismissing employee - Employees engaged in activity in support of union - Board finds that employer violated *The Trade Union Act.*

Unfair labour practice - Interference - Communication - Board finds that employer's questions and statements about union constitute interference within the meaning of s. 11(1)(a) of *The Trade Union Act.*

Unfair labour practice - Interference - Co-worker opposition - Board finds that conduct of anti-union employees not coercive or intimidating - Employer therefore did not condone or permit anti-union employees to engage in coercion or intimidation.

Unfair labour practice - Remedy - Monetary loss - Award - Board orders employer to pay dismissed employee monetary loss for the period from date of dismissal to date of reinstatement.

Unfair labour practice - Remedy - Reinstatement - Discharge or suspension - Board orders employer to reinstate dismissed employee to same position with same hours and rate of pay.

***The Trade Union Act*, ss. 11(1)(a), (b), (c), (e), (g) and (m).**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Service Employees' International Union, Local 333 (the "Union") applied for a certification Order to represent the employees at Calgarian Retirement Group Ltd. (the "Employer") at its nursing home called Primrose Chateau in Saskatoon on November 27, 1996, which was granted by the Board on April 11, 1997. On January 22, 1997, the Union filed an unfair labour practice which alleged that the Employer had terminated the employment of Violet Nadon and Erica Lichtenwald contrary to ss. 11(1)(a), (b), (c), (e), (g) and (m) of *The Trade Union Act*, R.S.S. 1978, c. T-17. The Union also alleged that the Employer had made it known to employees that it would do anything to break the Union; the Employer told employees that if they joined the Union they would lose their employment benefits; the Employer offered to assist employees to withdraw their support for the Union; and that the Employer removed keys from employees. The Union alleged that the Employer's conduct had a discriminatory and intimidating effect on the employees.

The Employer demanded particulars of certain allegations from the Union and the Union supplied further particulars as follows:

1. *In regard to paragraph 4(h) that Primrose Chateau has made it known to its employees that it will do anything to break the union: One or more of the employees at Primrose Chateau were told orally in December, 1996 by Frances Wondga that the District Manager had said he would do anything he could to break this union.*

2. *In regard to paragraph 4(j) that Primrose Chateau has made it known to its employees that it will assist them in withdrawing union cards signed: One or more of the employees were questioned by Harley Pyper and Frances Wondga as to whether they had signed union support cards. These employees were further pressured by Frances Wondga to sign letters of withdrawal of support. This pressure caused Carla Deluca and Matthew Shadden to sign the attached notes which were authored by Ms. Wondga and forwarded to the office of Service Employees International Union by Ms. Wondga.*

3. *In regard to paragraph 4(k) that Primrose Chateau has taken keys to the employment premises away from the employees: These particulars are within the knowledge of the Respondent.*

4. *In regard to paragraph 4(l): Sufficient particulars have been set out above and in the Unfair Labour Practice Application. It is the evidence of these*

> *actions and their effect on the employees that will determine the operation of section 11 of the Act.*

The Employer then applied to the Board for an Order requiring the production of further particulars which was heard by the Board on May 9, 1997, and Reasons for Decision issued on May 16, 1997, in which the Board ordered the Union to provide better particulars in relation to its allegation related to the removal of keys from the employees. The Board also directed that two witnesses would be subpoenaed by the Board to attend the hearing as Board witnesses. In response to the Board's Order, the Union provided the following particulars:

> *Prior to the first week of January, 1997, all cooks and housekeepers had keys to the service entrance of the employment premises. Between January 1 - 9, 1997 these keys were taken away from all housekeepers yet remained with the cooks. The housekeepers were then required to enter the employment premises via the front door and sign in yet the cooks were not required to do the same. This differentiation of treatment without explanation has resulted in a perception of attempted intimidation by the employer.*

The hearing of the main application took place July 28, 1997 and July 30, 1997.

Facts

Primrose Chateau is a retirement home for seniors. Tony and Luella Bosch are the managers and are responsible for overseeing the day to day operations of the home. Harley Pyper is the bus driver for the home and is also a friend of Mr. and Ms. Bosch. Mr. Pyper was subpoenaed by the Board to attend the hearing to give evidence as a Board witness.

Mr. Pyper testified that during a regular staff meeting held on December 1, 1996, he asked Mr. and Ms. Bosch if he could talk to the staff alone at the end of the meeting. Mr. and Ms. Bosch, along with Roger Johnson, Dietary Manager, left the meeting and Mr. Pyper proceeded to try to convince the employees not to join the Union. He asked the staff if a union was being certified. He also tried to inform employees of the process of negotiating a contract - that benefits, for instance, would have to be negotiated. He denied telling employees that they may lose their benefits. Mr. Pyper said he had nothing against the Union but was annoyed that only 50 percent of the staff knew about the Union. The remaining employees were not approached to sign union cards.

After the meeting, Mr. Pyper and two co-workers, Brian Johnson and Faye Wondga, who also opposed the Union, approached employees individually in an attempt to get the employees to withdraw their support for the Union. Mr. Pyper approached Matthew Shadden, a young employee, on two occasions to discuss the matter. Both discussions occurred at the workplace when Mr. Shadden had come on shift. On the second occasion, Mr. Pyper was accompanied by Ms. Wondga and during that meeting, Mr. Shadden signed a paper that Ms. Wondga had presented to him. Mr. Pyper denied that either he or Ms. Wondga told Mr. Shadden that he would lose his benefits if the Union was organized.

On cross-examination, Mr. Pyper was shown several letters that the Union had received by fax from employees at Primrose Chateau in January, 1997. Mr. Pyper recognized his signature on one letter but he did not know who had written or prepared the text of the letters. He had received copies of the letter from Ms. Wondga who asked him to circulate them to other employees. Some were letters withdrawing the employee's membership card in the Union; others were letters opposing the Union.

The letters expressing opposition to the Union contained the same message. Some had been written by the same person. They read as follows:

> *I the undersigned employee*
> *of the Primrose Chateau*
> *310 Cree Crestant(sic)*
> *Saskatoon Saskatchewan*
> *DO NOT Want to belong to any*
> *union. I am satisfied with*
> *my employment and my benefits*
> *which I feel are quite adequate at*
> *no extra cost to me.*
> *This includes Parking, meals,*
> *coffee, health & medical insurance*
> *Also a pleasant place to work.*
>
> *"Employee signature"*

The withdrawal of support cards were handwritten by the same person and signed by the employees in question in different hand writing. They stated:

> *I the undersigned have signed a union card to become affiliated with the SEIU Local 333. But I wish to have my name with drawn & my card returned to me.*

Copies of the letters were faxed to the Union by Ms. Wondga.

Mr. Pyper acknowledged that he had a good working relationship with Mr. and Ms. Bosch and that he frequently ate his lunch with the managers in the Primrose Chateau.

Mr. Pyper was also aware that the key arrangement had changed for some employees. Apparently, during the period around January, 1997, employees were now required to attend the office to get keys for the suites in the home.

On examination by counsel for the Employer, Mr. Pyper indicated that he had a brief discussion with Mr. Bosch concerning the Union. He asked Mr. Bosch if he knew about the organizing effort. According to him, Mr. Bosch replied that he did know about the Union drive but that he was not able to discuss it with Mr. Pyper. Mr. Pyper indicated the conversation lasted only two minutes.

Mr. Pyper also indicated that he had a discussion with Edward Sigtermans, Regional Manager of the Holiday Retirement Corporation, concerning his wage rate. Mr. Pyper asked Mr. Sigtermans when he would be receiving his annual wage increase. Apparently, Mr. Sigtermans advised Mr. Pyper that no wage increases would be issued until there was a union settlement.

James Deline testified for the Union. Mr. Deline is a cook in the Primrose Chateau. He also attended the staff meeting in December, 1996 and recalled that Mr. Pyper asked Mr. and Ms. Bosch if he could talk to the staff alone. According to Mr. Deline, Mr. Pyper asked employees who attended the meeting if they had signed union cards. He also recalled Mr. Pyper stating that benefits would be cut and that he knew of a way to get out of the Union. Mr. Deline testified that Mr. Pyper invited employees to see him after the meeting.

Mr. Deline testified that no one responded to Mr. Pyper as the employees were too afraid. Mr. Pyper and Ms. Wondga were viewed as being closely identified with management. Mr. Deline thought that anything that was said to Mr. Pyper or Ms. Wondga would get back to Mr. and Ms. Bosch.

Mr. Deline also testified that he had been reprimanded by Ms. Bosch for wearing a shirt that had not been properly ironed. At some point after this reprimand and after the commencement of the Union's

organizing drive, Mr. Deline was asked by Ms. Bosch if he had anything to do with the Union to which Mr. Deline replied that he had spearheaded the Union's organizing drive.

Mr. Deline testified that he ran into Mr. Pyper and Mr. Bosch one day coming back from coffee. Mr. Pyper apparently lost control and started to scream at Mr. Deline about the Union. Mr. Deline reported the incident to Ms. Bosch who indicated that she was not going to get involved in the matter. Mr. Deline felt that it was unfair that he was being "written up" for having an unironed shirt when Mr. Pyper was apparently free to lose his temper in front of the boss at the workplace.

Mr. Deline also complained that Ms. Wondga was assigned scheduling in the kitchen when the task had formerly been performed by the dietary manager.

Since the organizing drive, Mr. Deline had received two disciplinary warnings and one suspension with pay. The first warning or write up was related to the unironed shirt described above. The second occurred when Mr. Deline wore sweat pants to work instead of the approved black or chequered pants. Mr. Deline testified that his kitchen pants had a hole in them that prevented him from wearing them on the day in question. He was also suspended one day with pay for a time infraction.

Mr. Deline was of the view that he was being disciplined for rather minor matters when others were not similarly disciplined. He felt the discipline was in retaliation for his role in organizing the Union.

Mr. Shadden also testified for the Union. He is employed at the Primrose Chateau as a dishwasher in the kitchen. He also attended the staff meeting in December, 1996 and reported that Mr. Pyper asked who was involved in the Union. According to Mr. Shadden, Mr. Pyper told the staff that they would lose benefits, meals, parking and the like if the Union came in. Mr. Shadden indicated that the employees at the meeting did not respond to Mr. Pyper as they were afraid that they would lose their jobs.

Mr. Shadden testified that Ms. Wondga and Mr. Pyper met with him on one occasion in the Primrose Chateau. Ms. Wondga also approached him twice on her own, once before the meeting between Mr. Shadden, Ms. Wondga and Mr. Pyper, and once after that meeting. At the first meeting with Ms. Wondga, she gave Mr. Shadden two pieces of paper to fill out. One piece was the letter quoted above;

the second was a withdrawal of membership form. Mr. Shadden testified that he put the papers in his backpack. Later, he met with Ms. Wondga and Mr. Pyper and was again presented with the two letters. Mr. Pyper and Ms. Wondga attempted to persuade Mr. Shadden that a union was not needed in the workplace. The next evening Ms. Wondga persisted in getting him to sign the two letters, and he finally relented to "get her out of his face." He reported this to the Union representative the following day.

Prior to the Union's certification, Mr. Shadden had been "written up" on one occasion for being 15 minutes late. He has subsequently been disciplined for being late and indicated that management gave him more slack than other employees were allowed for being late.

Ms. Wondga was called as a Board witness. Ms. Wondga now resides in Calgary and testified over the telephone with all parties present. Ms. Wondga was employed as first cook at the Primrose Chateau from October, 1995 to February, 1997. She worked with Roger Johnson. Prior to the fall of 1996, Roger Johnson was responsible for preparing staff schedules. This task was then assigned to Ms. Wondga by the managers.

Ms. Wondga recalled the staff meeting in December, 1996. She testified that at the end of the meeting, Mr. Pyper stood up to discuss the Union's certification efforts. She indicated that Mr. Pyper felt that all employees should have been contacted by the Union and asked if they wanted to join the Union. Ms. Wondga recalled that Mr. Pyper said to employees that it was possible to lose benefits through the negotiation process. Ms. Wondga recalled Mr. Pyper expressing his own view that he did not want a union.

With respect to Mr. Shadden, Ms. Wondga confirmed that she had met with him on three occasions to try to dissuade him from the Union. She acknowledged providing Mr. Shadden with the two letters and having written the letter herself. Ms. Wondga indicated that she phoned the Labour Relations Board to get information on how to oppose a union. She was told by the Board to set up a letter withdrawing support for the Union and have people sign it. Ms. Wondga also approached other employees with the letters. She collected the signed copies of the letters and faxed them to the Union. Ms. Wondga used the fax machine at the office in the Primrose Chateau. She did not recall if she had asked permission to use the fax machine.

Ms. Wondga acknowledged that she told other employees that if a Union came in they may lose benefits such as paid meals, parking, plug-ins and medical benefits.

Ms. Wondga also testified that she is a friend of Ms. and Mr. Bosch but denied that she had discussed the Union with them. She indicated that Mr. Bosch advised her that he could not talk to her about the Union as he was management and she was an employee.

Carla Daluca testified for the Union. She worked as a part-time server at the Primrose Chateau for two years. She attended the December, 1996 meeting and gave evidence that was similar to the testimony of Mr. Shadden and Mr. Deline. Ms. Daluca testified that she felt pressured by Ms. Wondga to sign the withdrawal of support letter which she eventually did sign. She met with Ms. Wondga on three occasions at work to discuss the matter. Ms. Daluca testified that she was written up once for being late for work. This occurred after her probationary period was over.

On cross-examination, Ms. Daluca testified that she had been approached by a Union supporter at work. She also indicated that Ms. Bosch told her on one occasion that the Primrose Chateau "can't have a union."

Ms. Lichtenwald also testified for the Union. Ms. Lichtenwald is a 16 year old student who was employed on a part-time basis as a server. Ms. Lichtenwald worked eight hours a week and earned six dollars per hour. When she commenced employment, she was not told that she had to serve a probationary period. Ms. Lichtenwald had the misfortune of being late for work on one occasion. She asked a friend to phone in and report to management that she would be in for the next shift. When she arrived at work, Ms. Bosch advised her that she was fired. Ms. Lichtenwald had no disciplinary record. She was also aware that other employees had been late for a shift and were not terminated by the Employer.

Ms. Lichtenwald concluded that she was terminated because Ms. Bosch wanted to make an example of her. Ms. Lichtenwald supported the Union but was not active in its organization. She believed her friend, Sherri Oulette, who helped her get her a job at the Primrose Chateau, was active in organizing the Union. Ms. Lichtenwald assumed that she was fired because she was friends with Ms. Oulette and that Ms. Oulette was known to be a union supporter.

Ms. Oulette also testified for the Union. She worked at the Primrose Chateau as a server. Ms. Oulette indicated that she attended the staff meeting in December, 1996 where Mr. Pyper spoke to the staff regarding the Union. Ms. Oulette indicated that Mr. Pyper asked who had signed union cards, to which no one responded. Ms. Oulette testified that she did not want to let management know who supported the Union. She viewed Mr. Pyper and Ms. Wondga as being close to management and likely to report to them on the meeting. Ms. Oulette also indicated that Ms. Wondga spoke to her and Ms. Daluca and tried to dissuade them from supporting the Union.

Ms. Oulette quit her employment at the Primrose Chateau because she did not feel comfortable working with Ms. and Mr. Bosch. Ms. Oulette testified that Ms. Bosch would yell at her over little things and she noted that their relationship had changed since the Union had come in. She assumed that Mr. and Ms. Bosch knew that she supported the Union.

On cross-examination, Ms. Oulette said that she was unaware when she was hired that she was required to serve a three month probation. She was provided a copy of a staff handbook when she was hired, but she did not tell Ms. Lichtenwald about the handbook.

Roger Johnson was found to be in-scope of the Union's bargaining unit when the certification application was granted. Roger Johnson has worked as dietary manager since July, 1995. He is responsible for planning and preparing the meals for residents.

Roger Johnson did not attend the portion of the December, 1996 staff meeting where Mr. Pyper discussed the Union. He did testify, however, that he viewed Mr. Pyper and Ms. Wondga as being particularly friendly with Mr. and Ms. Bosch, and noted that they both spent considerable time with the Bosch's. Roger Johnson was of the view that Ms. Wondga was given preferential treatment by the managers and, as an example, he noted that she was allowed to hire her sister, step-sister and boyfriend. Roger Johnson noted that other staff did not have the same kind of pull with Mr. and Ms. Bosch. Roger Johnson had experiences with Ms. Wondga which indicated that she would discuss matters that occurred between them with Ms. Bosch. On one occasion, he had words with Ms. Wondga in the cooler, which got back to Mr. and Ms. Bosch.

Roger Johnson noted that his scheduling responsibilities were removed in July 1996 and given to Ms. Wondga. He was unsure why this change had occurred and thought it was inconsistent with his role as the dietary supervisor. On cross-examination, Mr. Johnson acknowledged that this change in duties occurred before the Union came on the scene and had nothing to do with his role in the Union's organizing campaign.

With respect to the Union's organizing drive, Roger Johnson indicated that Ms. Bosch approached him and asked if he had signed a union card. He indicated that she told him that if the Union came in, they could lose their employment benefits. He also indicated that Mr. Pyper approached him to discuss the Union. Mr. Pyper assumed that Roger Johnson would not be included in the Union because he was management.

Roger Johnson noted that the fax machine on the premises was available to be used by staff until the last week of December or early January, 1997 at which time the lock on the office was changed. The key was kept in the possession of the managers.

Roger Johnson complained that after the certification, Mr. and Ms. Bosch became more intimidating in their tone and demeanour.

Ms. Nadon worked at the Primrose Chateau from September, 1995 to December 30, 1996, at which time she was terminated. Ms. Nadon worked in the kitchen and housekeeping areas. She arrived at work on December 30, 1996 and carried out her duties serving breakfast to the residents. After breakfast, she was told that Mr. and Ms. Bosch wished to speak to her. They took Ms. Nadon upstairs to a suite and pointed out that she had not cleaned it properly. Ms. Nadon testified that Mr. Bosch stood nose to nose with her screaming that she had not cleaned the room and that she had lied about cleaning the room. Ms. Nadon protested and said that she had cleaned the room but that the resident had returned home later the same day she had cleaned the room. As a result, the room did not appear as she had left it after cleaning it. Mr. Bosch's behaviour scared Ms. Nadon. On the way down the elevator, she said to him "if you are going to fire me, fire me now." Ms. Nadon reported feeling very scared. Finally, she told Mr. Bosch that she was quitting. Ms. Nadon had no prior disciplinary record.

On cross-examination, Ms. Nadon acknowledged that she had some previous disagreement with the managers over the reduction of her hours of work. She felt that Mr. and Ms. Bosch were favouring Maxime Gouldie, who was related to Ms. Wondga. It was Ms. Nadon's opinion that Mr. Bosch wanted to fire her in order to give the remainder of her hours to Ms. Gouldie.

Ms. Nadon was not involved in the Union's organizing drive and kept her feelings about the Union to herself. At the time of the hearing, she had not obtained other work.

Flo Brotten, Union Organizer, testified that she received copies of the letters withdrawing support for the Union by facsimile. She testified that the Union did not receive any documents from employees by courier contrary to what Ms. Wondga had indicated in her testimony.

Mr. Sigtermans is responsible for the retirement homes operated by the Employer for the Western provinces and he attends at Primrose Chateau once every four to six weeks. Mr. and Ms. Bosch report directly to Mr. Sigtermans.

Mr. Sigtermans testified that the Employer provides employees with a handbook entitled "Canadian Facilities Staff Handbook" which sets out the job duties and job benefits for employees. The booklet contains employment rules on discipline as well. It also provides for trial period of 90 calendar days, with reviews at the 30 day and 60 day period.

In the Union's unfair labour practice application, an allegation was made that the Employer changed the key policy for housekeeping staff during the time of the organizing campaign. Mr. Sigtermans testified that he had directed managers in his region to enforce the Employer's policy that required master keys to be left in the premises overnight and not taken home by staff. He indicated that there had been a number of break-ins of residents' rooms in some facilities owned by the Employer. In these circumstances, he felt it was important to reinforce the key policy in order to better secure the safety of residents and to protect the staff from unfounded allegations of theft. This action was taken in December, 1996 prior to the time that Mr. Sigtermans became aware of the Union campaign. The change was made in the entire region with Mr. Sigtermans faxing the same memo to all facilities. On cross-examination, Mr. Sigtermans denied that the change in policy had anything to do with the Union.

On cross-examination, Mr. Sigtermans indicated that the employee handbook filed with the Board was the British Columbia handbook. A slightly different book would be used in Saskatchewan. He also indicated that an employee is asked to sign a document indicating that they received a copy of the handbook when they are hired. Mr. Sigtermans had no personal knowledge of whether employees in Saskatchewan were provided with the handbook.

With regard to the scheduling of dietary staff, Mr. Sigtermans was aware that responsibility for scheduling had been removed from Roger Johnson because he was not keen about doing the scheduling. Mr. Sigtermans indicated that this decision would have been made at the local level by Mr. and Ms. Bosch and he was unaware who took over the scheduling function.

Mr. Sigtermans did not recall meeting with Mr. Pyper to discuss his pay or salary after the Union was certified.

Ms. Gouldie also testified for the Employer. She has been employed at the Primrose Chateau since June, 1996 and works in the kitchen and the housekeeping department. Ms. Gouldie started as a full-time employee but went to part-time status after three months. Ms. Gouldie is Ms. Wondga's sister. Ms. Gouldie attended the staff meeting in December 1996. She indicated that she was upset at the meeting because other employees were picking on Ms. Wondga. She recalled Mr. Pyper's comments about the Union and did not take any offence to them.

Ms. Gouldie was present the day Ms. Nadon resigned from her employment. She recalled Mr. Bosch asking Ms. Nadon in a normal tone of voice to come and meet with him. Subsequently, Ms. Nadon returned to the staff room where Ms. Gouldie was having coffee. Ms. Gouldie reported that Ms. Nadon threw her keys and name tag across a table. Ms. Gouldie reported that Ms. Nadon was in tears. Diane Derker, Head of Housekeeping, took Ms. Nadon aside and asked her to reconsider resigning from the Primrose Chateau. Ms. Gouldie said that Ms. Nadon was adamant that she was going to resign. She then left the premises through the kitchen.

Ms. and Mr. Bosch have acted as managers of Primrose Chateau since July, 1995. Ms. Bosch testified that Ms. Nadon was hired as a part-time dishwasher and was also trained in housekeeping. With respect to the December 30, 1996 incident with Ms. Nadon, Ms. Bosch recalled that she and Mr. Bosch

were checking empty suites when they came across one room that appeared not to have been cleaned. There was no evidence that the carpet had been vacuumed, the room was dusty, the bed rumpled and the sink in the bathroom had been used. Mr. and Ms. Bosch noticed that the housekeeping work sheets indicated that the room had been cleaned on December 27, 1996, a Friday. Ms. Bosch indicated that the following Monday, she and Mr. Bosch asked to meet with Ms. Nadon. According to Ms. Bosch, on the way up to the room in the elevator Ms. Nadon remarked to Mr. and Ms. Bosch, "if you want to fire me, fire me now."

Mr. and Ms. Bosch and Ms. Nadon examined the room in question and Mr. Bosch asked Ms. Nadon for an explanation of why it was marked off as being cleaned when it had not been cleaned. According to Ms. Bosch, Ms. Nadon replied that she was not a criminal, that she didn't have to work at the Chateau. Ms. Nadon concluded that the resident must have been home and she asserted that she had cleaned the room as indicated on the work sheet. Ms. Bosch testified that Mr. Bosch spoke in normal tones to Ms. Nadon, while Ms. Nadon was the one who became hysterical.

According to Ms. Bosch, Ms. Nadon walked out of the suite. Later, she left a resignation letter on Ms. Bosch's desk. Ms. Bosch indicated that it was unlikely that Ms. Nadon would have been fired for not cleaning the room; she would likely have placed a written warning on her employment file.

Ms. Bosch testified that Ms. Lichtenwald was on probation when her employment was terminated because she missed a shift on January 1, 1997. Ms. Bosch was required to work in place of Ms. Lichtenwald for the breakfast shift. Ms. Bosch left a telephone message for Ms. Lichtenwald telling her not to come in for the lunch shift. Serving staff work two hour shifts around each meal hour. Ms. Lichtenwald apparently did not get the telephone message as she showed up for the lunch shift. Ms. Bosch met her in the dietary manager's office and asked her why she had Ms. Oulette call in for her. Ms. Lichtenwald then asked Ms. Bosch "does this mean I'm finished" to which Ms. Bosch replied "I guess it does." Ms. Bosch testified that she had no real intention of firing Ms. Lichtenwald but she did so on the spur of the moment.

With respect to Ms. Lichtenwald's probationary status, Ms. Bosch testified that she provided Ms. Lichtenwald with an employee handbook when she started to work at the Primrose Chateau. In the

handbook, the probationary period is set out. As well, if a shift is missed, Ms. Bosch felt she had grounds for terminating employment.

Ms. Bosch became aware of the Union's certification application on December 6, 1996 when she received the application from the Labour Relations Board. She acknowledged that a couple of employees approached her to discuss the matter, however, she simply told them to phone the Labour Relations Board for information and she did not otherwise get involved in the discussion. Ms. Bosch recalled the December, 1996 staff meeting and Mr. Pyper's request to speak to the staff but she maintained that she had not discussed the matter earlier with Mr. Pyper.

Ms. Bosch readily admitted that she was friendly with Ms. Wondga and Mr. Pyper. She also indicated that she had been friendly with all the staff. However, in the fall of 1996, the staff appeared to break into two camps and the workplace was no longer a big happy family. Ms. Bosch denied that any changes were made in the workplace after management became aware of the organizing drive other than carrying out the direction of Mr. Sigtermans with respect to the use of master keys.

Ms. Bosch was unaware that Ms. Wondga had used the fax machine at the Primrose Chateau to send material to the Union and she testified that had she known that Ms. Wondga was using the machine for that purpose, she would not have permitted her to use it.

On cross-examination, Ms. Bosch acknowledged that she had not conducted a 30 day review of Ms. Lichtenwald's performance as required by the policy set out in the employee's manual. She also acknowledged that she had not fired any other staff person for being late for a shift.

Ms. Bosch recalled presenting Ms. Lichtenwald with the employee's handbook but she indicated that Ms. Lichtenwald had not returned the document to Ms. Bosch which would acknowledge that she had received a copy of the handbook.

With respect to Ms. Nadon, Ms. Bosch testified that she did not make any inquiries as to whether the resident of the room in question had returned to the Primrose Chateau in the time between when Ms. Nadon reported that she had cleaned the room and the time Mr. and Ms. Bosch conducted an inspection of the room. Ms. Bosch denied that Mr. Bosch used any harsh words toward Ms. Nadon.

Judy Tubman was called as a witness by the Union in rebuttal. Ms. Tubman was working in housekeeping on Friday, December 27, 1996, the day Ms. Nadon cleaned the resident's suite. Ms. Tubman recalled that she entered the room, noticed the carpet had been vacuumed and took off her shoes before she walked into the room.

Relevant Statutory Provisions

The Board is required to consider the following sections 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:*
>
> > *(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;*
> >
> > *(b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; but an employer shall not be prohibited from permitting the bargaining committee or officers of a trade union representing his employees in any unit to confer with him for the purpose of bargaining collectively or attending to the business of a trade union without deductions from wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purposes of such trade union;*
> >
> > *(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;*
> >
> > ...
> >
> > *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act,*

> *and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*
>
> ...
>
> *(g) to interfere with the selection of a trade union as a representative of employees 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;*

Arguments

Mr. Koskie, counsel for the Union, argued that Mr. Pyper and Ms. Wondga, acting as agents for the Employer, improperly interrogated Mr. Shadden and Ms. Daluca with respect to their membership in the Union and coerced the two employees into signing withdrawals of their membership from the Union. The Union cited *Alberta Food and Commercial Workers Union, Local 401 v. Super Valu, A Division of Westfair Foods Ltd.*, [1981] Oct. Sask. Labour Rep. 38, LRB File No. 121-81, in support of the proposition that the employer must remain strictly neutral during a union organizing campaign and must not engage in any discussions which have as their purpose the desire to influence employees in their decision to join or not join a trade union.

The Union also argued that the Employer was required to provide employees a workplace that was free from coercion and intimidation from employees who opposed the Union. In this regard, the Union relied on the Board's decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Canada Ltd.*, [1993] 2nd Quarter Sask. Labour Rep. 193, LRB File No. 056-92, where the Board found the Employer had violated ss. 11(1) (a), (b) and (g) of the *Act* by failing to

control the intimidating and coercive behaviour of employees in the anti-union camp during the union's organizing drive. The Union also referred the Board to *United Food and Commercial Workers, Local 1400 v. F.W. Woolworth Co. Limited*, [1993] 1st Quarter Sask. Labour Rep. 227, LRB File No. 158-92, for a similar proposition.

The Union argued that the conduct of the managers leaving the staff meeting and agreeing to Mr. Pyper's request to speak to the staff without questioning him as to the need for a staff meeting made the managers' assertion that they were unaware of the reason for the meeting unbelievable. The Union asked the Board to conclude that the managers were aware of the purpose of the staff meeting and of Mr. Pyper's and Ms. Wondga's efforts to obtain withdrawal of support signatures. The Union also looks to Ms. Wondga's close relationship with the managers and her ability to use the fax machine to send material to the Union as indicators that management was aware of and gave tacit support to the anti-union drive.

With respect to the termination of Ms. Lichtenwald, the Union referred the Board to its decision in *United Food and Commercial Workers, Local 1400 v. POS Pilot Plant Corporation*, [1994] 1st Quarter Sask. Labour Rep. 315, LRB File Nos. 267-93 & 013-94, for the proposition that it is sufficient for the Union to establish that there was trade union activity being carried on either by the employee in question or by other employees during the period before the onus of proof shifts to the Employer. The Union also argued that the motivation of the employer can be judged by the "credibility and coherence" of the explanation advanced for the termination of the employee: see: *The Newspaper Guild v. The Leader-Post*, [1994] 1st Quarter Sask. Labour Rep. 242, LRB File Nos. 251-93 to 253-93. According to the Union, Ms. Lichtenwald was terminated for no real reason; lateness had not resulted in the termination of other employees; the employee had not been advised that she was "on probation"; and progressive discipline was not applied to her despite the Employer's policy on discipline. The Union asked the Board to conclude that Ms. Lichtenwald's firing was intended to send a message to other employees regarding the Employer's authority over them.

With respect to Ms. Nadon, the Union submitted that Ms. Nadon was constructively dismissed by the managers. The dismissal occurred after Ms. Nadon had been subjected to a harsh verbal attack by the managers, one which was unjustified on any reasonable view of the evidence.

The Union also argued that the Employer violated s. 11(1)(m) of the *Act* by changing the arrangement with respect to access to the keys of the Primrose Chateau and by changing the discipline policy with respect to terminating employees for lateness.

Mr. Miller, counsel for the Employer, argued that the Board is not required to examine the merits of a termination or lay-off, but rather is required to determine if anti-union animus played some role in the Employer's decision. Counsel referred to the *P.O.S. Plant Corporation* case, *supra*.

With respect to Ms. Nadon, counsel submitted that the employee resigned of her own free will. Counsel referred the Board to *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Santa Fe Foods Inc.*, [1991] 2nd Quarter Sask. Labour Rep. 74, LRB File Nos. 014-91 to 016-91, where the Board rejected the union's argument that an employer's failure to accept a withdrawal of a resignation as a termination.

Counsel submitted that Ms. Lichtenwald's termination occurred during her probationary period when she was being evaluated for her suitability as an employee. Counsel referred the Board to the *P.O.S. Plant Corporation* case, *supra*, as an example of the Board not finding the termination of a probationary employee to constitute a breach of s. 11(1)(e) of the *Act*.

With regard to the allegation that Mr. Pyper and Ms. Wondga acted as Employer agents in conducting the anti-union drive, counsel argued that there is no evidence that the employees were in fact acting at the request of, or on behalf of, the Employer. On this theory, the Employer cannot be held responsible for the conduct of the employees.

Analysis

The Union's allegations with respect to the conduct of Mr. Pyper and Ms. Wondga during the organizing period are premised on one of two theories: (1) Mr. Pyper and Ms. Wondga were acting as agents of the Employer to obtain information on which employees had signed union cards and to convince employees to withdraw their support for the Union; or (2) the Employer tacitly approved the anti-union activities of Mr. Pyper and Ms. Wondga by its conduct in not preventing them from engaging in coercive or intimidating behaviour toward fellow employees with respect to the Union.

The Board must be somewhat cautious in reaching a conclusion that employees who conduct campaigns against a trade union during its organizing drive are acting as agents of the Employer. There is no doubt that frequently the interest of these employees and the employer are the same - that is, they both desire that the workplace remain unorganized. However, the convergence of the interests of the employees who oppose the union and the employer is insufficient evidence from which to draw a conclusion that the employees are acting at the request of and under the authority of the employer. Employees in the workplace are entitled in the course of a union's organizing campaign to express their opposition to a union so long as their conduct does not constitute improper coercion or intimidation. In *United Food and Commercial Workers, Local 1400 v. F.W. Woolworth Co. Limited*, [1992] 3rd Quarter Sask. Labour Rep. 110, LRB File No. 169-92, the Board outlined the evidence that is required to establish that an employee is acting as agent of the employer. The Board commented, at 119-120:

> *For the Board to find, in essence, that the employer is responsible for distributing the "Straight From Prince George" memorandum, it must be established that Ms. Clavell was acting as its agent. It is not enough to show, as the union has, that her activities fit into and furthered the employer's interest, although that is a factor. In Apollo Machine Products Limited [1982] Aug. Sask. Labour Report, p. 57, the Board ruled that there must be evidence that the agent acts at the request of or under the authority of the employer (see also: Triad Power Ltd. [1985] Oct. Sask. Labour Report, p. 34). In Apollo Machine Products Limited (supra), the board found that the absence of direct evidence of this relationship was fatal. In Triad Power Ltd. (supra), the board merely commented upon the necessity of evidence, thereby suggesting that it is not necessary that this relationship be established by direct evidence. Like any other element in an unfair labour practice, it may be a conclusion drawn from other proven facts.*
>
> *The burden of proof lies upon the union and, although it has certainly raised a strong suspicion, it cannot be said that on a balance of probabilities it has been proven that Ms. Clavell was acting at the request of or under the control and direction of management. An equally possible explanation is the common reality that if the employer creates certain conditions, it is often unnecessary for it to become involved in the activities of employees like Ms. Clavell. It merely creates the conditions and then waits for an employee to come forward and do the rest. The Board is not suggesting that every anti-union employee is an unwitting pawn of the employer. Some employees are genuinely offended by union tactics. Some are politically or religiously opposed to unions. Some have a past history with unions or a particular union, which provides a reasonable explanation for their opposition to a union organizing campaign. The Board is not determining into which category Ms. Clavell falls. It has merely determined that the union was unable to prove that she acted as an agent of the employer, as that phrase has been understood and applied by the Board.*

In the present instance, the Union has established only a tenuous link between Mr. Pyper and Ms. Wondga and the management of the Primrose Chateau. The two employees were viewed by other employees as being close to management. These conclusions were drawn from the amount of time Mr. Pyper and Ms. Wondga spent socializing with the managers at the workplace and otherwise. Aside from this evidence, there is nothing to link the conduct of Mr. Pyper and Ms. Wondga to the Employer. The Board cannot conclude that Mr. Pyper and Ms. Wondga were acting as agents of the Employer.

The second theory of liability rests on the notion that the Employer permitted Mr. Pyper and Ms. Wondga to engage in anti-union conduct that either was not permitted to be engaged in by Union supporters in the workplace or was coercive and intimidating to the point that it should have been the subject of discipline in the workplace. This theory does not depend on a finding that the employees were acting as agents of the Employer. In the *WaterGroup Canada Ltd.* case, *supra*, the Board dealt with similar allegations and found the Employer in violation of ss. 11(1)(a), (b) and (g) of the *Act* for permitting the conduct of an anti-union employee to continue over a lengthy course of time. The Board stated, at 197:

> *The Board has always shown a reluctance to interfere in the debate between employees on whether they should or should not be represented by a union. The Board's reluctance is grounded in the recognition that great care and restraint must be exercised by the Board or we could stifle the very debate we are attempting to encourage and protect. Nevertheless, the Employer has a duty to provide its employees with a workplace where they can exercise the rights given to them by law without facing coercion and intimidation if they attempt to do so. We are not suggesting that an employer will be responsible for failing to prevent all misconduct by its employees at the workplace. However, where an employer has knowledge, and repeatedly over a lengthy period of time fails to control its employees' misconduct, it can expect to be held responsible for this failure.*
>
> *We are not being asked to find that the Employer was giving direct instructions to Mr. Davidovitch and that Mr. Davidovitch was an Employer's agent. We are satisfied that Mr. Davidovitch and his supporters were independently motivated and capable of engineering this campaign on their own. However, the Employer, through its tacit if not open approval and cooperation, encouraged Mr. Davidovitch and provided the essential ingredient which made it all possible. Mr. Davidovitch was allowed to act as he did only because he was serving the Employer's interests.*

Mr. Pyper and Ms. Wondga were permitted by the Employer to conduct a meeting on work time; they were permitted to meet with employees on work time; Ms. Wondga was permitted to use the Employer's facsimile machine to send withdrawals of support to the Union; and Mr. Pyper is reported to

have lost control and screamed at Mr. Deline in the presence of Mr. Bosch with respect to the Union for which Mr. Pyper was not disciplined. At the same time, there is evidence that supporters of the Union also discussed the Union at work with fellow workers and engaged in some recruitment efforts at the workplace.

In our view, the conduct of Mr. Pyper and Ms. Wondga does not fall in the coercive or intimidating end of the scale. They may have been persistent in dealing with the two young employees, and the two employees may have resented the approaches. This discomfort, however, is not sufficient to render the conduct improper. In addition, access to employees at the workplace was permitted to both sides, there being no evidence of discriminatory treatment of Union supporters for engaging in recruiting efforts at work. The Board is somewhat concerned with Mr. Deline's description of Mr. Pyper's outburst in the presence of Mr. Bosch. Mr. Bosch did not testify in the proceedings. Compared to the discipline handed out to Mr. Deline for fairly petty matters such as an unironed shirt, one would have expected that an angry and hostile outburst by an employee toward another employee would have warranted at least a verbal reprimand from the Employer. However, in the overall scheme of matters, the outburst occurred on one occasion, it was not part of an overall campaign of harassment or intimidation such as was the case in the *WaterGroup Canada Ltd.* case, *supra*.

On these facts, the Board does not find that the Employer condoned or permitted Mr. Pyper and Ms. Wondga to engage in conduct that constituted coercion or intimidation. As a result, the Board does not find that the Employer violated ss. 11(1)(a), (b) or (g) of the *Act*.

With respect to Ms. Nadon's resignation, the Union argued that Ms. Nadon was constructively dismissed. Ms. Nadon indicated that Mr. Bosch's confrontational behaviour scared her. She tendered her resignation after the incident and after she had some opportunity to discuss her resignation with the housekeeping supervisor.

The Board is sympathetic to Ms. Nadon's situation. She was unfairly and unjustly accused of lying by Mr. and Ms. Bosch. She was also treated in a manner that was abusive. However, we cannot find on these facts that Ms. Nadon was actually fired by the Employer, or that the Employer would have terminated her employment if she had not resigned. Ms. Bosch indicated that she would not have terminated Ms. Nadon for the incident in question. In these circumstances, the Board does not find that

the Employer terminated the employment of Ms. Nadon. As a result, no finding can be made under s. 11(1)(e) of the *Act*.

With respect to Ms. Lichtenwald, there was much discussion as to whether she was on probation at the time of her termination. There is no dispute that Ms. Lichtenwald failed to report to work on January 1, 1997 at the time she was scheduled to attend. This is likely not an infrequent event with the staff of the Primrose Chateau, many of whom are young students like Ms. Lichtenwald who are juggling student life with small amounts of paid employment. The evidence of other employees made it clear that not all incidents of lateness resulted in termination of employment. Employees of the Primrose Chateau were engaged in union activity at the time Ms. Lichtenwald was terminated, although Ms. Lichtenwald indicated that she was not open about her involvement in the Union. The Employer was aware of the Union drive because it had received notice from the Labour Relations Board that the Union had applied to be certified as the bargaining agent. By other accounts, after the Union came on the scene in the Primrose Chateau, Ms. Bosch's attitude towards workers became harsh and demanding. As well, in relation to the Employer's reasons for terminating Ms. Lichtenwald's employment, Ms. Bosch indicated that she had no intention of firing Ms. Lichtenwald. She made the decision to do so on the spur of the moment in response to Ms. Lichtenwald's question "does this (the lateness) mean I'm finished."

On these facts, the Board cannot conclude that the Employer had a credible or coherent reason for terminating Ms. Lichtenwald's employment. In *The Newspaper Guild v. The Leader-Post*, [1994] 1st Quarter Sask. Labour Rep. 242, LRB File Nos. 251-93 to 253-93, the Board made the following observations, 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 Trade Union Act coincide. The strength or weakness of the case an employer offers in defence of the termination is one indicator of whether union activity may also have entered the mind of the Employer.*

In Ms. Bosch's own mind at the time of the incident, the dismissal of Ms. Lichtenwald was not justified. Under s. 11(1)(e) of the *Act*, once it is demonstrated by the Union that the employee was dismissed and

that the employee or other employees were engaged in activity in support of the Union, the onus is on the Employer to establish that the dismissal was for "good or sufficient reason". The Board is not concerned with the niceties of "just cause" but with whether the reasons for termination hold any water or do they merely disguise the Employer's true motives to discourage employees from joining the Union. In our view, the Employer in this instance has failed to meet the burden of proving that it had good and sufficient reason for terminating Ms. Lichtenwald. The presumption contained in s. 11(1)(e) of the *Act* therefore applies and the Board finds that the Employer committed an unfair labour practice within the meaning of s. 11(1)(e) of the *Act*.

The Union also applied for an unfair labour practice under ss. 11(1)(c) and (m) of the *Act* relating to the change in the Employer's policy regarding the handling of keys to residents' suites. The change in the enforcement of the policy was explained by Mr. Sigtermans. It was clearly unrelated to any activity on the part of employees with respect to the Union. In the Board's view, the change was insignificant from a labour relations point of view and the Employer was not required to negotiate it with the Union prior to requiring managers to enforce a pre-existing workplace policy.

The evidence did indicate certain conduct on the part of Ms. Bosch that the Board considers improper under s. 11(1)(a) of the *Act*. Ms. Bosch asked Mr. Deline and Roger Johnson if they had signed union cards. She had also told Roger Johnson that if a union came in, employees would lose workplace benefits. Ms. Daluca testified that Ms. Bosch told her that the Primrose Chateau "can't have a union". These matters do constitute interference within the meaning of s. 11(1)(a) of the *Act*. The Board will issue an order restraining the Employer from engaging in such conduct.

Conclusion

The Board dismisses the Union's application with respect to ss. 11(1)(b), (c), (g) and (m) of the *Act*. In relation to Ms. Lichtenwald, the Board orders the Employer to reinstate Ms. Lichtenwald to the position she held on December 31, 1996 at the same rate of pay and hours of work as she enjoyed at that time. The reinstatement shall take place within 48 hours of the Employer receiving a copy of the Board Order and Reasons by facsimile transmission from the Board. The Board also orders the Employer to pay to Ms. Lichtenwald the monetary loss suffered by her during the period commencing January 1, 1997 to the date of her reinstatement. If the parties are unable to agree on the amount of the loss, either party

may refer the matter to the Board for determination. The application with respect to Ms. Nadon is dismissed. The Board will issue an Order requiring the Employer to refrain from interfering with employees in the exercise of their rights under the *Act*.

SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 333, Applicant and CALGARIAN RETIREMENT GROUP LTD., Respondent

LRB File No. 006-97; March 30, 1998
Chairperson, Gwen Gray; Members: Bruce McDonald and Gordon Hamilton

For the Applicant: Ted Koskie
For the Respondent: Ron Miller

DISSENT WITH REASONS

Gordon Hamilton, Board Member: This matter was heard by the Board on July 28 and July 30, 1997.

I have had an opportunity to review the written reasons of the Board. The recitation of the facts and the argument is generally accurate. I find I must dissent on the finding of an unfair labour practice against the Respondent in relation to Ms. Lichtenwald and take exception to the analysis of the facts and the law.

1. The Omitted Fact

There is one fact which was omitted in the decision from the testimony of Ms. Lichtenwald's friend, Ms. Oulette. It concerned her perception of the true reason for the termination of Ms. Lichtenwald. In her testimony, Ms. Oulette indicated she thought Ms. Lichtenwald was terminated because she was late for work. Ms. Oulette did not state there was any perceived motivation behind the termination in relation to the union organizing drive. She had ample opportunity to indicate this belief, but the only reason for her friend's termination, in her mind, was because her friend was late.

2. The Impact on the Analysis of the Board's Decision

The Board's decision concerning Ms. Lichtenwald rests on the lack of "credible or coherent reasons" for the Employer to terminate her employment. The reason given by Ms. Bosch for the termination, being that Erica Lichtenwald was late, was credible enough to be believed by Sherri Oulette, a witness for the Applicant. Ms. Bosch was blatantly honest when she stated that she initially had no

intention to terminate Ms. Lichtenwald, but did so on the spur of the moment in response to a question "Does this mean I'm finished?" The misconduct of Erica Lichtenwald was significant enough in her mind for her to question her Employer as to whether she still had employment. On the basis of these facts, I have great difficulty in not finding that the Employer had "credible and coherent reasons for terminating Ms. Lichtenwald's employment."

3. The Issue of Motive

The Board's decision cites *The Newspaper Guild* case on page 262 which indicates that "the motivation of the Employer is the central issue." There was no evidence established by the Applicant to show any motivation other than that supported by the facts with respect to the termination.

4. The Presumption of s. 11(1)(e) of *The Trade Union Act*

There is little dispute that the provisions of s. 11(1)(e) contain a reverse onus on the Employer. The above cited case, *The Newspaper Guild* sets out the reason for the reverse onus provision of the *Act*, at 244:

> *The rationale for the shifting to an employer of the burden of proof...is to show that a decision to terminate or suspend an employee was completely unaffected by any hint of anti-union animus....*

Other decisions of this Board follow the same approach: *U.S.W.A. v. Eisbrenner Pontiac Asuna Buick Cadillac GMC Ltd.*, [1992] 3rd Quarter Sask. Labour Rep. 135, LRB File Nos. 161-92, 162-92 & 163-92, in which the Board at 139-140 stated that there "must be a plausible reason and not accompanied by anything which indicates that anti-union feeling was a factor in the decision" for there to be a breach of this provision. The decision of *SGEU v. Regina Native Youth and Community Services Inc.*, [1995] 1st Quarter Sask. Labour Rep. 118, LRB File Nos. 144-94, 159-94 & 160-94, at 123, similarly explained that the employer has an onus to show that the trade union activity played no part in the decision to discharge. Subsequent cases, such as *Moose Jaw Exhibition Company*

Limited v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, [1996] Sask. L.R.B.R. 575, LRB File Nos. 131-96, 132-96 & 133-96 have adopted this approach.

5. Analysis

In this case, the Employer explained why it discharged Ms. Lichtenwald - for being late. Her friend, Ms. Oulette, a witness for the Applicant, confirmed that was her understanding and perception of the reason for the termination. The Board has consistently applied the reverse onus provisions such that "just cause" is not the issue but whether the "explanation given by the employer holds up." I make no comment as to whether it constitutes just cause, but it clearly was the reason, on the facts. If there was an intention to "send a message", Ms. Oulette would certainly have been aware of that "message". Other employees would have stated in evidence that this was the message they received.

No such evidence was presented to the Board to even raise the allegation beyond the level of simply argument set out by the Applicant. There was no evidence in relation to the conduct of the Employer regarding Ms. Lichtenwald that would suggest otherwise. Nor was there evidence of an overriding attempt to interfere with the rights of employees generally or apply coercive tactics contrary to the *Act* that could possibly have tainted the reason for the termination as explained by Ms. Bosch.

It is inappropriate and inconsistent with previous Board decisions and the provisions of *The Trade Union Act* to find an unfair labour practice against an employer in the absence of any evidence. The suspicions of the Applicant do not make it so, without some evidence to validate the suspicions. If unfair labour practices are to be taken seriously by the parties covered by the *Act*, it is imperative that the Board not make findings against a party without clear evidence in support of such a finding, even in the application of a reverse onus section as under consideration here.

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, Applicant and E.C.C. INTERNATIONAL INC., Respondent

LRB File No. 362-97; April 1, 1998
Vice-Chairperson, James Seibel; Members: Bob Todd and Judy Bell

For the Applicant: Gary Bainbridge
For the Respondent: Melissa Brunsdon and Jean Torrens

Bargaining unit - Appropriate bargaining unit - Confidential personnel - Evidence that following certification, plant manager to deal with all labour relations matters on-site and will require secretarial and clerical support - Board determines that confidential secretary should be provisionally excluded from bargaining unit.

Bargaining unit - Appropriate bargaining unit - Confidential personnel - Board stresses that each case will be carefully examined on merits before decision made to exclude employee from access to collective bargaining.

***The Trade Union Act*, ss. 2(f)(i), 5(a), (b), (c), (m) and 5.2.**

REASONS FOR DECISION

Background

James Seibel, Vice Chairperson: Communications, Energy and Paperworkers Union of Canada (the "Union") filed a certification application seeking designation as the bargaining agent for a unit of employees of E.C.C. International Inc. (the "Employer") comprising all employees employed by the Employer in Saskatchewan except the plant manager.

In its reply, the Employer claimed that in the event certification was granted, the appropriate unit should also exclude the confidential secretary. The Employer also stated that the geographic scope of the unit should be restricted to the city of Prince Albert. At the hearing before the Board, the parties agreed that the geographic scope of the unit should be limited to the existing plant operated by the Employer which is located approximately 17 kilometres northeast of the city of Prince Albert. At the opening of the hearing, counsel for the Employer submitted that the exclusion in dispute should be granted provisionally pursuant to section 5.2 of *The Trade Union Act*, R.S.S. 1978, C. T-17, as the incumbent

secretary/clerk, Gail Heidt, would not commence performing the alleged confidential duties until after certification occurred. The exclusion is sought solely on the basis that the person in the position would regularly act in a confidential capacity with respect to the industrial relations of the Employer, pursuant to section 2(f)(i)(B) of the *Act*. It was not submitted that the position has any managerial function.

Employer's Evidence

Alfred Bates, Plant Manager, testified on behalf of the Employer. The Employer's plant is located adjacent to the Weyerhauser paper mill near Prince Albert. It produces precipitated calcium carbonate for use as a filler and brightener in the paper-making process. The Weyerhauser mill is its only customer. The product is delivered to the paper mill via a pipeline. Weyerhauser supplies the plant with its electricity, natural gas and water.

The Employer's North American head office is located in Atlanta, Georgia. It operates a number of industrial enterprises in Canada and the United States but the Prince Albert plant, which was purchased in 1991, is its only operation in Saskatchewan.

At present, the plant has eight staff: the plant manager, five process operators, one maintenance person and one secretary/clerk.

Mr. Bates commenced employment at the plant under a previous owner as a process operator in 1988. He was promoted to plant supervisor in 1989 and to plant manager in 1995. The plant supervisor position has since been eliminated. As plant manager, Mr. Bates is responsible for overseeing the entire plant operation including the duties previously performed by the plant supervisor. He reports to the process engineer in the Atlanta head office.

The plant operates 24 hours a day, seven days a week. The process operators work shifts and are based in a control room which is adjacent to the administration office, which they have access to at all times. The maintenance person works from 7:00 am to 3:00 pm, five days a week. The incumbent secretary/clerk, Ms. Heidt, works from 8:00 am to 4:00 pm, Monday to Friday.

Mr. Bates testified that if the application for certification is granted, the plant will be the Employer's only unionized operation in North America. He said that his superiors have advised him that he will be responsible for bargaining with the Union on behalf of the Employer, but, as he is a neophyte to the process, he will likely have the aid of an outside negotiator. And, he said, upon the conclusion of a collective agreement, he will be responsible for its administration including ongoing labour relations and any related differences and disputes.

According to Mr. Bates, Ms. Heidt presently performs all the clerical and secretarial duties required at the plant which includes responsibility for the backup and maintenance of the plant's computer system and server, arranging for outside repair and service of the computer and office equipment, receipt and distribution of all correspondence and faxes, maintenance of the personnel files, preparation and submission of work records to the payroll company, completion of purchase requisitions, batching of invoices and receipts, month-end invoicing, ensuring accurate completion by the process operators of quality control forms and work logs, documentation of daily product transfers and transmission of documents as required to head office and the human resources department in Atlanta. He said that only Ms. Heidt and himself have access to all of the information in the plant computer system.

Mr. Bates testified that when the plant supervisor position was eliminated he had to assume those duties as part of his own. He said that he presently spends 40 to 50 hours a week on operational matters. In addition, he communicates daily with the Atlanta head office by telephone, fax and e-mail, and attends periodic meetings. He said that if certification occurs, he will not have the resources to cope with an increase in the clerical duties associated with labour relations unless he can delegate duties to, and rely upon, an out-of-scope person in the plant.

Following certification, Mr. Bates envisions the expansion of Ms. Heidt's duties to include attendance at, and the taking of minutes of, all bargaining meetings, all conference calls with his supervisors respecting same, and all associated clerical duties including preparation of correspondence and secretarial functions. Once a collective agreement is achieved, he sees Ms. Heidt being responsible for all plant personnel records and files, maintenance of any files with respect to plant industrial relations including grievance and arbitration, and associated clerical duties such as preparation of grievance replies. He said that she will be privy to all deliberations and planning by himself in conjunction with his superiors respecting all of the foregoing.

Employer's counsel entered in evidence a position description for the secretary/clerk prepared by Ms. Heidt in October, 1997, and recently approved without change by Mr. Bates. While it does not reflect the anticipated expansion of duties outlined above, the position description does confirm the wide secretarial/clerical functions of the position as it is presently performed.

In cross-examination Mr. Bates admitted that he can type and that he maintains his own lap top computer which he can use to store information and send e-mail which cannot be accessed by anyone else in the plant including Ms. Heidt. However, the degree of his facility in this regard was not canvassed in depth. Mr. Bates testified that the Employer has a human resources department, but it is located in Maryland and the people in the department are not particularly familiar with Canadian or Saskatchewan labour law; that is one reason why the responsibility for collective bargaining and ongoing labour relations was to be assigned to him.

He also admitted that the secretary/clerk's function will be strictly clerical - no element of decision-making would be involved - but that she will be privy to decisions and information respecting the Employer's labour relations and the terms and conditions of employment of the other staff.

Mr. Bates admitted that he could not say at this time exactly what that would involve, how much time it would take or how much it would add to Ms. Heidt's workload. He agreed with Union counsel that wage and benefit decisions were made by the Atlanta head office, but that his recommendations are usually adopted. He also said that because of the present small administrative capability at the plant, the employees' benefits were administered by a person working for another industrial operation in Ontario. Mr. Bates testified that he has not had occasion to impose discipline on any employee during his time as plant manager.

Union's Evidence

Ms. Heidt testified that she started with the Employer in her present secretary/clerk position on a part-time basis in 1992 and became a full-time employee in January, 1997.

She confirmed that only she and Mr. Bates have complete access to the plant computer system and server, however, she said that access is gained by entry of initials as there is no password required and,

therefore, anyone could access all information by use of her initials. She said that she maintains the system on a daily basis, consulting the Employer's United States-based information technology department or outside service providers as necessary. The process operators generally consult her if they have computer problems. She raised no serious dispute to Mr. Bates' description of her present duties and responsibilities except that she maintained that her functions were almost strictly clerical rather than secretarial. Indeed, she said, "I can't recall typing letters and things really ever," and while she did not deny that she had the capability, she said that Mr. Bates did his own correspondence and she did not have access to his laptop computer. She also said that she did not have access to anyone else's e-mail which is accessed by individual password.

Ms. Heidt said that she maintains the personnel files and payroll records and the files are kept in an unlocked cabinet along with general office forms and are accessible to, and have on occasion been accessed directly by, the other staff. And, while she has assisted staff with benefits applications, this has rarely occurred; except for disability claims, the staff usually deals with it themselves directly with the plan insurer.

She did not agree that her present duties would justify her exclusion from the bargaining unit on a confidential basis. Her position was that Mr. Bates was capable of performing any clerical and secretarial duties that might be required with respect to labour relations.

Employer's Argument

Counsel for the Employer did not argue that the secretary/clerk position should be excluded from the bargaining unit on the basis of the duties presently performed by the incumbent. Rather, it was argued that the position should be excluded provisionally because of the confidential industrial relations information and associated duties that are anticipated to be assigned to and to devolve upon the position following certification.

Counsel filed a written brief and relied upon the following decisions of the Board:

> *Canadian Union of Public Employees, Local 3737 v. Town of Moosomin*, [1994] 2nd Quarter Sask. Labour Rep.92, LRB File No. 038-94;

Saskatoon Interval House Inc. v. Saskatchewan Government Employees' Union, [1990] Fall Sask. Labour Rep. 63, LRB File No. 033-90;

Royal Canadian Legion Regina (Sask.) No. 1 Branch v. Retail, Wholesale and Department Store Union, [1988] Spring Sask. Labour Report, LRB File No. 067-88;

Hillcrest Farms Ltd. v. Grain Services Union (ILWU-Canadian Area), [1997] Sask. L.R.B.R. 591, LRB File No. 145-97; and

Canadian Union of Public Employees, Local 2752 v. Town of Unity, [1988] Fall Sask. Labour Rep. 80, LRB File No. 041-88.

In particular, counsel argued that given the small size of the staff complement and the fact that the position in question is the only clerical support position in the plant, it was essential, in the circumstances, that it be excluded from the unit.

Union's Argument

The arguments raised by counsel for the Union were two-fold: first, with respect to the duties of the position, it was clear that it did not presently meet the criteria for exclusion under the *Act*, nor had the Employer adduced evidence such as would disclose a conflict of interest on the part of the incumbent even if she were assigned the duties anticipated by the Employer; and, second, to exclude the position in these circumstances would be to deny the incumbent the right protected by the *Act* to be represented by a union.

Counsel relied upon the following decisions of the Board and the cases cited therein:

Rosetown School Division No. 43 v. Canadian Union of Public Employees, Local 3002, [1981] Sask. Labour Rep. 49, LRB File No. 385-80;

United Food and Commercial Workers, Local 1400 v. Household Trust Company, [1987] Mar. Sask. Labour Rep. 29, LRB File No. 087-86;

University of Regina (MacKenzie Art Gallery) v. Canadian Union of Public Employees, Local 1975, [1995] 1st Quarter Sask. Labour Rep. 213, LRB File No. 266-94; and

Canadian Union of Public Employees, Local 882 v. City of Prince Albert, [1996] Sask. L.R.B.R. 680, LRB File No. 095-96.

Relevant Statutory Provisions

Sections of the *Act* to be considered include the following:

> *2. In this Act:*
>
> ...
>
> *(f) "employee" means:*
>
> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or*
>
> *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer.*
>
> *(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.*
>
> ...
>
> *5. The board may make orders:*
>
> ...
>
> *(m) subject to section 5.2, determining for the purposes of this Act whether any person is or may become an employee;*
>
> ...
>
> *5.2(1) On an application pursuant to clause 5(m), the board may make a provisional determination before the person who is the subject of the application is actually performing the duties of the position in question.*

> *(2) A provisional determination made pursuant to subsection (1) becomes a final determination after the expiry of one year from the day on which the provisional determination is made unless, before that period expires, the employer or the trade union applies to the board for a variation of the determination.*

Analysis

The Board has considered the exclusion issue raised in this application several times in the last few years.

It is clear that to base an exclusion under s. 2(f)(i)(B) of the *Act* the Board must be satisfied that the statutory criteria has been or will be met: that is, that the person must regularly act in a confidential capacity with respect to the industrial relations of the Employer. It is irrelevant to the Board's determination whether the person has mere access to such information or acts in a confidential capacity with respect to other kinds of information, for example, matters related to competitive positioning.

In the *City of Prince Albert* decision, *supra*, the Board succinctly stated the policy behind such exclusions, at 683:

> *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.*

And in the *Hillcrest Farms Ltd.* decision, *supra*, the Board stated, at 600:

> *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.*

Because of the deprivation of union representation for the employee involved, the Board is mindful that it is only for good and compelling reasons that exclusions on this basis should be allowed. The high degree to which this concern must be heeded was stated by the Board in the *University of Regina* decision, *supra*, as follows, 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.*

Realistically, however, there is often a clash between this principle and the practical needs of the employer following certification to have someone in a secure position to handle its clerical requirements related to its labour relations. While the Board has not articulated a policy as such, it has demonstrated sensitivity to this concern. In the *Town of Moosomin* decision, *supra*, the Board stated, 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.*

And, the Board stated in the *Hillcrest Farms Ltd.* decision, *supra*, at 600:

> *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 exclusions 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.

The Board has recognized that it is often a reality that an increase in industrial relations activity is a result of successful certification: See: *Service Employee's International Union, Local 299 v. Langenburg Centennial Special Care Home*, [1993] 1st Quarter Sask. Labour Rep. 199, LRB File No. 248-92 and *Saskatchewan Government Employees' Union v. Estevan Area Home Care District No. 9 Inc.*, [1991] 4th Quarter, Sask. Lab. Report 54, LRB File No. 206-91.

The Board has also recognized that this concern may be amplified when there is only one staff member employed in a clerical capacity and who, of necessity, will likely be thrust into the role of performing those duties in the new context of a unionized workplace: See: *Saskatoon Interval House*, *supra*, and *Royal Canadian Legion*, *supra*.

A further principle which bears upon the situation is that it is not necessary that all or a substantial portion of the position's work time will be spent on such confidential matters, but rather that such duties will be regularly performed, genuine and significant, though not necessarily greatly time-consuming.

In the present case, Ms. Heidt is the only clerical/secretarial person on a relatively small staff. And, while Mr. Bates may be computer literate to some degree, all of the examples of his compositions entered in evidence by the Union as purported proof of his word-processing capabilities were no more than memoranda of a couple of sentences or paragraphs in length; and, there was no evidence that he performed any clerical duties related to employee relations matters such as maintenance of personnel records, completion of personnel documents and forms or filing. The Board accepts his evidence,

however, that he will be responsible for the conduct of collective bargaining by the Employer and for all labour relations and employee discipline after an agreement is obtained.

There can be little doubt that Mr. Bates will require secretarial and clerical support for these new functions and duties. He is the manager of a plant several thousand miles from the Atlanta head office, his superiors and any alternate clerical support, and his superiors have made it clear to him that he will bear primary responsibility on-site for all labour relations matters.

Therefore, the situation in this case is fundamentally different from that in *Household Trust Company*, *supra*, where the Board declined to allow exclusion of any clerical position from the bargaining unit on the grounds that the employer's industrial relations were not conducted at the branch level, but primarily at higher levels of the company.

Accordingly, in the circumstances of the present case, we have determined that the position of confidential secretary should be excluded from the bargaining unit. However, as the new and expanded duties of the position are not yet being performed, this determination is made provisional pursuant to section 5.2 of the *Act* and shall not become final except in accordance with the *Act*. The Union will be protected if the duties of the position do not in practice meet the criteria for exclusion in that an application can later be made for further consideration.

It is to be made clear that this decision is not to be taken as evidence of a policy of this Board to routinely allow the exclusion of one employee who acts in a purported confidential capacity at the request of an employer, but rather, as demonstration of the continued approach by the Board, as clearly stated in *Service Employees' International Union, Local 333 v. Metis Addictions Council of Saskatchewan Inc.*, [1993] 3rd Quarter Sask. Lab. Rep. 49, LRB File No. 002-93, that each case will be carefully examined on its merits before the decision is made to exclude an employee from access to collective bargaining.

As the Union has filed evidence indicating that its application is supported by the majority of the employees in the bargaining unit as now defined, the application is granted.

We also find that the geographic scope of the unit as agreed to by the parties limiting it to the existing plant is appropriate in the circumstances, and this will be reflected in the certification Order.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 870, Applicant and RURAL MUNICIPALITY OF COALFIELDS NO. 4, Respondent

LRB File No. 326-97; April 14, 1998
Vice-Chairperson, James Seibel; Members: Carolyn Jones and Don Bell

For the Applicant: Ed Cowley
For the Respondent: Bill Johnson

Arbitration - First collective agreement - Board imposes collective agreement language recommended by Board agent on disputed items after hearing representations from parties.

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

REASONS FOR DECISION AND ORDER

James Seibel, Vice Chairperson: By a certification Order dated May 2, 1997, the International Union of Operating Engineers, Local 870 (the "Union") was designated as the bargaining agent for a unit of employees of the Rural Municipality of Coalfields No. 4 (the "Employer") comprised of foremen, equipment operators and labourers. After six months of contract negotiations the Union obtained a positive strike mandate. On October 28, 1997, the Union filed this application pursuant to s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17, which requested the Board's assistance in concluding a first collective agreement between the parties. The Employer consented to the application.

During this period, the Union filed an unfair labour practice application which alleged a violation of ss. 11(1)(a), (e) and (m) of the *Act* by the Employer, but the application has since been withdrawn.

By an Order dated December 17, 1997, the Board appointed, Terry Stevens, Executive Director, Labour Relations, Mediation and Conciliation Branch, Saskatchewan Labour, or his designate, to assist the parties in their attempt to reach a collective agreement and to report on the progress of the bargaining.

George Semeniuk, assisted by Lori Henderson, both of the Branch, met with the parties on January 12 and 13, 1998, and reported to the Board on January 26, 1998. Mr. Semeniuk reported that the parties reached agreement on all issues except the following:

1. *Whether between March 16 and November 14 of each year, while working the 10 hour shift from 7:00 am to 5:00 pm, employees should be allowed a 30 minute paid meal break; and*

2. *After how many accumulated hours of work operators should progress from the starting wage to the first incremental increase.*

With respect to the first issue, the Union was of the opinion that the meal break should be paid, while the Employer disagreed.

With respect to the second issue, the Union's position was that the wage progression for operators should occur after 1600 hours of work, while the Employer contended that the threshold should be 2240 hours.

In his report, Mr. Semeniuk recommended that the meal break be paid as that reflected the past practice of the Employer regarding meal breaks on ten hour shifts. With respect to the wage progression, Mr. Semeniuk recommended that progression occur after 2000 hours of work. He provided the parties with his recommendations.

The parties were invited to make representations to the Board regarding these recommendations.

Employer's Position

Garry Lafrentz testified on behalf of the Employer. He is the Reeve of the Employer, sits on council and is on the Employer's bargaining committee. He confirmed that after two days of intense negotiations, assisted by Mr. Semeniuk and Ms. Henderson, these two issues were the only ones that remained. He admitted the inexperience of himself and council in collective bargaining and stated that this was the primary cause of the problems which led to the filing of the unfair labour practice application, and to the perception of the Union of the slow progress in negotiations. However, the substance of his evidence on this point tended to illustrate that the parties had made great strides to establish good will and a healthy relationship.

Mr. Lafrentz testified that, because the operator classification would receive an approximate 20 percent wage increase, the opinion of council was that the meal break in question should be unpaid. He stated

that the new rates would still be approximately one dollar per hour less than those being paid for equivalent labour in the Estevan area. He further admitted that the other job classifications would not be endowed with an increase in wages of the same magnitude.

He noted that in the general geographic area around the Employer, there exists many well-paying job opportunities as a result of coal mining and oil field operations. However, he said that the operators were afforded more flexibility than the employees of private sector employers in the area as they are allowed to take time to engage in farming operations, and this enhancement had to be considered when comparing wage rates.

He said that as Reeve he knew that council was under pressure from ratepayers to hold the line on wage rates.

With respect to the issue of hours of work to the first wage progression, he said that the position of council was based again on its perception of the mood of ratepayers.

He did testify that the Employer was in a relatively strong financial position relative to many other rural municipalities because of the industrial activities in the area, and that it had a surplus in the last fiscal year.

Union's Position

The Union called no viva voce evidence, but relied on the report of the Board agent, advising that it was prepared to accept Mr. Semeniuk's recommendations.

Arguments

Neither party took the position that the Board should not intervene in this case, nor that the parties should be given further opportunity to reach a final agreement.

Counsel for the Employer urged the Board to depart from the recommendations of the Board agent as it had done, in part, in *United Food and Commercial Workers, Local 1400 v. Madison Development*

Group Inc., [1997] Sask. L.R.B.R. 68, LRB File No. 053-96. It was argued that the unpaid meal break and higher wage progression threshold were a trade-off for the operator classification wage increase. Counsel said that the Employer felt it was under pressure from ratepayers to maintain a firm stand on these issues.

The Union argued that the Board agent's recommendations should be accepted; paid meal breaks on ten hour shifts were the past practice of the Employer and the status quo should be maintained. Mr. Cowley stated that although a standard wage progression threshold in the industry is 1600 hours, in a demonstration of good will the Union was willing to accept the recommendation of 2000 hours. The Union's position is that the wage rates are fair in all the circumstances and not excessive.

Analysis

There is no question that the Board is not bound to accept the recommendations of its Board agent. And, although it was not raised by the parties, the Board has stated in the past that it is reluctant to intervene in collective bargaining and, depending on the circumstances, this reluctance may be greater when it comes to monetary matters. The Board's approach was articulated in the *Madison* case, *supra*, at 73-75:

> *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.*
>
> ...
>
> *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.*

In the present case, the "general framework" and much more, including almost the whole of the collective agreement, has been negotiated by the parties. But despite the intense two days of assisted bargaining that achieved this result, the Board agent has concluded that the two items that remain cannot be resolved with his assistance.

The outstanding items are minor. They affect only two or three employees at present. The financial impact no matter which way they are determined will not be large. The Union has expressed

willingness to compromise to the extent that it will accept the recommendations of the Board agent. While the Board will not hastily impose contract terms, to further delay the achievement of an agreement when only two such minor items appear to be "deal breakers" would be highly undesirable. The Employer's busy work season will start in the very near future. The Board feels that to risk the erosion of the good will established between the parties, who have now demonstrated to themselves their ability to conduct a healthy relationship, in these circumstances would be injudicious.

The compelling inference of the evidence of Mr. Lafrentz is that the position of the Employer in refusing to consider changing its stance on these two issues is based on some vague perception of the disgruntled mood of ratepayers rather than on a logical and reasoned foundation.

With respect to the issue of the meal break on the ten hour shift, the evidence was that a paid break was the historical practice. No concrete justification was provided to depart from this. It appears to be fair and reasonable in all the circumstances.

Attached as Appendix A to these Reasons is the Collective Agreement between the parties including the disputed provisions as drafted and recommended by the Board agent.

AND ORDERS:

That the outstanding issues shall be resolved by implementing the collective agreement language recommended by the Board agent including Article 12.01(6) of the Collective Agreement and Schedule "A" thereto.

TREVOR SARANCHUK, Applicant and CAPITAL PONTIAC BUICK CADILLAC GMC LTD., Employer and UNITED STEELWORKERS OF AMERICA, Union

LRB File No. 250-97; April 14, 1998
Vice-Chairperson, James Seibel; Members: Hugh Wagner and Judy Bell

For the Applicant: Larry LeBlanc
For the Employer: N/A
For the Union: Angela Zborosky

Decertification - Practice and procedure - Vote - Board reviews purposes and objects of *The Trade Union Act* and past decisions and policy on rescission applications - Board declines to order vote where applicant did not tender evidence of majority support.

***The Trade Union Act*, ss. 3, 5(k), 6(1) and 6(2).**

REASONS FOR DECISION

Background

James Seibel, Vice Chairperson: The United Steelworkers of America (the "Union") was designated as the bargaining agent for a unit of employees of Capital Pontiac Buick Cadillac GMC Ltd. (the "Employer") by a certification Order dated April 14, 1993. The current collective agreement expires August 31, 1999.

Trevor Saranchuk brought this application on behalf of himself and other employees seeking rescission of the certification Order pursuant to s. 5(k) of *The Trade Union Act*, R.S.S. 1978, c. T-17.

In its reply, the Union stated that the application does not have the support of a majority of the employees in the bargaining unit and that the Union continues to enjoy majority support.

Counsel for Mr. Saranchuk conceded that his client did not file evidence of majority support for the application. However, he requested the Board to order that a vote be conducted pursuant to s. 6(1) of the *Act* to determine the actual level of support for the application. This request is based on the fact that the evidence filed indicated a level of support for the application of approximately 45 percent.

For the purpose of argument on this issue only, counsel for Mr. Saranchuk relied only on the evidence filed and the Board was asked to assume that there was no evidence of management interference.

Counsel for the Union agreed to argue the narrow issue of whether a vote should be ordered in the circumstances, but requested, in the event the Board did determine that a vote should be ordered, that she be allowed to cross-examine Mr. Saranchuk on his application and to call evidence. Counsel for Mr. Saranchuk agreed to this.

Applicant's Argument

At the outset, Larry Leblanc, counsel for Mr. Saranchuk, conceded that to order a vote in these circumstances would be contrary to the Board's long-standing policy to decline to order a vote on a rescission application where the evidence filed disclosed a level of support of 50 percent or less.

It was argued, however, that in respect of rescission the *Act* does not prescribe when a vote must be held nor does it prohibit the ordering of a vote when the evidence of support is 50 percent or less. Although counsel was unable to provide any precedent where this Board has ordered a vote in such a situation, he argued that the Board is not bound by the principle of *stare decisis*.

Counsel argued that the Board should look to other jurisdictions that have enacted specific rules as a guide to changing this Board's policy. Reference was made to legislative provisions in British Columbia which mandate the conduct of a vote where not less than 45 percent of the employees in a unit apply for cancellation of a certification order, and to those of Ontario, Alberta, New Brunswick and Newfoundland, all of which require evidence of support for decertification of not less than 40 percent.

He stated that the Board's policy as to when it will order a vote on an application for rescission should be the same as its policy on an application for certification unless there is evidence of management influence or interference; that is, if evidence is filed of support for the application of at least 25 percent, the Board should exercise its discretion to order a vote unless it is a "small unit." "Small" was not defined by counsel. Finally, counsel argued that the *Act* prescribed the level of support necessary for a representation vote in the case of a "raiding" application under s. 6(2) of the *Act* at 25 percent, and said that decertification should not be any more onerous.

Union's Argument

Angela Zborosky, counsel for the Union, argued that the Board should not change its policy which was developed to promote the objects of the *Act*. Counsel pointed out that the legislature had made major changes to the *Act* in the 1994 amendments after extensive consultation with stakeholders and had not made any amendments which affected the Board's well-known policy on this issue. She said that the Board should continue to apply the existing policy to promote consistency and predictability.

With respect to the situation in other jurisdictions, counsel argued that in Saskatchewan there was an annual opportunity to apply for rescission during the open period so the policy is not unfair even though it is different than that applied to certification applications.

Two main arguments were advanced on behalf of the Union. The first was that of the principle of "apprehension of betrayal." Briefly stated, the argument is that the relationship between an applicant for rescission and management would cause employees to support the application out of fear that if they did not, it would be made known to management. The Board has previously recognized this as a legitimate concern: See: *Robert Monahan v. Capital Pontiac Buick Cadillac GMC Ltd. and United Steelworkers of America*, [1993] 4th Quarter Sask. Labour Rep. 109, LRB File No. 169-93; and *Todd Weathered v. Harmon International Industries Inc. and United Steelworkers of America*, [1994] 3rd Quarter Sask. Labour Rep. 293, LRB File No. 276-93, affirmed (1994), 124 Sask R. 155 (Sask. Q.B.).

The second argument made by counsel was that the Board has already recognized through certification that the Union represents a majority of the employees in the bargaining unit. If the Board were to allow a vote in circumstances where an application for rescission demonstrated less than majority support, it would put the union in the position of constantly facing an anti-union campaign and having to re-prove support. As the vote would be some time after the application had been made, it would increase the opportunity for employer influence or interference in the interim period.

Statutory Provisions

The *Act* provides 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.*
>
> *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;*
>
> *6(1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board may, in its discretion, subject to subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.*
>
> *6(2) Where a trade union:*
>
> > *(a) applies for an order of the board determining it to represent the majority of employees in an appropriate unit for which there is an existing order of the board determining another trade union to represent the majority of employees in the unit; and*

> *(b) shows that 25% or more of the employees in the appropriate unit have within six months preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining*
>
> *the board shall, subject to clause 5(k), direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:*
>
> *(c) is satisfied that another trade union represents a clear majority of the employees in the appropriate unit; or*
>
> *(d) has, within six months preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit.*

Analysis

The Board has reiterated the purpose and objects of s. 3 of the *Act* in numerous decisions. Most recently 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, the Board enunciated how this purpose affects the interpretive approach to the *Act*, at 717-718:

> *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 Opetchschesaht 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.*

There is, accordingly, a legislative bias in the *Act* which is intended to foster the underlying object of creating and maintaining industrial peace through orderly collective bargaining. See: *F.W. Woolworth Co. Ltd. v. Labour Relations Board*, [1954] 13 W.W.R. (N.S.) 1 (Sask. C.A.).

The issue raised and argument advanced on behalf of Mr. Saranchuk is not new. Despite this, counsel for Mr. Saranchuk was unable to direct us to a decision by any labour relations tribunal in support of his argument. The Board is left to conclude that apparently, except where mandated by legislation, no Canadian labour relations tribunal has adopted the policy or practice of ordering a vote in circumstances similar to those that pertain to this case.

In Saskatchewan there has never been a statutory requirement to conduct a vote on an application for rescission, and the present *Act* is silent on the point. Indeed, rescission was not available under the federal Wartime Labour Relations Regulations, P.C. 1003, which governed labour relations in the province prior to the coming into force of the 1944 *Act*; once a union was certified it remained certified unless it was displaced by another union.

The Board's power to rescind a certification order was first found in s. 5(g) of the 1944 *Act*, which merely provided that the Board could rescind its orders or decisions. Accordingly, the discretion of the Board to order a representation vote on rescission has always been unfettered, to be exercised in attainment of the objects of the *Act*. In *Schuett v. Campbell West (1991) Ltd. and International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870*, [1994] 2nd Quarter Sask. Labour Rep. 114, LRB File No. 059-94, affirmed (1994), 124 Sask. R. 155 (Sask. Q.B.), the Board commented, at 116:

> *It should first be noted that the Legislature did not expressly address the issue of rescission of a certification order in the Act, and consequently did not provide any guidance to the Board with respect to a process by which applications seeking this result should be determined. Though the Act makes it relatively clear that a trade union must by some means establish that it enjoys the support of a majority of the employees in the bargaining unit considered appropriate, there is no particular procedure laid down for the Board for deciding the issue of certification.*
>
> *The current processes now followed with respect to applications for rescission of certification orders, according to which employees are required to make application during the open period defined in s. 5(k) of the Act and to demonstrate employee support, were entirely invented by the Board on the basis of their interpretation of the implications of general provisions of the statute.*

The Board's basic policy on this issue has been in place for many years and has been reconsidered each time it is refined. In fact, it appears that the Board considered several of the points of argument raised in these proceedings some 50 years ago. The Board recognized early on the mischief that could occur if an appropriate policy was not developed. In *Eddie Soon (Canadian Cafe Ltd.) v. Hotel and Restaurant Employees' and Beverage Dispensers' Union, Local 829*, (1946) 1 S.L.R.B.D. 148, the Board stated, at 150:

> *In an industry ... where labour turnover is high, the Board could conceivably be called upon again and again to redetermine the question as to whether or not the union represents a majority of employees in the bargaining unit.*

And it appears that the existence of a current collective bargaining agreement at the time of the application for rescission (as is the case here) has long been a compelling factor in the consideration of the application. In *Queen City Cartage Company, Regina v. Canadian Brotherhood of Railway Employees and Other Transport Workers, Division 186*, (1947), 1 S.L.R.B.D. 270, the Board stated, at 271-272:

> *There could hardly be any doubt as to the broad authority conferred upon the Board by [section 5(g)] to rescind any of its orders. It would be inexpedient for the Board to rescind any of its orders. It would be inexpedient for the Board to rescind an order while a collective bargaining agreement is still in force.*

This is not to say that rescission will not be granted during the term of a collective agreement, but that in determining whether a vote will be ordered it is a relevant consideration.

In the present case, a collective agreement is in force with considerable time remaining to expiry. The application merely states, in paragraph six thereof, that one reason why the certification Order should be rescinded is that "the employees are dissatisfied with the value they receive in return for the dues they pay." The issue of hearsay on a material point aside, however, there was no evidence adduced to explain what this means. No evidence was presented that the collective bargaining process has not resulted in a fair agreement that serves the interests of the employees. In essence, therefore, there is no evidence of any probative value or weight before the Board as to why this application was made.

In our opinion, to argue that a vote should be ordered in this case by attempting to draw an analogy to the Board's policy on ordering a representation vote on applications for certification is to compare apples with oranges. From the time of the 1944 *Act* through to the 1972 *Act* the Board was required to order a representation vote on an application for certification where the union filed evidence of support of a certain minimum percentage; section 6(3) of the 1972 *Act* established the threshold at 25 percent. However, this requirement was repealed by S.S. 1983, c. 81, s. 5, and the Board since that time has exercised its discretion as to when to order a vote. There has never been such a requirement in the case of rescission of certification, and the Board's basic policy has been in place for many years. The legislature has not seen fit to change the policy.

The existence of a certification order is *prima facie* proof of majority support of the employees in the bargaining unit. See: *Prince Albert Co-operative Association Limited v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1982] May Sask. Labour Rep. 55; LRB File No. 535-81, affirmed (1982), 141 D.L.R. (3d) 524 (Sask. C.A.); and *Saskatchewan Union of Nurses v. Sisters of Charity of Montreal (Grey Nuns)*, [1985] April Sask. Labour Rep. 46, LRB File No. 378-84. In the present case, counsel for Mr. Saranchuk has not tendered any evidence that questions this. Presumably Mr. Saranchuk attempted to obtain as much evidence of support for the application as possible and

came up short of a majority. In the absence of any evidence of interference by the certified Union or others, there is no reason to believe that the failure to obtain evidence of majority support for the decertification application does not represent the true, informed and reasoned wishes of the employees. There was no evidence adduced which would, in the least, lead to the inference that the independent decision of any employee was compromised in violation of the *Act* or otherwise. However, this is not to suggest that the Union in the present case is required to adduce and rely upon the existing certification Order on this application: the onus here is squarely on Mr. Saranchuk. As was stated by the Board in the *Campbell West* decision, *supra*, at 117-118:

> *The interpretation also seems more consistent with the general burden of proof applied by this Board and other tribunals, which requires an applicant to prove positively that the application is well-founded, rather than being able to invite the respondent to prove that the existing situation should continue to exist.*
>
> *It should further be noted that the implication of the interpretation in Revelstoke that a trade union must hold itself in readiness at all times to fend off challenges to its status as the representative of employees is not consistent with the policy which the Board has followed with respect to other issues. In Saskatchewan Government Employees' Union v. Wascana Rehabilitation Center and Physical Therapists Association, LRB File No. 236-92, the Board reviewed previous decisions concerning the issue of the basis on which certification Orders may be amended to include new groups of employees. The Board quoted the following comment, approving findings of the Board, from a Saskatchewan Court of Appeal decision in Army and Navy Department Store Ltd. v Retail, Wholesale and Department Store Union (1962), 39 W.W.R. 311:*
>
> > *So long as a certification order of the labour relations board is valid and subsisting, the status of the union so certified as representing a majority of employees in the appropriate unit for the purpose of bargaining collectively cannot be questioned and the Labour Relations Board, before making an order that the employer has engaged in an unfair labour practice contrary to sec. 8(1) of The Trade Union Act, R.S.S. 1953, ch. 259, by refusing to bargain collectively with the union, is not obliged to enter into an inquiry as to whether the union so certified continues to represent a majority of the employees.*
>
> *Given the view we have expressed above, we should perhaps make it clear that we do not suggest it is necessary for the Union in this case to rely on the certification order to prove anything. We mention this point simply as an example in support of the proposition that it cannot be inferred from the sections cited in Revelstoke that the Board requires unions to show in every instance that they can freshly demonstrate majority support.*

The core of the *Act* as enunciated in s. 3 of the *Act* that the representation issue be determined by the employees according to the wishes of the majority only has meaning if the expression of those wishes is respected. Nothing in this case leads us to determine that we should depart from the present long-standing policy of the Board with respect to ordering a vote on an ordinary application for decertification, that being that an applicant must file evidence of support of at least 50 percent plus one employee in the bargaining unit.

Likewise, to argue that the statutory mandate respecting votes on raiding applications contained in s. 6(2) of the *Act* should apply as a policy to decertification, is to compare two unrelated situations. In the former case, support for union representation per se is not an issue.

Finally, the Board also confirms that the apprehension of betrayal is of particular significance in decertification applications. As was stated in the *Monahan* decision, *supra*, at 117:

> *This apprehension of betrayal provides the answer to a question frequently asked by employers and their representatives whenever the Act is the topic of discussion. That question is why will the Board grant the certification applications of unions on the basis of the support cards filed by the Union, but rarely grant a decertification application on the basis of the support cards filed by the Applicant.*

The opportunity for mischief that can have a lasting effect on the bargaining agent's viability as an effective representative during the period between the filing of an application for certification and the actual conduct of a vote is too great to consider departing from the Board's policy in the ordinary case. Indeed, even the filing of evidence of majority support for a decertification application is no guarantee that it truly reflects the wishes of a majority of the employees; for example, in *Davies v. Service Employees' International Union, Local 333 and Dutchak Holdings Ltd. operating as WPD Ambulance Care*, unreported, LRB File No. 206-97, the applicant filed evidence of majority support for the decertification application but it was rejected by the employees on a secret ballot vote.

For the foregoing reasons, the Board determines that the application is dismissed. It is to be hoped that the Board's position on this issue is clear and that it will not soon arise again.

PRINCE ALBERT POLICE ASSOCIATION, Applicant and PRINCE ALBERT BOARD OF POLICE COMMISSIONERS, Respondent

LRB File No. 005-97; April 15, 1998
Chairperson, Gwen Gray; Members: Don Bell and Carolyn Jones

For the Applicant: Richard Elson
For the Respondent: Mitch Holash

Duty to bargain in good faith - Agreement - What constitutes agreement - Employer refused to incorporate wellness package agreed to by parties into collective agreement - Board holds that employer violated s. 11(1)(c) of *The Trade Union Act.*

Unfair labour practice - Duty to bargain in good faith - Remedy - Board orders employer to sign collective agreement incorporating wellness package agreed to by parties.

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

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Prince Albert Police Association (the "Association") filed an unfair labour practice application against the Prince Albert Board of Police Commissioners (the "Employer") on January 21, 1997, which alleged that the Employer failed to bargain collectively with respect to an indemnification issue and a wellness package. On April 11, 1997, the Board issued Reasons for Decision in which it deferred the issue of indemnification to a Board of Arbitration which was seized with the issue under a reference to arbitration pursuant to s. 84 of *The Police Act*, R.S.S. 1978, c. P-15.01. The Board, however, held that the Board of Arbitration did not have concurrent jurisdiction with this Board on the wellness package issue and accordingly, heard and determined that portion of the dispute between the parties.

Facts

Sergeant Eldon Laird was president of the Association during the years 1993 and 1994 and acted as chief spokesperson for the Association in its negotiations with the Employer. In 1993, the executive committee of the Association also included Gary Doetzel, Vice-President, Kelly Liebrecht, Secretary and Bonnie Logue, Treasurer. In 1994, Craig Weich was elected to replace Bonnie Logue and Corporal Glen Gordon was elected to replace Kelly Liebrecht.

Collective bargaining for the 1992-1994 collective agreement commenced between the parties in April, 1993. The Employer's bargaining committee consisted of Len Cantin, the city commissioner who acted as the chief negotiator, Bob Glasser, the personnel director of the city of Prince Albert, Councillor Morley Jaeger from the Police Commission, Joe Adams, finance director of the city and Greg McCullagh, Chief of Police.

During this bargaining the Employer proposed the introduction of physical fitness testing for the members of the Association. The Employer thought that all police officers should be physically fit and, in order to gauge fitness, it was proposed that the members pass an annual fitness test designed for police officers called the peace officers physical abilities test (POPAT).

At the same time as the Employer was proposing to seek the introduction of fitness testing in the collective agreement, Chief McCullagh notified the Association that the Employer wished to relocate the weight and exercise room in the police station from its main floor location to a basement location. It was the opinion of the Association that the exercise equipment was being relocated to a place where no one would use it because it lacked access to showers and a change room.

After some discussion at the bargaining table, the proposal for a physical fitness test was sent to a physical fitness committee comprised of Inspector Truba, an out-of-scope employee, and two in-scope officers, Sergeant Grolla and Constable Becker. The committee made the following recommendations on the issue of fitness testing:

> 1. *That the Prince Albert Police Department adopt the Peace Officers Physical Abilities Test (POPAT) as the standard of fitness that all members should strive to attain and maintain through their service. The POPAT level is recommended as it is a job related physical test that approximates the physical*

activity performed by police officers. The POPAT is designed so that the officer can demonstrate that he has the minimum ability to perform the physical duties associated with the occupation.

2. *That all police officers hired after a determined date shall be contractually obligated to maintain the standard of fitness adopted by the Department and undertake yearly testing and provide yearly medical certifications that they are physically capable of undertaking the test.*

3. *That present members be strongly encouraged to increase their level of physical fitness and that testing of these members be on a voluntary basis.*

4. *That all testing be undertaken under the direct supervision of a qualified person who holds the necessary certification or training to perform such testing.*

5. *That resource personnel and programs be made available to police personnel to support physical fitness and the wellness philosophy. Topics that may be covered in the programs may include:*
   (a) Diet and exercise/long term benefits.
   (b) Cardiovascular system.
   (c) Concept of personal wellness.

6. *That the Department pursue the idea of enrolling a member in the "Fitness Leadership Course" available through the Canadian Police College. This person would then have the basic knowledge and skills to assist the health status of individuals by planning an appropriate exercise program and suggesting modifications to lifestyle in order to improve general health.*

7. *Recognizing the limited manpower of the Department and the cost effectiveness of utilizing a trained police officer to fulfil this role even on a part-time basis, identify an existing city staff member who may have the necessary expertise or alternatively train a city employee for this purpose who would be available to all city employees.*

8. *That the City provide through the use of existing facilities or make available through the private sector adequate facilities as determined by all parties which members of the Department could use while participating in fitness level improvement or fitness maintenance program.*

9. *That discussions be entered into between the City and other agencies such as school boards to make facilities available for members to promote activities such as volleyball, basketball, floor hockey, etc.*

10. *The Committee makes no recommendations as to who is responsible for the funding of programs, resource people or POPAT testing, as this should be resolved through the bargaining process.*

> *11. The Committee identifies as a matter of information that the cost of the POPAT test presently is $40.00 per person.*

The Association's negotiating committee found it difficult to oppose the fitness requirement as a matter of principle. However, they were concerned with the ability of their members to keep fit and as a result, focused their counterproposals on the provision of Employer paid recreational facilities. This was the sugar to make the "pill" of fitness testing go down better with its members. The Association initially proposed that both city owned and private health club memberships be provided to the Association's members. The Employer, however, expressed reluctance to provide Association members with paid memberships to private health or fitness clubs, but did express a willingness to give access to city owned recreational facilities.

Minutes of negotiations that took place on November 30, 1993 between the Association and the Employer record the following discussion related to the physical fitness committee's recommendations:

> *The Physical Fitness Committee has provided a report which is attached.*
>
> *The City Commissioner commented that the proposal was a good start however he had several concerns which included item #3 which indicated that present members would only be expected to participate on a voluntary basis and item #5 where the resource personnel and programs were not specified.*
>
> *After some discussion on item #5 it was concluded that reference to resource personnel may mean having access to a local trained personal fitness instructor. The Association commented that item #6 may address the proposal to have resource personnel available.*
>
> *The Association raised concern about the possibility of their members hurting themselves while maintaining their physical fitness and they assume that W.C.B. would cover them if this occurs. The City Commissioner responded that personal fitness would be the individual's responsibility and therefore injuries would not be covered by W.C.B. unless the injury happened on the job.*
>
> *The City Commissioner proposed requiring all Department employees to undergo medical examinations with their own doctors and each employee would then develop their own personal fitness program in conjunction with their doctor.*
>
> *The Association agreed with the proposal but felt that it could not be made mandatory. It was agreed that the medical exam and development of a physical fitness program was mandatory and it was up to the individual employee to follow their established program. Employees would be granted free use of City facilities in accordance with the current City Wellness Program.*

> *Discussion on the cost of medical examinations and although there is no cost at present the Association was concerned that this could change in the future. The City Commissioner responded that such costs were the responsibility of the employee and the Board would not consider paying for the medical examinations.*
>
> *Discussion on item #6 and it was agreed that local expertise could be available, possibly through the Health Board, and therefore there may be no need to enrol a member in the Fitness Leadership Course.*
>
> *Discussion on item #9 and the Association felt that access to certain school facilities should be available. The City Commissioner responded that this was a good idea but he added that it was up to individual members to approach schools and community clubs and this was part of the concept of community policing.*

The minutes were prepared by Mr. Glasser of the Employer's committee and were accepted by the Association as an accurate reflection of the discussions that took place at the negotiating meetings.

Sergeant Laird testified that at the November 30, 1993 meeting there was an agreement of sorts with the Employer respecting physical fitness testing. The Association would agree to require new members to undergo annual fitness testing using the POPAT and current members would undergo medical assessments and develop fitness programs. In return, the Employer through the city would provide access to city owned recreational facilities to members of the Association. Sergeant Laird testified that there were some matters that remained outstanding as of November 30, 1993, including the question of workers compensation coverage while exercising and the costs of medical exams.

A set of minutes again prepared by Mr. Glasser related to the February 10, 1994 bargaining meeting between the parties were filed as an exhibit by the Association. The minutes record the following discussion under the title "Length of Agreement":

> *Discussion on the possibility of a three year agreement. The City Commissioner explained he could deal with 1992 and 1993 but that any settlement for 1994 was subject to Police Commission and City Council approval.*
>
> *The City Commissioner stated that if there was a three year contract the offer would be $500.00 per employee per year for 1992 and 1993 and he would recommend 2% for 1994. The offer includes use of City facilities (attached) and the inclusion of eye examinations under the Extended Health plan which provides for one eye examination per year for dependants under 18 years of age and one eye examination every two years for employees and their dependants who are 18 years of age or over.*

Attached as an appendix to the minutes was a document entitled "Wellness Package - Use of City Facilities" which was the plan in place for CUPE and out-of-scope city employees.

The parties held their last bargaining meeting on May 5, 1994. At that meeting, the minutes record the following discussion on fitness testing:

> *Agreement to incorporate item #2 of the report of the Physical Fitness Committee into the Collective Agreement with the added provision that any medical examination costs incurred by employees in taking the POPAT test would be cost shared by the Board on a 50/50 basis. In addition, the cost of administering the POPAT test would be paid by the Board.*
>
> *The remainder of the recommendations which were agreed which includes items 1, 3 and 4 would be administered through a Police Department policy. Item 3 would be revised to read that employees would be required to provide the Police Department with a personal fitness plan on an annual basis with a copy to the Association. Employees would be expected to base their fitness plans on an annual medical examination. Any physical fitness testing undertaken by employees would be on a voluntary basis.*
>
> *Director of Personnel to draft proposed wording for collective agreement as well as proposed and will also provide the Police Chief with details that should be included in the Police Department policy on physical fitness of police officers.*

The minutes also record the financial agreement as follows:

> *The Association returned to the room and advised that they would settle the agreement as follows:*
>
> *1992 - $500*
> *1993 - $500*
> *1994 - 2%*
>
> *Agreement is subject to signing of the collective agreement. Eye exams effective January 1, 1994 and use of City facilities will be effective the date of signing of agreement.*

Sergeant Laird testified that this proposal formed the basis of the final settlement between the parties. A meeting of the members of the Association was held in May, 1994 to ratify the proposed agreement. Sergeant Laird did not recall if he had a copy of a draft collective agreement. He did recall that he read out to members a short version of the negotiated items. At that time, he advised members that the

Wellness Package had been accepted as part of the physical fitness agreement and he circulated copies of the Wellness Package to Association members. It was Sergeant Laird's view that the collective agreement would not have been ratified by the members if the physical fitness testing had been included with no provision for use of city recreation facilities.

A collective agreement was then prepared by Mr. Glasser. In Article 13.07 it included the provisions related to mandatory fitness testing of new members. It did not contain any provision requiring the Employer to provide Association members with free access to city facilities. Sergeant Laird explained that after two and one-half years of trying to get a collective agreement with the Employer there was considerable pressure on the Association to sign the agreement. He overlooked the omission of the Wellness Package.

In any event, after June, 1994, when the agreement was ratified by both parties, the city issued passes to the Association's members to permit them to use city owned recreation facilities. The amount of use was recorded for each employee and was accounted for as an employment benefit for income tax purposes. Access to the facilities has remained since the signing of the collective agreement.

On cross-examination, Sergeant Laird indicated that the facilities listed in the Wellness Package were facilities owned by the city of Prince Albert, not the Employer. Sergeant Laird also acknowledged that he was provided with a draft collective agreement and that he had an opportunity to read the agreement before he was asked to sign it on behalf of his members. Sergeant Laird also identified an Employer policy which incorporates part of the physical fitness committee recommendations on physical fitness plans and physical fitness testing, which Sergeant Laird indicated was agreed to as the method of recording agreement on these matters for current members. The policy document requires all members to file a personal fitness plan with the Chief of Police. It also outlines that police hired after June 1, 1994 must undergo annual fitness testing using POPAT as the testing method. These items corresponded to Items 1, 3 and 4 in the report of the physical fitness committee.

Corporal Gordon was elected president of the Association in 1995. He held the position of secretary in 1993-1994 and first attended a bargaining meeting in November, 1993. Corporal Gordon's recollection of the November 30, 1993 meeting with the Employer was that the Association would include mandatory fitness testing for new members in return for which its members would receive free access

to city owned recreation facilities through the Wellness Package. The Association felt it could sell mandatory testing to its members if it had the Wellness Package to offer them at the same time. In the final meeting, Corporal Gordon understood that the parties agreed that the collective agreement would be amended to include mandatory fitness testing for new members and that the Employer's procedure manual would be amended to include a requirement for an annual fitness plan for all members. In exchange for these two substantive changes, the Association members would receive access to city facilities. Corporal Gordon's testimony was similar to Sergeant Laird's in his estimation that without the Wellness Package attached to mandatory testing, the agreement would not have been ratified by the membership of the Association.

The absence of the Wellness Package from the collective agreement was not realized by the Association until the next round of collective bargaining. According to Corporal Gordon, the Association executive heard rumours that the city wanted to eliminate or restrict the Wellness Package. The executive then started to review the agreement and could not locate any provision outlining the terms of the Wellness Package. However, during the period from the signing of the agreement to date, the Employer has provided members of the Association with access to the city recreation facilities in accordance with the Wellness Package document which had been circulated to the Association's bargaining committee and members.

Bargaining for the 1995 collective agreement commenced between the parties in October, 1995. In its bargaining proposals, the Employer proposed the elimination of the golf course from the Wellness Package. Corporal Gordon testified that the Employer's negotiating committee stated at the bargaining table that the free golf course use for Association members has caused political problems for the Employer. Apparently, members of the public who use the golf course were irritated with the free use granted to Association members. The Association felt this problem resulted from the Employer's poor communication plan following the last collective agreement. At the same time, the Association's proposals included a proposal to incorporate the Wellness Package into a new clause 12.12.

The parties were unable to resolve the terms of their collective agreement and they referred the matters in dispute to binding arbitration before an arbitration board chaired by Dan Ish, Q.C. The Ish Board rendered its first award on November 15, 1996. At page 5 of the Award, the Ish Board stated the Employer's position with respect to the wage settlement, which included "this proposal includes

elimination of the 'wellness program' which is a policy of the Employer, not included in the collective agreement, that gives the Association members the right to use city facilities at no cost." As indicated in the Board's reasons issued on the preliminary objection in this application, the Ish Board did not otherwise deal with the issue of the Wellness Package.

On December 18, 1996, Corporal Gordon wrote to Laurent Mougeot, Human Resources Director for the city and chief negotiator for the Employer, to insist that the Wellness Package be included in the written collective agreement. The Association eventually entered into a new collective agreement with the Employer but it did so on the express understanding that the issue of the inclusion or exclusion of the Wellness Package would be decided by this Board.

Chief McCullagh has been chief of police in Prince Albert since December, 1990. During the 1993-1994 negotiations with the Association, he sat in on the negotiation meetings as an advisor to the chief negotiator. If Chief McCullagh was unable to attend a meeting, Inspector Peter Piecowye would replace him. Chief McCullagh recalled that the parties agreed that the mandatory fitness testing provisions would be included in the collective agreement, while the agreement on the use of facilities would be included in the Employer's policy and procedures manual. The manual would also include provisions dealing with fitness plans and voluntary testing. The Chief was unaware that the city of Prince Albert had amended the Wellness Package document contained in its policy and procedure manual to apply only to police and firefighter association employees effective January 1, 1996. Chief McCullagh noted that the negotiating committee for the Employer had no authority to grant free access to facilities owned by the city of Prince Albert.

On cross-examination, Chief McCullagh acknowledged that although the Employer is a separate legal entity, it obtained the majority of its operating funds from the city of Prince Albert. The city also provides financial and administrative services to the Board, including payroll, accounting, human resources, and negotiation of collective agreements. Chief McCullagh agreed that if the Employer negotiated with the Association to grant its members free access to city facilities, the Employer could fund that request from the grants received from the city of Prince Albert.

Chief McCullagh also recalled that there was initial resistance among members of the Association to mandatory fitness tests. Some senior members were concerned that they might not be able to attain the

appropriate fitness levels. At the same time, the weight room was being relocated to a less desirable location in the police station due to space needs of the service. In relation to the collective bargaining in November, 1993, Chief McCullagh testified that the use of city facilities was offered to the Association in return for its agreement to include the mandatory fitness testing requirement for new members. Chief McCullagh agreed with counsel for the Association that the February 10, 1994 minutes which summarized the Employer's monetary offer, along with the words "the offer includes use of city facilities (attached) . . ." was the deal struck with the Association with respect to the Wellness Package. In the monetary offer, the Employer offered signing bonuses of $500 per employee for 1992 and 1993, which Chief McCullagh assumed would be written into the collective agreement without any party expressly requesting that the terms be included. Chief McCullagh acknowledged in clear terms that the use of city facilities without charge was a negotiated item between the Association and the Employer.

Relevant Statutory Provisions

The relevant statutory provisions include the following sections of *The Trade Union Act*, R.S.S. 1978, c. T-17:

> *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;*
>
> ...
>
> *(d) "collective bargaining agreement" means an agreement in writing or writings between an employer and a trade union setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions of employees;*
>
> *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;*

Arguments

Richard Elson, counsel for the Association, argued that the definition of collective bargaining in s. 2(b) of the *Act* requires the parties to reduce the agreement reached to writings. In the present case, he submitted that the Employer had failed to sign a collective agreement that reflected the terms of the agreement arrived at by the parties. In support of the Association's position, counsel referred the Board to *International Woodworkers of America v. Shelter Industries Inc.*, [1981] Feb. Sask. Labour Rep. 51, LRB File No. 268-80. Counsel also referred the Board to *Lee v. Carpenters Provincial Council and Wm. Clark Interiors*, [1990] Spring Sask. Labour Rep. 41, LRB File No. 092-88, for the proposition that the Board can infer from the evidence, both written evidence and the conduct of the parties, that both parties intended the written documents, even if they have not been ratified or executed, to be a collective agreement. Counsel also referred the Board to *Re Mississauga Hydro Commission and International Brotherhood of Electrical Workers, Local 636* (1984), 17 L.A.C. (3d) 299 (Picher) and *Re Alcan Canada Products Ltd. and Metal Foil Workers' Union, Local 1663* (1982), 5 L.A.C. (3d) 1 (Arthurs) for similar propositions arising in the arbitration arena.

Counsel also argued the doctrine of estoppel, that is, that the Employer is estopped from denying that the Wellness Package is part of the collective agreement between it and the Association. In this regard, counsel noted the conduct of the Employer in providing the Wellness Package to the Association's members since the signing of the 1992-1994 agreement. Counsel argued that the evidence indicated that the Employer sought changes to the Wellness Package in its 1995 bargaining proposals which showed that the Employer did not view the Wellness Package as a non-negotiated item which was subject to unilateral change. Counsel also argued that the Employer's representations were relied on by the Association to its detriment.

Counsel argued that the Employer had access to the chief negotiator for the Employer during the 1992-1994 round of collective bargaining and its failure to call Mr. Cantin as a witness should lead the Board

to draw an adverse inference that his testimony would not support the Employer's case. In support of this proposition, counsel cited *Murray v. City of Saskatoon* (1951), 4 W.W.R. 234 (Sask. C.A.).

Counsel also argued that the Employer cannot rely on lack of authority as a defence to the Association's allegations that the Employer agreed to provide its members with free access to facilities owned by the city. The fact of their authority to make such an offer is proven by the conduct of the Employer subsequent to the signing of the agreement, that is, access was provided. In addition, if the Employer lacked authority to require the city to provide free access, the Employer would need to cover the costs of the access from its own budget.

Mitch Holash, counsel for the Employer, argued that the Employer was not here to argue that the matter was not negotiated by the parties in the 1993-1994 bargaining. He readily admitted that there was a negotiating history to the provision, however, the issue is whether the agreement would be included in the collective agreement or merely form part of the city of Prince Albert's policy manual which could unilaterally be amended by the city. Counsel argued that the best evidence of the agreement is the signed collective agreement which does not contain the Wellness Package. Counsel noted that the Wellness Package remains in the policy manual of the city of Prince Albert. Counsel also noted that the collective agreement provisions dealing with fitness were drafted by the city and forwarded to the Association where they were reviewed by the executive of the Association. No request for the inclusion of the Wellness Package was made at the time of the signing of the 1992-1994 agreement. In the Employer's opinion, this evidence supports the view that the parties agreed to leave the Wellness Package as a policy of the city of Prince Albert subject to change by the city without negotiations.

Counsel argued that the *City of Saskatoon* case, *supra*, only applies if the Employer still employs the persons whose evidence is relevant to the proceedings. Where the Employer no longer employs such witnesses, the inference cannot be drawn by the witnesses' failure to testify.

Counsel also argued that the Association's evidence was ambiguous at best. Sergeant Laird agreed that the proposal was to include the mandatory fitness testing in the collective agreement and points 1, 3, and 4 from the physical fitness committee report in the policy manual of the Employer.

Analysis

In the present instance, the Association argued that through oversight on the part of the Association and the Employer, the requirement to provide free access to city recreation facilities in accordance with the Wellness Package was omitted as a term of the 1992-1994 collective agreement, despite the fact that it was agreed to in the negotiations between the Employer and the Association and recorded in the minutes of the bargaining meetings.

The Employer, on the other hand, takes the position that the Wellness Package was offered, but as an Employer policy, not as a term of the collective agreement. That is, like the agreement to incorporate the non-mandatory aspects of the physical fitness committee's report into Employer policy, the parties agreed to the same arrangement with respect to the Wellness Package.

On the evidence presented by the Association and the Employer, this Board concludes that in the negotiations leading to the 1992-1994 collective agreement, the parties agreed to institute a mandatory physical fitness testing requirement for all new members of the Association and to incorporate this requirement into the collective agreement. In addition, the Board finds that in exchange for this provision, the Employer agreed to provide members of the Association with free access to the recreation facilities owned by the city of Prince Albert on terms set forth in a policy of the city of Prince Albert called the Wellness Package. The parties also agreed to reduce to written policy other aspects of the report of the physical fitness committee, which provisions were included in the policy manual of the Employer.

The question for the Board to determine from these facts is whether the Employer has failed to bargain collectively with the Association by failing to commit the agreement to writing or writings as required by s. 2(b) of the *Act*. In *Cook v. International Woodworkers of America, Local 1-184 and Shelter Industries Ltd.*, [1981] Sask. Labour Rep. 51, LRB File No. 268-80, the Board found the Union guilty of an unfair labour practice for failing or refusing to sign a collective agreement which embodied the terms of an agreement ratified by the employees in the bargaining unit. This finding arose out of the statutory duty imposed on the parties to bargain collectively, which includes as an aspect of the overall duty an obligation to embody the terms of the agreement arrived at in negotiations "in writing or writings."

In the *Wm. C. Interiors Ltd.* case, *supra*, the Board stated as follows, at 49:

> *Of fundamental importance is that the parties intend a writing or writings to constitute a collective bargaining agreement. The intention of the parties is to be gathered from what they have done. If the writings contain clear and unequivocal terms and conditions of employment, do not contemplate the continuation of negotiations, and have in fact been implemented by both sides, the Board may reasonably infer that both parties intended the writings to constitute a binding collective bargaining agreement.*

In our view, the evidence does not support the Employer's claim. The minutes of meeting on May 5, 1994, which record the last bargaining session prior to the drafting of the final agreement, clearly set out that the use of city facilities was considered part of the wage package and would be effective the date of the signing of the agreement, which did in fact occur.

It may be possible to conclude, as the Board did in the *Lee* case, *supra*, that the parties have reduced their agreement to writing even though it is not in the form of a formal, ratified agreement. However, in order to ensure that the parties and employees have a clear understanding of collective agreement rights and responsibilities and in order to reduce the potential for disputes arising from collective bargaining, it is essential that the parties record their agreements in a form that is accessible to employees and to successive bargaining committees.

Most often, this would occur through the signing of a Memorandum of Agreement at the conclusion of the bargaining session which sets forth the amendments, additions and deletions to the existing collective agreement and sets out the negotiated changes to the rates of pay and benefits provisions. These terms are then incorporated into a new version of the collective agreement. In this manner, historical changes in the agreement are documented and understood by both parties.

In this instance, the parties skipped the Memorandum of Agreement stage of the negotiations and proceeded to draft a new collective agreement which did not include the agreement to provide Association members with free use of city facilities in accordance with the Wellness Package. The Association has requested the Employer incorporate this provision into the collective agreement and the Employer has refused to do so.

In our view, the Employer is in violation of s. 11(1)(c) of the *Act* for refusing to incorporate the agreement to provide Association members with free use of city facilities in accordance with the terms set out in the Wellness Package into the collective agreement between the parties. Although the obligation arose under the 1992-1994 collective agreement, the matter was not subject to any amendment in the Ish Board Award. As such, it remains part of the collective agreement between the parties and must be incorporated into the written collective agreement.

The Board will issue an Order finding the Employer in violation of s. 11(1)(c) of the *Act* and directing the Employer to sign a collective agreement containing its agreement to provide Association members with free use of city facilities according to the terms set out in the city of Prince Albert's Wellness Package which was filed before the Board as an attachment to Exhibit A-5.

ROGER DREVER AND GERALD DREVER, Applicants and MAPLE CREEK SCHOOL DIVISION NO. 17, Employer and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4162, Union

LRB File Nos. 031-98 and 032-98; April 20, 1998
Chairperson, Gwen Gray; Members: Donna Ottenson and Judy Bell

For the Applicants: Roger Drever and Gerald Drever
For the Employer: N/A
For the Union: Harold Johnson

Religious exclusions - Application - Board excludes members of Plymouth Brethren from bargaining unit.

Religious exclusions - Test - Board reaffirms use of four-fold test to determine if individuals should be excluded under s. 5(l) of *The Trade Union Act*.

***The Trade Union Act*, s. 5(l).**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Canadian Union of Public Employees, Local 4162 (the "Union") was certified to represent employees at the Maple Creek School Division No. 17 (the "Employer") on March 9, 1998. At the hearing of the certification application, Gerald Drever and Roger Drever had applied to be exempt from joining and paying dues to the Union under the religious beliefs exemption contained in s. 5(l) of *The Trade Union Act*, R.S.S. 1978, c. T-17. These applications were filed on March 2, 1998 and the Union was not prepared at the certification hearing to deal with the exemption requests at that time. The Board therefore issued interim Orders excluding Roger and Gerald Drever from the Union until the applications for exclusion were disposed of by the Board. A hearing of the final matters took place on April 6, 1998 with Roger and Gerald Drever and the Union in attendance. No one appeared on behalf of the Employer.

Facts

Roger Drever is a grounds caretaker and Gerald Drever is an outdoor caretaker and a spare bus driver for the Employer. Both are members of a religious sect known as the Plymouth Brethren. The Plymouth Brethren follows the teachings of the Bible. The Brethren has no formal structure or central doctrines governing the conduct of its members.

The central beliefs of the Brethren were stated in a letter to the Board from Roger and Gerald Drever as follows:

> *In this letter we wish to briefly state why we cannot join or support a trade union, trade association, or any other membership organization.*
>
> *We affirm that the company of christians commonly called Plymouth Brethren do not have a written constitution, and do not have a world wide headquarters but are governed by the articles of faith as set out in the Holy Bible.*
>
> *We affirm that we cannot join a union because of the following articles of faith:*
>
> 1. *Be ye not unequally yoked together with unbelievers*
> *- 2 Corinthians 6:14*
>
> 2. *Let every one that nameth the name of Christ depart from iniquity.*
> *- 2 Timothy 2:19*
>
> *We also affirm that anyone joining or supporting a trade union, professional association or other membership, except amongst those we take communion with would be excommunicated from our fellowship and this in effect would separate us from our families.*

At the hearing, Roger and Gerald Drever indicated that their religious beliefs prevented them from joining any trade union, not just the respondent Union. In addition, they do not belong to any other association, be it a professional association or otherwise, which might involve them in groups that include non-believers in their membership.

In response to questions asked by counsel for the Union, Roger and Gerald Drever noted that they do follow the law, use social insurance numbers, send their children to school as required by law, maintain car insurance on their automobiles to the extent required by the law, maintain third party liability

insurance on their property, maintain bank accounts, hold and use Saskatchewan health care insurance numbers and sell their grains through the Canada Wheat Board.

Arguments

Roger and Gerald Drever relied on the materials filed with the Board. They also noted that other members of their Brethren had been exempted in the past by this Board from joining a trade union.

Counsel for the Union asked the Board to exercise extreme caution in granting the exemptions. Counsel noted that Roger and Gerald Drever's objection to joining a trade union appeared to be based more on a philosophical ideal than a religious belief. Counsel noted that Roger and Gerald Drever participate in insurance plans, medicare and the like thus they are not opposed to all forms of associations.

Relevant Statutory Provisions

The Board must apply s. 5(l) of the *Act* to these applications:

> *5. The board may make orders:*
>
> ...
>
> *(l) excluding from an appropriate unit of employees an employee whom the board finds, in its absolute discretion, objects:*
>
> *(i) to joining or belonging to a trade union; or*
>
> *(ii) to paying dues and assessments to a trade union;*
>
> *as a matter of conscience based on religious training or belief during such period that the employee pays:*
>
> *(iii) to a charity mutually agreed upon by the employee and the trade union that represents a majority of employees in the appropriate unit; or*
>
> *(iv) where agreement cannot be reached by these parties, to a charity designated by the board;*

> *an amount at least equal to the amount of dues and assessments that a member of that trade union is required to pay to the trade union in respect of such period;*

Analysis

In *Mary Ann Enns v. Kindersley Union Hospital and Saskatchewan Union of Nurses*, [1993] 3rd Quarter Sask. Labour Rep. 149, LRB File No. 135-93, this Board surveyed the case law across Canada on the principles to be applied to a request of an employee for a religious exemption. In that instance, the Board referred to a decision of the Canada Labour Relations Board in *Barker v. Teamsters' Union, Local 938*, [1986] 86 C.L.L.C. 16,031, in which the Canada Board summarized the criteria for dealing with an application of this nature as follows, at 14,288:

> *(1) The applicant must object to all trade unions, not just to a particular trade union.*
>
> *(2) The applicant does not have to rely on some specific tenets of a religious sect to base his objections.*
>
> *In the same manner as the British Columbia and Ontario boards, we believe it is not for us to disqualify some convictions because they are personal to the applicant. While it will be easier for the latter to convince the Board that his belief is "religious" when this belief forms part of the dogma of a sect, we believe we would misconstrue section 162(2) if we were to get involved with religious orthodoxy.*
>
> *(3) An objective inquiry must be made into the nature of the applicant's belief in the sense that they must relate to the Divine or man's perceived relationship with the Divine, as opposed to man-made institutions. . . .*
>
> *(4) Finally, the applicant must convince the Board that he is sincere and that he has not rationalized his objections to the union on religious grounds after he was made aware of the provisions of the Code.*

In our view, Roger and Gerald Drever have satisfied the Board on each of the four tests listed above. Roger and Gerald Drever have a sincere, genuine and longstanding belief that the Bible requires them to abstain from joining organizations or associations in which they will have contact with non-believers. This belief is based on the Brethren's understanding of various passages in the Bible and forms part of the religious observances of the Brethren.

The Board will issue an Order excluding Roger and Gerald Drever from the bargaining unit. Roger and Gerald Drever and the Union shall attempt to reach agreement on a charity to which the Employer shall direct the dues and assessments that Roger and Gerald Drever would otherwise pay to the Union. If no agreement can be reached, the matter may be referred back to the Board for a determination.

INTERNATIONAL UNION OF OPERATING ENGINEERS HOISTING AND PORTABLE AND STATIONARY, LOCAL 870, Applicant and KIEWIT MANAGEMENT LIMITED and GILBERT NORTHERN LIMITED, Respondents

LRB File No. 248-97; May 7, 1998
Chairperson, Gwen Gray; Members: Bruce McDonald and Don Bell

For the Applicant: Neil McLeod
For Kiewit: Kurt Wintermute
For Gilbert: N/A

Practice and procedure - Amendment - Board allows union to amend application to claim that two employers named in application are "related employers" under *The Construction Industry Labour Relations Act, 1992* and/or *The Trade Union Act*.

***The Trade Union Act*, s. 19.**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The International Union of Operating Engineers Hoisting and Portable and Stationary, Local 870 (the "Union") applied on July 21, 1997, to be certified for a bargaining unit described as "all operating engineers and operating engineer foremen employed by Kiewit Management Limited/Gilbert Northern Limited in the Province of Saskatchewan." Kiewit Management Limited ("Kiewit") replied to the application and indicated that it did not engage an hourly workforce in Saskatchewan but operated its projects with labour supplied by Gilbert Northern Limited ("Gilbert"). Gilbert filed a statement of employment which indicated that it had engaged eight employees in the proposed bargaining unit at the time of the application. The parties, at their request, have been engaged in a pre-hearing process with a Board agent to determine various matters arising out of the application, reply and statement of employment.

On October 30, 1997, the Union applied to the Board for permission to amend its application to include a reference to the related employer provisions contained in 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 (the "CILRA"). The wording of the substantive amendment sought by the Union is as follows:

> *The applicant further applies for an Order pursuant to Section 18(1) of The Construction Industry Labour Relations Act and/or Section 37.3 of The Trade Union Act declaring that the corporations or businesses named in paragraph 3 herein are one employer for the purposes of the respective statutes, and that a Certification Order be issued naming both companies as one employer.*

Kiewit objected to the amendment and asked that the Union's application proceed in its present form or be withdrawn and re-filed to include a request for a single employer declaration.

Kiewit also objected that the proposed amendment did not allege facts that are capable of sustaining a related employer declaration under s. 18 of the CILRA because the employers named in the application are not "unionized employers."

Gilbert took no position on the Union's proposed amendment and did not appear at the hearing held on April 13, 1998 to determine the matter.

Arguments of the Parties

Mr. McLeod, counsel for the Union, advised the Board that the Union filed the application naming Kiewit and Gilbert in a fashion that was intended to raise the legal issue of their status as related employers. The amendment is sought to make the Union's request for a related employer declaration clear on the face of the application. He argued that both Kiewit and Gilbert had notice of the application and opportunity to participate in the proceedings. In addition, the application to amend was brought before hearing of the final application allowing Kiewit and Gilbert an opportunity to consider their position on the Union's request for a declaration of related employer and to reply to the amended application.

Counsel for the Union brought to the Board's attention its decision in *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. P.S.P Erectors Inc.*, [1995] 3rd Quarter Sask. Labour Rep. 64,

LRB File No. 083-95, where the Board held that if an applicant intended to treat two separate legal entities as one employer on a certification application, the application must be brought under s. 18(1) of the CILRA or s. 37(3) of the *Act.* Prior to this decision, unions had filed applications naming two employers in the description of the bargaining unit and the Board had issued orders naming two employers on the theory that the employers were related employers. The Union, in this instance, argued that Kiewit and Gilbert would have been aware of the previous practice before the Board and would have understood that the application was worded in a manner so as to raise the related employer issue.

Mr. McLeod argued that the Union's application to amend did not offend the rule that amendments cannot be used to substitute one application for another, as the Board found to be the case in *Eckl Ceramics 1978 Ltd.*, [1983] Apr. Sask. Labour Rep. 69, LRB File No. 562-82. He defended the application as being an application to amend in order to ensure that the real question raised by the application is determined. In this regard, counsel referred the Board to *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Wolfe Construction Ltd.*, [1994] 4th Quarter Sask. Labour Rep. 116, LRB File No. 164-94, where the Board permitted the Union to amend the name of an employer where the Union had named an incorrect corporate entity as the employer. The Board in that instance allowed the Union to substitute the name of the entity which was actually employing the carpenters in question for the employer named in error in the application. Counsel also referred the Board to *United Brotherhood of Carpenters and Joiners of America, Local 1021 v. Lockerbie Management Ltd.*, [1987] April Sask. Labour Rep. 44, LRB File No. 283-86.

Mr. Wintermute, counsel for Kiewit, raised three objections to the proposed amendment. First, counsel argued that the amendment was an attempt to substitute a new application for the old one. In this regard, he referred the Board to its decision in *Eckl, supra, Yorkton Co-operative Association Limited,* [1985] Dec. Sask. Labour Rep. 60, LRB File No. 248-85, and *Fairford Industries Ltd.*, [1985] July Sask. Labour Rep. 31, LRB File No. 041-85.

Counsel for Kiewit argued that the majority of amendments approved by the Board are related to the correction of the name of an employer, which is a power specifically granted to the Board under s. 19(3) of the *Act.*

Counsel submitted that the Union's original application was a request for the Board to certify either Kiewit or Gilbert as the employer, not an application to have them declared related employers. As such, the granting of the amendment would fundamentally alter the nature of the application which would constitute an improper use of the amendment powers.

Second, counsel for Kiewit submitted that the facts alleged by the Union are incapable of sustaining an application for "related employer" under the CILRA because neither Kiewit nor Gilbert is a "unionized employer."

Third, counsel argued that a construction union cannot obtain a declaration of "related employer" under the *Act* because that field, so to speak, is occupied by the provisions contained in the CILRA.

Relevant Statutory Provisions

The Board must consider the following provisions contained in the *Act*:

> *19(1) No proceedings before or by the board shall be invalidated by reason of any irregularity or technical objection, but the board may, at any stage of proceedings before it, allow a party to alter or amend his application, reply, intervention or other process in such manner and upon such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy in proceedings.*
>
> *(2) The board may at any time and on such terms as the board may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.*
>
> *(3) For greater certainty but without limiting the generality of subsections (1) and (2), in any proceedings before it, the board may, upon such terms as it deems just, order that the proceedings be amended:*
>
> > *(a) by adding as a party to the proceedings any person or trade union that is not, but in the opinion of the board ought to be, a party to the proceedings;*
> >
> > *(b) by striking out the name of a person or trade union improperly made a party to the proceedings;*

> *(c) by substituting the name of a person or trade union that in the opinion of the board ought to be a party to the proceedings for the name of a person or trade union improperly made a party to the proceedings;*
>
> *(d) correcting the name of a person or trade union that is incorrectly set forth in the proceedings.*
>
> *(4) The board may at any time correct any clerical error in any order or decision made by the board or any officer or agent of the board.*

Analysis

The Board will allow the Union to amend its application in the manner proposed. The Union's original application sought a certification order against Kiewit and Gilbert. Although it is possible to interpret the application as seeking an order against either Kiewit or Gilbert, we accept that the Union intended the application to raise the issue of the relatedness of the two employers. The amendment simply serves to clarify the Union's claim that the two employers are "related employers" either under the CILRA or the *Act,* and is not an attempt by the Union to substitute a new application for the original application.

With respect to the argument raised by Kiewit that the Union failed to establish facts which would permit the Board to find that the two named employers are "related employers" under the CILRA and the argument that the CILRA provisions oust s. 37.3 of the *Act,* the Board is of the view that these arguments are best left for the final hearing on the merits of the application after the Board has heard evidence and argument from all the parties. Kiewit may renew its arguments on these points at the hearing and the Board makes no determination with respect to them at this stage.

The Board will permit Kiewit and Gilbert to respond to the issues raised by the amendment by filing further replies to the application. The replies shall be filed with the Board within 10 days of the parties receiving these Reasons and Order.

CITY OF SASKATOON, Applicant and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 59, and SASKATOON CIVIC MIDDLE MANAGEMENT ASSOCIATION, Respondents

LRB File No. 232-97; May 12, 1998
Chairperson, Gwen Gray; Members: Brenda Cuthbert and Bruce McDonald

For the Applicant: Jim Cowan
For CUPE: Lois Lamon
For SCMMA: Tom Milroy

Bargaining unit - Appropriate bargaining unit - Board policy - Board confirms that it prefers large units including as many employees as possible over small specialized craft or other units - When faced with multiple bargaining units Board will take restrictive approach to defining scope of smaller specialized unit.

Bargaining unit - Appropriate bargaining unit - Board policy - Middle management unit - Board defines middle management unit in restrictive fashion by confining membership to positions which would be in labour relations conflict of interest with members of larger unit or positions with some peculiar historical reason for exclusion from larger unit.

Bargaining unit - Appropriate bargaining unit - Community of interest - When determining community of interest, Board will focus on labour relations aspects of position not professional or other status.

Bargaining unit - Appropriate bargaining unit - Community of interest- Job functions of superintendent positions incompatible with membership in larger unit in labour relations sense - Superintendent positions therefore assigned to middle management unit.

Bargaining unit - Appropriate bargaining unit - Community of interest - Job functions of technical and project officer positions not incompatible with membership in larger unit in labour relations sense - Technical and project officer positions assigned to larger unit.

***The Trade Union Act*, ss. 2(a), 5(m) and 5.2.**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The City of Saskatoon ("City") applied to the Board for an Order under ss. 5(m) and 5.2 of *The Trade Union Act*, R.S.S. 1978, c. T-17 to determine if ten newly created positions in the facilities services branch of the asset management department of the City should be assigned to the Canadian Union of Public Employees, Local 59 ("CUPE") or to the Saskatoon Civic Middle Management Association ("SCMMA").

On November 12, 1997, the Board issued a provisional Order under ss. 5(m) and 5.2 of the *Act* dealing with the positions of superintendent pools, superintendent recreational facilities, superintendent office buildings and superintendent general trades in which the Board found the positions to be within the scope of SCMMA's certification Order. This certification Order was issued by the agreement of all parties.

On April 17, 1998, after concluding the evidence on the application on April 14, 1998, the Board issued further provisional Orders in which it assigned the positions of superintendent boards and agencies, superintendent program facilities, manager project services and manager maintenance support to SCMMA and the positions of project officer - project services and technical officers - maintenance support to CUPE. These Reasons provide the Board's rationale for the April 17, 1998 Orders. The Orders were issued before Reasons were published in order to permit the City to fill the positions as soon as possible following the completion of the hearing.

Facts

The application rose out of restructuring of the administration of the City which began in August, 1995, and ultimately resulted in the consolidation of 23 departments into nine departments. The asset management department is one of the newly formed departments and it has overall responsibility for the management of the physical assets of the City. The department is organized into five branches: vehicle and equipment, inventory and disposal, purchasing services, facilities services and business administration. The general manager of the department is Larry Ollenberger, who reports to the City

commissioner. Each branch in the department is overseen by a branch manager, all of whom report to Mr. Ollenberger.

The facilities services branch came about as a result of the amalgamation of the design services branch and building maintenance and operations branch. Derek Lovlin is the branch manager. The branch is responsible for the maintenance, operation and building of City buildings and facilities.

Prior to June, 1997, the facilities services branch was organized along functional lines into teams that can generally be described as a design team, a building maintenance team, a building operations team, a paint and utility team, an energy management team and an overall facilities co-ordinator. Each team was responsible for carrying out its specialized functions in all City facilities. As a result, when work was undertaken in a given facility, it would require the co-ordination of the various teams each of whom had their own superintendent or supervisor. No one person was responsible for overseeing all of the work performed in a particular facility.

In June, 1997, the City proposed to re-organize the facilities services branch by creating work teams that would perform all the operations, maintenance and design work for a particular facility or groups of facilities, in other words, to create client focused work teams. The goal of the restructuring was to create a more streamlined approach to facility maintenance and operation by having one person responsible for all aspects of building maintenance, operation and design, and to reorder the accounting structures in order to enable each facility to account for its maintenance and operations costs. The proposed restructuring resulted in the flattening of the reporting structures by eliminating in-scope (CUPE) supervisory positions in the trades areas and by eliminating the in-scope (CUPE) position of facility maintenance co-ordinator. However, the changes did not result in any actual job losses.

The new teams consist of tradespeople, operators, custodians and general labourers headed by superintendents. A client focused team was established in each of the following five areas: pools, recreational facilities, boards and agencies, program facilities, and office buildings. A general trades team was also proposed consisting of a superintendent, painters, carpenters, welders, electricians, plumbers and other trades to provide support work for the client focused teams and to undertake the painting program for the City facilities.

In addition, two support teams were formed to provide assistance to each of the client based work teams. The maintenance support team is headed by a manager and is responsible for providing technical maintenance support to each composite team. The project services team, also headed by a manager, provides project management assistance to each of the six superintendents.

CUPE agreed with the City and SCMMA that the superintendents of pools, recreational facilities, office buildings and general trades would fall within the scope of SCMMA's bargaining unit. These superintendents oversee the work of 15 to 25 employees each.

The evidence indicated that the superintendent of boards and agencies may have at most three employees to supervise while the superintendent of program facilities may have at most four employees to supervise. The job description for each superintendent position contains the following job responsibility:

> *Manages assigned staff, hires, assigns work schedules, assesses staffing needs, identifies and pursues other resources if necessary, and performs layoff and recall as required. Plans and approves staff development. Responsible for performance management and disciplinary action when required.*

The superintendent of boards and agencies is required to possess a two year technology program in building mechanical systems, civil engineering or architectural technology, along with certification in BOMI facilities management administration and building operator A (5th class power engineering). The superintendent of program facilities is required to possess journeyman mechanical, electrical or carpentry certificates and certification in BOMI facilities maintenance administration. These qualifications are similar to the qualifications required by other superintendents.

The manager of project services supervises the work of an engineer, architect, interior designer, energy management officer and project officers. The engineer, architect and energy management officer positions fall within the SCMMA bargaining unit. The project services manager is required to manage staff with the same supervisory power as a superintendent. The manager must be qualified as a professional engineer or registered architect.

The manager of maintenance support manages building technicians, MPC support, keys/security personnel, CAIP and technical officers. This position is also required to exercise supervisory authority over other employees in the same terms as a superintendent. The qualifications for this position are graduation from a recognized two year program in building operations, architectural, mechanical or civil technology.

Technical officers are responsible to the manager of maintenance support. These positions do not involve supervisory functions, either direct or indirect. The qualifications required include journeyman status in the mechanical, electrical or carpentry trades. The overall job function is to provide technical analysis, investigation or evaluation within his/her discipline for facilities owned by the City.

Project officers are responsible to the manager of project services. They also do not exercise any direct or indirect supervisory functions. The job qualifications include journeyman status in the mechanical, electrical or carpentry trades. Project officers manage the planning, design, tendering, construction and commissioning of various construction or repair projects in the City.

The certification Order issued to CUPE was last amended on January 26, 1994 and reads in part as follows: "all employees of the City of Saskatoon, employed in the following departments." Eighteen different departments are named and various positions are excluded from each department.

The certification Order issued to SCMMA is dated January 9, 1997 and reads in part as follows: "all administrative, supervisory and professional staff employed by the City of Saskatoon ... in the following departments..." The Order then lists 14 different departments and excludes various positions from each department. The Order also excludes:

> *all other employees in the said departments who are appropriately members of the following:*
>
> *Canadian Union of Public Employees, Local 47*
> *Canadian Union of Public Employees, Local 59*
> *Canadian Union of Public Employees, Local 859*
> *International Association of Fire Fighters, Local 80*
> *Amalgamated Transit Union, Local 615*
> *International Brotherhood of Electrical Workers, Local 319*

The process of delineating the bargaining unit for SCMMA occurred through the use of a Board agent who reviewed the positions in dispute between CUPE, SCMMA and the City and made recommendations to the parties for the placement of each position. In the end result, all parties accepted the recommendations of the Board agent and a final certification Order was issued by the Board in accordance with the agreement reached. As a result, this is the first occasion on which the Board is asked to articulate the boundaries of the middle management unit.

In its evidence, SCMMA claimed that the following positions included within its bargaining unit do not have a supervisory component to their job duties: risk management and administration manager in the solicitor's department; liaison officer in the corporate information services branch of the finance department; investment coordinator in the treasurer's branch of the finance department; staff training and development officer in the organization and staff development branch of the human resources department; training officer in the vehicle and equipment branch of the asset management department; safety officer in the occupational health and safety branch of the human resources department; systems technician in the occupational health and safety branch of the human resources department; and rate analyst in the public works department. CUPE provided the Board with evidence that the risk management and administration manager in the solicitor's department did in fact supervise one of CUPE's members in the department. In addition, CUPE noted that the human resources and finance personnel would normally be excluded from CUPE because of their access to confidential information pertaining to the industrial relations of the City. Other positions, such as the rates analyst, would fall outside of CUPE's normal jurisdiction in relation to Canadian Union of Public Employees, Local 859, Canadian Union of Public Employees, Local 47, Amalgamated Transit Union, International Brotherhood of Electrical Workers or the Fire Fighters Union.

CUPE led evidence which indicated that all journeyman tradespeople were included historically in its bargaining unit. The normal progression of a tradesperson is from a general tradesperson position to assistant supervisor to supervisor. CUPE has many working supervisors in its local. Matt Baranick testified that as turf supervisor he supervises two assistant foremen, one lead hand and between 35 to 40 staff persons. He does little "hands on" work in his department and spends most of the time planning and supervising the work of others. James Boa testified that, as an engineer assistant IV, he manages projects in the public works department and supervises the work of engineer assistants III and II. He indicated that there are several positions in CUPE which require university or technical education and

professional qualifications, including accountant V's, drafting technicians, payroll supervisor and recreation administrators.

Carrie Humphreys, Vice-President of SCMMA, testified that the line generally drawn between SCMMA members and CUPE members is between the superintendent levels and the supervisor levels.

Dennis Edwards, Superintendent of Office Buildings, holds one of the four newly created positions agreed by the parties to belong in the SCMMA bargaining unit. He testified as to his role in hiring, disciplining and terminating members of CUPE who work under him. According to Mr. Edwards, the superintendent of office buildings is empowered to impose discipline up to and including discharge, which he has done in consultation with his branch manager and human resources department. With respect to the technical officer and project officer positions claimed by SCMMA in the asset management branch, Mr. Edwards testified that both positions would work closely with the superintendents of each of the areas of the facilities services branch by providing them with technical knowledge and assistance.

Arguments of the Parties

Jim Cowan, on behalf of the City, argued that the superintendents and managers in the facilities services branch of the asset management department should fall within the middle management unit as they form part of the senior management team in the branch and perform managerial functions in relation to the CUPE members. He argued that it did not make sense to divide the supervisory and management group between the two unions as proposed by CUPE. The managers and superintendents all perform the same type of work in relation to CUPE members although the number of CUPE members supervised by each may vary. Mr. Cowan took no position with respect to the technical officer and project officer. In relation to the superintendents and managers, he argued that there was a community of interest among all the superintendents and the managers in the branch and that they shared a community of interest with other middle managers across the City's departments. Superintendents are expected to manage subordinate CUPE staff and they would be in a conflict of interest if they were placed in CUPE's jurisdiction. In addition, superintendents and managers play key roles in the City's financial planning, policy setting and delivery of service planning.

Tom Milroy, on behalf of SCMMA, proposed that the superintendents, managers, project officers and technical officers should be included in its bargaining unit. With respect to the superintendents and managers, SCMMA's basic position is that these employees are in a conflict of interest situation with CUPE members because of their supervisory responsibilities.

With respect to the project officers and technical officers, Mr. Milroy argued that these positions are an integral part of the management team. He noted that the positions provide expert assistance to the superintendents. It was noted that the officers can impact on CUPE's membership by determining the staffing ratios for certain positions, by recommending the contracting out of work and the like.

Lois Lamon, on behalf of CUPE, noted that the technical officer and project officer positions did not purport to exercise any supervisory role over members of CUPE. The positions are not involved in any confidential labour relations matters on behalf of the City. According to her, the positions share a community of interest with members of CUPE and provide a promotional line for tradespeople in CUPE's bargaining unit. The qualifications and job role, in CUPE's opinion, are similar to other technical positions in the City such as the engineering assistant.

With respect to the superintendent of boards and agencies and the superintendent of program facilities, Ms. Lamon argued that there was no significant supervisory role established for these positions and they should be placed in CUPE.

Relevant statutory provisions

The Board must consider the following provisions in the *Act*:

> *5. The board may make orders:*
>
> ...
>
> *(m) subject to section 5.2, determining for the purposes of this Act whether any person is or may become an employee;*
>
> *5.2(1) On an application pursuant to clause 5(m), the board may make a provisional determination before the person who is the subject of the application is actually performing the duties of the position in question.*

> *(2) A provisional determination made pursuant to subsection (1) becomes a final determination after the expiry of one year from the day on which the provisional determination is made unless, before that period expires, the employer or the trade union applies to the board for a variation of the determination.*

Analysis

The Board was not asked in this instance to determine if the positions in dispute are "employees" within the meaning of s. 2(f)(ii) of the *Act*. The parties have agreed that the positions do fall within either CUPE's or SCMMA's bargaining units. In the course of hearing the evidence of Mr. Edwards, the Board noted that it had decided in *Saskatchewan Government Employees' Union v. Saskatchewan Liquor and Gaming Authority; Saskatchewan Liquor Store Managers' Association v. Saskatchewan Liquor and Gaming Authority*, [1997] Sask. L.R.B.R. 836, LRB File Nos. 037-95 & 349-96, that the Board approaches the question of whether or not 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 addition, the Board adopted a streamlined approach for determining managerial status as follows, at 854:

> *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.*

Clearly, if a person has effective authority to impose discipline up to and including discharge on an employee, the person is a manager, not an employee, and cannot be included in any bargaining unit. Although it is unnecessary in this instance to determine the employment status of the superintendents, managers and officers under discussion in the application, the Board would simply remind the parties that if managerial authority as we have defined it above is devolved to the superintendent and manager level, the persons occupying the positions will not be "employees" within the meaning of s. 2(f)(i) of the *Act*. The City, in this instance, assured the Board that although the superintendents and managers would have input into the discussions regarding the discipline of employees falling within the CUPE bargaining unit such that their inclusion in the CUPE bargaining unit would give rise to a labour

relations conflict, they did not have independent authority to discipline or dismiss. Such decisions are made in consultation with the branch manager, general manager and human resources department.

The Board is required in this application to draw a line between the "all employee" CUPE unit and the supervisory unit of SCMMA. In multi-bargaining unit settings, such as the City, the Board is primarily concerned with ensuring that the multiplicity of bargaining units does not result in labour relations instability. In the present instance, the Board is of the view that the delineation between the industrial units and the middle management unit has not been sufficiently defined to avoid applications of this nature. The parties are not confident as to the bargaining structures. The City, as a result, is hindered in filling new positions until the jurisdictional issues are resolved either by the agreement of the bargaining agents or by reference to the Board. In order to provide the parties with guidance in sorting out future disputes, the Board will establish some general criteria for assessing whether a position should be assigned to CUPE or to SCMMA.

We start with the observation that this Board, along with other labour relations boards in Canada, generally prefers large units, including as many employees as possible, to small specialized craft or other units. In *Hospital Employees' Union, Local 180 v. Health Sciences Association of British Columbia and Kelowna Hospital Society*, [1977] 2 Can. L.R.B.R. 58, the British Columbia Labour Relations Board expressed the labour relations policy reasons for favouring large all employee units in the following terms, at 67:

> *The first is the long-standing policy in favour of large industrial units, units covering as many employees as possible. This policy, which is designed to promote industrial stability, administrative efficiency, and common frameworks of employee conditions, has particular force in the public sector . . . Special features must be present to warrant a departure from this norm. In hitherto unorganized sectors of the economy, an exception will be permitted where to insist on the norm would be to effectively deny collective bargaining . . . In other instances, exceptions have been permitted on the basis of s. 41 of the Code or powerful historical or like factors.*

Flowing from this preference for large bargaining units, when faced with multiple bargaining units, the Board will take a fairly restrictive approach to defining the scope of the smaller, specialized unit. In the *Kelowna Hospital* case, *supra*, the British Columbia Labour Relations Board adopted this restrictive approach and explained its rationale, at 68:

> *Where two (or more) bargaining units have been established in any undertaking, the first a large industrial unit and the other a smaller craft or special group unit, the boundaries of the latter should be defined or developed with a relatively restrictive frame of mind. There are at least two reasons for adopting that approach. First, to give sanction to a more expansionist view in favour of the smaller unit would be to further dilute the general policy in favour of single industrial units. The smaller, special characteristic unit will have been created to meet particular and compelling circumstances not to give the trade union a beachhead from which it can make further inroads into the larger units and the overriding policy. Secondly, the relatively restrictive state of mind will in many cases be necessary to avoid denuding the industrial or service unit of a significant element of its viability and bargaining strength. When the smaller, exceptional unit is created it frequently creams off and takes into membership the most skilled employees. The unit, although relatively small, derives its bargaining strength from the fact that it contains such skilled persons - persons quite essential even in the short run to the continued operation of the employer. The industrial unit, although larger, will generally contain a number of persons who are not essential in the short run to the employer's operations. Sheer size will be one measure of the bargaining strength of the larger unit. But another measure, often equally significant, will be the extent to which the industrial or service unit includes technical or skilled employees.*

This approach was approved by the Board in *Regina Civic Middle Management Association v. City of Regina and City Hall Administrative Staff Association, Local No. 7, C.U.P.E. and Civic Employees' Union, Local 21, C.U.P.E.*, [1980] 3 Can. L.R.B.R. 390, LRB File Nos. 298-79 & 314-79.

In Saskatoon and Regina, the middle management units were formed from the employees who were excluded by Board Order or by agreement from the large, all employee units, which generally include an outside workers unit, inside workers unit, transit unit and a fire fighters unit. Special units may also exist in city owned utilities, such as the IBEW unit in the City. Although there may be some historical anomalies that explain the exclusion of some of the positions from the larger industrial units, generally, the exclusions came about because of the potential for a labour relations conflict with membership in the industrial unit arising out of the managerial duties performed by management personnel and because of the close alignment of middle management personnel with decision-making processes that may affect the larger industrial units. In the public sector, it is not unusual to have several layers of management in which the lowest level do not exercise sufficient managerial authority to remove them from the definition of "employee", although their community of interest lies closer to the managerial suite than to the industrial bargaining units.

In these situations, the Board has approved the creation of middle management units. In doing so, however, the Board has defined the middle management unit in a restrictive fashion by confining its membership to those positions who, if they were included in a large industrial unit, would be placed in a conflict of interest situation between their obligations to perform supervisory and first rung management functions in relation to those employees and their membership in the larger unit. The Board has also allowed positions to be included in middle management units which have some peculiar historical reason for being excluded from the industrial bargaining unit. However, these positions are not permitted to be used as a springboard for organizing other positions that otherwise would be included in the larger industrial unit.

In relation to defining the community of interest that must be shared by persons assigned to the middle management unit, the Board will focus on the labour relations aspects of their positions. The professional or other status required by the position will not be considered a determining factor, unless the position is one that for historical reasons was included in the middle management unit, or excluded from the industrial unit. This is consistent with the Board's previous decision in *City of Regina v. Canadian Union of Public Employees, Local 7 and Regina Civic Middle Management Association*, [1986] Sept. Sask. Labour Rep. 69, LRB File Nos. 387-85, 389-85, 031-86 & 032-86 where the Board considered the position of Research and Planning Analysts in the Parks and Recreation Department of the City of Regina and held as follows, at 70:

> *. . . after considering all of the circumstances the Board has decided that they ought properly to fall within the bargaining unit represented by the Canadian Union of Public Employees, Local 7. The Board views the Regina Civic Middle Management Association as representative of employees in "middle management" positions, and in its opinion the Analysts do not perform duties of a sufficiently managerial character to warrant placing them in that Association.*

In the present application, the Board holds that the superintendent of boards and agencies, the superintendent of program facilities, manager project services and manager maintenance support fall within the middle management unit, at least on a provisional basis. The job descriptions for the positions contain first line managerial functions which include "performance management and disciplinary action." It would be difficult for such employees to be placed in the CUPE unit without giving rise to a conflict of interest between their job functions and their membership in the Union. They are also unlike the working supervisors in CUPE in that they are expected to impose minor discipline on staff and have input into major disciplinary decisions up to and including discharge. Overall, their job

functions are incompatible with their membership in CUPE and they will be assigned as a result to SCMMA.

In its arguments, CUPE suggested that the creation of the superintendent positions in question was motivated by anti-union animus, in that it was an attempt on the part of the City to ensure a contingent of qualified tradespeople on staff in the City in the event of a future strike of the civic unions. Other than the assertions made by CUPE in argument, there was no evidence that the re-organization of the asset management department, in particular, the facilities services branch, was undertaken for reasons tainted by anti-union animus. The Board has recognized in past decisions and continues to recognize that the *Act* does not dictate a certain level of management or certain quota of management. Each case will be judged on its own merit according to the functions performed. The Board will not infer from the simple fact of re-organization that anti-union animus is the motivating reason for the creation of new or different management structures.

In relation to the project officer and technical officer positions, the Board finds that their job responsibilities are significantly different than the superintendent and managerial positions. The project officers and technical officers do not supervise CUPE staff. They may provide technical expertise to the workforce but they are not directly or indirectly responsible for overseeing the performance of other employees. As a result, the Board will assign the positions to CUPE.

In its evidence and argument, SCMMA took the position that the technical officer and project officer were "near" managers, that is, that they are an integral part of the management team because they provide expert advice to the management structures in the branch. SCMMA also views some of its bargaining unit as containing a number of similar members who are highly skilled but not directly involved in the management of employees who fall within the CUPE bargaining unit. SCMMA argued with respect to the project and technical officers that they in effect were similar to other positions in SCMMA which do not perform managerial functions.

In our view, the evidence with respect to the "near" managers was unsatisfactory. If there are positions currently within SCMMA which have no role in managing the work of other employees, they will be treated by the Board in future applications as anomalies. They will not be deleted in their ranks from SCMMA, there having been some historical reason for being included in SCMMA and excluded from CUPE. However, these ranks will not be expanded by the Board.

In the present instance, there is no evidence that the technical officers and project officers have been excluded from CUPE in the past or included in SCMMA in the past. As such, the Board finds that they are properly assigned to CUPE because they do not exercise any managerial functions that would place them in a conflict of interest situation with other CUPE members.

CITY OF SASKATOON, Applicant and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 59, SASKATOON CIVIC MIDDLE MANAGEMENT ASSOCIATION and AMALGAMATED TRANSIT UNION, LOCAL 615, Respondents

LRB File No. 244-97; May 20, 1998
Chairperson, Gwen Gray; Members: Terry Verbeke and Bruce McDonald

For the Applicant: Jim Cowan
For CUPE: Lois Lamon
For SCMMA: Tom Milroy
For ATU: Dan Bichel

Bargaining unit - Appropriate bargaining unit - Board policy - Board confirms that it prefers large units including as many employees as possible over small specialized craft or other units - When faced with multiple bargaining units Board will take restrictive approach to defining scope of smaller specialized unit.

Bargaining unit - Appropriate bargaining unit - Board policy - Middle management unit - Board defines middle management unit in restrictive fashion by confining membership to positions which would be in labour relations conflict of interest with members of larger unit or positions with some peculiar historical reason for exclusion from larger unit.

Bargaining unit - Appropriate bargaining unit - Community of interest - When determining community of interest, Board will focus on labour relations aspects of position not professional or other status.

Bargaining unit - Appropriate bargaining unit - Community of interest - Job functions of accountant position in transportation department not incompatible with membership in larger unit in labour relations sense - Accountant position assigned to larger unit.

The Trade Union Act, ss. 2(a), 5(m) and 5.2.

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The City of Saskatoon (the "City") applied for an Order under ss. 5(m) and 5.2 of *The Trade Union Act*, R.S.S. 1978, c. T-17, to determine if a newly created position of "accountant" in the transportation department of the City falls within any of the three bargaining units currently in place. At the time of the application the position had not been filled and the City sought a provisional determination from the Board.

The Canadian Union of Public Employees, Local 59 ("CUPE") appeared at the hearing but did not claim jurisdiction over the position in question. The Amalgamated Transit Union, Local 615 ("ATU") and the Saskatoon Civic Middle Management Association ("SCMMA") both claimed jurisdiction over the position. The City did not contest the status of the accountant as an "employee." It simply required a determination from the Board as to the appropriate unit in which to place the position.

The transportation department is one of nine departments which report to the City Commissioner. The department is headed by a general manager, Tom Mercer, and consists of six branches, one of which is the transit branch. The position is assigned to the administrative and support services branch of the transportation department and will report to the business administrator who is the branch head. Within this structure, the position will work with the coordinator of payroll services and coordinator of revenue services who are members of ATU. Both of these positions require grade twelve education with post-secondary courses in accounting or business administration.

The duties of the position are set out in a job description and are general duties regularly performed by accountants in a large organization. The position description requires the incumbent to possess professional accounting certification along with three to five years related experience. The position will provide accounting services to five branches of the department with appropriately 80 percent of the work flowing from the transit branch. The position will provide technical instruction to other employees in the department but will not directly supervise any employees. The position is not authorized by the City to manage performance, recommend or implement discipline, hire staff or have significant input into the collective bargaining process. The position is required to control cash and

monitor the sick leave fund which is administered by a union-management committee. The position may be required to attend meetings in the place of the branch manager.

ATU is certified to represent "all employees employed by the City of Saskatoon, Transit Department" with certain managerial exceptions. SCMMA is certified to represent "all administrative, supervisory and professional staff employed by the City of Saskatoon" with certain managerial exceptions and except all employees who are members of ATU. Prior to 1995, the transit department was a separate department within the City. It is now amalgamated with urban design, parking, traffic planning and electronic communications to form the transportation department. Employees in the latter areas are represented by CUPE and SCMMA. The administration branch contains employees who are represented by CUPE and ATU. The remaining employees in the transportation department are located in the transit branch and are represented by ATU and SCMMA.

Within the transit branch, ATU represents employees who hold supervisory or foreman positions. CUPE represents accountant V positions in the treasurer's department, public works department, engineering department and comptroller department. Accountant V's are required to possess the same certification as the accountant position in the transportation department.

SCMMA represents an accounting coordinator in the leisure services department. This position possesses qualifications similar to the accountant in transportation. However, it is also required to supervise the staff and day-to-day activities of centralized payroll, accounts payable and revenue systems of the leisure services department. SCMMA also represents the accounting manager and accounting control manager in the finance department. These positions require professional accounting certification and supervise CUPE members. SCMMA also represents employees who do not perform supervisory or managerial functions in relation to employees in CUPE bargaining unit. In particular, SCMMA pointed to the position of the transportation services coordinator in the traffic planning and operations branch of the transportation department.

ATU's seniority is based on classification seniority within its bargaining unit, while CUPE's seniority unit is city wide. CUPE does not recognize seniority earned while working in another bargaining unit in the City. SCMMA does not subscribe to a seniority system.

Relevant Statutory Provisions

The Board must consider ss. 5(m) and 5.2 of the *Act*. They are as follows:

> *5. The board may make orders:*
>
> ...
>
> *(m) subject to section 5.2, determining for the purposes of this Act whether any person is or may become an employee;*
>
> *5.2(1) On an application pursuant to clause 5(m), the board may make a provisional determination before the person who is the subject of the application is actually performing the duties of the position in question.*
>
> *(2) A provisional determination made pursuant to subsection (1) becomes a final determination after the expiry of one year from the day on which the provisional determination is made unless, before that period expires, the employer or the trade union applies to the board for a variation of the determination.*

Arguments

ATU argued that the dividing line between ATU and SCMMA occurs when a position contains significant supervisory powers over and above the working foreman type of supervisory power. This position lacks any supervisory responsibilities and will at most provide guidance and direction to less skilled employees in the branch. The position spends most of its time in the transit area which is covered by ATU's certification. On this theory, it should fall within ATU.

SCMMA argued that it represents a layer of middle management that goes across traditional boundaries in the City. It represents other professional accountants and its certification Order applies to "professionals" which SCMMA defined as any occupation that has established a form of peer review. It also noted that the position would have a conflict if it remained in the ATU unit because the accountant is responsible for cash control and the sick bank. SCMMA also argued that the position is "near" management in the sense that it reports to an out-of-scope position.

The City took no position on the matter.

Analysis

This is the second occasion on which the Board has been asked to comment on the scope of the middle management unit at the City. In *City of Saskatoon v. Canadian Union of Public Employees, Local 59 and Saskatoon Civic Middle Management Association*, [1998] Sask. L.R.B.R. 321, LRB File No. 232-97, the Board set out its approach in determining the boundaries of the middle management unit along the following general principles:

1. *in a multi-bargaining unit setting, the Board is primarily concerned with ensuring that the multiplicity of bargaining units does not result in industrial instability;*

2. *the Board historically favours larger, industrial units over smaller specialized bargaining units as being the best vehicles for promoting industrial stability;*

3. *when faced with multiple bargaining units, the Board will take a restrictive approach to defining the scope of the smaller, more specialized unit;*

4. *middle management units will be confined, in general, to those employees who, if they were included in the large industrial unit, would be placed in a conflict of interest situation between their obligations to perform supervisory and low level managerial functions and their membership in the larger unit;*

5. *the Board may allow for exceptions to the conflict of interest test where there are peculiar historical reasons for excluding persons from the larger unit, but these exceptions will not be permitted to form a spring board for organizing positions that otherwise would be assigned to the larger unit.*

In the present case, the position of accountant in the transportation department will be assigned to ATU. The position does not exercise supervisory or low level managerial authority. It is similar in conditions of work, qualifications and work duties to positions which are currently placed into the CUPE all employee unit, as opposed to SCMMA. Professional accounting positions that have been assigned to SCMMA include supervisory functions over CUPE or other employees. The professional status is not sufficient to remove the position from the larger unit on the test of conflict of interest. Also, professional accountants do not have a history of being excluded from the large industrial units that would justify excluding them from ATU's all employee unit. CUPE, in this instance, has agreed that the

majority of the work performed by the position falls within the scope of ATU's certification Order and the Board agrees with this assessment.

The Board will issue a provisional Order under s. 5.2 of the *Act* assigning the accountant position to ATU, which will become final on the expiration of one year unless an application is made to vary the Order.

SASKATOON CIVIC MIDDLE MANAGEMENT ASSOCIATION, Applicant and CITY OF SASKATOON, Respondent and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 59, Intervenor

LRB File Nos. 354-97 and 010-98; May 20, 1998
Vice-Chairperson, James Seibel; Members: George Wall and Terry Verbeke

For the Applicant: Tom Milroy and Brian Heinz
For the Respondent: Judy Schlechte
For the Intervenor: Lois Lamon

Bargaining unit - Appropriate bargaining unit - Board policy - Board confirms policy of preferring larger more inclusive units over smaller more fragmented units.

Bargaining unit - Appropriate bargaining unit - Board policy - Main policy which influences scope of bargaining unit is the promotion of industrial stability.

Bargaining unit - Appropriate bargaining unit - Board policy - Middle management unit - Middle management unit must be confined to positions in conflict or potential conflict through exercise of supervisory duties with membership in general unit.

Bargaining unit - Appropriate bargaining unit - Community of interest - Industrial relations characteristics of position are of overarching significance.

Bargaining unit - Appropriate bargaining unit - Community of interest- Social housing facilitator exercises no regular supervision with respect to members of general unit - Job functions of social housing facilitator not incompatible with membership in general unit - Social housing facilitator position therefore assigned to general unit.

***The Trade Union Act*, ss. 2(a), 5(m) and 5.2.**

REASONS FOR DECISION

Background

James Seibel, Vice-Chairperson: Each of Saskatoon Civic Middle Management Association ("SCMMA") and Canadian Union of Public Employees, Local 59 ("CUPE") is certified as bargaining agent on behalf of a group of employees employed by the City of Saskatoon (the "City"). Each of five

other union locals also represents a unit of employees of the City, among them firefighters, transit workers and electrical workers, for example.

In LRB File No. 098-96, SCMMA applied to be certified to represent, generally, middle management, supervisory and administrative employees of the City. A number of the positions applied for were claimed by CUPE and the City. The parties engaged in a mediation process which culminated in an agreement on all disputed positions, including that of social housing facilitator. It was agreed that the position would be included in the unit represented by CUPE subject to an agreement to review the appropriateness of the assignment in one years' time. The period has elapsed and the parties are unable to agree on which unit should include the position.

In this application, SCMMA has applied to the Board, pursuant to ss. 5(k) and 5.2 of *The Trade Union Act*, R.S.S. 1978 c. T-17, for a determination as to whether the social housing facilitator position should appropriately be included in the bargaining unit that it represents instead of that represented by CUPE.

The City took no position on the application and attended the hearing on a watching brief basis.

Evidence

Tom Milroy testified on behalf of SCMMA. He has been its president since officers were elected after its formation in March, 1996. He has been employed by the City since 1988, and is presently systems co-ordinator in the leisure services department. He said that SCMMA currently represents approximately 135 employees. Upon an interim certification Order being granted in August, 1996, it acquired about 75 members from the out-of-scope Exempt Staff Association which generally included City employees at the branch manager level and above. Mr. Milroy said that most of the issues that arose between SCMMA and CUPE involved employees below branch manager because the scope of their duties can be so variable. There were approximately 17 positions assigned to CUPE where the incumbents remained members of SCMMA.

He said that the employees represented by SCMMA exercise supervisory capacity to a greater or lesser degree, but the most defining characteristic is their ability to affect policy making by the City.

Mr. Milroy maintained that the social housing facilitator position was analogous to two other positions in the SCMMA unit: race relations co-ordinator and emergency measures co-ordinator. All three positions, he said, are specialized, demonstrate a certain amount of independence and have a larger than ordinary impact on policy because of the degree to which they support and develop policy on behalf of special committees.

Russell Mawby, the incumbent in the position of social housing facilitator, also testified. He has been in the position since it was first filled in April, 1996. He said that most of his responsibilities are assigned to him by the Social Housing Advisory Committee ("SHAC") and most of his day-to-day contact with management is with the manager of community planning in the building and planning department.

Mr. Mawby said that SHAC is comprised of two members of City Council and representatives of the Saskatoon Housing Authority, Saskatoon Native Housing, Saskatoon Real Estate Board, YWCA and the Saskatoon Home Builders' Association. According to Mr. Mawby, SHAC's mandate is to formulate, develop and propose social housing policy to City Council; he acts as a resource to SHAC to help it to identify how the municipality can participate with and assist the community in developing social housing. He said that the social housing capital reserve receives ten percent from all City land sales and that his position is funded partly out of the reserve and partly by the Province.

SHAC's 1997 annual report describes the mandate of the social housing facilitator as follows:

- *explore and develop a range of innovative housing models that will provide affordable housing to people with low and moderate incomes.*
- *explore and recommend how the City of Saskatoon might be involved in and how it can promote long-term affordable housing developments, including any financing strategies that may be required.*
- *explore opportunities and facilitate partnerships between the non-profit and private sectors for social housing.*
- *act as a clearinghouse for innovative housing ideas and models.*
- *monitor, evaluate and respond to housing policies, programs and legislation from all levels of government.*
- *identify, monitor and liaise with various target groups that are in the greatest need of affordable housing.*

Mr. Mawby holds a degree in architecture and founded a housing society in Ontario before assuming his present position.

He sees his primary role as a representative of the City to the community in the area of social housing. He has been working with the local credit union board and in the formulation of a social housing trust. He said that he is attached to the steering committee for the downtown housing initiative and works with all building and planning department branch managers to a greater or lesser degree, one of whom is an out-of-scope employee and the others being SCMMA members. He also must work or have contact with City inspectors, planners, assessors, leisure services, public works, the race relations co-ordinator, community associations, the banks and Canada Mortgage and Housing Corporation.

He admitted that he does not usually supervise any other employees, but is doing so temporarily on a special project he developed. He did not elaborate.

Two documents were filed regarding descriptions of the position's duties: the original job posting from 1995 used to fill the position for the first time, and a job description generated in January, 1998. Mr. Mawby said that the former document, which is comprised of general research and reporting functions, is fairly descriptive of his first 18 months in the position, but he said that, being a new position, his duties have evolved and developed over time to include more consultant and policy development functions as described in the latter document. He believed that the 1995 job posting was used in the mediation process between SCMMA and CUPE as the basis to provisionally place the position in the unit represented by CUPE in January, 1997, but that it does not accurately reflect his duties as they have evolved.

Mr. Mawby stated that during his first 18 months he assisted SHAC in developing a "workplan" which was approved by Council in October, 1997 to implement the specifics of a "strategic plan" adopted by Council in 1996. He testified that, in particular, through working with the race relations co-ordinator, he believed that their comparative functions were similar in structure and nature in that they both work with and through an advisory committee and that they have similar impact on policy making. In cross-examination, however, he admitted that the race relations co-ordinator reports directly to the City Commissioner, whereas he reports to the manager of community planning.

Dave Taylor testified on behalf of CUPE. He has been president of the local since 1991. He stated that CUPE represents a broad range of labour, clerical, semi-professional, professional, technical, trades and supervisory positions. He testified that the first time he had seen the new job description for the position in question was at the hearing before the Board, but felt that it described qualifications and duties similar to other positions in the CUPE unit, particularly that of heritage co-ordinator and certain planner positions. Among the examples referred to by Mr. Taylor were the positions of senior planner I and land administrator, each of which requires a university degree as a qualification and who report to the manager of the zoning standards branch and the land manager, respectively. The heritage co-ordinator position similarly requires a university degree, is supervised by the senior planner I and takes general direction from the manager of the zoning standards branch.

He said that there are great differences between the job functions of race relations co-ordinator and social housing facilitator; for example, the former position has a much greater potential to impact on City policies through programs such as affirmative action and employment equity.

With respect to reporting responsibilities he said that the race relations co-ordinator and the emergency measures co-ordinator report directly to the City Commissioner, the City's most senior employee, whereas Mr. Mawby reports to the manager of community planning (a SCMMA member), who in turn reports to the general manager of planning (an out-of-scope employee), who then reports to the City Commissioner.

In cross-examination Mr. Taylor admitted that during the mediation process SCMMA had not asked CUPE to relinquish any existing positions, but restricted its jurisdictional claims to new positions or those created as a result of re-organization, and continues to follow that approach.

SCMMA Argument

The thrust of Mr. Milroy's argument, on behalf of SCMMA, was that the social housing facilitator position has the ability to significantly impact City policy which, it was argued, is one of the defining characteristics that brings the position within the SCMMA unit. He said that the position was analogous in this respect to those of race relations co-ordinator and emergency measures co-ordinator.

It was argued that the duties and responsibilities of the position have changed significantly during the time since the position was first filled and the present such that it has evolved functionally from a support position to one more in the nature of consultation. It was urged that the position's greater community of interest lay with SCMMA.

CUPE Argument

On behalf of CUPE, Ms. Lamon argued that the position in question exercises no regular supervisory responsibilities and simply has the power to make recommendations to SHAC which is a multi-party advisory committee rather than a committee of Council. She pointed out that CUPE represents many positions requiring university education or exercising supervisory duties.

It was argued that the extent to which the social housing facilitator position can affect policy is limited to recommendations made to SHAC and the building and planning department branch managers. This, it was said, is much different from the position of emergency services co-ordinator, for example.

It was argued that the CUPE unit contains several positions analogous in many respects to the social housing facilitator position such as planners and landscape architects, job descriptions of which were entered into evidence.

Finally, it was said that there is no conflict in this position being in CUPE but that if the position was moved into SCMMA, another member of that unit, the buildings and lands branch manager, would be responsible for any discipline creating a potential for conflict.

Analysis

The extension of access to the benefits of collective bargaining to include supervisory and junior managerial employees through the creation of a separate bargaining unit for so-called "middle management" employees becomes problematic in determining where employees should be placed at the interface with out-of-scope managerial staff at one end and with the general bargaining unit at the other.

The latter situation is often more difficult than the former because, while the criteria which are used to guide the Board in determining who is or is not an "employee" within the meaning of the *Act* have been the subject of hundreds of decisions in this and other jurisdictions and are relatively clear, the criteria and guiding principles for determining whether an employee is appropriately classed within the middle management unit have not been well-defined; there are few precedents which the Board may consult for guidance on this issue.

The fact that even the jurisdictions which have specific reference in their labour relations legislation to such mid-management units have had relatively few applications may reflect that labour relations boards in general have not been disposed to sanction such units readily. In part, this may be because of the difficulty in delineating the boundaries of middle management units.

In its recent decision in *Saskatchewan Government Employees' Union v Saskatchewan Liquor and Gaming Authority; Saskatchewan Liquor Store Managers' Association v. Saskatchewan Liquor and Gaming Authority*, [1997] Sask. L.R.B.R. 836, LRB File Nos. 037-95 & 349-96, the Board approached the issue of a person's status as an "employee" or a "manager" by examining whether the person's job functions and responsibilities have the potential to place the person in a position of conflict of interest with any bargaining unit. As that decision states, the primary types of responsibilities which serve to distinguish managerial status would include such characteristics as the power to discipline and discharge and to influence labour relations, while secondary factors include the authority to hire, promote and demote.

This approach has been well regarded for some time in this and other jurisdictions and has generally yielded logical results in determining exclusions on the basis of managerial or confidential grounds. In *Professional Institute of the Public Service of Canada v. Executive Branch of the Government of Saskatchewan and Saskatchewan Government Employees' Union*, [1997] Sask. L.R.B.R. 530, LRB File No. 018-97, after referring to the definition of "employee" in s. 2(f) of the *Act*, the Board stated, at 547-548:

> *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.*

The rationale is to ensure that the exclusions from the unit are those positions which are truly managerial or confidential, rather than to expand the definition of "employee." By focusing on certain key criteria the task is less complex and more predictable - parties are better able to solve such problems on their own.

This approach is also complementary to the long standing policy of this Board to prefer the creation of larger more inclusive units to smaller more fragmented units. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. O.K. Economy Stores Ltd.*, [1990] Fall Sask. Labour Rep. 64, LRB File No. 264-89, the Board stated, at 66:

> *In Saskatchewan, the Board has frequently expressed a preference for larger and fewer bargaining units as a matter of general policy because they tend to promote administrative efficiency and convenience in bargaining, enhance lateral mobility among employees, facilitate common terms and conditions of employment, eliminate jurisdictional disputes between bargaining units and promote industrial stability by reducing the incidence of work stoppages at any place of work (see Industrial Welding (1975) Limited, [1986] Feb. Sask. Labour Rep. 45, LRB File No. 274-85).*

While certain situations may bear unique characteristics which require adjustments or exceptions to this general approach, once the basic policy of facilitating access to collective bargaining is accepted, the overarching policy which influences the shape of the unit is the promotion of industrial stability. In

Island Medical Laboratories Ltd. v. Health Sciences Association of British Columbia, (1993), 19 CLRBR (2d) 161, the British Columbia Labour Relations Board stated, at 187:

> *We believe that the concept of community of interest as employed by all labour relations boards in North America adequately addresses both goals on initial applications for certification. The facilitation and encouragement of collective bargaining and the issue of industrial stability are not policy matters completely divorced from one another either at the initial stage of certification or at the second or additional stage of the expansion of collective bargaining. For example, at the initial stage of certification, the design of the bargaining unit must ensure the viability of collective bargaining. The Board would not put into a single bargaining unit employees whose communities of interest directly conflict; further, no bargaining unit would be created that cuts across a particular classification, where all members are in the same physical location, resulting in half of the employees in that classification in the bargaining unit and the other half out of the bargaining unit. Both these situations would not be conducive to the settlement of collective bargaining disputes.*
>
> *Industrial stability, however, has different facets, depending upon whether one is at the initial stage of certification or at the second or additional stage of certification. At the initial stage of certification, the concern with industrial stability is with the design of the bargaining unit. The focus is on a single unit - one union, one employer. However, at the second or additional stage of certification the concern is threefold: first, the design of the bargaining unit; second, the proliferation of bargaining units; and third, the relationship not just between the second or additional units and the employer but between the units themselves. As the number of units increases, so does the potential for industrial instability.*
>
> *At the second or additional stage of certification, among the four criteria cited in ICBC - administrative efficiency and convenience, lateral mobility, common frame work of employment conditions and industrial stability - we see industrial stability as the most crucial factor. The factors of administrative efficiency and convenience, lateral mobility, and a common framework of employment conditions really go to only one factor: the simplifications of the administration and negotiation of collective agreements (and thus contribute to industrial stability). It is axiomatic in labour relations that a proliferation of bargaining units increases the potential for industrial instability. Multiple bargaining units per se raise a serious concern about industrial stability.*

The determination of the composition of middle management units requires a focused approach to allow more accurate and efficient decisions as in the case of managerial exclusions. The Board has determined that, in fostering industrial peace and stability, the essence for assignment to the middle management unit must be confined to those positions which would be in conflict or potential conflict in the exercise of their supervisory and junior management duties in relation to their membership in the general unit. It should be recognized that there may be exceptions to the strict application of this

criterion for historical or other good and sufficient reasons but it is the industrial relations characteristics of the position in relation to community of interest which are of overarching significance.

In the present case, the social housing facilitator position exercises no regular supervisory responsibilities with respect to other CUPE members. Evidence was adduced that the incumbent was temporarily supervising one or a few CUPE members in relation to a specific project. However, no evidence was adduced as to the nature or level of supervision involved or that the situation was other than unusual and of a limited term. There was no evidence of the potential for conflict with others in the CUPE unit. No historical reason was presented for excluding the position from that unit.

The level of education required by the position is not relevant in these circumstances. The evidence established that CUPE represents other positions requiring post-secondary education in related disciplines such as planning and landscape architecture. Indeed, the emergency services co-ordinator position does not require a post-secondary degree. Accordingly, in this situation, educational qualifications are of minor significance.

With respect to the ability to affect policy making by the City, the social housing facilitator position is, at best, in an indirect or oblique position to do so - the position reports to the manager of community planning, provides staff support and makes recommendations to SHAC, a purely advisory body of which the incumbent is not a member. No evidence was adduced that would demonstrate how the position's functions in this regard would conflict with CUPE membership. By contrast, the emergency services co-ordinator position, among other duties, co-ordinates civic departments and agencies in the development of a municipal disaster plan, organizes and trains municipal staff and outside agencies in emergency preparedness, develops emergency communications plans, prepares the emergency planning budget, acts as chairperson of the emergency measures planning committee and directs and supervises the administration and staff of the emergency measurers organization, reporting directly to the City Commissioner - the differences from the position in question are apparent.

The position appears to have greater commonalities with, for example, senior planner 1, land administrator and heritage co-ordinator. Like these positions, the social housing facilitator is supervised by a SCMMA member and it may indeed create a situation of conflict to include it in the SCMMA unit as well.

From a labour relations perspective, the Board is convinced that the greater community of interest of the position lies with the larger industrial unit where the position has affinities with other positions in that unit.

Accordingly, we find that the position is properly assigned to CUPE.

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 911, Applicant and ISM INFORMATION SYSTEMS MANAGEMENT CORPORATION, Respondent

LRB File No. 120-97; May 26, 1998
Chairperson, Gwen Gray; Members: Ken Hutchinson and Gloria Cymbalisty

For the Applicant: Tom Waller, Q.C.
For the Respondent: Dennis Ball, Q.C.

Unfair labour practice - Interference - Administration of trade union - Employer unilaterally applied security policy to union president/employee and entered union's office without consent - Board finds that employer acted improperly by entering union office without express or implied agreement of union - Board does not find unfair labour practice as conduct of employer resulted in part from miscommunication with union president.

Unfair labour practice - Interference - Administration of trade union - Employer in unionized workplace must differentiate between employee as employee and employee as union representative in applying employment policies - Employee as union representative is on equal footing with employer's representatives.

***The Trade Union Act*, ss. 11(1)(a), (b) and (h).**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Communications, Energy and Paperworkers Union of Canada, Local 911 (the "Union") was certified as bargaining agent for employees of ISM Information Systems Management Corporation ("ISM") on May 5, 1993. On March 18, 1997, the Union filed an unfair labour practice application with the Labour Relations Board in which it alleged that ISM entered the office of the Union located in the ISM office building on two occasions. The Union alleged that this conduct was an unfair labour practice within the meaning of s. 11(1)(a), (b) and (h) of *The Trade Union Act*, R.S.S. 1978, c. T-17.

In its reply, ISM admitted that its security personnel entered the Union's office. However, ISM justified the entry based on security rules in place at the workplace for securing the intellectual property of ISM.

ISM claimed that the Union, as a voluntary user of ISM's computer system, is subject to the security requirements imposed on all other users.

Facts

Gary Schoenfeldt, president of the local Union, testified that the Union has occupied an office in the main office building of ISM for approximately six years. The collective agreement between the parties contains the following provision with respect to paid Union staff and office space:

> *The Company agrees that CEP, Local 911 may select an Employee to serve in a full-time capacity as representative for the Union. The Company will pay the salary and benefits for this Employee as they do for any other Employee. The salary for this position shall be equivalent to the highest rate in the Collective Agreement. This person will maintain Employee status and receive all rights and benefits as such during his/her term(s).*
>
> *The Company will further provide at Company expense:*
>
> - *A proper enclosed office on Company premises complete with furniture, telephone, and necessary office equipment.*
> - *The opportunity for this Employee to maintain or enhance their skill set, not to exceed 33% of their time.*
> - *Upon completion of his/her term, reinstatement to his/her former classification and appropriate pay level and given time for (re)training in the position.*

The office space used by the Union contains a desk, computer and filing cabinets. The records of the Union are stored in the office, including membership files, negotiating records, records of job postings and financial records. The Union also keeps various documents in electronic format, such as grievance forms and other routine Union forms. The office is used by the full-time president and by members of the Union's executive. The Union also uses the office for meetings.

The computer in the Union's office is owned by ISM. It is connected by a local area network ("LAN") to other ISM worksites which allows the Union through e-mail to keep in touch with its members who work throughout the city of Regina. The computer system is secured by a password system and a lock-out procedure when the authorized user leaves the computer.

When the Union's office is not in use, the door and one filing cabinet are locked. The desk and other three filing cabinets have non-functioning locks. Mr. Schoenfeldt thought he had informed ISM that these locks were not functioning in November, 1996. The executive members of the Union and the shop steward have keys to the Union's office. ISM retained a master key and cleaning staff has access to the Union's office.

ISM initiated a new security policy in November, 1996. Mr. Schoenfeldt discussed the policy with Barry Guest, head of ISM's security compliance project. Mr. Guest popped into the Union's office approximately two weeks prior to the November incident in which security personnel entered the Union's office. He informed Mr. Schoenfeldt that the new security policy was being implemented and, as a result, there would be a sweep of the building in the near future. Mr. Schoenfeldt assumed that Mr. Guest provided him with this information as president of the Union; he did not understand Mr. Guest to be advising him that the Union's office would be included in the sweep.

On November 17, 1996, Mr. Schoenfeldt found an ISM End User Security Guideline for ISM Employees - Clean Desk and Computer Workstation Physical Inspection Checklist on his desk indicating that the Union's office had been entered and inspected by the Employer. The checklist noted that furniture in the office was unlocked, confidential material was exposed, diskettes and software were exposed and keys were left unsecured. The document was signed by A. Foraie.

Mr. Schoenfeldt testified that he was shocked by ISM's conduct in entering the Union's office and he called the police to report the incident as a break and enter. Mr. Schoenfeldt concluded from the checklist that ISM personnel had looked at the material left out on the Union's desk and had gone to the measure of opening the unlocked desk and filing cabinets. Mr. Schoenfeldt indicated that ISM has a clean desk policy which requires employees to leave their desks clean each night. The Union, on the other hand, did not follow ISM's procedures in its own office area.

Between November, 1996 and March, 1997, the Union did not discuss the November incident with ISM. Mr. Schoenfeldt testified that during that time the Union was busy resolving a number of outstanding grievances. ISM hired a new human resources manager and the Union felt their relationship with ISM had taken a turn for the better. However, on March 6, 1997, the Union received a second physical inspection checklist. The "clean desk" portion of the form had not been completed by the persons conducting the search. The workstation portion of the form was checked and marked "OK".

On this occasion, Mr. Schoenfeldt, accompanied by Chuck Hanesworth, Chief Shop Steward, went to the office of Mr. Foraie, Building Manager, and asked if he had been in the Union's office again. Mr. Foraie had signed the first checklist. Mr. Foraie advised Mr. Schoenfeldt that Gordon Luciuk had checked the Union's office. Subsequently, Mr. Schoenfeldt had a heated discussion about the incident with Mr. Wainwright, Human Resources Manager. During this exchange, Mr. Schoenfeldt told Mr. Wainwright that he would not tolerate this conduct. Mr. Schoenfeldt indicated in evidence that he was extremely irritated that ISM had entered the Union's office on a second occasion. During this conversation, Mr. Wainwright informed Mr. Schoenfeldt that the policy was being implemented on orders from Toronto.

Subsequent to the two incidents, Mr. Schoenfeldt discovered that one Union file on up-coming bargaining was missing from the Union's office. He testified that the missing file has caused him no end of searching and worrying in a large part due to ISM's unauthorized entry into the Union's office.

On cross-examination, Mr. Schoenfeldt acknowledged that the computer network is a world-wide system connecting the ISM Regina office to ISM and IBM in other locations. He also acknowledged that the Union comes into possession of confidential employer documents through its work in representing members of the Union. He also agreed that he was an in-scope employee who continued to be paid by ISM while he acted as full-time president of the local Union.

ISM notified all employees in March, 1996 that it was implementing a new security system to conform to the system used by IBM, the owner of ISM. The application of the security system to the Union was not discussed directly with the Union, although the Union, in its representation role, had discussion concerning the application of various parts of the policy with ISM and with its members. Part of the reason for implementing the new security policy was to ensure that employees had locked space to store work so that they could comply with the clean desk portion of the security policy. Mr. Schoenfeldt filed various e-mail messages exchanged between him and Mr. Foraie regarding the installations of

locks and the provision of keys for locked cupboards, filing cabinets and desks in the Union's office. The Union finally decided to purchase its own filing cabinets and ultimately did not require ISM to install new locks or provide new keys.

Mr. Luciuk is one of two senior managers of ISM in Saskatchewan and he reports directly to the president of ISM. Mr. Luciuk testified that the president of ISM advised each employee by letter on March 15, 1996 that new security policies were being implemented as a result of IBM issuing new computer security guidelines for worldwide implementation. At the same time, employees were provided with copies of the computer security guidelines. Mr. Luciuk indicated that a copy of this letter and guidelines would have been provided to Mr. Schoenfeldt through his e-mail.

The security committee consisted of Mr. Guest and three in-scope security employees. Mr. Luciuk testified that the Union's office was checked as part of an office wide sweep of ISM premises in November, 1996 to assess employee compliance with the new security policies. The sweep included the offices of the executive branch as well as all other ISM employees. Mr. Luciuk was not aware of any concerns or complaints being raised by the Union with respect to the new policies. The security sweep occurred again in March, 1997. On this occasion, Mr. Luciuk was involved in the check of the Union's office and he testified that he and one other member of the security team entered the office, turned on the computer to test the password usage, observed and noted open files and left. The process took slightly longer than one minute to complete.

On cross-examination, Mr. Luciuk acknowledged that the new security policies were introduced without negotiating the same with the Union. He also agreed with counsel for the Union that the documents setting forth the policy did not indicate that it would apply to the Union's office. He agreed as well that ISM did not advise the Union that it intended to search the Union's office. ISM treated the Union office in the same manner as it treated the offices of all its employees. Mr. Luciuk justified ISM's treatment of the Union based on its use of the LAN and the employment status of the president, who is paid to function as a full-time president by ISM.

Relevant Statutory Provisions

The relevant provisions for consideration include the following sections from 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:*
>
> > *(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;*
> >
> > *(b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; but an employer shall not be prohibited from permitting the bargaining committee or officers of a trade union representing his employees in any unit to confer with him for the purpose of bargaining collectively or attending to the business of a trade union without deductions from wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purposes of such trade union;*
> >
> > ...
> >
> > *(h) to maintain a system of industrial espionage or to employ or direct any person to spy upon a member or proceedings of a labour organization or the offices thereof or the exercise by any employee of any right provided by this Act;*

Arguments

Mr. Waller, Q.C., counsel for the Union, argued that ISM's conduct in entering the office of the Union in the absence of a Union official and without notice to the Union constitutes interference with the legal entity of the trade union and with the conduct of the Union's operations. Counsel cited *United Steelworkers of America v. Universal Engine Service and Supply Inc.*, [1986] Feb. Sask. Labour Rep. 69, LRB File Nos. 168-85 & 200-85 to 208-85, as authority for the proposition that the phrase "interference with the administration of a trade union" refers to interference in the internal business of the Union. Counsel also relied on *Canadian Union of Public Employees, Local 3730 v. St. Paul's Roman Catholic Separate School Division No. 20*, [1996] Sask. L.R.B.R. 315, LRB File No. 033-96. Counsel argued that the manner in which the Union runs its office is a matter of internal operation that cannot be interfered with by ISM.

With respect to the November, 1996 search of the Union's office, counsel argued that an inference can be drawn from ISM's failure to call as a witness the person who conducted the search that his or her testimony would not have benefited ISM's case. Counsel argued that ISM cannot assert its security policy against the Union nor can it enforce the clean desk policy, both of which are intended to apply only to ISM's employees, not to the Union.

Counsel also argued that ISM's entry into the Union's office was an unreasonable exercise of managerial power, which threatened the operations of the Union. He argued that ISM's interest in the security of its computer system could be met without conducting a clandestine search of the Union's premises.

Under s. 11(1)(h) of the *Act*, counsel noted that the Board has apparently not been asked to consider a case arising from the industrial espionage section in the *Act*. Counsel pointed out that this was likely a result of the obvious impropriety of an employer searching the office of a trade union. The Union argued that ISM breached this provision by directing its representatives to enter the Union's locked office and to conduct a search of the office unbeknownst to the Union.

Under s. 11(1)(a) of the *Act*, counsel argued that ISM interfered with Mr. Schoenfeldt's rights to participate in the trade union by searching the Union's office. The effect on Mr. Schoenfeldt was significant. In addition, the conduct may also impact on bargaining unit members by causing them not to trust the Union to keep the information they provide from ISM. In other words, the conduct undermines the Union's ability to represent its members.

Mr. Ball, Q.C., counsel for ISM, argued that the evidence of Mr. Schoenfeldt was not credible because of what he failed to disclose to the Board. Counsel pointed out that the Union was aware of the change in security policy for one year prior to filing the unfair labour practice application. He noted that Mr. Schoenfeldt failed to mention to the Board in his evidence in chief that he had access to confidential ISM material on the computer in the Union's office. Counsel also asserted that the Union's claim that ISM had failed to provide cabinet locks was demonstrably untrue and that the evidence indicated that ISM went some distance to assist the Union in obtaining proper locks and keys. In addition, counsel argued that it had warned the Union through e-mail and through its head of security that the building would be swept for security compliance. On this theory, the Union should not have been upset or surprised by the searches.

With respect to the Union's allegation under s. 11(1)(a) of the *Act*, counsel argued that the purpose of the search was not to intimidate or interfere with an employee's rights, but was rather to secure the assets of the corporation. With respect to s. 11(1)(b) of the *Act*, counsel argued that it was implied in the Union's use of the LAN that it was subject to the same security rules as employees. Such treatment is not discriminatory. Counsel also argued that the search did not constitute industrial espionage under s. 11(1)(h) of the *Act* as there was nothing secretive about the search. First, Mr. Schoenfeldt received the same e-mail messages setting out the policy and the enforcement of the policy; second, the head of security warned him of the security sweep; third, the security committee who conducted the search left an audit form in the office of the Union indicating that they had conducted a security sweep of the office.

Counsel argued that the Union is not exempt from the application of employer rules when it is in possession of confidential employer information. At the same time, ISM acknowledged that it must be sensitive to the Union's needs for confidentiality. In this instance, counsel argued that ISM had provided the Union with the equipment and facilities to lock up its confidential material. A spot audit in these circumstances was not improper.

Analysis

Under *The Trade Union Act* the relationship between a trade union and an employer is one of equal status. Both are parties to a collective agreement; both have rights in relation to the collective agreement; and both have the power to enforce the collective agreement. The *Act* fosters the equality of this relationship, in part, by limiting the employer's role in the formation and administration of trade unions and by ensuring that there exists an arms length relationship between the employer and the trade union. The limits on an employer's role respecting the administration of a trade union were described by the Board in *Saskatchewan United Food and Commercial Workers v. Federated Co-operatives Ltd.*, [1985] May Sask. Labour Rep. 30, LRB File No. 213-83, at 33:

> *Section 11(1)(b) of the Act prohibits an employer from interfering with the formation or administration of any labour organization. The Canada Labour Relations Board considered the phrase "interference with the formation or administration of a trade union" as it appears in Section 184(1)(a) of The Canada Labour Code in National Association of Broadcasting Employees and Technicians v. A.T.V. New Brunswick Limited (C.K.C.W.-T.V.) 1979 3 CLRB 342 and stated, at 346-7:*

> *The administration of the union. This is directed at the protection of the legal entity, and involves such matters as elections of officers, collecting of money, expenditure of this money, general meetings of the members, etc. In a word all internal matters of a trade union considered as a business. This is to assure that the employer will not control the union with which it will negotiate and thus assure that the negotiations will be conducted at arm's length.*

> *A union's right to discipline its own members is as much an administrative function of the union as the election of its officers. Section 11(1)(b) of the Act prohibits an employer from interfering with that function. Interference could occur in a number of ways. Some of the most obvious include, for example, attempting to bribe, intimidate or improperly influence witnesses or union officials involved in discipline proceedings.*

A union representative must be dealt with on an equal footing with the employer when functioning as union representative as he or she is the exclusive representative of employees under s. 3 of the *Act*. In *United Food and Commercial Workers International Union, Local Union 175 v. Valdi Inc.*, [1980] 3 Can. LRBR 299, the Ontario Labour Relations Board commented on the special status of a union representative in the following terms, at 310-311:

> *A union steward plays an important role in the collective bargaining process in the area of contract administration. . . Inevitably, the union steward will have to seek information from and question management representatives about their actions or about work conditions. . . Union stewards cannot be in fear for their own jobs if they are to pursue effectively the legitimate grievances of fellow employees. A similar point was developed by Professor Brandt in Re Firestone Steel Products (1975), 8 L.A.C. (2d) 164 at 167-8 where he wrote:*
>
> > *. . . a committeeman is, while attempting to resolve grievances employees and company personnel, always functioning on the border line of insubordination. His role is to challenge company decisions, to argue out company decisions and, if in the discharge of that role he is to be exposed to the threat of discipline for insubordination, his ability to carry out his role while be substantially compromised.*

As a result, it is necessary for the employer to differentiate between when an employee is an "employee" simpliciter, and when an employee is acting in a representative capacity as union president, shop steward, grievance committee member, occupational health and safety committee member and the like.

It may be difficult for an employer to differentiate perfectly in its dealings with an employee in situations where the employee is frequently changing hats between his or her role as an employee and union representative. However, when the employee is elected to a full-time position as union president, although his or her employment status is maintained through the negotiated provisions in the collective agreement, the employee is for all purposes the on-site representative of the union and takes his or her direction from and is under the control of the local union. The fact that the employer may pay the salary of the full-time president does not alter the nature of the relationship between the employer and the union officer. It is one of equal status, not a subordinate relationship of employer-employee.

ISM, in this situation, assumed that its employment policies with respect to the security of computers applied to the president of the Union because he is an employee of ISM. However, clearly this assumption would not be made in respect of other employment policies. For instance, it would be peculiar for ISM to expect the full-time president to submit time cards, adhere to start and quit times, phone in to report an absence due to illness, submit weekly progress reports, comply with dress codes or the like. Such conduct on the part of ISM would readily be understood as interfering with the internal operations of the Union because ISM would be monitoring the activity of the Union president as Union president. In our view, ISM's underlying assumption in the present case is faulty; it demonstrates a lack of understanding of the equality of status between a trade union and an employer; and it unfortunately resulted in an atmosphere of distrust on the part of the Union toward ISM.

ISM, in unilaterally applying the security policy to the Union, also made certain assumptions about its right to control its property. The Union, in responding to ISM's conduct, also asserted property interests. Under a collective bargaining regime, an employer's right to control its property may be curtailed by its corresponding legal obligations arising under the *Act*. In the *Canadian Linen Supply Co. Ltd.* case, *supra*, the Board summarized the applicable principles as follows, at 108-109:

> *A great deal has been written in other jurisdictions on the relationship between the employer's management and property rights and the obligation placed on employers by labour legislation in those jurisdictions not to interfere with representation of employees by their union or with its administration. [See T. Eaton Co. Ltd., (Ontario Court of Appeal) 1989, Dec. Ontario Labour Relations Board Report, p. 1292; T. Eaton Co. Ltd., (OLRB) 1986 10 CLRBR, p. 289; Adams Mine, 1982 OLRB Rep., Dec., 17667; Canada Post Corporation, 69 di p. 91; Canada Post Corporation, Decision No. 693 (as yet unreported); Canada Post Corporation, Decision No. 29 (as yet unreported); Canada Post Corporation, Decision No. 800 (as yet unreported)].*

> *Generally speaking, where the parties have been unable to reach an accommodation on this subject, the weight of authorities express the view that an employer cannot prohibit employees or non-employee union representatives from engaging in union business on the employer's premises during non-working hours unless the employer is protecting a legitimate business interest. Without attempting to be exhaustive, examples of a legitimate business interest include maintaining productivity, discipline, good order, safety and security. At the same time, the boards and courts who have considered this issue have been very careful not to overstate the rights of employees and union representatives. All boards emphasize how fact sensitive the balance is and subscribe to the view of the Ontario Court of Appeal that notions of absolutism have no place where the right of employees to engage in trade union activity comes into conflict with the employer's property and management rights. Neither right is unlimited and an accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. It follows, that the formulation of general rules must be undertaken with caution for differing fact situations that may call for different accommodations. (See Consolidated Fastfrate Ltd., 1980 OLRB Rep. April, 418 at 421; Audio Transformer Co. Ltd., 1969 OLRB Nov. 994 at 1002-3.)*

In our view, the present case presents a textbook example of the need for an accommodation between the Union's legitimate activity in the workplace and ISM's legitimate concerns with the security of its property. Neither right is unlimited, as stated above. The Union has been provided with an office and equipment on ISM's premises to facilitate the Union's activities in the workplace. Likely, the arrangement benefits ISM as well as it provides ISM with access to a Union representative without any interruption in the work processes.

However, the Union had a reasonable expectation that its office would be considered off limits from ISM unless an access agreement was entered into between the Union and ISM. In this instance, the Union had agreed that the cleaning staff be permitted to enter its office and access was granted for that purpose. It would not be unusual for ISM to retain a master key to permit it access to the office in the event of an emergency or maintenance problem that required immediate attention. Otherwise, the Union viewed its office as its own space, subject to its own controls, as it would apply if its office were located off ISM's premises. In our view, this is a fair and reasonable expectation, absent any agreements to the contrary with ISM. The office is the centre of the Union's internal operations; it is the depository of the Union's records and files, some of which may contain information that the Union does not wish to share with ISM. The right and ability of a union to operate an office free from employer scrutiny seems to this Board to be essential in order to ensure that an arm's length relationship is maintained between the trade union and the employer.

At the same time, ISM has provided the Union with access to its computer network which contains valuable and confidential corporate information. It is not unrealistic for ISM to require the Union to agree to the application of a security policy with respect to the Union's use of the computer network. The Union, in this sense, is like any other third party who is allowed access to the ISM computer network. Access agreements need to be negotiated. This discussion should have occurred before ISM provided the Union with access to the system; it also is a discussion that must occur between ISM and the Union in those representative capacities, not between ISM and an employee.

In our view, the unilateral decision by ISM to apply the security policy, particularly that aspect of the policy which permitted ISM to enter the Union's office without permission, to the Union president in his status as employee was improper. ISM must seek the Union's agreement to the security arrangement. If no agreement can be reached, it may not be possible for ISM to permit the Union to have access to the computer network. This may be the price the Union must pay for ensuring the integrity of its own internal operations. In this regard, it is the responsibility of both parties to attempt to accommodate their competing interests.

In this instance, ISM assumed it had provided Mr. Schoenfeldt with notice of the intended search of the Union's office when Mr. Guest informed Mr. Schoenfeldt that a sweep of the building would take place in the near future. In the Board's opinion, although ISM made incorrect assumptions about its right to enter the Union office without the Union's agreement, its assumptions may have been fed in part by the miscommunication between Mr. Guest and Mr. Schoenfeldt. Mr. Guest likely believed that he had given notice of the office sweep to the Union through his conversation with Mr. Schoenfeldt. Mr. Schoenfeldt misunderstood Mr. Guest's intentions in advising him of the sweep. The failure of Mr. Schoenfeldt to protest the application of the policy to the Union's office may have led the Employer to conclude that the Union agreed to permit ISM to enter its office. In these circumstances, the Board is of the opinion that a finding of an unfair labour practice is not justified. Although ISM misconceived its relationship with Mr. Schoenfeldt and made certain assumptions based on that misconception, the Board is confident that its conduct in entering the Union's office without permission will not be repeated. In order to be perfectly clear, an employer is not entitled to enter the office of a trade union without the express or implied agreement of the union. However, this does not prevent the Employer from requiring the Union to enter into an access agreement or security agreement before providing the Union with access to its computer network.

As a final matter, the Board does not wish to be understood as commenting on whether or not ISM is obligated under the terms of the collective agreement quoted above to provide the Union with a computer. That matter can be or has been resolved by arbitration. Our remarks are confined to the access granted to the Union to the local area network and world area network of ISM and IBM which must be the subject of discussion between ISM and the Union in order to arrive at a mutual agreement on the terms of use by the Union.

No order will issue in this matter.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Applicant and DOMINION BRIDGE INC., Respondent

LRB File No. 302-97; May 26, 1998
Vice-Chairperson, James Seibel; Members: Donna Ottenson and Don Bell

For the Applicant: Drew Plaxton
For the Respondent: Susan McGillivray

Construction industry - Appropriate bargaining unit - Standard construction unit - Board excludes pipefitters from statement of employment for carpenters' unit.

Evidence - Admissibility - Certification - Board declines to consider evidence from time period after application filed to determine what type of work affected employees engaged in.

***The Trade Union Act*, ss. 2(a), 5(a), (b), (c), 10 and 18.**

REASONS FOR DECISION

Background

James Seibel, Vice-Chairperson: The United Brotherhood of Carpenters and Joiners of America, Local 1985 (the "Union"), pursuant to ss. 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17, applied to be designated as the certified bargaining agent for a unit of employees employed by Dominion Bridge Inc. (the "Employer") as follows:

> *all journeymen carpenters, carpenters, carpenter apprentices and carpenter foremen employed in the Province of Saskatchewan*

The application originally came before the Board for hearing on December 1, 1997, but was adjourned because of some uncertainty as to identification of the Employer and a request by counsel for the Employer to file an amended statement of employment.

When the application finally came before the Board on April 9, 1998, the sole issue to be determined was the composition of the statement of employment for the purpose of determining the level of support for the application.

The application, filed with the Board on September 19, 1997, estimated that there was one employee in the unit. The original statement of employment filed by the Employer, dated October 3, 1997, declared that there were three employees in the unit: Jerry Kramer, Trent Reiger and Trevor Sigfusson. The amended statement of employment, dated December 11, 1997, also declared that there were three employees in the unit but instead of Mr. Sigfusson, Owen Whittaker was listed as the third employee.

The Union's position was that only Mr. Kramer should properly appear on the statement of employment.

Employer's Evidence

Two witnesses testified on behalf of the Employer, Earl Buchinski and Larry Balcaen.

Mr. Buchinski is the general manager for the Employer in Saskatchewan. He testified that between May and December, 1997, the Employer was general contractor on the Trans-Canada Pipeline project at Grenfell. He said, however, that he was never at the site and the work was supervised by the Winnipeg office of the Employer.

He said that the Employer performed the metal trades' work on the project using union labour and sub-contracted the non-metal work, including the carpenter work. In cross-examination, he admitted that the Employer has been certified by several of the metal trades for many years including the ironworkers, boilermakers, millwrights and operating engineers and that although the project was an "open site" the Employer hired from the trades' hiring halls. He said that the non-metal subcontractor, Barclay Construction, which did the carpenter work, was a unionized employer.

Mr. Buchinski testified that he completed and declared both statements of employment filed by the Employer. He said that the first statement of employment was prepared from information provided to him by Neil Harrington in the Winnipeg office. However, he said that some time later the Employer's Grenfell site superintendent, Mr. Balcaen, brought to his attention that Mr. Sigfusson, who was not

doing carpenter work, should not have been on the statement of employment, but rather it should have included Mr. Whittaker. He completed and declared the second statement of employment to reflect this information.

Entered in evidence on behalf of the Employer were its internal payroll records for each of the four persons listed between the two statements of employment. Mr. Buchinski testified as follows in relation to this information:

(a) Mr. Kramer, a journeyman carpenter, was hired on September 18, 1997, from the Union's hiring hall and was laid off on October 31, 1997;

(b) Mr. Reiger, an apprentice pipefitter dispatched from the pipefitter's hall, was hired on July 14, 1997, and laid off on November 19, 1997;

(c) Mr. Whittaker, an apprentice pipefitter dispatched from the pipefitter's hall, was hired on October 8, 1997, and laid off on October 31, 1997; and

(d) Mr. Sigfusson, a journeyman pipefitter, was hired on July 2, 1997, and laid off on October 24, 1997.

In cross-examination, Mr. Buchinski admitted that while the amended statement of employment stated that Mr. Whittaker was employed by the Employer at the date of the application, September 19, 1997, he in fact was not hired until October 8, 1997, and this information was an inadvertent error on his part. He maintained that Mr. Kramer was engaged in performing carpenter work with respect to scaffolding, but was unable to provide any details of the work. He said that Mr. Reiger was engaged in assisting Mr. Kramer for the majority of the time from and after September 18, 1997, and Mr. Whittaker was engaged in assisting Mr. Kramer from and after October 8, 1997, until the end of October, 1997. Prior to September 18, 1997, he said that Mr. Reiger performed pipefitter work.

Mr. Buchinski testified that, prior to September 18, 1997, Barclay Construction provided carpenters to the Employer from time to time to erect scaffolding on a barter basis in exchange for use of equipment, but due to a shortage of manpower could not continue to do so after that date; that was when the

Employer called for a carpenter from the hiring hall. According to Mr. Buchinski, this was unusual for the Employer.

In cross-examination, he admitted that Mr. Reiger and Mr. Whittaker were paid according to rates in the provincial pipefitter's agreement. He also said that, although they had been hired as apprentice pipefitters, because Mr. Reiger was doing carpenter work on and after September 18, 1997, and Mr. Whittaker, on and after October 8, 1997, he listed their occupational classification on the statement of employment as "carpenter." But he admitted that, while Mr. Kramer's union dues were remitted to the Union, those for Mr. Reiger and Mr. Whittaker were remitted to the pipefitter's union.

Mr. Balcaen was the Grenfell project superintendent for the Employer. He testified that he was responsible for hiring Mr. Kramer. He said he used the hiring hall because there were other unionized carpenters on site. The "tube and clamp" scaffolding required for the project necessitated the use of a journeyman carpenter. He said that Mr. Reiger assisted Mr. Kramer on September 18, 1997 and for the majority of his work time until the end of October, 1997; Mr. Reiger's usual routine was to clean the washrooms each morning for an hour or so and then to assist Mr. Kramer. He admitted that they may not have begun actual construction of the scaffold until September 19, 1997.

Mr. Balcaen testified that Mr. Kramer worked ten hour shifts, six days a week, that he spent approximately 85 percent of his time working on scaffold construction and that Mr. Reiger worked with him for perhaps 80 percent of that time - that is, four or five days a week - while Mr. Whittaker worked with him "for a few days here and there." He said, however, that they would not work with Mr. Kramer at the same time. He said that he was responsible for scheduling the work and made a daily decision as to who to assign to work with Mr. Kramer. At the end of October, 1997, when Mr. Kramer and Mr. Whittaker were laid off, he said that Mr. Reiger went back to helping a pipefitter on a full-time basis.

In cross-examination, when asked whether he had completed and remitted hours-worked documents for apprenticeship and trade qualification for either Mr. Reiger or Mr. Whittaker, Mr. Balcaen indicated that he had not because he had not been asked to. However, in response to questions by the Board, he admitted that if it had been requested, he would have indicated that all of the hours worked by each man were in respect of apprenticeship as a pipefitter.

With respect to Mr. Reiger, he specifically admitted that his "normal job" at the site was as a pipefitter and not as a carpenter. When asked whether he was paid as a pipefitter or a carpenter, he replied, "pipefitter - he was hired as a first year apprentice pipefitter."

When asked why he did not hire an apprentice carpenter to assist Mr. Kramer, Mr. Balcaen said that it had not occurred to him to do so. Although he claimed he had not seen it prior to the hearing, Mr. Balcaen identified a "Pre-job Mark Up" report which delineated the trade jurisdictions of the work on site and admitted that it indicated that the Employer had budgeted for two carpenters on the site.

Union's Evidence

Mr. Kramer was called to testify on behalf of the Union. He is a journeyman carpenter and member of the Union. He was dispatched from the hiring hall to the Grenfell site on September 18, 1997. He said that Mr. Reiger assisted him for the first five days he was there in the construction of scaffolding, but said that Mr. Reiger complained to the general foreman because he had been hired to do pipefitting work. After that, Mr. Kramer said that, when he asked Mr. Reiger for a hand a couple of times, he declined. Mr. Kramer said he worked alone until the second week of October, 1997, when Mr. Whittaker assisted him for perhaps a total of four days. He said that Mr. Sigfusson never worked with him at all.

He was not cross-examined by counsel for the Employer.

The Union filed evidence of Mr. Reiger's registration as a steamfitter/pipefitter apprentice with the Saskatchewan Apprenticeship and Trade Certification Unit.

Employer's Argument

Ms. McGillivray, counsel for the Employer, conceded at the outset of argument that Mr. Whittaker was not hired by the Employer until after this application was filed, but argued that he spent the majority of his time doing carpenter work as did Mr. Reiger (from and after September 18, 1997) regardless of the fact that they were apprentice pipefitters.

She referred to several cases where the Board has considered the position of employees in the construction sector who do the work of more than one craft. She cited the decisions in *International Union of Operating Engineers, Hoisting and Portable and Stationary, Local 870 v. K.A.C.R. (A Joint Venture)*, [1983] Sept. Sask. Labour Rep. 37, LRB File No. 106-83 and in *Operative Plasterers and Cement Masons, Local 442 v. Vector Construction Ltd.*, [1992] 2nd Quarter, Sask. Labour Rep. 82, LRB File No. 307-91, as authority for the following propositions:

1. their status on an application for certification is governed by the craft in which they were employed for a majority of their time; and

2. in order to determine the answer to the first proposition, one must look at a reasonably representative period of time which is indicative of normal responsibilities.

It was then argued that, because the carpenter work only commenced on September 18, 1997, the alternatives open to the Board for establishing the "reasonably representative period" in this case were either:

1. September 18 and 19, 1997, the latter date being the date of the filing of the application; or

2. September 18, 1997, through to near the end of October, 1997, when the carpenter work ceased.

Counsel argued that it was the type of work performed by Mr. Reiger and Mr. Whittaker and not their trade certification that determined which bargaining unit they were encompassed in, and that what was at stake was their fundamental right to participate in a representation vote.

While it was conceded that the policy of the Board is to not consider evidence of facts or events after the date of the filing of an application with the Board, counsel argued that the Board could exercise its discretion under s. 10 of the *Act* to do so in this case. It was argued that it would not be logical to

consider only the work done by employees on or before the date of filing because that would limit the representative period to only two days.

Ms. McGillivray argued that the Board's policy with respect to consideration of evidence from after the date of filing is in place to render pointless subsequent sanctions of or attempts to influence employees and, in this case, the Board was not being asked to consider support evidence so application of the policy is unnecessary.

Union's Argument

Mr. Plaxton, counsel for the Union, urged the Board not to depart from its general policy with respect to post-filing evidence. He said that, if the Board follows policy, then Mr. Whittaker would not be on the statement of employment and Mr. Reiger would have spent at most one and one-half days doing carpenter work. It was submitted that, in any event, one's registration of apprenticeship provides a strong indication of one's status: see, *Carpenters' Provincial Council of Saskatchewan v. A.V. Concrete Forming Systems Ltd.*, [1983] Nov. Sask. Labour Rep. 35, LRB File No. 107-83.

Mr. Plaxton argued that the *K.A.C.R.* decision, *supra*, was not applicable to the present case because the Employer used traditional craft persons and not so-called generic "construction workers."

With respect to the representative period to be looked at by the Board, counsel urged that the only fair and logical test was a period prior to and including the date of application, and on that assumption, Mr. Kramer was the only carpenter employed by the Employer who should appear on the statement of employment. Counsel argued that the statement of employment was so fraught with error or misrepresentation that it should be disregarded altogether.

Statutory Provisions

Among the provisions of the *Act* which the Board must consider are the following:

> 5. *The board may make orders:*

> *(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*
>
> *(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;*
>
> *(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*
>
> *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.*
>
> *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.*

Analysis

In this case, the unit applied for is the standard bargaining unit description assigned to the Union by the Board in *Construction and General Workers' Union, Local 890 v. International Erectors and Riggers, a Division of Newbery Energy Ltd.*, [1979] Sept. Sask. Labour Rep. 37, LRB File No. 114-79 and is appropriate for the purpose of bargaining collectively.

At issue is the accuracy of the statement of employment and whether either or both of Mr. Reiger and Mr. Whittaker are employees within the meaning of s. 2(f)(i) of the *Act* for the purpose of determining whether there is majority support for the application or whether they were engaged in performing some craft other than carpenter work for a majority of their time during the "reasonably representative period" considered by the Board.

In this regard, the Board is of one mind that there is no serious question but that Mr. Kramer is the only person who should properly be listed on the statement of employment and is the only employee in the unit applied for. And this is the result no matter in which of several ways the matter is approached.

Counsel for both parties properly characterized the criterion applied by the Board. The Board's long-standing policy was succinctly stated in the *K.A.C.R.* decision, *supra*, where the Board confirmed the certification of employees in the construction industry on traditional craft lines. The Board stated, at 45:

> *Where employees are engaged in the work of different crafts the Board will characterize the craft in which they were employed for a majority of their time as the one governing their status on an application for certification. In determining which type of work employees were employed at "for a majority of their time" the Board will look not to the date of the making of the application but, rather to a period of time leading up to the date of the application. Just how far back in time the Board will go depends on the particular circumstances of the individual case. See: Teamster Local Union No. 230 et al v. Johnson-Keiwit Subway Corporation, 66 C.L.L.C. 16,091 at page 921 and Chauffeurs, Teamsters & Helpers, Local 395 v. Western Caissons (Sask) Limited, 67 C.L.L.C. 16,015 at page 983.*
>
> *The Board will attempt to review actual job duties over a reasonably representative period of time and will not permit either the union or the employer to confine the review to an arbitrarily established time frame which is not indicative of normal responsibilities. In this case, it was inappropriate to take a two week "window" immediately prior to the date of the filing of the application which was, of course, during the winter shut down, in order to determine what work the employees involved were performing the majority of their time.*

While counsel for the Employer urged the Board to consider the six weeks or so subsequent to the date of the filing of the application in order to determine who were employees engaged in carpenter work, the Board was not directed to any prior case where this had been done.

In this case, the Board will exercise its discretion pursuant to s. 10 of the *Act* in accordance with its policy not to consider evidence of facts, matters or events subsequent to the date of application in determining this issue. The risk of manipulation of the composition of the work force is simply too great in a case of this kind and detection of such an attempt may be nearly impossible. In any event, the Employer's witnesses did not have an adequate explanation as to why the Employer had not

requisitioned assistance for Mr. Kramer from the Union's hiring hall instead of using an apprentice pipefitter; if there was not enough pipefitters' work to keep Mr. Reiger busy, then it makes no sense that Mr. Whittaker would have been hired.

Accordingly, Mr. Whittaker, who was hired after the date of application is excluded from the statement of employment and from the unit for the purposes of determining support for the application.

Even if the Board were to consider such post-application evidence, the Board accepts the evidence of Mr. Kramer over that of Mr. Balcaen; Mr. Balcaen was supervising the entire project of some 100 workers or more for a period of approximately seven months and, in the opinion of the Board, Mr. Kramer is much more likely to recall who worked with him and for how long during his six week tenure. According to Mr. Kramer, during that period of time, each of Mr. Reiger and Mr. Whittaker worked with him on scaffolding for no more than four or five days.

With respect to the period of time prior to and including the date of application, Mr. Reiger worked only one and one-half days of his more than two months of employment performing carpenter work. By the admission of the Employer's witness, Mr. Balcaen, Mr. Reiger worked the balance of his time performing pipefitter work. Furthermore, it was clear on the evidence that Mr. Reiger was at all times accepted and treated by the Employer as an apprentice pipefitter:

a. he had been registered as a steamfitter/pipefitter apprentice since February 20, 1998;

b. the Employer's internal employee records describe him as a first year pipefitter;

c. he was paid according to provincial pipefitters' rates;

d. the Employer deducted and remitted union dues on his behalf to the pipefitters' union; and

e. Mr. Balcaen testified that, had he been asked, he would have reported Mr. Reiger's hours as credit for his trade certification as a pipefitter.

It would not be logical for the Board to consider only the work Mr. Regier performed on September 18 and 19, 1997, as reasonably representative of his employment for the purpose of this application and the Board declines to do so.

Accordingly, Mr. Reiger is excluded from the statement of employment and from the unit for the purposes of determining support for the application.

No issue was raised that Mr. Kramer was not properly on the statement of employment and, in any event, he was at all times accepted and treated by the Employer as the journeyman carpenter that he is.

As majority support for the application has been filed, the application is granted.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 59, Applicant and CITY OF SASKATOON and SASKATOON REGIONAL ECONOMIC DEVELOPMENT AUTHORITY INC., Respondents

LRB File No. 164-97; May 27, 1998
Chairperson, Gwen Gray; Members: Bruce McDonald and Brenda Cuthbert

For CUPE: Harold Johnson
For the City: Barry Rossmann
For SREDA: Larry Seiferling, Q.C.

Successorship - Transfer of business - Contracting out - Successorship provision does not apply to situation where unionized employer alters manner in which it performs work by paying contractor to perform portion of work for fee.

Common employer - Control and direction - Union failed to demonstrate that City and SREDA operate under common control and direction on day-to-day basis or overall - SREDA and City are not related employers under s. 37.3 of *The Trade Union Act*.

Employer - Definition - Principal or contractor - City does not dominate labour relations environment of employees of SREDA to the extent that would justify designation of City as employer under s. 2(g)(iii) of *The Trade Union Act*.

***The Trade Union Act*, ss. 2(g)(iii), 37 and 37.3.**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: Canadian Union of Public Employees, Local 59 ("CUPE") applied to the Board on May 26, 1997 for an Order pursuant to ss. 5, 37 and 37.3 of *The Trade Union Act*, R.S.S. 1978, c. T-17, determining that the employer of employees at Saskatoon Regional Economic Development Authority Inc. ("SREDA") is the City of Saskatoon (the "City"). In the alternative, CUPE applied for a declaration that the City and SREDA are related employers within the meaning of s. 37.3 of the *Act*. In the final alternative, CUPE applied for an order determining that SREDA is a successor employer to the City within the meaning of s. 37 of the *Act*.

SREDA took the position that:

1. CUPE abandoned any representation rights it may have enjoyed with respect to the employees in question through its delay in requesting SREDA to bargain with respect to such employees;

2. SREDA is a body independent of the City and is not controlled by the City; and

3. if SREDA is a "related employer" to the City, it formed that relationship before the enactment of s. 37.3(1) of the *Act* and is therefore immune from the application of the *Act*.

The City set forth various facts that it relied on in its reply. In particular, it noted that CUPE had previously argued that the transfer of work from the City to SREDA constituted a contracting out, not a successorship under the *Act* which the City agreed with at the time.

Facts

In 1992, the City established an Economic Development Authority (the "Authority") for the City of Saskatoon by bylaw under s. 51 of *The Urban Municipality Act, 1984*, S.S. 1983-84, c. U-11. The Authority was responsible for developing and implementing an economic development strategy for the City. The Authority consisted of the mayor, two Council members, the city commissioner and 13 members-at-large who were appointed by City Council. The Authority reported to City Council and obtained its annual operating budget from the City.

For some 30 years prior to 1992, economic development functions had been carried on in the economic development office which had been a line department in the City structures. When the Authority was created, three employees of the former economic development office were seconded to the Authority for a period of one year.

In March, 1993, the City received notice from the Authority that it no longer wished to continue the secondment of the employees in question past the completion of the one year time frame. The City gave CUPE and the employees notice that the positions would be abolished as of September 30, 1993 and that employees would be re-assigned to other positions within the City.

CUPE filed a grievance with the City over the job abolitions. It argued that the Authority was not a successor employer to the City but was instead a contractor. The City agreed with the Union that the arrangement with the Authority was a "contracting out" situation, which resulted in certain collective bargaining rights for the displaced members. CUPE, however, did not accept the settlement and continued to press the matter both in the arbitration forum and before this Board.

In 1996, SREDA was incorporated as a non-profit corporation. In addition, Bylaw No. 7308 creating the Authority was repealed by City Council on December 16, 1996. SREDA carries on economic development work for Saskatoon and the surrounding region which consists of the rural municipality of Corman Park, the rural municipalities which are contiguous to the boundary of Corman Park and the urban municipalities within the boundaries of these rural municipalities. Its membership includes the urban and municipal governments mentioned above and investment members. Investment members pay an annual fee to belong to SREDA. As a class, they are entitled to elect a minimum of seven and a maximum of eleven directors to the board of directors. The City has entered into a contract with SREDA whereby SREDA performs economic development work for the City in exchange for a grant of money. The City has four members on the Board of SREDA but otherwise does not control the work or the staff of SREDA. The City also entered into an agreement with SREDA to transfer the assets of the Authority to SREDA.

Prior to filing this application, CUPE did not approach SREDA to bargain collectively with respect to its employees.

Relevant Statutory Provisions

The Board must consider the following provisions contained in the *Act*:

> 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;*

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.

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.

37.3(2) Subsection (1) applies only to businesses, undertakings or other activities that become associated or related after the coming into force of this section.

In addition, the Board will refer to ss. 51(1) and 61(1) of *The Urban Municipality Act, 1984*:

51(1) A council may, by bylaw, provide for the appointment of any board, association, commission or other organization that it considers desirable for the purpose of managing and operating or advising in the management and operation of any activity of the urban municipality and in the extension and improvement of its service.

61(1) Subject to the other provisions of this Act, for the purposes of every Act or regulation concerning wages, hours and conditions of work, trade unions, labour relations or any matters governing employment:

> *(a) every municipal employee, including every member of the municipal police force, and every employee of a board, association, commission or other organization established pursuant to this Act by a council is deemed to be an employee; and*
> *(b) the urban municipality and any board, commission and agency appointed by the council or established by or pursuant to this Act and*

> *responsible for the payment of wages to any employee is deemed to be an employer.*

Arguments

Mr. Johnson, counsel for CUPE, directed the Board's attention to ss. 51(1) and 61(1) of *The Urban Municipality Act, 1984*. He noted that s. 51(1) of *The Urban Municipality Act, 1984* empowers the City to appoint by bylaw a board, association, commission or other organization to carry out municipal functions. Under s. 61(1) of *The Urban Municipality Act, 1984*, employees of such boards, associations, commissions or other organizations are deemed to be employees and the board, commission or agency appointed by Council is deemed to be the employer of the employees. Counsel argued that the effect of these provisions is to make the employees of SREDA employees of the City because SREDA is an agent of the City with respect to the economic development functions of the City.

Second and alternatively, counsel for CUPE argued that SREDA is a related employer under s. 37.3 of the *Act* because it is controlled by the City both through its annual grant, which covers most of the annual operating budget of SREDA, and through its appointments to SREDA's board of directors.

Third and alternatively, counsel for CUPE argued that SREDA is a successor employer under s. 37 of the *Act* by taking the work and assets of the former Authority and line department from the City to perform the work previously performed by the City.

Mr. Rossmann, counsel for the City, argued that the City contracted out the work of the economic development office first to the Authority and secondly, to SREDA. The City did not cease to perform economic development work, it simply re-arranged the manner in which the work was done, that is, through a contracting agency and not through a line department of the City. Counsel argued that this type of contracting out does not fall within the successorship provisions contained in s. 37 of the *Act*.

With respect to the provisions contained in s. 61 of *The Urban Municipality Act, 1984*, counsel argued that the provision did not apply to SREDA because it is not a board, association, commission or other organization appointed under bylaw by Council. In addition, he noted that the provision merely clarifies the confusion caused by the common law status of municipal employees by deeming them all to be

employees either of the City or the board, association, commission or other organization appointed by Council.

Counsel for the City also argued that the related employer provisions contained in s. 37.3 of the *Act* do not apply to bring the employees of SREDA within the scope of CUPE's certification Order. He argued that the evidence did not demonstrate that there was common control between the City and SREDA.

Mr. Seiferling, Q.C., counsel for SREDA, argued that the employees of SREDA fell outside any interpretation that could be placed on the certification Order issued to CUPE. He noted that the Order was not an "all employee" order but rather was applicable only to the departments listed in the certification Order.

Secondly, counsel for SREDA argued that the application should be dismissed because of CUPE's delay in bringing the application to the Board. Counsel noted that the Authority was created effective September 1, 1992; the secondment of CUPE members ended on September 30, 1993; the bylaw creating the Authority was repealed December 16, 1996; SREDA entered into a contract with the City on August 31, 1997, and the City transferred the Authority's assets to SREDA by agreement dated July 31, 1997. During this time, CUPE made no efforts to require SREDA to bargain collectively with them. The application was the first notice to SREDA that it may be considered a related or successor employer to the City.

With respect to the related employer argument, counsel for SREDA argued that there was a lack of common control between SREDA and the City to sustain a finding of related employer. Counsel also argued that SREDA could not be found to be a successor employer under s. 37(1) of the *Act* as successorship provisions do not apply to a simple contracting out such as occurred in this instance.

Analysis

In this instance, the Board does not find that SREDA is a successor employer within the meaning of s. 37 of the *Act*. In our view, the cases establish that the successorship provision does not apply to a situation where a unionized employer alters the manner in which it performs work by paying a contractor to perform a portion of its work for a fee.

For instance, in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Crescent Heights Janitorial Service*, [1985] Oct. Sask. Labour Rep. 50, LRB File Nos. 079-85, 080-85 & 083-85 to 086-85, the Board held that the contracting out of janitorial services by a mall owner constituted a transfer of work but not a transfer of a business. A similar finding was made in *Saskatchewan Government Employees' Union v. Chatterson Building Cleaning Ltd.*, [1986] Dec. Sask. Labour Rep. 42, LRB File Nos. 193-86 to 196-86.

Similarly, in *Saskatchewan Government Employees Union v. Government of Saskatchewan, Department of Tourism, Small Business & Co-operatives; Saskatchewan Government Employees' Union v. Tourism Industry Association of Saskatchewan, Inc. (TISASK)*, [1989] Winter Sask. Labour Rep. 63, LRB File Nos. 119-87 & 217-87, the Board held that the contracting out of visitor reception sites from the government to a non-profit corporation, which was paid a monthly fee by government for providing the service, did not constitute the sale of a business within the meaning of s. 37 of the *Act*.

Another example can be found in *Saskatchewan Government Employees' Union v. Saskatchewan Liquor Board and Saskatchewan Brewers Association Ltd.*, [1985] July Sask. Labour Rep. 41, LRB File No. 100-83, where the Liquor Board contracted with the Brewers Association to have the latter perform work previously performed by the Liquor Board. The Board found that the transfer of work did not constitute the sale or disposition of a business.

In the situations described above, as is the case with the City and SREDA, the new employer performed work that had, in the past, been performed by the employees of the predecessor. The unionized employer still required the work to be performed for its own benefit, however, it had re-organized the manner of performing the work by contracting out the work to a contractor for a fee. Generally, in the absence of anti-union animus, such contracting out does not fall within the successorship provisions contained in s. 37 of the *Act* as the Board does not find the transfer of work to constitute a sale or disposition of a "business."

These cases can be distinguished from situations where a unionized employer transfers, for want of a better term, a "profit centre" to a third party. For instance, in *Canadian Union of Public Employees, Local 1975-01 v. Versa Services Ltd.*, [1993] 1st Quarter Sask. Labour Rep. 174, LRB File No. 170-92, the Board found that a transfer by the University of food services operations to Versa Services Ltd. did constitute the sale or disposition of a business. Versa was engaged in the provision of food services for its own benefit and was not merely contracting to perform work for the University.

Similarly, in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Pauline Hnatiw*, [1981] Feb. Sask. Labour Rep. 54, LRB File No. 190-80, the Board found that a transfer of a cafeteria from a co-operative to a different business in return for a monthly rental paid to the co-operative did fall within the successorship provisions. Reference could also be made to *Saskatchewan Government Employees' Union v. Headway Ski Corporation*, [1987] Aug. Sask. Labour Rep. 48, LRB File No. 396-86, and *Saskatchewan Government Employees' Union v. Golf Kenosee Inc.*, [1987] Sept. Sask. Labour Rep. 34, LRB File No. 180-86, where similar transfers of governmental enterprises were found to fall within the successorship provisions.

As indicated above, in our view, the City has contracted out its economic development work to SREDA. It pays SREDA to perform the work. This transaction does not constitute a transfer or disposition of a business within the meaning of s. 37 of the *Act*.

With respect to CUPE's claim that the City is the actual employer of the employees of SREDA, the Board finds that this claim is based on a faulty premise. Section 61(1) of *The Urban Municipality Act, 1984*, as cited above, deems municipal employees to be "employees" and deems the board, commission or agency which is responsible for paying such employees their "employer." Section 61(1) of *The Urban Municipality Act, 1984* merely overcomes the common law impediments to treating municipal employees as employees for the purpose of modern labour and employment laws. For instance, in *Bruton v. Regina City Policemen's Association, Local No. 155*, [1945] 2 W.W.R. 273 (Sask. C.A.), the Saskatchewan Court of Appeal held that the chief of police of the city of Regina was not an "employer" or an "employer's agent" within the meaning of the *Act*.

Otherwise, the determination of who is the actual employer of the employees of SREDA falls to be determined in accordance with ss. 2(g) and 37.3 of the *Act*. The Board will consider designating a principal the "employer" of the employees of a contractor in situations where there are corporate ties

between the principal and contractor and a corresponding lack of arm's length dealings between them. Frequently such arrangements have been used to attempt to circumvent a certification Order by having a contractor provide labour to the principal on a cost plus basis. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Gaming Corporation and Marwest Food Systems Ltd.*, [1996] Sask. L.R.B.R. 523, LRB File No. 083-96, the Board explained the purpose of the s. 2(g)(iii) designation as follows:

> *In determining the criteria that should apply to a determination under s.2(g)(iii), we must be mindful that in designating a principal as the "employer", the Board is "separating the responsibility for bargaining collectively with respect to wages from the responsibility for paying them" (Cana, supra, at 48). Before doing so, the Board must be convinced that the separation of responsibility is based on a sound labour relations footing. In past decisions, the Board has been influenced by factors indicating that the principal dominates the financial affairs of the contractor to such an extent that the setting of wage rates and other working conditions does not affect the financial health of the contractor. For instance, in the Cana case, supra, the Board held that "finding Pan-Western responsible for negotiating wage rates for carpenters on the Y.M.C.A. project will not as a practical matter remove whatever control Buchner Construction Inc. may have over its own financial affairs". It seems to this Board that the designation of a principal as "employer" under s. 2(g)(iii) of the Act can be made where it will enhance the collective bargaining process by requiring the party effectively controlling the purse strings to sit at the bargaining table. In these circumstances, the ability of the union and the contractor to negotiate and conclude a collective agreement may be frustrated by the formal absence of the principal from the bargaining table. If the principal plays an invisible role at the table, in the sense that the contractor cannot conclude an agreement without consulting with and obtaining tacit approval of the agreement from the principal, then the collective bargaining process is well served by requiring the principal to actually engage in formal collective bargaining with the union. There are different types of relationships that may fall within the scope of this provision, including contractors who provide labour services on a cost plus basis. In many cases the principal will effectively determine the terms and conditions of work for employees, such as their hours of work, work assignments, and the like, as well as determining wages and the other costs. The provision, however, is not limited to the labour broker relationships. Each case requires an examination of a number of factors to ensure that an assessment is made of the labour relations gains to be achieved by separating the responsibility for negotiating a collective agreement from the responsibility for paying wages.*

In our view, the City does not dominate the labour relations environment of the employees of SREDA to the extent that would justify a designation of the City as the "employer" under s. 2(g)(iii) of the *Act*. The City does not effectively determine the terms and conditions of work for the employees of SREDA through its contract with SREDA. SREDA has an income generating ability that extends beyond its

contract with the City of Saskatoon and is not in such a subordinate position to justify the application of s. 2(g)(iii) of the *Act*.

Without undertaking a thorough review of all of the elements that establish "related employer" status under s. 37.3 of the *Act*, the Board is of the opinion that the Union has failed to demonstrate that the City and SREDA operate under "common control and direction." The City holds a voting position on the board of directors of SREDA, but it does not hold a majority position on the Board. As a non-profit organization, SREDA is governed by representatives of the various stakeholders. It is contractually obligated to provide certain services to the City, but that contract, in and of itself, does not establish that SREDA and the City are under "common control and direction." It may be as the Union argued that if the City withdrew from its contract with SREDA, the latter would no longer be a viable organization. However, the economic dependence of a sub-contractor on its principal is not necessarily indicative of "common control."

In our view, common control or direction refers to the day-to-day control of the operations of both and the overall control of the operations of the two organizations. When the economic development operations were carried out by the Authority, an agency established by the City, there was a degree of common direction or control that would satisfy the requirements of s. 37.3 of the *Act*. The City controlled the board of the Authority; it provided the Authority with its operating funds, staff, offices, equipment and like; it could also eliminate or change the Authority by altering the bylaw under which the Authority was established. SREDA, however, is a different entity. Although it received some minor assets from the City, it is not subject to the degree of control, either day-to-day or overall, that existed between the Authority and the City.

The Board therefore concludes that:

1. SREDA is not a successor employer to the City under s. 37 of the *Act*;

2. SREDA is the actual employer of its employees;

3. there is no labour relations reason for designating the City as the employer of the employees of SREDA under s. 2(g)(iii) of the *Act*; and

4. SREDA and the City are not related employers under s. 37.3 of the *Act*.

An Order will issue dismissing CUPE's application.

MACKENZIE SOCIETY VENTURES INC., Applicant and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3364, Respondent

LRB File No. 169-97; May 27, 1998
Vice-Chairperson, James Seibel; Members: George Wall and Brenda Cuthbert

For the Applicant: Kevin Wilson
For the Respondent: Aina Kagis

Employee - Managerial exclusion - Program co-ordinator has authority to investigate incidents, impose discipline and hire staff and is therefore in a conflict of interest with members of bargaining unit - Board provisionally excludes program co-ordinator position.

***The Trade Union Act*, ss. 2(f), 5(m), 5.2 and 42.**

REASONS FOR DECISION

Background

James Seibel, Vice-Chairperson: Pursuant to an Order of the Board dated May 4, 1989, Canadian Union of Public Employees, Local 3364 ("CUPE") was certified as the bargaining agent on behalf of a unit of employees employed by MacKenzie Society Ventures Inc., formerly MacKenzie Society for the Advancement of Children Inc. (the "Employer"). The certification Order reads as follows:

> *The Labour Relations Board hereby makes an order:*
>
> *(a) determining that all employees of Mackenzie Society for the Advancement of Children Inc., at Ostapak House, Anaka House and the Mackenzie Training Centre except the Executive Director, Book-keeper/Confidential Secretary and Supervisor/Administrators, are an appropriate unit of employees for the purpose of bargaining collectively;*
>
> *(b) determining that the Canadian Union of Public Employees, Local 3364, 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) requiring the Mackenzie Society for the Advancement of Children Inc., the employer, to bargain collectively with the trade union set forth in paragraph (b), with respect to the appropriate unit of employees set out in paragraph (a).*

The Employer has applied to amend the Order as follows:

(a) to change the name of the Employer from MacKenzie Society for the Advancement of Children Inc. to MacKenzie Society Ventures Inc. in paragraphs (a) and (c) of the certification Order;

(b) to substitute the name Preece Place for Ostapak House in paragraph (a) of the certification Order;

(c) to substitute the job titles:

(i) general manager for executive director;

(ii) supervisor of residential services for supervisor/administrators; and

(iii) financial and administrative clerk for bookkeeper/confidential secretary;

in paragraph (a) of the certification Order;

(d) to add the position of job coach as an exclusion from the bargaining unit in paragraph (a) of the certification Order; and

(e) to add the position of program co-ordinator as an exclusion from the bargaining unit in paragraph (a) of the certification Order.

At the hearing before the Board, CUPE consented to all of the requested changes except the request for the exclusion of the program co-ordinator position and, in that regard, it took the position that the incumbent program co-ordinator acts neither in a managerial nor a confidential capacity with respect to the Employer's industrial relations such as to found the exclusion sought.

Evidence

Sylvia Mozelisky testified on behalf of the Employer. She has been its general manager since 1996. The Employer is a non-profit corporation operating facilities in the Preeceville area to support residential and community living and vocational training programs for physically and mentally challenged adults. The programs presently serve the residential and vocational needs of 24 persons through two group homes, Preece Place and Anaka House and the MacKenzie Training Centre, as well as a community living program, a Sarcan recycling depot, used clothing stores in Preeceville and Kamsack and a laundromat in Kamsack. Ostapak House is no longer in operation and has been replaced by Preece Place. All of the Employer's operations are unionized with the exception of the Sarcan facility, stores and laundromat.

There are presently 31 employees in the bargaining unit. Ms. Mozelisky oversees the Employer's entire operation, both union and non-union.

Each of the group homes was managed by an out-of-scope group home supervisor/administrator until May, 1997, when the Employer combined the two positions into a single supervisor of residential services position, which has been vacant since November, 1997. The new position has been advertised twice, but there has been no suitable applicant. Ms. Mozelisky said that she planned to advertise the vacancy again, but also said that it is possible that a suitable candidate may not be found any time soon, if ever, and that the Employer would not fill the position with other than a capable candidate. She said that part of the difficulty in filling the position was to attract a suitable candidate to a small town.

According to Ms. Mozelisky, the program co-ordinator position was created in 1995 upon the recommendation of Saskatchewan Social Services, Community Living Division, which advised the Employer that it should have a single person responsible to develop, implement, monitor and evaluate the Employer's "programming." In general, programming is individual skills training designed to assist persons in achieving independence to their level of potential.

By letter dated February 7, 1996, the Employer sent CUPE a copy of the job description for the program co-ordinator position approved by its board of directors and advised that it was being filled by then MacKenzie Training Centre in-scope supervisor, Shirley Neufeld. The letter stated, in part, as follows:

> *This [program co-ordinator] position represents the evolution of [Shirley Neufeld's] job description into the role she is presently doing within the organization.*

The accompanying job description stated that the position "is designed as a managerial, professional, leadership position."

CUPE replied by letter dated February 12, 1996 stating that it considered the position to be in-scope and advised that the Employer must negotiate with CUPE about the status of the position or apply to the Labour Relations Board to determine the issue. The matter was an item of discussion during bargaining, but no agreement was reached.

Ms. Mozelisky referred to the position description for the program co-ordinator. Among other things, it requires that programming conform to the standards established by the Community Living Division's "Continuum of Restrictive Procedures" (the "Continuum") which establishes guidelines detailing the requirements of consent and authority for increasing levels of behavioural prompts and responses in interactions with clients by staff members developing and implementing programming. Ms. Mozelisky referred to the Continuum to underscore the alleged managerial responsibility of the program co-ordinator position: to ensure and monitor compliance with the Continuum by staff while carrying out programming directions, including investigation of incidents and implementation of discipline when necessary.

In particular, Ms. Mozelisky testified that the following attributes of the position are most relevant to the issue at hand:

1. In conjunction with the general manager, and on recommendation to the board of directors, the program co-ordinator has the ability to hire and dismiss staff. She has the independent authority to give verbal and written warnings and to suspend with pay;

2. The program co-ordinator presently supervises all of the workers at the group homes, the training centre and the community integration workers on a daily basis, a total of approximately 20 or 21 people; she establishes and reviews the implementation of the programming that these employees carry out; she assists these employees with problem-solving and renders assistance as required;

3. The program co-ordinator is on emergency weekend call on an alternating basis with the general manager and in the absence of the general manager; they do not take simultaneous vacations;

4. The program co-ordinator is responsible for the training of staff, and decides who will receive training or re-training and what the nature of it shall be;

5. In conjunction with the general manager, the program co-ordinator conducts staff probation reviews and evaluations and determines promotions;

6. The program co-ordinator administers the programming budget - the size was not indicated; and

7. The program co-ordinator has direct contact with the Employer's board of directors through service on the program committee of the board which is responsible for admitting and discharging clients to and from the programs and for ensuring the development of appropriate programs; the program co-ordinator sets the committee's agenda.

With respect to the hiring and firing functions, Ms. Mozelisky testified that she and Ms. Neufeld had jointly interviewed and discussed the applicants for four or five positions. She said that although they have only an authority to recommend hiring or termination to the board, board approval was a "formality" in most instances. During her tenure, however, there has not been an occasion where an employee has been terminated.

Ms. Mozelisky stated that there is a "log book" in each group home to document anything of significance about the clients, and a "communication book" used to inform staff about the day's events. She said that Ms. Neufeld reviews these books for the purposes of evaluating the effectiveness of programming and for compliance by staff with the Continuum.

The Employer has recently adopted a "Statement of Policy on Abuse" with a formal reporting and investigation protocol. According to the reporting protocol, staff are to make their initial report to their "supervisor." Ms. Mozelisky said that initial investigation would most likely be conducted by the program co-ordinator; in one actual incident, this was the case. Also, errors in the administration of medications are generally dealt with by Ms. Neufeld.

The Employer also has a formal "incident reporting procedure" with respect to any client behaviours which actually cause or have the potential of causing harm to the individual, to others or to property. Ms. Mozelisky testified that there are many such incidents. Staff members complete the reports which are reviewed by the program co-ordinator. The reports are in four forms: residential behaviour, vocational behaviour, medical injury and property damage. The program co-ordinator alone may "sign off" the first two types of reports - Ms. Neufeld drafted the forms for these that are currently in use. The latter two types of reports also require the general manager's review and signature. Ms. Mozelisky stressed that because of the fact that group home staff often work alone and unsupervised the reporting and review procedures are extremely important - she intimated that the role of the program co-ordinator was crucial in this regard; continued funding of the Employer's programs requires compliance with the terms of its service agreements with Social Services and with the Continuum.

Ms. Mozelisky testified that other examples of managerial duties performed by the program co-ordinator include the following:

- preparation of an individual quality of life document for each client which details daily programming items to be carried out by staff;

- preparation of an annual personal program plan for each client detailing personal objectives in each of several areas and guidelines for intervention by staff;

- the formulation of performance standards for MacKenzie Training Centre staff describing their general duties and performance standards in each of several areas - each staff member is to sign the document; and

- preparation of specific behaviour management strategies for certain clients to be followed by staff.

Ms. Mozelisky said the program co-ordinator is charged with monitoring and evaluating adherence by staff with these plans, and to carry out any discipline required by a failure to do so. Ms. Neufeld investigated an incident of alleged contravention of the policy on abuse and prepared a written report; along with Ms. Mozelisky she also attended the disciplinary meeting with the employee and was consulted with respect to the sanction.

Ms. Mozelisky referred to actual instances of discipline effected by Ms. Neufeld. On January 24, 1997 she gave a written reprimand to an in-scope employee for failure to complete duties. And on March 14, 1997 she verbally reprimanded the group home supervisor - an out-of-scope employee - for failure to adhere to standards of behaviour. The reprimand was recorded in writing. According to Ms. Mozelisky, Ms. Neufeld and herself jointly interviewed and hired the community integration worker and two casual employees. On one occasion, in the absence of Ms. Mozelisky, Ms. Neufeld made a determination on the entitlement of an employee to bereavement leave.

According to Ms. Mozelisky, Ms. Neufeld administers staff sick leave and bereavement leave requests in her absence. Together, they investigated a case of suspected abuse of sick leave.

Ms. Mozelisky expressed concern that the program co-ordinator was already in a position of conflict with respect to the employees in the bargaining unit regarding the supervisory and disciplinary obligations of the position.

In cross examination, Ms. Mozelisky admitted that Ms. Neufeld was not on the Employer's bargaining committee and that she was not included in a grievance mediation process regarding an employee under her supervision in the fall of 1996. She admitted that Ms. Neufeld was not on the Employer's grievance committee. She also admitted that if the position of supervisor of residential services is filled, that

person would assume the duties currently being performed by Ms. Neufeld with respect to supervision of the operation of the group homes.

With respect to the authority to discipline, Ms. Mozelisky stated that the program co-ordinator has the power to terminate employees but had never actually found it necessary to do; indeed, Ms. Mozelisky herself has not had occasion to exercise that authority.

Veronica Erickson testified on behalf of CUPE. She is the president of the CUPE local and has been an employee of the Employer since June, 1991. She is currently working as a temporary full time caregiver at Preece Place. She works rotating shifts of one week each on days, evenings and nights. When on day shift, she works at the MacKenzie Training Centre, and when on evenings and nights, at one of the group homes.

Ms. Erickson testified that when there was a group home supervisor/administrator that person supervised the group home employees and the only interaction with the program co-ordinator was over programming issues. When asked by counsel for the Union whether Ms. Neufeld directed her work when she was at the Training Centre, she replied that there was an agenda posted which generally described her duties in blocks of time and indicated break times. Ms. Erickson did say, however, that they generally work side by side in the mornings with low-functioning clients who required personal direction, but that in the afternoons she and another employee generally do an activity with the clients and Ms. Neufeld is not usually involved.

With respect to interaction with Ms. Neufeld at Preece Place in the evenings and nights, Ms. Erickson said that Ms. Neufeld would "drop in from time to time" to deliver supplies or to pick up data sheets; however, she could not say exactly what she was doing when she was there.

Ms. Erickson said that if she was uncertain how to handle a client in a particular situation she would consult Ms. Mozelisky and, similarly, if she wanted to take a leave or vacation time. However, on cross-examination, she said she did not know whether other employees would consult Ms. Neufeld over management issues. She claimed she was unaware that Ms. Neufeld had ever made any independent decisions on personnel matters; she said that Ms. Neufeld had never hired anyone without direction from Ms. Mozelisky or the board of directors.

With respect to behaviour incident reports, she said that when there was a group home supervisor, the old form of report required the signature of the supervisor rather than that of the program co-ordinator. The former group home supervisor was laid off in October, 1997.

In cross-examination, Ms. Erickson admitted that she was only aware of Ms. Neufeld's day-to-day activities during mornings at the Training Centre one week out of three.

When asked whether she understood that Ms. Neufeld had the authority to tell her what to do or not to do with clients, she replied "yes, with respect to programs." And when asked whether she takes direction from Ms. Neufeld she said, "yes, I would have to do it if she asked, but I've never been told she is my supervisor."

She said that she did not know what role Ms. Neufeld played in investigating behaviour incident reports or in employee performance evaluation.

When asked whether during a "heated conversation" in August, 1994, she had told Ms. Neufeld that she was too close to management and should be out of the union, she stated that she did not recall but it was possible she had done so.

Although Ms. Neufeld was present throughout the hearing before the Board, neither party called her to testify.

Employer's Argument

Mr. Wilson, counsel for the Employer, stated that the Employer was seeking exclusion of the program co-ordinator position on the grounds of both managerial function and confidential capacity with respect to the Employer's labour relations. He said that the position was in conflict with other members of the bargaining unit because of its ability to affect the terms and conditions of their work and economic lives.

He stated that Ms. Neufeld supervises some 21 staff, administers the policy on abuse, is charged with the responsibility of discipline, performs scheduling and makes staff work assignments. He said that no other employee has direct contact with the board of directors.

It was argued that it was not unusual for hiring and firing to be done jointly by two or more managers.

It was pointed out that, as the two former group home supervisor positions had been consolidated into one residential supervisor position, if the program co-ordinator position was excluded, the Employer was not gaining an additional exclusion in terms of numbers and that the job coach exclusion is irrelevant because that position is funded by an outside agency.

It was argued that the incident of discipline of the group home supervisor demonstrated the managerial scope of the program co-ordinator's authority with respect to programming matters.

Finally, counsel requested that if the Board was not disposed to make a final Order excluding the program co-ordinator from the bargaining unit, that it consider making a provisional Order under s. 5.2 of *The Trade Union Act*, R.S.S. 1978, c. T-17.

Union's Argument

Ms. Kagis argued on behalf of CUPE that the evidence disclosed showed that Ms. Neufeld was a supervisor rather than a manager and that the factors the Board has generally considered germane to the issue of managerial exclusions had not been satisfied. For example, she said that while Ms. Neufeld provided input into matters of hiring and firing, she was not wholly responsible for the decisions. She pointed out that the job description document makes no reference to personnel issues.

Ms. Kagis also argued that the Board should discount the fact that the supervisor of residential services position was vacant, because, if filled in the future, Ms. Neufeld's duties would change. The organizational chart discloses that the supervisor is responsible for the group home staff and does not report to the program co-ordinator. She stated that the evidence did not disclose that the program co-ordinator exercised any significant authority with respect to the terms and conditions of employment of bargaining unit employees and certainly fulfilled no confidential capacity with respect to the Employer's labour relations.

Ms. Kagis made reference to the fact that the Employer did not call Ms. Neufeld to testify in these proceedings; while she did not specifically suggest that the Board should draw an adverse inference from this, it was intimated that it colours the credibility of the Employer's case.

Statutory Provisions

The Board must consider the following provisions of the *Act*:

> 2. *In this Act:*
>
> > *(f) "employee" means:*
> >
> > > *(i) a person in the employ of an employer except:*
> > >
> > > > *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or*
> > > >
> > > > *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer.*
>
> 5. *The board may make orders:*
>
> > *(m) subject to section 5.2, determining for the purposes of this Act whether any person is or may become an employee;*
>
> *5.2(1) On an application pursuant to clause 5(m), the board may make a provisional determination before the person who is the subject of the application is actually performing the duties of the position in question.*
>
> *(2) A provisional determination made pursuant to subsection (1) becomes a final determination after the expiry of one year from the day on which the provisional determination is made unless, before that period expires, the employer or the trade union applies to the board for a variation of the determination.*

> *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

In its decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Remai Investment Corporation*, [1997] Sask. L.R.B.R. 335, LRB File Nos. 014-97 & 019-97, the Board reiterated the rationale underlying managerial exclusions under the *Act*, at 337:

> *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 issue of labour relations conflict of interest is the fundamental basis for such exclusions, as the Board stated in *City of Regina v. Canadian Union of Public Employees, Local 21 and Regina Civic Middle Management Association*, [1995] 3rd Quarter Sask. Labour Rep. 153, LRB File No. 268-94, 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.*

Specific examples of authority and responsibility which the Board has considered over the years to assess the issue are myriad and include the following, although it is not an exhaustive list:

- hiring;
- discipline and discharge;
- administration of the collective agreement and grievances;
- employee performance evaluation;
- direction of the workforce, including hours of work and authorization of leave, vacation and overtime; and
- the exercise of independent discretion.

However, the analysis of any particular situation must be approached with prudence and resistance to the tendency to simply check off and tally these factors to arrive at a decision. As the Board stated in *Remai*, *supra*, at 340-341:

> *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.

Recent decisions of the Board dealing with the delineation of the boundaries of middle management bargaining units in the public sector at the interfaces with the out-of-scope classifications and the general bargaining unit are instructive. Those cases caused the Board to review the indicia used to identify where managerial authority really lies: See: *Professional Institute of the Public Service of Canada v. Executive Branch of the Government of Saskatchewan and Saskatchewan Government Employees' Union*, [1997] Sask. L.R.B.R. 530, LRB File Nos. 018-97 & 031-97.

In *Saskatchewan Government Employees' Union v. Saskatchewan Liquor and Gaming Authority and Saskatchewan Liquor Store Manager's Association*, [1997] Sask. L.R.B.R. 836, LRB File Nos. 037-95 & 349-96, the Board stated, at 853:

> *... 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.*

And further, the Board stated, at 854:

> *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 the present case, the situation is somewhat complicated because the vacancy of the supervisor of residential services position has resulted to some extent in additional responsibilities for the program co-ordinator. While the evidence did not describe with any precision which of Ms. Neufeld's duties would revert to that position if it is filled, there are responsibilities which were described which are clearly within the purview of programming and which would not change in that event.

We accept the evidence of Ms. Mozelisky that the duties performed by Ms. Neufeld include a number of functions generally associated with management. And, it seems apparent that even if the supervisor vacancy is filled such management functions would continue to be performed by Ms. Neufeld with respect to all aspects of programming. The functions of primary importance in this regard are the authority to impose discipline and to hire staff. It is not unusual in modern organizations that no single person has the authority to hire and discharge - such decisions are now commonly reached by a consensus after several participants in the process have provided input and recommendations and the matter has been thoroughly reviewed. Indeed, this may result in better and fairer decision-making than more autocratic systems which were prevalent in the past.

We accept that Ms. Neufeld has a wide discretion to independently establish procedures and assign responsibilities with respect to all programming and that includes the authority to impose discipline up to and including discharge; the several actual instances referred to in evidence appear clear in this regard. The fact that a person has not actually exercised an ostensible authority to discharge employees does not mean that they do not have that authority; it may be as indicative of a motivated well-trained and efficient workforce as anything else.

The evidence was clear that Ms. Neufeld has participated in the making of a number of decisions respecting personnel matters and her role in this regard appears to have been expanding. Whether this was due to the absence of a supervisor of residential services was not completely clear, however, she had been involved in such matters prior to the vacancy, including her discipline of the group home supervisor.

The ability of the program co-ordinator to respond quickly and effectively to alleged incidents of erroneous or improper action in the implementation of programming or abuse of clients should be free of any risk of compromise in order to ensure the health and safety of both clients and staff. The Board is of the opinion that the exercise of this authority in the manner required and expected by the Employer to fulfill its programming mandate and obligations places the program co-ordinator in a position of conflict of interest with members of the bargaining unit in several respects. In particular, her duties of investigative and disciplinary authority may realistically be the subject of grievance by bargaining unit members - the program co-ordinator cannot be expected to fulfill these duties fairly, efficiently and impartially as a member of the bargaining unit. Although Ms. Neufeld was not called to testify by either party, in the particular circumstances of this case, the Board cannot draw an adverse inference

against the Employer; the evidence of Ms. Mozelisky was, to a large extent, objective and was not contradicted in cross-examination or by the evidence of Ms. Erickson - both witnesses were credible, but Ms. Erickson was largely unable to provide specific information outside the ambit of the duties of her own position. However, Ms. Neufeld's evidence would probably have been illuminating and may have clarified some of the uncertainty about the effect of the residential services supervisor vacancy.

On the evidence adduced, it is clear that this situation is not analogous to that considered by the Board in the *Remai*, *supra*, or the *City of Regina*, *supra*, cases, where it was determined that the positions in question were supervisory and not managerial. In *City of Regina*, *supra*, the Board stated, at 161:

> *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.*

In the present case, however, the potential conflict of interest is far greater than the risk of mere "awkwardness or discomfort" and, quite conceivably, may make it impossible for the incumbent to reconcile competing loyalties.

Accordingly, the Board finds that the program co-ordinator position shall be excluded from the unit, but because the effect of the filling of the vacancy in residential services on the duties of the position cannot be fully assessed, the exclusion will be provisional to become final after the expiry of one year from the date of the Order unless, before that period expires, CUPE applies to the Board to vary this determination.

The Board also grants the remaining amendments to the original Order as applied for and consented to by the parties.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant and SASKATCHEWAN SCIENCE CENTRE INC., Respondent

LRB File No. 373-97; June 16, 1998
Chairperson, Gwen Gray; Members: Donna Ottenson and Terry Verbeke

For the Applicant: Drew Plaxton
For the Respondent: Mary Neufeld

Duty to bargain in good faith - Refusal to bargain - Parties agreed to bargain issue after first portion of collective agreement ratified - Union not subsequently required to serve notice to bargain issue - Employer's refusal to bargain issue constitutes violation of s. 11(1)(c) of *The Trade Union Act*.

Collective agreement - Interpretation - Board reviews purpose of and interpretative approaches to s. 33 of *The Trade Union Act*.

***The Trade Union Act*, ss. 2(b), 5(d), 5(e), 5(k), 11(1)(c), 33 and 42.**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: United Food and Commercial Workers, Local 1400 (the "Union") was certified to represent a group of employees at the Saskatchewan Science Centre (the "Employer") on December 14, 1995. On December 22, 1997 the Union filed an unfair labour practice application with the Board which alleged that the Employer had failed to bargain in good faith with the Union.

The Employer filed a reply with the Board on January 9, 1998 in which it denied committing an unfair labour practice. The matter was heard by the Board on February 2, 1998.

Facts

Don Logan, Chief Negotiator, testified on behalf of the Union that the parties commenced bargaining for a first collective agreement around June, 1996. In November, 1996 an application was brought to rescind the Union's certification Order. The Board dismissed the application on March 24, 1997 on the grounds of employer interference.

A bargaining meeting was held between the Union and the Employer on November 7, 1996. Mr. Logan testified that during this meeting the duration of the first agreement was discussed but no agreement was reached with respect to this term.

Following the November 7, 1997 negotiating meeting, Mr. Logan forwarded a document to the Employer which recorded the positions of the parties at the conclusion of the meeting. The article pertaining to the duration of the agreement remained a "Union" proposal and did not contain specific dates except for a start date which the Union proposed be the date of ratification by the Union members.

Pay schedules were also attached to this document. The Employer's proposed pay schedule covered the period 1997 to 1998. At the bottom of the schedule the Employer stated that "if categories are accepted by the Union, the Employer will offer 2% increase each year."

The Union's proposed pay schedule covered the 1997 calendar year. At the time it was made, the Union's proposal would have resulted in a contract of longer than one year, depending on when the Union membership ratified the agreement.

A further bargaining meeting was held on February 25, 1997. Mr. Logan described the meeting as bordering on hostile. No significant progress was made and new meeting dates were set for April, 1997.

According to Mr. Logan, during the April meetings the Employer became more specific with respect to its proposal on the duration of the agreement. Paul Hartung, Executive Director and chief spokesperson at the bargaining table for the Employer, raised the issue of the ability of the Employer to pay the wage increases proposed and suggested that the parties come back and bargain again at the end of 1997. Mr. Logan testified that there was a strong suggestion made by Mr. Hartung during these meetings that the parties should settle something "now" and come back at the end of the year. Mr. Hartung intimated that

a better deal might be achieved for the employees if the parties came back later to negotiate the 1998 wage rates.

The Union's interest was twigged by this suggestion and it came back with a version of this proposal in May, 1997. In a letter to the Employer dated May 6, 1997 and faxed to the Employer on May 7, 1997 the Union formally proposed the following terms:

> *Enclosed is an amended Union proposal on wages.*
>
> . . .
>
> *We are proposing that all increases be retroactive to January 1, 1997 and expire on December 31, 1997. At that time, we would negotiate the wage rates to apply January 1, 1998 to December 31, 1998. We are further proposing that the entire Collective Agreement be effective date of ratification by the Union membership and expiring on December 31, 1998.*
>
> *I have also enclosed a proposed Letter of Agreement regarding the Union's proposed wage opener.*
>
> *We have agreed to meet on May 21, 1997 at 9:30 a.m. We would ask that you reply to this position at this meeting.*

The Letter of Understanding attached to the letter read in part as follows:

> *#2 RE: Wage Opener*
>
> *The parties agree to reopen for negotiations, only the wage Appendix of this Agreement, covering the period January 1, 1998 to December 31, 1998. During this period, the remainder of the Collective Agreement shall remain in force, except that the Parties agree that Sections 34(1) of The Trade Union Act will apply as an expired Agreement.*

The proposed salary grid attached to the Union's letter indicated that the wages proposed by the Union would take effect January 1, 1997.

On May 21, 1997 the Employer proposed the wage schedule that ended up in the final agreement, withdrew a management rights proposal and proposed that the contract be retroactive to January 1, 1997 and that it expire on December 31, 1997.

Mr. Logan testified that during discussion of the Employer's proposal, he pointed out to the Employer that there can be serious liabilities incurred if the entire agreement is made retroactive. According to Mr. Logan, Mr. Hartung indicated that he had not thought about the possible liabilities arising from making the whole agreement retroactive. In the end, it was agreed that the agreement would have as the effective date the date of ratification with wage rates retroactive to January 1, 1997.

The Union's membership ratified the agreement on July 12, 1997. Mr. Logan then signed the agreement on behalf of the Union and sent the document to Mr. Hartung for signature. He also requested that two original signed copies be returned to the Union. After some time, Mr. Logan wrote Mr. Hartung to inquire as to when the Employer would return the agreements to the Union. On August 22, 1997 Mr. Hartung wrote Mr. Logan and advised him as follows:

> *The Collective Bargaining Agreement referred by you in your memo has already been returned to your office.*
>
> *While it was received some five weeks ago, your office was told I would not be returning to the province until August 6th. On August 6th I sent an e-mail to C. Strand and T. Ward asking them to sign the agreement. On August 12th they signed.*
>
> *Upon review by legal counsel they were mailed on August 20th.*

Mr. Strand and Mr. Ward were part of the Union's negotiating committee and they signed the agreement on behalf of the Union. Mr. Logan had earlier requested that Mr. Hartung arrange for both to sign the agreement.

The final agreement contained the following "duration of agreement" provision:

> *23.01 This Agreement shall be effective from [date of ratification by the Union's membership] and shall remain in effect until December 31, 1997, and thereafter, from year to year, but either party may, not less than thirty (30) days, and not more than sixty (60) days before the expiry date of such Agreement, give notice in writing, to the other party to negotiate a revision thereof.*

The salary grid attached to the agreement as Appendix "A" stated that it is "effective and retroactive to January 1, 1997."

Subsequent to the ratification and formal signing of the first collective agreement, Mr. Logan, by letter dated November 21, 1997, sent notice to bargain to the Employer. By letter faxed to the Union on November 26, 1997 John Knight, Director of Operations for the Employer, responded to the notice to bargain as follows:

> *We have been advised that according to section 33(2)(c) of The Trade Union Act, a collective bargaining agreement which provides for a term of less than one year will be deemed to provide for its operation for a term of one year.*
>
> *In the case of the Saskatchewan Science Centre Inc. and U.F.C.W., the agreement was signed and ratified in July, 1997, with an expiry date of December 31, 1997. As a result, we believe that by operation of section 33(2), your notice would be outside the "open period."*
>
> *We would appreciate your comments on this matter. It is not our intention to commit an unfair labour practice by failing to negotiate revisions. We are under the impression that various sections of The Trade Union Act make it inappropriate to do so at this time.*
>
> *If we are mistaken and it is subsequently determined that the collective bargaining agreement's expiry date is indeed December 31, 1997, we wish in the alternative to give notice that we intend to seek certain revisions to the collective agreement. However, in view of the very specific provisions of The Trade Union Act, we do not believe that such an interpretation is possible.*

This was the first time that the Employer formally raised the issue of s. 33(2)(c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 with the Union. According to Mr. Logan, Glenn Stewart, Union Organizer, had reported earlier to Mr. Logan that Mr. Hartung had raised the issue of the one year term with him. The Union, however, did not understand Mr. Hartung to be suggesting that the Employer would not be willing to enter into negotiations for a 1998 agreement.

Mr. Logan responded to Mr. Knight's letter on December 1, 1997 and indicated that the Union was of the opinion that its notice to bargain complied both with Article 23.01 of the collective agreement and s. 33(4) of the *Act*. Mr. Logan went on say "one final matter, the Union is surprised by the position taken by the Employer, as the dates chosen for the first Agreement and the commitment to return to the bargaining table early were done with the Employer being represented by a lawyer." This comment

referred to the presence of Ms. Neufeld, counsel for the Employer, at the bargaining table beginning with the February 25, 1997 meeting. In his testimony, Mr. Logan complained that although the Employer had a lawyer at the bargaining meetings not one peep was raised by the Employer with respect to s. 33(2)(c) of the *Act*.

Mr. Knight replied to Mr. Logan in the following terms on December 12, 1997:

> *Unfortunately, nothing in your letter deals with the issue at hand, being the provision in The Trade Union Act which sets out a minimum one year term for a collective bargaining agreement. Faced with this problem, we cannot proceed to bargaining.*
>
> *Section 24 of The Trade Union Act provides that union and employer can refer a dispute to the Labour Relations Board. It is our recommendation that the Saskatchewan Science Centre Inc. together with U.F.C.W., Local 1400, jointly apply to the Labour Relations Board for a determination about this issue.*
>
> *It is our understanding that one of the purposes of the provision is to ensure that third party rights can be easily determined with respect to the termination of a collective bargaining agreement or the selection of a different union. Thus, there are other interests other than merely those of the employer and UFCW at stake.*
>
> *In any event, faced with our collective bargaining agreement which has a term of less than one year, we must deal with the legislation. We recommend a joint application if you continue to doubt that the section applies. If you have a different suggestion or proposal, we would be pleased to consider it.*
>
> *Please contact us with your comments.*

Mr. Logan interpreted the Employer's letters as a refusal to bargain and he noted that they appeared to be tied in to the representation question. In retrospect, Mr. Logan regretted bringing the potential liability of full retroactivity to the attention of the Employer during bargaining. In light of the Employer's position with respect to s. 33(4) of the *Act*, Mr. Logan thought he might have been wiser to have "pulled a fast one" on the Employer. He testified that he did not choose this option during bargaining because he did not think that was a good way to start off a bargaining relationship. He felt that it was only fair to the Employer to disclose the potential for retroactive liability if the entire contract was made retroactive to January 1, 1997.

On cross-examination, Mr. Logan testified that he was generally familiar with the provisions contained in the *Act*. With respect to s. 33 of the *Act*, he was aware that a three year term was the maximum length of a collective agreement. When he negotiated the Employer's agreement, it did not occur to him that s. 33 of the *Act* required a term of at least one year. When asked if he possessed a better understanding of the provisions of the *Act* than most lawyers, Mr. Logan indicated that he did not feel qualified to answer that question.

Mr. Hartung testified for the Employer. Mr. Hartung led the Employer's side of the bargaining table. Ms. Neufeld joined the negotiating committee in February, 1997 and attended three bargaining sessions starting with the February 25, 1997 meeting. Mr. Hartung indicated that he did not have a great deal of experience with collective bargaining, having only his experience with International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada at the Employer to draw on. He relied on Mr. Logan to prepare updates to the collective agreement package and found Mr. Logan to be an honest person.

With respect to the duration of the proposed agreement, Mr. Hartung testified that at the April 25, 1997 meeting the Employer was still proposing a two year agreement. This proposal was reflected in its wage offer which covered the years 1997 and 1998. The Employer had offered a two percent increase in each year of the proposed two year agreement. However, according to Mr. Hartung, he was concerned with making the best offer he could for the employees in question. In this light, he suggested to the Union that a one year agreement may be more beneficial for them and that they might be better off negotiating the 1998 wage rates at a later time.

Mr. Hartung recalled receiving the May 6, 1997 letter from Mr. Logan with respect to the two year agreement with a wage re-opener for 1998. He indicated that this proposal was not accepted by the Employer at the May 21, 1997 meeting. Mr. Hartung confirmed that at the May 21, 1997 meeting the Employer withdrew its proposed management rights clause and presented a wage offer of two percent retroactive to January 1, 1997. Mr. Hartung did not recall if an expiry date was agreed to during that meeting.

When Mr. Logan forwarded the tentative agreement to Mr. Hartung, he did notice that the expiry date was stated as December 31, 1997. He indicated that this was the first occasion where he had seen a reference to an expiry date. He understood, however, that the tentative agreement was going to be sent for ratification by the Union's membership and that it was a "done deal" if ratified. He did not think the agreement was conditional on any term or on review by the Employer's legal counsel.

With respect to the term of the tentative agreement, Mr. Hartung understood that the agreement would not be retroactive except for the wage schedule. He acknowledged that the Employer did not want the agreement to be retroactive because of the liabilities the Employer would incur for other changes, such as the provision of a statutory holiday on Easter Monday.

Mr. Hartung understood that the tentative agreement was ratified by the Union's membership on July 12, 1997. He was away on holidays until August 6, 1997 but was informed that Mr. Logan had been phoning with respect to the collective agreement while he was away. When he returned from holidays, he received Mr. Logan's August 21, 1997 letter requesting the return of the signed agreement. Mr. Hartung's response to Mr. Logan, in which he explained the delay in returning the collective agreement in part as being caused by a review of the document by the Employer's legal counsel, was untrue. Mr. Hartung admitted that he was embarrassed with the delay and had used the reference to legal counsel as an excuse. Mr. Hartung had not had the collective agreement reviewed by the Employer's legal counsel prior to returning a signed copy to the Union.

Mr. Hartung testified that Mr. Knight was hired by the Employer in September, 1997 to assume responsibility for day to day operations, staff negotiations, grievance handling and the like.

On September 4, 1997 Mr. Hartung forwarded the collective agreement to Ms. Neufeld for a legal opinion. In the last week of September, 1997 Mr. Hartung became aware through his discussions with Ms. Neufeld that there may be a problem with the duration of the agreement. Mr. Hartung indicated that he was somewhat concerned about the problem and had raised it in a conversation with Mr. Stewart. Mr. Hartung then confirmed the exchange of letters that occurred between Mr. Knight and Mr. Logan concerning the renewal negotiations.

Mr. Hartung stated that he was unaware of the one year minimum term for a collective agreement prior to September, 1997.

On cross-examination, Mr. Hartung indicated that he became aware of the problem in regard to s. 33(2)(c) of the *Act* about mid-September, 1997 but did not raise the issue with the Union until late October, 1997 or early November, 1997. He was unaware if Mr. Knight had discussed the matter with the Union prior to the exchange of letters set out above. Mr. Hartung acknowledged that when the agreement was signed, he understood that it would expire on December 31, 1997 and the main reason for the choice of expiry date was to permit the parties to negotiate the wage rates for 1998. Mr. Hartung indicated that he understood at the May 21, 1997 bargaining meeting that the agreement was to expire December 31, 1997. Although this date had not been filled in the working copy of the agreement that was under consideration on May 21, 1997 Mr. Hartung testified that he understood the expiry date to be December 31, 1997 with full retroactivity for wages to January 1, 1997.

Mr. Hartung could not recall if Mr. Logan was the one who raised a concern with retroactivity of the full agreement. He did recall, however, that full retroactivity was a concern of the Employer.

Mr. Hartung also testified that the Employer would not negotiate a revision of the agreement with the Union unless it was told to negotiate by the Board. He understood that the effect of s. 33(2)(c) of the *Act* was to render such negotiations "illegal." He was concerned with the validity of the negotiations and with the rights of "third" parties, that is, employees who may wish to decertify or to change unions.

Relevant Statutory Provisions

Collective bargaining is defined in s. 2(b) of the *Act* as follows:

> 2. *In this Act:*
>
> > *(b) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the*

> *agreement or represented by a trade union representing the majority of employees in an appropriate unit;*

The requirement to bargain collectively is enforced through the unfair labour practice provisions set out in s. 11(1)(c) of the *Act* which provides as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> ...
>
> *(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's remedial authority with respect to unfair labour practices is set out in ss. 5(d), (e), 5.1 and 42 of the *Act* which provide:

> *5. The board may make orders:*
>
> ...
>
> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
>
> *(e) requiring any person to do any of the following:*
>
> *(i) refrain from violations of this Act or from engaging in any unfair labour practice;*
>
> *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*
>
> *5.1 In making an order pursuant to subclause 5(e)(ii), the board may consider a plan, submitted by a person found to have violated the Act, the regulations or a decision of the board, for rectifying the violation.*
>
> *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.*

Section 33 of the *Act* contains provisions relating to the term of a collective agreement as follows:

> *33(1) Except as hereinafter provided, every collective bargaining agreement, whether heretofore or hereafter entered into, shall remain in force for the term of operation provided therein and thereafter from year to year.*
>
> *(2) Where a collective bargaining agreement:*
>
> *(a) does not provide for its term of operation;*
>
> *(b) provides for an unspecified term; or*
>
> *(c) provides for a term of less than one year;*
>
> *the agreement shall be deemed to provide for its operation for a term of one year from its effective date.*
>
> *(3) Where a collective bargaining agreement hereafter entered into provides for a term of operation in excess of three years from its effective date, its expiry date for the purpose of subsection (4) shall be deemed to be three years from its effective date.*
>
> *(4) Either party to a collective bargaining agreement may, not less than 30 days or more than 60 days before the expiry date of the agreement, give notice in writing to the other party to terminate the agreement or to negotiate a revision of the agreement and where a notice is given the parties shall forthwith bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.*
>
> *(5) A trade union claiming to represent a majority of employees in the appropriate unit of employees or any part thereof to which a collective bargaining agreement applies may, not less than 30 days or more than 60 days before the anniversary date of the agreement, apply to the board for an order determining it to be the trade union representing a majority of employees in the appropriate unit of employees to which the agreement applies, or in any part thereof, and if the board makes such order the employer shall forthwith bargain collectively with that trade union and the former agreement shall be of no force or effect insofar as it applies to any unit of employees in which that trade union has been determined as representing a majority of the employees.*

The effect of the "open period" is set out in s. 5(k) of the *Act*:

> *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;*

Union's Argument

Mr. Plaxton, counsel for the Union, referred the Board to *Communication Workers of Canada v. Northern Telecom Canada Limited*, [1985] Oct. Sask. Labour Rep. 46, LRB File No. 062-85; *Retail Clerks Union, Local No. 401 v. Independent Trucking Limited*, [1978] Mar. Sask. Labour Rep. 51, LRB File No. 549-77; *Letkeman v. Westco Storage Ltd. and United Food and Commercial Workers, Local 1400*, unreported, LRB File No. 322-83, which stand for the general proposition that the provisions of s. 33 of the *Act* apply to each collective agreement and override any provision in a collective agreement which conflicts with the provisions contained in s. 33 of the *Act*.

Counsel also referred the Board to its decisions which require, as part of the duty to bargain in good faith, the Employer to disclose relevant information to the Union. In particular, reference was made to *Saskatchewan Government Employees' Union v. Government of Saskatchewan*, [1989] Winter Sask. Labour Rep. 52, LRB File Nos. 245-87 & 246-87, which sets out the general duty to disclose; and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Holiday Inn Ltd.*, [1989] Spring Sask. Labour Rep. 66, LRB File Nos. 175-88, 176-88 & 178-88, which held that the repudiation of a term already agreed to between the parties in negotiations constituted bad faith bargaining.

Counsel relied on the cases cited to argue that in this instance the Employer had a clear agreement to return to the bargaining table to negotiate the wage rates for 1998. Rather than comply with the agreement, the Employer changed its mind and refused to bargain collectively with the Union.

Counsel also referred the Board to *Canadian Union of Public Employees, Local 2569 v. Santa Maria Senior Citizens Home Inc.*, [1994] 4th Quarter Sask. Labour Rep. 134, LRB File No. 192-94, for the proposition that anti-union animus is not required in order to find a breach of the duty to bargain in good faith - it is sufficient if the Employer "fails" to bargain in good faith with the Union. Counsel suggested anti-union animus may be found by the Employer's reference to the interest of third parties as being the reason for refusing to negotiate the 1998 agreement.

Counsel also referred the Board to *Amalgamated Transit Union, Local 615 v. City of Saskatoon*, [1992] 4th Quarter Sask. Labour Rep. 80, LRB File No. 120-92, where the Board held that a collective agreement was signed with the intention not to bring all negotiations to an end. In this situation, the Board held that s. 33 of the *Act* did not apply and negotiations were required to continue under the original notice to bargain.

Counsel argued that the Board can interpret the agreement as a one year agreement. Its wage provisions are truly retroactive to January 1, 1997; they are not a signing bonus but apply to all employees who worked during the period in question. In addition, counsel argued that the parties all thought they had signed a one year agreement.

Alternatively, if the Board finds that the agreement's effective date is the date of ratification, then the Board can apply the decision in *Amalgamated Transit Union, supra*. Counsel argued that this would be consistent with the evidence. The Employer suggested that the parties sign off for 1997 and get back to bargaining at the end of 1997 for the 1998 agreement.

In the further alternative, counsel argued that the source of the duty to bargain can arise from a voluntary undertaking to bargain. In support of this proposition, the Union referred the Board to its decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Canada Ltd. et al.*, [1993] 1st Quarter Sask. Labour Rep. 111, LRB File No. 197-92. Counsel noted that the Employer's refusal to bargain for a 1998 agreement was premised on a mistaken view of s. 33 of the *Act* - that is, that bargaining would be illegal. Counsel noted that mid-stream bargaining is permissible

and, in any event, in these circumstances was required by the terms of the agreement. Counsel also noted that the only difference between mid-stream bargaining and renewal bargaining is that the latter attracts the ability to exercise the right to strike or lock-out while mid-stream bargaining does not.

Counsel requested an Order directing the Employer to bargain collectively with the Union.

Employer's Argument

Ms. Neufeld, counsel for the Employer, argued that the Employer is not under a legal duty to negotiate. She stated that the Union's negotiator made a mistake in negotiating a six month agreement. Nevertheless, s. 33(2)(c) of the *Act* requires that the agreement be effective for a term of one year from the agreement's effective date, which would bring the existing agreement to an end on July 11, 1998.

Counsel for the Employer referred the Board to a decision of the Saskatchewan Court of Appeal in *Utah Co. of Americas and International Union of Operating Engineers, Hoisting and Portable, Local 870* (1959), 59 CLLC ¶ 15,460; *Saskatoon Printing Pressmen and Assistants Union, No. 206 v. LRB (Sask.) and Western Publishers (Prince Albert) Limited et al.* (1967), Vol. III, Sask. L.R.B. Decisions 510; *Independent Trucking Limited, supra*; *Northern Telecom Canada Limited, supra*; *International Brotherhood of Electrical Workers, Local 2067 v. City of Swift Current et al.*, [1990] Fall Sask. Labour Rep. 46, LRB File No. 066-90; and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Remai Investment Co. Ltd.*, [1993] 4th Quarter Sask. Labour Rep. 136, LRB File Nos. 167-93 & 168-93. These authorities stand for the proposition that the time limits imposed on collective agreements by s. 33 of the *Act* cannot be varied by the terms of a collective agreement. Counsel argued that the Union's notice to bargain the 1998 agreement did not conform to s. 33(4) of the *Act* because it was not filed in the 30 to 60 day period before the expiry date of the agreement. Counsel also argued that the expiry date is deemed to be one year from the effective date of the agreement according to the provisions contained in s. 33(2)(c) of the *Act* or July 11, 1998.

Counsel stated that the Union had an experienced negotiator at the table and should have known the effect of s. 33(2)(c) of the *Act*. In addition, counsel argued that the situation is unlike the factual circumstances contained in the *Amalgamated Transit Union* case, *supra*, because it is not impossible in these circumstances for the Union to serve notice to bargain. Finally, counsel argued that the purpose of the open period would be defeated, in these circumstances, if the Board required the Employer to bargain with the Union.

Analysis

The parties, through good faith bargaining, arrived at an agreement and the central features were as follows:

1. an "effective date" of July 12, 1997 the date of ratification by the Union's membership;

2. an "expiry date" of December 31, 1997; and

3. a wage schedule effective by its terms on January 1, 1997 to December 31, 1997.

The parties negotiated this agreement on the understanding and clear intent that they would enter into further negotiations for the calendar year 1998 particularly for the purpose of settling the wage rates for that year. This agreement came about at the suggestion of the Employer who intimated to the Union that it may be better for its members if the 1998 wage settlement was deferred to a later time. The decision to limit retroactivity of the agreement for all provisions except the wage schedule to the date of ratification was made at the suggestion of the Union who, in good faith, did not wish to see the Employer unknowingly burdened with the cost of full retroactivity.

One issue for the Board to determine is whether s. 33(2)(c) of the *Act* applies to this agreement to "deem" its term of operation to extend past December 31, 1997. The purpose of the mandatory one year term of operation is to ensure that there is at least one "open period" during the life of a collective agreement. "Open periods" are those occasions during which the parties can apply to amend or rescind a certification order under s. 5(k) of the *Act*.

Section 5(k) of the *Act* also permits a competing union to attempt to raid the existing bargaining unit by filing an application under ss. 5(a), (b), (c) and (k) of the *Act*. In these circumstances, if the raid is successful, the existing collective agreement is terminated in accordance with the provisions contained in s. 33(5) of the *Act*.

The "open period" that is contemplated by ss. 5(k) and 33(5) of the *Act* occurs during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of a collective agreement. If parties to a collective agreement were permitted to bargain an agreement of less than one year, they would be able to avoid applications to amend or rescind the certification Order by altering the effective date of the agreement before an open period is reached. Section 33(2)(c) of the *Act* addresses this problem by requiring a term of operation of at least one year from the effective date of an agreement.

The Board looks to the collective agreement in order to determine its term of operation. In the present case, the agreement provides that "this [a]greement shall be effective from [date of ratification by the Union's membership] and shall remain in effect until December 31, 1997." Although the wage portion of the agreement was retroactive to January 1, 1997 we do not interpret the phrase "term of operation" as including the retroactive period. If the phrase "term of operation" is included the retroactive period, it would defeat the purpose of s. 33(2) of the *Act* which is to create an open period one year from the agreement's effective date. For instance, in the present situation, if the term of the agreement was held to be one year because of the retroactivity of its wage provisions, its effective date still remains July 12, 1997 as stated in the agreement, and its open period would occur in the 30 - 60 day period preceding July 12, 1998. This open period would vanish with the termination of the agreement on December 31, 1997 and the negotiation of a new collective agreement.

The other interpretative approach to s. 33(2) of the *Act* would be to treat the commencement of the retroactive phase of the agreement as the "effective date." However, this would result in a great deal of uncertainty in calculating the open period. The entire agreement would need to be reviewed to determine if any provision operated with retrospective effect. If it did, then it would also be necessary to ascertain the exact date it took effect. It seems to the Board that the most sensible approach is to accept the date that is set forth in the agreement itself as the "effective date" and to calculate the term of its operation from that date, keeping in mind the purpose of s. 33 of the *Act*.

The case law cited by both parties and referred to above clearly sets out that the provisions of s. 33 of the *Act* are mandatory. If the terms of a collective agreement conflict with the provisions contained in s. 33 of the *Act*, the provisions contained in s. 33 of the *Act* prevail. Therefore, if there were no other considerations in this instance, the term of the agreement between the Union and the Employer would be extended by the provisions of s. 33(2)(c) of the *Act* from December 31, 1997 to July 11, 1998. The open period in which negotiations could commence would be the 30 to 60 day period preceding July 12, 1998. In this case, on its bare facts, the Union's notice to revise which was provided to the Employer on November 21, 1997 would be premature.

However, the Board is of the view that the negotiations for the year 1998 form part and parcel of the original obligation to bargain which arose on the issuing of the certification Order. The Board came to this conclusion by considering the intent of the parties at the time the 1997 portion of the agreement was settled. It is clear that the parties did not intend the 1997 agreement to conclude the first collective bargaining agreement. It was a partial resolution of the first collective agreement and had the effect of removing the year 1997 from the bargaining table. However, the wage portion of that agreement did not extend to 1998 and both parties agreed that they would continue negotiations in order to settle the 1998 wage rates and terms of employment.

In our view, the factual situation in the present case is similar to that considered in the *Amalgamated Transit Union* case, *supra*. In that case, the union and employer had signed off a one year agreement. The employer then argued that the one year agreement must continue in effect for a further year because the union had failed to give notice to revise the agreement in accordance with s. 33(4) of the *Act*. On the facts of the case, it was impossible for the union to provide the notice required by s. 33(4) of the *Act* because the agreement was signed after the passage of the "open period". The Board held as follows, at 82:

> *In this case, it was absolutely impossible for the Union to give notice during November 1991, and this taken with the surrounding circumstances leads to only one reasonable conclusion: that the collective bargaining agreement of February 7, 1992, was not intended to bring all negotiations to a conclusion. It was never intended to apply to 1992, or to release the Employer from the obligation to negotiate for the period following 1991. If there had been evidence to establish that the February 7, 1992 agreement was intended to bring negotiations to an end, the Board would have had no hesitation in finding that s. 33(1) applied. However, as indicated, we are not of that view and, accordingly, the November 2, 1990 Notice remained operational following February 7, 1992. The application is accordingly granted.*

In our view, the Employer in the present case has a similar obligation to continue bargaining collectively with the Union. This obligation arose with the issuing of the certification Order and was not completed with the signing of the 1997 portion of the collective agreement. The parties have yet to finalize the first collective agreement by completing the 1998 portion of it as they agreed to do in their bargaining. In these circumstances, the Union was not required to serve a notice to bargain in order to resume collective bargaining for the 1998 year as the parties had not concluded the first round of bargaining and both remain under an obligation to bargain arising from the issuing of the certification Order.

The Employer's refusal to bargain with the Union with respect to the 1998 portion of the first agreement constitutes a violation of s. 11(1)(c) of the *Act*.

The Board would also add that it is not "illegal" or contrary to the *Act* for an employer and union to engage in mid-stream collective bargaining. This is the prerogative of the parties. The collective agreement process is intended to be flexible in order to meet the exigencies of the parties. The *Act* itself also contemplates mid-term bargaining under the technological change provisions contained in s. 43 of the *Act* and in the definition of "bargaining collectively" contained in s. 2 of the *Act* and with respect to other matters such as the creation of new positions. In this instance, even if the Employer believed that it had no legal obligation to bargain collectively with the Union, which we have held was an incorrect assessment of its obligation, such bargaining would not offend any provision of the *Act*.

An Order will issue finding the Employer in violation of s. 11(1)(c) of the *Act* and directing it to bargain collectively with the Union to resolve all outstanding matters.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, Applicant and COMFORT MECHANICAL LTD., Respondent

LRB File No. 082-98; June 17, 1998
Chairperson, Gwen Gray; Members: Gloria Cymbalisty and Judy Bell

For the Applicant: Tom Waller, Q.C.
For the Respondent: Art Halfinger

Employee - Managerial exclusion - Attendance as employer's representative at hearing is evidence of managerial authority - Board excludes employer's representative from bargaining unit.

Construction Industry - Appropriate bargaining unit - Statement of employment - Individual not registered as apprentice or journeyman in compulsory trade - Board removes individual from statement of employment.

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

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (the "Union") applied to be certified for a standard bargaining unit related to its trade on April 28, 1998. The Union claimed that there were nine employees in its proposed bargaining unit.

Comfort Mechanical Ltd. (the "Employer") filed a reply sworn by Art Halfinger which indicated that there were ten employees in the proposed bargaining unit. In its statement of employment, the Employer listed Natalie Carlson as an apprentice and Art Halfinger as a journeyman.

The hearing was held before the Board on June 3, 1998, at which time Art Halfinger appeared on behalf of the Employer.

Facts

R. Harvey Fleming, Business Agent, testified on behalf of the Union. He indicated that the Union's standard bargaining unit includes tradespersons with apprenticeship or journeymen status. The plumbing and pipefitting trades are compulsory.

Mr. Fleming's testimony indicated that the Union considers Ms. Carlson to be a helper or utility worker. Mr. Fleming filed correspondence received by the Union from Ken Werner, Trade Time Assessor, Apprenticeship and Trade Certification Branch of Saskatchewan Post-Secondary Education and Skills Training Department. In the correspondence, Mr. Lerner indicated that there are no records related to Ms. Carlson in the Apprenticeship and Trade Certification Branch. Mr. Fleming concluded from this letter that Ms. Carlson is not registered as an apprentice and does not hold journeymen status as a plumber or pipefitter in Saskatchewan.

With respect to Art Halfinger, Mr. Fleming testified that Art Halfinger is the former owner of the Employer and had just recently sold the Employer to his son, Bob Halfinger. Art Halfinger is the person who swore the Employer's reply and statement of employment, and is also the person who appeared before the Board on behalf of the Employer. Mr. Fleming filed a letter which Art Halfinger had sent to the Director of Apprenticeship on April 8, 1998, with respect to crediting of apprenticeship hours for an employee. Art Halfinger signed the letter on behalf of the Employer. Mr. Fleming also filed correspondence exchanged between the Union's solicitors and the Employer which demonstrate that Bob Halfinger relied on Art Halfinger to reply to counsel's request for the production of payroll information which had been ordered by the Vice-Chairperson of the Board.

Mr. Fleming testified that Brad Lopes was terminated from his employment on April 27, 1998, the day before the application for certification was filed.

Art Halfinger was invited by the Board to give evidence with respect to the matters in issue. He testified that Ms. Carlson will be registered as an apprentice this month. Art Halfinger indicated that it was the Employer's practice to retain employees for a three month trial period to determine if they are suitable to enrol in an apprenticeship program. Art Halfinger testified that Ms. Carlson has proven to be a capable worker and will be enrolled in the apprenticeship program. At the time of the application, Ms.

Carlson was working with a journeyman plumber on the Marion school site performing whatever tasks were assigned to her by the journeyman.

With respect to his own employment, Art Halfinger testified that he sold his shares in the Employer to Bob Halfinger eight years ago. However, Art Halfinger works both in the office and on the job site for the Employer and receives a salary in return. Art Halfinger is not required to work but does so when and if he is available and able to work.

Art Halfinger testified that he does perform industrial relations functions for the Employer because Bob Halfinger has no experience in these matters. However, he does not hire or fire employees and does not directly supervise employees.

Mr. Waller, Q.C., counsel for the Union, asked Art Halfinger to identify the record of employment forms for two employees, Mr. Lopes and Warner Pittroff, which Art Halfinger was able to do. The record of employment for Mr. Lopes indicated that he was laid off for shortage of work on April 27, 1998, the day before the certification application was filed with the Board. The record of employment for Mr. Pittroff indicated that he was laid off for lack of work on March 27, 1998. Art Halfinger testified that Mr. Lopes was unlikely to be recalled because he was not a reliable and trustworthy employee. Art Halfinger denied that there was any coincidence between Mr. Lopes' lay-off and the Union's organizing drive.

With respect to Mr. Pittroff, Art Halfinger testified that the Employer had employed Mr. Pittroff on a casual basis over a number of years but doubted that Mr. Pittroff would be recalled because he was an unsuitable employee. Art Halfinger indicated that customers had complained about Mr. Pittroff.

Relevant Statutory Provisions

The Board must consider the definition of "employee" which is set out in section 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.*

Arguments

Mr. Waller, Q.C., counsel for the Union, argued that Ms. Carlson should be removed from the statement of employment because, at the time of the application, she was performing work as a helper or utility worker, neither of which are included within the scope of the bargaining unit applied for by the Union. Counsel noted that there was no evidence brought by the Employer to establish that Ms. Carlson had registered as an apprentice with the Apprenticeship Branch.

In addition, counsel argued that the evidence before the Board demonstrated that Art Halfinger was not an "employee" within the meaning of s. 2(f)(ii) of the *Act*. Counsel noted that Art Halfinger fulfils a managerial function for the Employer. He pointed the Board to its recent decision in *Saskatchewan Government Employees' Union and Saskatchewan Liquor Store Managers' Association v. Saskatchewan Liquor and Gaming Authority*, [1997] Sask. L.R.B.R. 836, LRB File Nos. 037-95 & 349-96 for the proposition that persons who have a significant input into the labour relations of the Employer will be excluded from the bargaining unit. Counsel also referred the Board to *Weathered v. Harmon International Industries Inc. and United Steelworkers of America*, [1994] 2nd Quarter Sask. Labour Rep. 61, LRB File No. 276-93 for a discussion of the term "employer's agent."

With respect to Mr. Lopes and Mr. Pittroff, counsel argued that there was some evidence supporting their inclusion on the statement of employment. With respect to Mr. Lopes, the Board could be suspicious about the coincidence of his termination with the filing of the Union's application. With regard to Mr. Pittroff, counsel argued that there was some indication that he may be subject to recall.

Art Halfinger, for the Employer, argued that Mr. Pittroff was laid off a considerable time before the application for certification and should not be included on the statement of employment. With respect to Ms. Carlson, Mr. Halfinger filed a time sheet which indicated the type of work performed by her in the time period in question. Art Halfinger argued that the work was plumbing and pipefitting work.

Analysis

As the Board indicated at the hearing of this application, Art Halfinger's attendance as the representative of the Employer at the hearing is sufficient evidence to establish that he is authorized to act on behalf of the Employer in relation to labour relations matters. This alone is enough to remove him from the definition of "employee" contained in s. 2(f)(i) of the *Act*. Art Halfinger cannot attend the hearing on behalf of the Employer in order to oppose the Union's certification and to argue at the same time that he is not vested with any "managerial authority" in relation to the Employer and its labour relations. This is an untenable position. As a result and on the basis of all of the evidence presented with respect to Art Halfinger, the Board finds that he is not an employee and will remove his name from the statement of employment.

With respect to Ms. Carlson, the evidence indicates that at the time of the hearing she was not registered as an apprentice or journeyman in the plumbing and pipefitting trades, both of which are compulsory trades, that is, persons performing such work must be registered under the appropriate legislation as an apprentice or journeyman. The Board finds that Ms. Carlson performed work that is normally performed by a helper or utility worker. These positions do not fall within the scope of the Union's certification. Ms. Carlson's name will also be removed from the statement of employment.

Mr. Lopes and Mr. Pittroff were laid-off before the application was filed. The employment relationship in the construction sector is generally one of short duration. Employees go from employer to employer depending on the work available. In order to determine which employees should be listed on a statement of employment, the Board will include those employees who were actually at work on the day

in question and those employees who have a "substantial connection with the employer in the period surrounding the application" [*International Association of Bridge, Structural & Ornamental Iron Workers v. Tamtrac Holdings Ltd.*, [1995] 1st Quarter Sask. Labour Rep 194, LRB File No. 254-94, at 196].

In this instance, there is no evidence which suggests that either Mr. Lopes or Mr. Pittroff continues to enjoy a substantial connection to the employer. Both were laid off for lack of work and the Employer's uncontradicted evidence indicates that they will not likely be recalled in the near future. In these circumstances, the Board will not include either employee on the statement of employment.

As the Union has filed support cards from a majority of the employees on the statement of employment, the Board will issue a certification Order.

STANLEY HANSEN, Applicant and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 333, Union and ROYAL UNIVERSITY HOSPITAL, Employer

LRB File No. 002-98; June 23, 1998
Vice-Chairperson, James Seibel; Members: Bob Todd and Terry Verbeke

For the Applicant: Clifford Holm
For the Union: Maureen Fryett
For the Employer: N/A

Religious exclusions - Application - Board excludes member of Seventh-day Adventist Church from bargaining unit.

Religious exclusions - Test - Board reaffirms use of four-fold test to determine if individual should be excluded under s. 5(l) of *The Trade Union Act*.

***The Trade Union Act*, s. 5(l).**

REASONS FOR DECISION

James Seibel, Vice Chairperson: Stanley Hansen applied to the Board to be excluded from the bargaining unit certified by Service Employees' International Union, Local 333 (the "Union") at Royal University Hospital of the Saskatoon District Health Board pursuant to s. 5(l) of *The Trade Union Act*, R.S.S. 1978, c. T-17. Mr. Hansen is a member of the Seventh-day Adventist Church (the "Church").

Section 5(l) of the *Act* provides as follows:

> 5. *The board may make orders:*
>
> ...
>
> *(l) excluding from an appropriate unit of employees an employee whom the board finds, in its absolute discretion, objects:*
>
> *(i) to joining or belonging to a trade union; or*
>
> *(ii) to paying dues and assessments to a trade union;*
>
> *as a matter of conscience based on religious training or belief during such period that the employee pays:*

> *(iii) to a charity mutually agreed upon by the employee and the trade union that represents a majority of employees in the appropriate unit; or*
>
> *(iv) where agreement cannot be reached by these parties, to a charity designated by the board;*
>
> *an amount at least equal to the amount of dues and assessments that a member of that trade union is required to pay to the trade union in respect of such period;*

Daniel Jackson, President of the Saskatchewan/Manitoba Conference of Seventh-day Adventists since 1996, and an employee of the Church since 1971 in various pastoral positions, testified that the Church's position with respect to labour union support or membership by Church members was developed soon after the Church was established in the nineteenth century.

In 1972, the Church's North American division committee on administration passed a resolution on the subject which forms part of the Church's working policy manual. The resolution reads in part as follows:

> *1. That the Seventh-day Adventist Church hereby reaffirm its historical position that its members should not join or financially support labour unions and similar organizations.*
>
> *2. That the Seventh-day Adventist Church member is following the teaching of the church when because of religious convictions he refuses to join or financially support labour unions and similar organizations or associations, or discontinues membership or financial support of a labour union, and similar organization or association.*
>
> *3. That pastors diligently inform Seventh-day Adventist Church members through sermons, personal counselling, church publications and other media of the Bible principles and the Spirit of Prophecy counsel on which the church's position is based.*

Mr. Jackson stated that the Church has re-affirmed this position every year since it was originally passed. He also referred to a selection of biblical references which the Church cites as the reasons for its position. However, he admitted that new members are not always aware of this position - that the first priority is to ensure that they are educated in the fundamental teachings of scripture and that a fuller understanding of such issues may not be achieved until a member engages in further study and growth.

Mr. Jackson confirmed that the Church's teachings on this point are biblically based, and are not based on economics nor are they a condemnation of trade unionism. Rather, he explained, it is intended to follow the Christian exhortation to be at peace with all people.

Mr. Hansen has been employed at Royal University Hospital since 1994 as a biomedical engineering technician, maintaining, repairing and calibrating medical equipment. Prior to that he had held similar positions at St. Paul's Hospital in Saskatoon and at Regina General Hospital in Regina.

Mr. Hansen has been a member of the Church in Alberta since 1977. He did not become aware of the Church's teachings on trade union membership or support until 1987 or 1988. And, it was around this time that he also became aware of the fact that one could apply for exclusion from union membership under the *Act*.

Despite this knowledge, he admitted on cross-examination that, in the years since, he had applied for and been admitted to membership in three locals of either the Canadian Union of Public Employees or Service Employees' International Union, the last being when he took up the position at Royal University Hospital.

However, he said that in the past two years his life had changed in many respects; for example, he has married and his wife is also a member of the Church. He realized that he had been doing things that were against the teachings of his faith and he felt an increasing desire to bring his beliefs and actions into congruence. As he explained it, he experienced "a deepening of conviction in respect to all the teachings of the Church," not just its position on trade union support, and he wanted to "live free of pretense and hypocrisy." He said that during the past two years he had thoroughly studied this issue, among others, and now finds that his continued membership in the Union is contrary to his deepening religious convictions. For example, he inferred that confrontation which could arise during job action might place him in a position of conflict with his duty of faith to live in peace with all persons.

In cross-examination, although he could not say for certain, Mr. Hansen stated that he did not think that he had ever voted on contract proposals or for union office elections. He was quite certain that he has not attended Union meetings.

Mr. Hansen's usual hours of work are Monday to Friday from 7:30 am to 4:00 pm. These hours do not conflict with the Church's sabbath which is from sunset Friday to sunset Saturday. On cross-examination he was asked whether he would work overtime on Saturdays if called in. Mr. Hansen said that it had never happened, and that if it did, he would first attempt to have someone else work for him. However, he said that certain employees in his department have special expertise with certain kinds of equipment and, that if for this reason it was necessary, he would attend at work. But, Mr. Hansen did not see this as a conflict because he believed that it would be allowed by the Church because it would be for the benefit of persons in need, ie. patients.

When asked whether if his application to the Board was dismissed would he quit his employment, he stated that he did not know; he would certainly find himself in a position of personal crisis, but would also have to consider the welfare of his family.

Analysis

Exclusion under s. 5(l) of the *Act* is a power that must be exercised with great caution as was explained by the Board in *Mary Ann Enns v. Kindersley Union Hospital and Saskatchewan Union of Nurses*, [1993] 3rd Quarter Sask. Labour Rep. 149, LRB File No. 135-93, at 151:

> *In providing for exclusion from a bargaining unit on religious grounds, the legislature has acknowledged that, for certain persons, involvement in trade union activity may be inconsistent with strongly held religious beliefs, and has concluded that public policy justified making an exception to the general principle that employees are compelled to confirm to the wish of the majority to enjoy trade union representation. In determining whether individual applicants are among those who fall within the scope of the exclusion, labour relations boards must be satisfied that the nature of the objection to trade union involvement which is being put forward is of a genuinely religious nature, and that the possibility of exclusion on religious grounds does not become a means by which employees who object on other grounds are relieved of the consequences of the decision of the majority.*

In similar cases the Board has alluded to the fact that close scrutiny of such applications is required because an exclusion is an exception to union security provisions, and an excluded individual shares in the benefits of collective bargaining without contribution to the process.

In considering these cases, the Board, in the *Enns* decision, *supra*, and in *Loewen v. Royal University Hospital and Saskatchewan Union of Nurses, Local 75*, [1996] Sask. L.R.B.R. 657, LRB File No. 031-96, found useful the following criteria enunciated by the Canada Labour Relations Board in *Barkers v. Teamsters' Union, Local 938*, (1986), 86 C.L.L.C., 16,031 at 14,288:

> *(1)* *The applicant must object to all trade unions, not just to a particular trade union.*
>
> *Like the conscientious objector who must be opposed to "any and all wars", the applicant must object to any and all trade unions.*
>
> *(2)* *The applicant does not have to rely on some specific tenets of a religious sect to base his objections.*
>
> *In the same manner as the British Columbia and Ontario boards, we believe it is not for us to disqualify some convictions because they are personal to the applicant. While it will be easier for the latter to convince the Board that his belief is "religious" when this belief forms part of the dogma of a sect, we believe we would misconstrue section 162(2) if we were to get involved with religious orthodoxy.*
>
> *(3)* *An objective inquiry must be made into the nature of the applicant's beliefs in the sense that they must relate to the Divine or man's perceived relationship with the Divine, as opposed to man-made institutions. For our purposes, a religious conviction or belief should be construed as the "recognition on the part of man of some higher unseen power as having control of his destiny, and as being entitled to obedience, reverence and worship" (Regina v. Leach, Ex Parte Bergsma, [1965] 2 O.R. 200 (Ont. H.C.J.), page 213). By the way, this test has been used not only in British Columbia but in all the latest cases of the Ontario Board.*
>
> *(4)* *Finally, the applicant must convince the Board that he is sincere and that he has not rationalized his objections to the union on religious grounds after he was made aware of the provisions of the Code.*
>
> *This clearly means that no such application could be granted without a public hearing*

In the present case, the Board is convinced of Mr. Hansen's sincerity. His objection to union membership and support did not arise as a result of the condemnation of trade unionism in general, nor is it directed at this Union in particular, it is based upon his Church's teachings and his own belief acquired through his intensified study in recent years.

Although he has been a member of various union locals for many years, we accept his evidence that his membership has been essentially nominal, and his participation in union affairs and processes minimal if any. We do not doubt the sincerity of his testimony that his life changed in recent years, coupled with his increasing interest in and study of his faith, which has resulted in a deepening of his devotion and the desire to live his convictions.

The picture that Mr. Hansen presented to the Board is of a man who joined a religion while young and exercised a somewhat superficial commitment, but with increasing maturity has sought to reconcile his life experience with his faith. There are few among us who do not change over the years. While the Union's concern for erosion of its security is no less genuine, the Board is convinced that the present case is a proper one in which to exercise the power afforded by s. 5(l) of the *Act*. We are satisfied that the guidelines enunciated by the Board in the *Enns* decision, *supra*, have been met.

Accordingly, the Board orders that Mr. Hansen be excluded from the bargaining unit. The union dues and assessments that otherwise would be payable by Mr. Hansen will be forwarded by the Employer to a charity mutually agreed to by the Union and Mr. Hansen. In the event the parties are unable to agree to a charity, the Board will remain seized to determine the issue.

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant and PRAIRIE BUS SERVICES (1983) LTD., Respondent

LRB File No. 083-98; June 24, 1998
Vice-Chairperson, James Seibel; Conference Call

For the Applicant: Harold Johnson
For the Respondent: Robert Watson

Practice and procedure - Particulars - Board holds that applicant is not required to disclose evidence by which it intends to prove facts alleged in application - Board dismisses interim application for particulars.

***The Trade Union Act*, s. 4(12).**

INTERIM APPLICATION FOR PARTICULARS REASONS FOR DECISION

James Seibel, Vice Chairperson: On April 28, 1998, Canadian Union of Public Employees ("the Union") filed an application with the Board alleging that the Respondent, Prairie Bus Services (1983) Ltd., ("Prairie Bus") had engaged in an unfair labour practice in violation of s. 11(1)(a) of *The Trade Union Act*, R.S.S. 1978, c.T-17.

Section 11(1)(a) of *The Trade Union Act* provides as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > *(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;*

Paragraphs 4 and 5 of the application provide as follows:

> *4. The applicant alleges that an unfair labour practice (or a violation of the Act) has been and/or is being engaged in by the said Prairie Bus Services (1983) Ltd. by reason of the following facts: - Employer has sent out a five page document which the Union finds intimidating and has hampered our organizing efforts. This document is attached to this application as Exhibit 'A'.*

> *5. The applicant Canadian Union of Public Employees submits that by reason of the facts hereinbefore set forth the said Prairie Bus Services has been or is engaging in an unfair labour practice (or a violation of the Act) within the meaning of Section 11(1)(a) of The Trade Union Act.*

The document in question is attached to these reasons as Appendix "A".

By letter dated June 10, 1998, counsel for Prairie Bus, Mr. Watson, advised the Union that further particulars were required in order for his client to prepare its Reply to the application. The particulars requested are as follows:

> *With respect to paragraphs 4 and 5 of the application of the Union and the entire application:*
>
> *Specify the exact portions of the Exhibit 'A' which are alleged to be contrary to The Trade Union Act, how said portions are alleged to be in violation of The Trade Union Act, and specify the exact portions and wording of the Act that these portions of Exhibit 'A' are alleged to violate.*

Counsel for the Union, Mr. Johnson, replied to the request by letter dated June 11, 1998, which reads as follows:

> *In response to your demand for particulars dated June 10th, 1998 and received by fax. The Union is alleging that the Employer committed an Unfair Labour Practice by interfering with, restraining, intimidating, threatening and coercing its employees in the exercise of their right to organize in and to form, join or assist trade unions, contrary to sections 3 and 11(1)(a) of The Trade Union Act, by communicating with their employees. Evidence of the communication is in appendix "A" of the Union's application to the Board.*
>
> *The Union alleges that the employer's communication in whole and all of its parts interferes, restrains, intimidates, threatens or coerces the affected employees.*

Mr. Watson's position was that the particulars were insufficient. He applied to the Board for an Order requiring that further particulars be given. The application was heard by the Executive Officer of the Board pursuant to s. 4(12) of the *Act* on June 23, 1998, by conference telephone call.

Mr. Watson argued that the Union's Reply to the request for particulars "says nothing" and that his client required more in order to prepare its reply. When the Executive Officer expressed the tentative opinion that there was enough information for the Respondent to know the case that had to be met and asked Mr. Watson to specify exactly what he felt he required further in order to plead, he responded, firstly, that the Union's response "told him nothing," but he declined to be more specific. Secondly,

when asked again what further details were required, he said that he "was not dealing with an open mind" so it was of no use for him to say. Accordingly, beyond the request for particulars contained in his June 10th letter to the Union, he declined to add anything further, or to specify what he did not understand about the Union's assertions.

The Board has considered the issue of sufficiency of particulars in several recent cases, which have analyzed the basis for requiring particulars in the context of the special form of pleadings used in proceedings before the Board. In *Amalgamated Transit Union, Local 615 v. Saskatchewan Abilities Council*, [1998] Sask. L.R.B.R. 156, LRB File No. 335-97, the Board made an analogy to the function of pleadings in civil cases, at 162:

> *The function of pleadings in civil proceedings is to define the issues in controversy, to give notice of the case the opposing party must meet, to aid the trier of fact in its investigation of the truth of the allegations and to form a record of the issues: See, McKeague and Voroney, The Queen's Bench Rules of Saskatchewan: Annotated, p. 158. Clearly the Board's process of application and reply are designed to fulfill a similar function while maintaining ease of access, flexibility and less formality in its process than exists in the superior courts. It is the result of a balancing of the interests of expedient decision-making and procedural fairness.*

In *United Food and Commercial Workers, Local 1400 v. P.A. Bottlers Ltd.* [1997] Sask. L.R.B.R. 249, LRB File No. 017-95, at 251, the Board described the policy considerations which bear upon the application of this function in the specialized context of the Board:

> *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 the present case, the Respondent's request for particulars asks for details as to how the subject document violates the *Act* and for specification of the exact words of the *Act* that the document is alleged to violate. In *Saskatchewan Abilities Council, supra,* the respondent employer requested particulars of the context in which alleged anti-union statements were made in relation to an alleged violation of s. 11(1)(a) and in relation to a separate issue, specification of which particular phrase of s. 11(1)(e) of the *Act* was alleged to be violated. The Board stated at 166:

> *We do not agree with counsel for the Employer that the particulars must describe the context in which the statements were made; generally that is not required to identify the material transaction and is not relevant to the purpose of pleading. ... What is required on an application to the Board is a statement of material facts which establish a basis for the allegations. A material fact is distinguished from the evidence by which a party intends to prove the material fact.*
>
> *We also do not agree with counsel for the Employer that the Union must identify which discrete allegations of fact will be relied upon to support each particular allegation of violation of the Act, nor that the Union must identify which sentence or phrase in s. 11(1)(e) of the Act is particularly alleged to have been violated. In our view the application leaves no serious doubt on this issue.*

In the present case, I see no reason to require the Union to specify whether the alleged actions of the Respondent "interfered with" and/or "restrained" and/or "intimidated" and/or "threatened" and/or "coerced" an employee in the exercise of a right conferred by the *Act*. It does not materially affect the Respondent's ability to reply to the application.

Furthermore, with respect to the Respondent's request that the Union identify which part or parts of the document in question have this effect, and the Union's response that it is the document as a whole and each of its parts, "how" it has this effect is a matter of evidence. The Union has alleged the fact that the document has this effect; that is sufficient to establish a basis to allege a violation of the statutory

provision. Whether the fact can be proven is an entirely different matter, but the Union is not required to disclose the evidence by which it intends to prove the fact.

The Respondent having declined to specify anything it may require further in order to plead to the allegation, the application is dismissed. The Respondent shall have a period of ten days from the date of these Reasons in which to file its reply to the application.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 333, Applicant and CONGREGATION OF SISTERS OF NOTRE DAME DE SION, Respondent

LRB File No. 288-97; June 25, 1998
Vice-Chairperson, James Seibel; Members: Bob Todd and Terry Verbeke

For the Applicant: Maureen Fryett
For the Respondent: Rod Donlevy

Employee - Managerial exclusion - Board finds no evidence of significant conflict or potential conflict between duties and functions of resident attendant-team leader position and membership in bargaining unit and no evidence that resident attendant-team leader's duties and responsibilities could have significant impact on terms and conditions of fellow employees - Resident attendant-team leader is employee within meaning of *The Trade Union Act*.

Employee - Managerial exclusion - Board reviews criteria for managerial exclusion under s. 2(f)(i) of *The Trade Union Act*.

Evidence - Admissibility - Certification - Board's long-standing policy is to reject evidence filed after application for certification - Board rejects documents filed after application purporting to withdraw evidence of support for union.

***The Trade Union Act*, ss. 2(f)(i), 10 and 18.**

REASONS FOR DECISION

Background

James Seibel, Vice-Chairperson: Service Employees International Union, Local 333 (the "Union") filed an application pursuant to ss. 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "Act") to be designated as the bargaining agent for a unit of employees employed by the Congregation of Sisters of Notre Dame de Sion (the "Employer") at its special care home and residence in Saskatoon (the "Residence"), described as follows:

> *all employees employed by the Sisters of Sion (Special Care Home), except the director of care, registered and graduate nurses and registered and graduate psychiatric nurses, employed and functioning as such, constitutes an appropriate unit of employees for the purpose of bargaining collectively.*

The application was filed with the Board on September 10, 1997. The reply and statement of employment were filed on September 26, 1997.

In the succeeding months, the application was set for hearing by the Board on several occasions, but either or both of the parties requested adjournments which were granted on their consent.

On February 17, 1998 certain employees notified the Board that they no longer supported the Union and wished to withdraw the evidence of their support. The Board provided them with notice of the hearing.

The matter came before the Board for hearing on March 16, 1998. At that time, Mr. Donlevy, counsel for the Employer, advised that the Employer sought the exclusion of Cindy Phillips from the bargaining unit on the grounds that she was not an "employee" within the meaning of the *Act* - an issue raised by the reply. However, counsel also advised that it was alleged that Ms. Phillips had been a principal organizer in the campaign resulting in this application and the Employer intended to argue that this would taint the evidence of support for the application such that it should be dismissed.

Ms. Fryett, on behalf of the Union, advised that she had been prepared to deal with the exclusion issue, but was not prepared to proceed on the latter issue and may require particulars. The Board, in an unreported interim oral ruling of the same date, determined that the procedure that would be followed would be that which was established by the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Remai Investments Corporation carrying on business as Imperial 400 Motel*, [1997] Sask. L.R.B.R. 303, LRB File Nos. 014-97 & 019-97. The Board would proceed first to hear and determine the issue of whether Ms. Phillips should be excluded from the bargaining unit on the basis that she is not an "employee" within the meaning of s. 2(f) of the *Act*. If the Board determined that she is an employee, and therefore within the proposed bargaining unit, then it would not be necessary to hear and determine the issue of the effect, if any, of alleged influence by her as a member of management upon the reliability of the evidence of support for the certification application.

The hearing was adjourned to April 29 and 30, 1998, upon the consent of the parties.

The employees who filed documents purporting to withdraw the evidence of their support for the Union were invited to address the Board, but none of them availed themselves of the opportunity.

Employer's Evidence

The Employer called five witnesses.

Sister Kay MacDonald

Sister Kay MacDonald has been the director and superior at the Residence since March 20, 1998, assuming the position from Sister Beth Linthicum. Sister MacDonald was formerly the provincial superior of the Employer and its European superior general.

She said that the Employer is a congregation of religious sisters living in community. The Residence is owned by the governance unit of the Employer, and serves as a residence for both active and retired sisters of the Employer as well as for other religious women as their guests. It is registered as a special care home with the Province.

Sister MacDonald testified that while she has overall day-to-day responsibility for the operation of the Residence in both its religious and administrative functions, the executive responsibility lies with the provincial council of the Employer through a community council at the local level. There are four departments in the Residence: housekeeping, laundry, dietary and care. A part-time manager/administrator, Leona Kuny, was hired approximately two years ago.

At present, of the 27 residents, 21 are members of the Sisters of Sion and the balance are members of another order. Of the 27 residents, 23 or 24 are essentially retired, but to a varying degree, still assist with duties in the Residence and with their own personal care. However, one of the purposes of the home is to care for the elderly members and guests. The ages of the sisters range from approximately 60 to their early 90s. No resident requires Level 4 care, and if a sister has medical care needs of that extremity she is placed with a facility which can provide that care - no registered nurses or psychiatric nurses are employed at the Residence.

Sister MacDonald made it clear that she had no real knowledge of the daily operation of the Residence prior to becoming superior in March, 1998, and had only met Ms. Phillips briefly during prior visits to the Residence. She said that she understood that Ms. Phillips had originally been hired some years ago with the title "director of nursing" even though she is not a nurse and there are no nurses at the

Residence. When asked by counsel for the Employer what Ms. Phillips's present title was, she said that while she is not called "manager" she manages and is in charge of the care-giving unit; she said that when she is on duty she is "in charge of everything that affects the health of the sisters in that department." The statement of employment filed by the Employer describes her occupational classification as "part-time resident attendant team leader"; the other care department staff are simply described as "part-time resident attendant."

According to Sister MacDonald, the care department is staffed 24 hours a day and Ms. Phillips is responsible for scheduling the shifts of the resident attendants. Only one resident attendant is present on evening, night and weekend shifts. Ms. Phillips works Monday through Thursday day shift; this is the only shift with a second resident attendant. On cross-examination, however, she admitted that this second resident attendant mainly bathed residents each day, as they cannot be left alone during the process and Ms. Phillips would have other duties to perform.

As far as the type and level of care performed by the resident attendants, Sister MacDonald said that none of the residents required feeding assistance; a few required assistance with bathing and dressing; a few required control in administration of medication; none are bedridden.

Sister MacDonald said that Ms. Phillips was responsible for contacting physicians as might be necessary on her shift, as would the other resident attendants, and that she "keeps the books." She did not elaborate on this latter point, but in cross-examination it was clarified that this was a reference to "reports" recorded in a "communication book" which the resident attendants use to advise each other about events on their shift and matters such as physician's directions and administration of medications. However, she admitted that all resident attendants were responsible for such record-keeping and were to advise Ms. Kuny or herself of matters of significance; indeed, if the situation was serious enough, she would expect to be informed at any time of the day, for example, if a physician was called in.

On cross-examination, Sister MacDonald stated that, upon assuming the position of director in March, 1998, she advised the staff that there was to be a change in the management structure of the Residence. Until that time other sisters outside their community had assisted the director in various aspects of management, but now Sister MacDonald was to be solely responsible for administration, while Ms. Kuny was in charge of staff relations and payroll, and accountable directly to her.

Leona Kuny

Ms. Kuny has been employed at the residence for a little more than two years. She testified that her formal title is "manager," and that her official work hours are 20 hours per week, although she often works more. She has overall responsibility for staff and personnel matters including payroll.

In addition to herself, there are 12 staff employed at the Residence: two full-time employees who work 80 hours in each two week period; nine part-time employees who work either 24 or 32 hours average per week; and a casual maintenance person who works on an hourly basis as and when required. The two full-time employees are in laundry and housekeeping. Only the care department has 24 hour coverage.

There are eight resident attendants: Ms. Phillips works 32 hours per week, Monday to Thursday from 7:00 am to 3:00 pm; a second resident attendant, Hope Marsonette, works days from 9:00 am to 2:00 pm, attending mostly to bathing of residents; Joanne Wesling works permanent night shift; four other resident attendants work 24 or 32 hours per week on rotating shifts; an eighth is called in on a casual basis.

She testified that Ms. Phillips was hired in 1981 and is the longest serving employee at the residence. Ms. Phillips's mother, Laurine Evans, had been "director of nursing" for many years and Ms. Phillips "took over" from Ms. Evans in 1992 when she retired. She said that Ms. Phillips is paid more than the other resident attendants because she is management. When asked why she considered Ms. Phillips to be management, she referred to the following matters and functions:

- she assumed Ms. Evans's position which was managerial;
- she is paid $2.30 per hour more than the other resident attendants;
- she is perceived as management by the residents;

- other resident attendants have told Ms. Kuny that they perceive Ms. Phillips to be their boss;
- when she was hired, Ms. Kuny was advised that Ms. Phillips was in charge of the resident attendants and responsible for resident care;
- from time to time Ms. Kuny has asked Ms. Phillips for information about certain policies of the Residence;
- Ms. Kuny discusses confidential matters with her about the condition of residents that she does not share with other resident attendants;
- Ms. Phillips may accompany the director to the hospital, doctor or social worker to discuss care arrangements for residents whose needs have become too great to be provided by the Residence;
- she does all of the "charting" regarding the residents' care;
- she schedules the shifts of the other resident attendants;
- she is the only resident attendant who is on permanent day shifts;
- she is allowed to take personal days off without prior approval or in case of illness, so long as she arranges to have her shift covered;
- she arranges relief coverage for ill or absent resident attendants;
- she purchases the medical supplies for the Residence without prior approval except for major expenditures such as wheelchairs;
- she is part of the interview team in the selection of candidates to fill vacancies in the care department;
- Ms. Kuny allowed her to hire a part-time employee for the care department without Ms. Kuny herself interviewing the candidate;
- she can direct the kitchen staff to prepare certain diets or meals for particular residents; and
- she and Ms. Kuny provided an in-service training session to the other resident attendants on blood pressure and blood sugar testing.

On cross-examination Ms. Kuny qualified several of these assertions. She admitted that other resident attendants would submit requests for time off to herself rather than Ms. Phillips. Ms. Kuny also admitted that staff requests for vacation are made to her, not to Ms. Phillips, and she reviews the requests to ensure adequate staffing levels. With respect to scheduling, she admitted that the extent of

Ms. Phillips's duties is to assign the employee names to a ten week master rotation. Although the master schedule itself was developed by Ms. Phillips at Ms. Kuny's request, Ms. Kuny gave her a number of guidelines to follow in its preparation, including certain minimum hours for particular employees, and has made changes to it from time to time. When it was implemented, Ms. Kuny circulated a memorandum to the staff requesting them to document any difficulties they experienced, including any effect on the care of the residents, and to provide same to her rather than to Ms. Phillips. A memorandum dated March 10, 1997, entered in evidence, referred to Ms. Phillips's scheduling as under "direction from the management team."

She admitted that the other resident attendants can give directions to kitchen staff but this occurs mostly on day shifts when the bulk of the meals are served so Ms. Phillips would do it most often.

With respect to charting the condition and care of the residents, she admitted that Ms. Phillips was previously responsible for entering all information on residents' charts from the communication book but that this procedure had been changed on the recommendation of the Residence's consulting physician. Each resident attendant now charts the events and duties that they have personally observed or performed. However, Ms. Kuny said that Ms. Phillips is responsible for ensuring that the resident attendants chart properly. Although there had never been an occasion to discipline anyone with respect to this function, she speculated that it would be she and Ms. Phillips who would be charged with doing so. In cross-examination, she admitted that Ms. Phillips had been the first resident attendant to attend an in-service training seminar on charting and that was why Ms. Kuny had asked her to monitor the charting being done by the other resident attendants.

Although Ms. Kuny had testified that if Ms. Phillips noticed anything incorrectly done by a resident attendant she was to complete an "incident report," she admitted that all of the resident attendants were expected to do likewise, even as concerns Ms. Phillips' performance.

She referred to one instance where she told Ms. Phillips to "speak to" a resident attendant about the proper procedure for signing for medications and to follow up with that person if necessary. When asked whether this was intended to be disciplinary she said that it was not and was only to provide direction. With respect to the in-service training for blood sugar testing, Ms. Kuny and Ms. Phillips had received training from a manufacturer's representative which they then passed on to the other resident attendants. Apparently, it is a simple procedure

With respect to Ms. Phillips' involvement in the hiring process, Ms. Kuny admitted that she, that is, Ms. Kuny, conducts the interviews. And, although in evidence in-chief she had said that Ms. Phillips's opinion with respect to suitability of candidates for resident attendant was respected, she admitted in cross-examination that in at least one instance she hired a candidate despite Ms. Phillips's reservations.

While Ms. Phillips is paid somewhat more than the other resident attendants, all of whom have far less seniority - $12.85 per hour versus $10.55 per hour - by comparison, Ms. Kuny's own hourly rate as "manager" is $20.00 per hour. She also admitted that Ms. Phillips is not involved in the budget-making process, nor does she administer a budget for the care department. Ms. Phillips pays no accounts, writes no cheques, and is not involved in any communication with the government respecting the financial affairs of the Employer.

With respect to Ms. Phillips's authority to purchase supplies, it became clear in cross-examination that this was mainly on an as-needed basis from a nearby drug store, and that other resident attendants had also had occasion to do this. Otherwise, her role is mostly restricted to advising Ms. Kuny as to what is required and Ms. Kuny then arranges for the purchase.

While Ms. Kuny had intimated that Ms. Phillips's permanent day shift was a privilege of being in management, she admitted on cross-examination that another resident attendant, Ms. Marsonette, also works only week day daytime shifts from 9:00 am to 2:00 pm, and that resident attendant Joanne Wesling only works night shifts by her own preference.

Elsie Gronsdahl

Elsie Gronsdahl has been a cook at the Residence since January, 1996, and is presently on a leave of absence. She testified that with respect to dietary matters, while she does the overall meal planning, she is expected to take any instructions from Ms. Phillips as to special requirements for any resident.

Angie Chetty

Angie Chetty has been a resident attendant at the Residence for nine years. When asked in-chief to whom she reported to "as your boss," she replied that it was Ms. Phillips. However, when asked for specifics as to what matters she would report to her, she only referred to advising her if she was sick so that Ms. Phillips could arrange a replacement.

She also stated that she only really came into contact with Ms. Phillips when leaving or coming onto a contiguous shift.

Ms. Chetty indicated that when necessary she has purchased supplies at the nearby drugstore or has asked one of the sisters to go.

She stated that she had never requested a leave of absence and only assumed that she would request it from Ms. Phillips who would then take the request to Ms. Kuny.

Uma Parmar

Uma Parmar has been employed as a part-time resident attendant at the Residence for approximately five years. She testified that Ms. Phillips was her "supervisor" and that she was the person she reported to. However, Ms. Parmar seldom works at the same time as Ms. Phillips - most communication between them is through the communications book.

When asked to whom she would report the illness of a resident, Ms. Parmar replied to Ms. Phillips, but "only if it is very serious and no one is around." She admitted that she has had occasion to call a physician without notifying Ms. Phillips.

Union's Evidence

Cindy Phillips

Ms. Phillips testified on behalf of the Union. She commenced employment with the Employer as a housekeeper at the Residence in 1981. About one year later she was asked to become a resident attendant. Ms. Phillips worked full-time on weekday day shifts in that position from 1982 to 1985. During that time Ms. Evans also worked the day shift alongside her. In addition, there were two other resident attendants who worked the night shifts while the sisters themselves covered the evening shifts.

In August, 1985, Ms. Phillips went on an extended maternity leave until April, 1986. When Ms. Phillips sought to return to work, she was told by the Employer that there was no work for her as the practice of having two resident attendants on the day shift was discontinued. Ms. Evans, therefore, worked weekday day shifts as the only resident attendant.

In March, 1987, Ms. Phillips applied for, and obtained, a position at the Residence as a part-time resident attendant on weekend day shifts, which she worked for approximately the next four years.

In 1992, Ms. Evans went on a medical leave of absence and Ms. Phillips filled her position on a temporary basis for approximately two months. When Ms. Evans returned to work, she found that she could not sustain full-time work, and Ms. Evans and Ms. Phillips shared Ms. Evans's position for approximately the next year until Ms. Evans's retirement. At that time the Employer asked Ms. Phillips if she would work the position on a full-time basis. Ms. Phillips was reluctant because, due to family circumstances, she was unwilling to work full-time hours. However, the Employer agreed to allow her to work 32 hours per week, Monday to Thursday, and also offered her a wage increase to $12.00 per hour, but she claimed she was required to sign a document acknowledging that she would receive no further wage increase for as long as she worked for the Employer (it was not made clear how she came to earn her present wage of $12.85 per hour). Although this document was not entered in evidence, her evidence on this point was not contradicted or questioned This contrasted with Ms. Evans's wage in the position which, at retirement, Ms. Phillips believed was approximately $15.00 per hour; this also was not contradicted.

Ms. Phillips testified that, prior to Ms. Kuny's becoming the manager in January, 1996, all hiring and disciplining of staff was done by the then superior of the Residence, Sister Linthicum. She said that, when care department staff were hired, Sister Linthicum would advise her of the number of shifts the new employee was to receive and whether they were to be preferred for certain shifts. Within these guidelines, Ms. Phillips prepared the work schedule. During this period Ms. Phillips was also responsible for arranging for someone to work in relief if a resident attendant called in sick. At some point, the sisters relinquished their provision of care on the evening shift and resident attendants were hired to cover that shift as well. Ms. Phillips could not recall when this occurred, but she was not involved in either the decision or in the staffing process.

Ms. Phillips described the general duties of a resident attendant on all shifts as providing personal care to the residents. Examples included assisting with feeding, bathing, hair care, cleaning and arranging their rooms, dressing, ensuring the taking of medications and virtually anything else required to ensure the comfort and continuing health of the residents. She said that more of this type of care is required on the day shift than on other shifts as the residents are awake and active. For this reason, a second resident attendant is on the day shift mainly to attend to the bathing of residents. Because the second resident attendant cannot leave a resident in the bath unattended, she is not readily available to assist Ms. Phillips with other duties. By contrast, on the evening and night shifts, the sole resident attendant will often have time to perform certain non-care functions such as laundry and cleaning of washrooms.

Ms. Phillips testified that she was not involved in the decision or the process to hire a manager. Nor when Ms. Kuny was hired was she involved in what might be described as any type of "management meetings." After Ms. Kuny was hired there was a staff meeting at which she distributed a document which introduced herself and described certain aspects of her new position. It is useful to set out part of the contents of that document as follows:

> *Job Description*
>
> *My job description reads as follows:*
>
> > *The manager/co-ordinator is responsible for the management of the following areas: human resources (this includes hiring and firing), nursing care, food services, laundry, housekeeping, purchasing, and property and equipment maintenance. Supervises all staff. Works in co-operation with the Superior of Acadia. Is accountable to the Provincial Council through a Committee appointed by the Provincial*

> *Council. The Provincial will be an ex-officio member of this Committee.*
>
> ...
>
> *4. Work with the Committee to determine which tasks can be performed by the sisters who are members of the community. In the light of this information, review staffing requirements as to qualifications, numbers, deployment, and training/educational needs. After such a review, make recommendations to be approved by the committee. Review these requirements on an on-going basis. Supervise the staff in the delivery of the medical, nursing and dietary services to the residents.*
>
> ...
>
> *My position is a PART TIME POSITION AND MY HOURS WILL BE FLEXIBLE. I will POST outside the office area certain HOURS I plan to be here during the week. If you have an EMERGENCY SITUATION or have a problem that cannot wait until my next scheduled working time, you can call me at home. My home number is 242-4608.*

No reference is made in this document to any devolution of any part of her authority to Ms. Phillips. By contrast there was no job description for Ms. Phillips's director of care or nursing position or, as it was later labelled, resident attendant - team leader. A document entered into evidence entitled "Sisters of Sion - Acadia - Staff Hourly Rates as of December 28, 1996" sets out the wage scale for housekeeper/laundry/maintenance, cook and resident attendant; the wage scale for the resident attendant-team leader position was left blank, but that column does contain the following reference: "provides direction in the care of the sisters and schedules the attendants."

When asked to describe her "supervisory authority" over the other resident attendants, Ms. Phillips stated that she essentially had none: she does not work with any of them, except Ms. Marsonette, and is not in a position to be able to supervise what they do. She said that she does, however, check the "job sheets" - a list of tasks posted by Ms. Kuny - to ensure that the evening and night resident attendants have completed them. These tasks include such things as cleaning equipment and changing bedsheets.

With respect to the change in charting procedures, Ms. Phillips said that because she had prior experience in charting, she was asked to monitor the entries made by the other resident attendants for a period of about two months, after which time her monitoring duties ceased. She said that now she merely reviews the charts at the time of shift change as all of the resident attendants do.

When asked in what way she is held responsible or accountable for the care given to the residents by the other resident attendants, Ms. Phillips said, "I don't see how I can be - I'm not there." She did say, however, that if she decides that a resident needs additional assistance in performing personal care or tasks which was not previously necessary, she discusses it first with either Ms. Kuny or Sister MacDonald because it represents an erosion of the resident's independence. She intimated that she is in a better position to do this than the other resident attendants, not because she is a manager or has additional authority, but rather, because she is on the day shift, she has much more opportunity to make such assessments as the residents are active and vocal; she has been there the longest, she has known many of the residents longer than any other staff member and she has, in many cases, cultivated a closer personal relationship with the residents, many of whom repose a great deal of personal trust in her.

With respect to her scheduling duties, Ms. Phillips testified that it consists of copying the master rotation - she does not determine independently who works when. Indeed, she said that when one of the resident attendants retired, Ms. Kuny decided to divide that person's shift among the remaining resident attendants, however, when this resulted in difficulty finding staff to relieve for absences, Ms. Kuny decided to fill the vacancy after all.

In relation to the Employer's assertion that one indicia of Ms. Phillips's alleged management status is that she is paid for additional hours spent on "bookwork" done at home, Ms. Phillips testified that while she previously had to do the scheduling and charting outside her regular work hours, since the implementation of a master rotation and the individual charting by the resident attendants, this is no longer the case.

With respect to the hiring function for the care department since Ms. Kuny arrived, she testified that both herself and Sister MacDonald have sat in on four or five interviews, but that the interview itself was conducted by Ms. Kuny. She has no access to the resident attendants' personnel files. She said that no care department permanent staff was hired between 1992 and the hiring of Ms. Kuny. She said she has only been present at interviews for summer relief and casual staff. Indeed, she perceived the reason for her attendance at these interviews to be that, because she is on permanent day shift, she has the most contact with residents when they are awake, has been employed the longest, and is in the best position to assess how any prospective resident attendant will be accepted by or fit in with the residents.

On cross-examination there was little erosion of Ms. Phillips's evidence-in-chief. It was clarified that Ms. Phillips does not have, and has never had, a written employment contract and there is no documentary description of her duties. She did admit that when she assumed Ms. Evans's position in 1992, albeit at less than full-time hours, she knew that it involved more than just resident attendant care, it also included the scheduling and charting duties. She also admitted that Ms. Evans received a higher wage for performing those duties and that Sister Linthicum accepted Ms. Evans as being "in charge" of the resident attendants.

When asked whether there had been any incidents of discipline of resident attendants since 1992, Ms. Phillips testified that she could not recall any, at least not on her shift. No evidence was presented to contradict this.

When presented with the minutes of a meeting held with the resident attendants on December 1, 1997, regarding the change in charting responsibility, and specifically the reference in the minutes that incident reports were to be put in a binder and "Cindy will deal with any problems she sees and give them to the manager," she testified that this meant that as the resident attendant with experience in charting, she was to help the others adjust to the new duty. If, however, the matter was serious, she was to advise Ms. Kuny. She was adamant that this did not authorize her to impose discipline.

Although she agreed in cross-examination that Ms. Evans's position, which she assumed, had a degree of responsibility beyond that of a simple resident attendant, she testified that with the engagement of Ms. Kuny as manager and the changes to scheduling and charting, her own responsibilities and authority have diminished as outlined above. A further example she gave is that she is now not allowed to answer the door or the telephone.

When asked whether if she saw untoward conduct on the part of a resident attendant would she have the duty to "make that conduct stop," she replied that she would - but she would expect anyone else to do the same. She does not, however, evaluate the performance of fellow employees.

Argument

Mr. Donlevy, counsel for the Employer, argued that Ms. Phillips was clearly not an employee within the meaning of the *Act*. He characterized the assessment of the evidence as essentially a matter of credibility as between the Employer's witnesses and Ms. Phillips. It was asserted that Ms. Phillips attempted to downgrade the level and nature of her authority and responsibility. Particular emphasis was placed upon Ms. Phillips's responsibility for scheduling and call-in of relief staff, as well as for performance evaluation of other staff in the care department, as evidence of her status as a manager.

Counsel asserted that the only real changes to Ms. Phillips's authority and responsibility upon the creation of the manager position and the hiring of Ms. Kuny was to preclude her from answering the door and telephone. He argued that the fact that she has not had occasion to invoke discipline does not mean that she does not have the authority to do so. Counsel said that the evidence disclosed that the Employer expected Ms. Phillips to deal with the care department staff with respect to whatever matters arose of a managerial nature; Ms. Kuny simply provides "guidelines."

Counsel argued that her higher wage in comparison to the other resident attendants and the fact she could take work home were also indices of her managerial status.

Ms. Fryett, on behalf of the Union, argued that the issue was not the relative credibility of the witnesses; the evidence of all witnesses was consistent in demonstrating that Ms. Phillips was not a manager in fact. It was asserted that, whatever Ms. Phillips's position was when she became director of care in 1992, it changed significantly thereafter, and also, the job content of the other resident attendants has changed to include charting and testing functions.

It was intimated that the discrepancy in the wage rates between Ms. Phillips and the resident attendants was essentially historical and a reflection of her experience and seniority. Ms. Fryett pointed out that the Employer never showed Ms. Evans's job description to Ms. Phillips, and did not bind her to a written contract as it had with Ms. Evans, the implication being that from the outset her position was different from Ms. Evans.

It was argued that the charting and scheduling functions have changed to such a degree that there is no longer any difference, with respect to the former function, between what Ms. Phillips does and what the other resident attendants do, and with respect to the latter, it has essentially been reduced to a matter of the mechanical insertion of names in the master rotation - discretion is no longer involved except in a minor way with respect to arranging relief staff. And, even in that regard, during the summer, staff can arrange their own relief by calling a commercial service provider.

It was further argued that the real reason for Ms. Kuny's consultation with Ms. Phillips on certain matters of policy, is simply because Ms. Phillips has the most practical knowledge of anyone now employed at the Residence.

Finally, it was argued that there was no conflict of interest disclosed by the evidence that would warrant Ms. Phillips's exclusion from the bargaining unit, and that there was no evidence of any substantive authority to hire, discipline or terminate staff, and no independent authority to influence the terms and conditions of employment of her co-workers.

Ms. Fryett referred to the Board's decisions in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Raider Industries Inc.*, [1996] Sask. L.R.B.R. 297, LRB File No. 005-96, and *Saskatchewan Union of Nurses v. Kindersley Senior Care Inc.*, [1989] Winter Sask. Labour Rep. 47, LRB File No. 219-88 in support of the Union's position.

Statutory Provisions

The following provisions of the *Act* are relevant:

> 2. *In this Act:*
>
> ...
>
> *(f) "employee" means:*
>
> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or*

> *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer.*

5. The board may make orders:

> *(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*
>
> *(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;*
>
> *(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*
>
> ...
>
> *(m) subject to section 5.2, determining for the purposes of this Act whether any person is or may become an employee;*

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.

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.

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

The issues to be determined by the Board in this case are whether Ms. Phillips is an employee within the meaning of s. 2(f)(i) of the *Act* and whether the unit applied for is an appropriate unit for the purpose of bargaining collectively. A collateral issue is that of the effect of the filing of documents by certain employees in February, 1998 purporting to withdraw evidence of their support for the Union.

The Board has had the opportunity in the recent past to re-assess the fundamental basis for managerial exclusions under the *Act*. The Board described the rationale in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Remai Investment Corporation*, [1997] Sask. L.R.B.R. 335, LRB File Nos. 014-97 & 019-97, as follows, at 337:

> *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.*

This rationale was recently reiterated by the Board in *MacKenzie Society Ventures Inc. v. Canadian Union of Public Employees, Local 3364*, [1998] Sask. L.R.B.R. 387, LRB File No. 169-97, at 398:

> *The issue of labour relations conflict of interest is the fundamental basis for such exclusions, as the Board stated in City of Regina v. Canadian Union of Public Employees, Local 21 and Regina Civic Middle Management Association, [1995] 3rd Quarter Sask. Labour Rep. 153, LRB File No. 268-94, 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.*

Accordingly, while the factors which the Board has considered over the years in the determination of managerial status are myriad, it is clear that the nexus is the consideration of conflict or potential for conflict between the functions of the position in question with the other members of the bargaining unit. To this end, the Board engages in an analysis of those characteristics of the position which are most relevant to that issue. In the *Remai* decision, *supra*, the Board described this function as follows, at 340-341:

> *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.

The definition of employee contained in the *Act* clearly indicates that, in assessing the relevant managerial indicia of a position, only persons whose primary responsibility is to actually exercise authority and actually perform functions that are managerial in character will be excluded and denied the right to bargain collectively. In *Saskatchewan Government Employees' Union v. Saskatchewan Liquor and Gaming Authority and Saskatchewan Liquor Store Managers' Association*, [1997] Sask. L.R.B.R. 836, LRB File Nos. 349-96 & 037-97, the Board adopted a more streamlined approach for determining managerial status as described, at 854:

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.*

Accordingly, exercise of the relevant managerial functions must not be a merely occasional or a secondary responsibility of the position in question.

In *Saskatchewan Liquor and Gaming*, *supra*, a recent decision of the Board respecting the delineation of the boundaries of a public sector middle management bargaining unit, the Board referred to the basis for exclusion from the bargaining unit as follows, at 853:

> *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.*

Therefore, the exercise of functions which are merely "supervisory" will not found exclusion under s. 2(f)(i) of the *Act*. The Board stated in *University Hospital v. Saskatchewan Union of Nurses*, [1984] Nov. Sask. Labour Rep. 31, LRB File No. 089-84, at 35:

> *Viewed in the context of these authorities, the Board has concluded that the words "any person who is an integral part of his employer's management" refers to individuals whose functions and responsibilities clearly and demonstrably cause them to become a necessary component of management. Those functions and responsibilities may include*

> *the exercise of "first line" authority over fellow employees (i.e. hire, fire, promote, demote, discipline, evaluate, etc.), significant participation in the planning and formulation of employer policy affecting the running of the organization or the direction of its workforce, independent decision-making authority in matters affecting the economic lives of employees, and responsibilities of an administrative nature which are central to policy and planning.*
>
> *Those general guidelines can be refined by the continuing recognition that in any setting (and particularly in the field of nursing) it is normal for the most highly trained and skilled individuals to teach and supervise those with less skill and experience, to allocate and coordinate work, and to ensure that it is being done properly, efficiently and safely. As a general rule, the Board will not find that those who only coordinate, direct and supervise the work of individuals with lesser skill or education are performing functions of a managerial character or that they are an essential component of their employer's management. Similarly, the duty to carry out minor admonitory functions need not create the kind of conflict requiring exclusion from the bargaining unit. From a practical standpoint, to hold otherwise would deny the benefits of collective bargaining to much of the highly trained, educated and skilled workforce that is characteristic of modern public and private sector enterprise. In the Board's opinion, the Legislature did not intend to do that when it amended the definition of "employee" in s. 2(f)(i) of The Trade Union Act.*

It should be noted that when the *University Hospital* decision, *supra*, was made, the definition of "employee" in s. 2(f)(i) of the *Act* provided for a broader basis of exclusion than the present wording; as the Board stated in *Raider Industries*, *supra*, at 307:

> *The implication [of this change in wording] is that the Board should be even more careful about exaggerating the degree of managerial authority which is attached to responsibilities which are supervisory in nature.*

Based upon all the evidence, the Board is firmly convinced that Ms. Phillips is an employee within the meaning of the *Act*. The situation in this case is analogous to the situations considered in many previous decisions of the Board. By way of illustration, in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Institute on Community Living*, [1996] Sask. L.R.B.R. 705, LRB File No. 157-96, the Board considered whether an evening supervisor should be excluded from the bargaining unit. The Board stated, at 713:

> *It seems clear that the person in the position of evening supervisor does perform some supervisory duties, and has perhaps some minor admonitory functions, although this is less certain. She does not, however, have any significant capacity to make independent decisions which would materially affect the terms and conditions of employment of other employees.*

And in *Kindersley Senior Care Inc.*, *supra*, the Board was faced with determining the same issue as concerned so called nursing unit managers at a long-term care facility. In finding that the incumbents were indeed employees, the Board made the following observation, at 50:

> *It is true that the employer has called each of the employees whose status is in dispute "Nursing Unit Managers" but it is perhaps trite to say that it is not what they are called but what they actually do that determines whether they are employees within the meaning of the Act. The Board heard considerable evidence with respect to their actual duties and responsibilities. It finds that although each of them have on occasion hired some employees, disciplined others, and carried out performance evaluations, it is unanimously of the view that their primary responsibility is the hands-on care of nursing home residents and other traditional nursing functions. Each is employed and functions as a general duty nurse for an average of 18 shifts per month, and each continues to work with other nurses in a cooperative, collegial way. It is true that both have consulted with the Director of Care in the development of procedures relating to the care of residents and training of staff. In doing so, however, they have simply used their professional knowledge and practical experience in the same way that those with the most professional knowledge and experience would have input into decision making in most other health-care institutions. Insofar as evidence designed to satisfy the Board that a Nursing Unit Manager can and does have authority to terminate another nurse within the scope of the bargaining unit, the Board finds that the real authority to do so actually resides with the Director of Care.*
>
> *As already indicated, the Board is of the view that the primary responsibility of both Ms. Mahaffey and Ms. Soanes is to provide hands-on care to the residents of the nursing home - duties and responsibilities indistinguishable from those provided by the other employees within the scope of the bargaining unit.*

In the present case, it is clear to the Board that, while Ms. Phillips has some supervisory responsibilities, these are by no means a substantial, let alone primary, part of the duties of her position as resident attendant - team leader; her primary responsibility is to provide hands-on care to the residents in exactly the same manner as the other resident attendants. And, similar to the *Community Living* case, *supra*, her admonitory responsibility and authority, if it exists at all, is so vague as to be incapable of definition. Certainly, none of the resident attendants who testified on behalf of the Employer made any concrete assertion that Ms. Phillips could, let alone does, exercise such a function beyond anything that might be characterized as the simple proffering of advice based upon her long experience at the Residence and her close relationships with the residents as a result of her lengthy tenure.

The vast majority of the factual evidence presented by the Employer's witnesses and Ms. Phillips was not contradictory, and was consistent with the greater degree of reliance and trust that an Employer will often place in its most senior employees as compared to its less experienced staff. This somewhat enhanced position is simply the result of the Employer making good use of an employee with the greatest "institutional memory" in the sense that she can articulate policies and procedures and the reasons why they were developed. Such employees often will have been employed longer than the managers who seek their advice, however, this does not make them managers themselves.

As an example, it is clear to the Board that Ms. Phillips' inclusion to a degree in the hiring process for care department staff is just this sort of reliance. The fact that her opinions are often acted upon must not be confused with where the real and actual decision-making power lies, that is, with the manager, Ms. Kuny and the director/superior, Sister MacDonald.

The Board is of the opinion that there is no evidence of any significant conflict or potential conflict between the duties and functions of the resident attendant-team leader position as actually performed by Ms. Phillips and membership in the bargaining unit, nor is there any evidence that her duties and responsibilities could be expected to have any significant impact on the terms and conditions of employment of her fellow employees.

While the Employer did not specifically raise an issue that Ms. Phillips should be excluded from the bargaining unit on the basis that she regularly acts in a confidential capacity with respect to the Employer's industrial relations, the Board finds, in any event, that she does not.

Accordingly, the Board finds that Ms. Phillips in her capacity as resident attendant-team leader is an employee within the meaning of the *Act*.

With respect to the appropriateness of the bargaining unit, it is clear on the evidence that an all employee unit is an appropriate unit for the purposes of bargaining collectively. There is no position of director of care or director of nursing, and no registered or graduate nurses or psychiatric nurses are or have been employed as such at the Residence. Accordingly, the Board finds that the unit shall be described as follows:

All employees employed by Congregation of Sisters Notre Dame de Sion at the special care home in Saskatoon, except the manager, constitutes an appropriate unit of employees for the purpose of bargaining collectively.

Ms. Phillips, an employee, is within the scope of the unit.

With respect to the documents filed on behalf of certain employees purporting to withdraw evidence of their support for the Union, it is to be noted that they were filed with the Board nearly six months after the date the application was filed. In accordance with the discretion afforded the Board pursuant to s. 10 and 18 of the *Act*, and with the Board's long-standing policy on this issue, the board has determined to reject this evidence. No evidence was presented which might persuade the Board to depart from the well known policy considerations in this regard.

As evidence of support of the majority of the employees in the unit has been filed with the Board, the application for certification is granted.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 21, Applicant and CITY OF REGINA, Respondent

LRB File No. 023-95

REGINA CIVIC MIDDLE MANAGEMENT ASSOCIATION, Applicant and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 21 and CITY OF REGINA, Respondents

LRB File No. 037-96; June 29, 1998
Chairperson, Gwen Gray; Members: Judy Bell and Donna Ottenson

For CUPE: Harold Johnson
For the City: Jim McLellan
For RCMMA: Rick Engel

Bargaining unit - Appropriate bargaining unit - Board policy - Middle management unit - Board defines middle management unit in restrictive fashion by confining membership to positions which would be in labour relations conflict of interest with members of larger unit or positions with some peculiar historical reason for exclusion from larger unit.

Bargaining unit - Appropriate bargaining unit - Community of interest - Board holds that history of training officer position justifies exclusion from larger unit - Training officer position assigned to middle management unit.

Duty to bargain in good faith - Refusal to bargain - Board confirms that employers have obligation to discuss bargaining unit assignment of newly created position with unions affected and to refer any dispute to the Board if agreement cannot be reached.

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

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: On February 6, 1995, the Canadian Union of Public Employees, Local 21 ("CUPE") filed an unfair labour practice application against the City of Regina (the "City") (LRB File No. 023-95) which alleged that the City had failed to bargain in good faith by unilaterally declaring the position of Training Officer (Fleet Management and Material Supply) to be out of the scope of CUPE's collective agreement. The City replied to the application by stating that the position of Training Officer

was an existing classification already assigned to the Regina Civic Middle Management Association ("RCMMA"). RCMMA applied to intervene in the CUPE application in which it asserted its jurisdiction over the position in question.

On February 26, 1996, the parties filed a reference of dispute pursuant to s. 24 of *The Trade Union Act*, R.S.S. 1978, c. T-17, in which they requested the Board to determine whether the newly created positions of Program Development Co-ordinator (Homeowner Flood Protection) and Open Space Services Co-ordinator belong within the CUPE or the RCMMA certification Orders.

A hearing of this matter was conducted on March 25, 1998. At the commencement of the hearing, the Board was informed by the parties that LRB File No. 037-96 would be adjourned sine die by consent of all parties because the positions in question had not yet been filled.

Mr. Engel, counsel for RCMMA, raised the preliminary issue of delay in bringing forward the application filed as LRB File No. 023-95. Counsel noted that the position was first filed in June, 1994 and had been the subject of collective bargaining between RCMMA and the City since that time. Counsel argued that it was unfair to the incumbents to hold up the assignment of their positions for such a lengthy period.

Mr. Johnson, counsel for CUPE, argued that the matter was subject to negotiations between all parties and had been scheduled before the date of hearing but postponed to permit further negotiations.

The Board indicated that it would reserve its decision on the preliminary issue and would proceed to hear the main case.

Facts

CUPE is certified to represent all employees of the City in the parks and recreation department, public works and engineering department and purchasing department with certain managerial exclusions and with the exclusion of CUPE Local 7 members and RCMMA members. RCMMA is the certified bargaining agent for all employees in the City of Regina, except CUPE and CUPE Local 7 members, Amalgamated Transit Union members and Regina Professional Fire Fighters Association members. In particular, RCMMA represents middle managers across the civic structure.

Nicholas Wagner, an employee with the City since 1986, testified on behalf of CUPE. Mr. Wagner works in automotive repair in the City in the classification of tradesperson II. At one time he also worked as an equipment operator.

Mr. Wagner testified that the position of training officer had previously been filled by Bill Stettner who retired in 1994 or 1995. Mr. Stettner was a member of CUPE and held the position of equipment co-ordinator in the community services and parks department. Mr. Stettner's main job was to assign City equipment to the various work crews in the City.

According to Mr. Wagner, Mr. Stettner instructed Mr. Wagner in the operation of a skid loader. From Mr. Wagner's perspective, the work performed by Mr. Stettner is comparable to the work now performed by the training officers. Mr. Wagner had received training from one of the new training officers on the operation of a forklift.

Mr. Stettner trained operators by explaining the oil, grease and air levels that required checking by the operator, by explaining the operation of the equipment and by observing the employee actually operating the equipment.

Mr. Wagner also had experienced a training session led by one of the training officers, whose position is in dispute in these proceedings. When Mr. Wagner was trained to use a forklift by the training officer, he was required to complete a written test which dealt with his comprehension of the safety regulations pertaining to the operation of the equipment. The training officer then explained the daily checks that are required to be made on the machine, such as fluid levels. The training officer also explained the operation of the equipment by giving a demonstration of its operation. The employees then took turns operating the equipment. The training process was done in a group setting and took approximately 30 minutes.

Mr. Wagner did not think that Mr. Stettner prepared training manuals for various pieces of equipment, but he was aware that the training officers do possess such material for use by the equipment operators. He was unaware if the training officers prepare such manuals.

Mr. Wagner also gave evidence with respect to an incident review committee which reviews all accidents involving City equipment. The committee assesses whether or not the accident was preventable. An equipment operator who is involved in an accident with City equipment may be assessed demerit points by the committee based on their assessment of the accident. After accumulating a set number of points, the equipment operator may be suspended from operating equipment. This system came into effect after the creation of the training officer positions in 1994. Both Rob Lipp and Jeff Peters, the training officers, are involved in the work of the committee. Mr. Wagner acknowledged that CUPE refused to participate on the committee because the outcome of the committee's work can affect the livelihood of its members.

Mr. Wagner acknowledged that Mr. Stettner was replaced by another CUPE member when he retired and he noted that CUPE has not lost the equipment co-ordinator position.

Brian Legard, a trades mechanic II in the Parks garage, also testified on behalf of CUPE. His testimony was similar to the testimony given by Mr. Wagner.

Tim Siekawich has worked for the City for 19 years. He first worked as an equipment operator for ten years on weed control and then transferred to the equipment pool. After a few years, he moved to the equipment office where he worked as a yard operator. He now works in the traffic department. In the equipment office, Mr. Siekawich worked as an acting equipment co-ordinator, then as the equipment clerk reporting to the equipment co-ordinator. Mr. Siekawich worked under Mr. Stettner for approximately two years.

The function of the equipment co-ordinator position included moving equipment between departments, training operators, co-ordinating small tools, ensuring communication among departments with respect to equipment use and making sure the equipment was operated properly by the equipment operators. Mr. Siekawich testified that Mr. Stettner's position had expanded over the years to include responsibility for the entire City fleet. In response to this change, a job classification request was made with respect to the equipment co-ordinator position for reclassification to supervisor - equipment and training. The

reclassification did occur on June 15, 1988. The job description for the position included the following duties:

> *Determines operator qualification to operate specific pieces of equipment and issues certification cards, disqualifies or extends the training periods for those who are unable to meet the minimum standards of safety and equipment operation.*
>
> *Performs follow up checks on operators to ensure effective and efficient operation of equipment and provides refresher courses, if necessary.*
>
> *Ensures that sufficient operators are properly trained in each classification to meet the requirements of equipment operation.*
>
> *Develops and maintains a system of staff training records including manpower skill inventory which would outline the number of operators who are qualified to operate a certain type of equipment at any given time.*
>
> *Assists supervisors in evaluating employees with potential for present and future training to ensure that the best candidates are selected, including monitoring operator performance in the areas of safety and equipment operation by analysing accidents, breakdown records on equipment, efficiency, dependability and interest shown by the individual.*
>
> *Conducts classroom instruction on defensive driving, 3A and 1A licenses, and light equipment.*
>
> *Maintains a departmental operations manual outlining the goals and objectives with regard to training, equipment, maintenance and safety.*
>
> *Promotes, coordinates and conducts formal instructional classes and field training programs for operators of all types of construction and maintenance equipment used by the directorate as well as coordinating the use of outside resources or instructors as required.*
>
> *Registers employees for courses offered by other agencies.*
>
> *Develops and implements training courses and manuals to improve upon and update the present courses as equipment and methods of procedure change.*
>
> *Provides a liaison with the Human Resources Department in relation to Staff Development and Training of Equipment Officers.*

Mr. Siekawich testified that Mr. Stettner put together the training program and training manuals in 1987; he also operated a defensive driving programs and trained operators on the equipment. Mr. Siekawich filed a number of training certificates which were signed by Mr. Stettner and indicated that Mr. Siekawich had been trained to operate various pieces of equipment. Mr. Stettner was putting together a training division using field trainers for certain pieces of equipment. Mr. Siekawich was a field trainer for a period of time.

From Mr. Siekawich's experience with the training provided by the new training officers, he concluded that they were performing work that was similar to the work performed by Mr. Stettner as equipment co-ordinator and by himself as a field trainer.

Mr. Siekawich indicated that there was no merit system for operators when Mr. Stettner was the equipment co-ordinator and responsible for training. He did indicate that Mr. Stettner could prevent an operator from operating certain equipment if the operator was not certified to operate the particular piece of equipment. Mr. Stettner apparently kept track of the accident records of operators and would take operators to task if they damaged any equipment. Mr. Siekawich indicated that Mr. Stettner could start the progressive discipline system.

Kirby Bodnar testified for the City. Mr. Bodnar is the standards development and training co-ordinator in the support services department of the City. He reports to the director of support services, Randy Garvie, who occupies an out-of-scope position. From 1991 to 1994, Mr. Bodnar occupied the position of training officer in the public works department which involved training equipment operators in the public works department.

Mr. Bodnar testified that Clarke Butler was the first training officer employed by the City in the public works department. Mr. Butler apparently began working as a training officer around 1980 and was a member of RCMMA during his tenure as training officer.

In 1994, the City advertised for two training officer positions which were assigned to the fleet management and material supply department. The two positions report to the training co-ordinator, Mr. Bodnar. The job duties of the training officers and the educational qualifications were similar to those required of the training officer position formerly attached to the public works department, which Mr. Butler and Mr. Bodnar had occupied previously. In particular, the training officer position required the

incumbent to have grade 12 education supplemented by a two year diploma in instructional techniques with emphasis on adult education, combined with three years experience in equipment operating. Mr. Lipp and Mr. Peters were hired to perform these functions in 1994.

Unlike the training officer position in public works, the new positions were designed to provide training where needed in the City operations. Mr. Bodnar as co-ordinator and the two training officers are responsible for the development of all training for the equipment operators in public works, facilities department, City Hall and community services and parks departments. They focus their training on the safety, operations and maintenance aspects of equipment. Certification records are maintained with greater care to ensure that the due diligence standards required by *The Occupational Health and Safety Act, 1993*, S.S. 1993, c. O-1.1 and regulations have been met by the City.

Mr. Bodnar also explained the operations of the incident review committee. He indicated that it was developed through the standards development and training section and was initiated in response to the accident rate at the City compared to other cities. The committee is established to determine if an accident was preventable. The result of the committee's work is to recommend changes to the work process, to discuss equipment with managers or to issue demerit points to equipment operators.

On a day to day basis, the training officers spend their time arranging training opportunities for staff, developing instruction manuals, certifying staff on equipment and checking up on the operation of equipment in the field. The work involves the training officers in constant monitoring of the rules and regulations relating to the safe operation of equipment.

Mr. Bodnar indicated that leadhands and foremen also provide on-the-job training to individual employees. He indicated that the difference between the training provided by the training officers and the field trainers was the emphasis of the latter on the actual work process. The training officers focus their efforts on ensuring that the individual knows the rules and regulations pertaining to the safe operation of the equipment and that he or she is competent to operate the equipment. The training officers also use field trainers to train employees in the use of equipment. At the end of the training period, a training officer sets up an evaluation of the employee in the field to determine if the employee should be certified for the equipment in question. If an employee fails certification, he or she is not permitted to operate the equipment in question without further training.

Mr. Bodnar noted that the current job description for equipment co-ordinator which is now assigned to the fleet management branch of support services department, no longer contains a training component. The job description requires the incumbent to "advise the Training Division on safety, operator proficiency, equipment condition, and equipment application and suitability" and "implement applicable training and safety policies."

Mr. Peters testified on behalf of RCMMA. Prior to being assigned to the training officer position, Mr. Peters was a mechanic and a member of CUPE. Mr. Peters indicated that his work sometimes brings him into conflicts with members of CUPE. As an example, he indicated that he designed a literacy test for equipment operators and he administers the test. He is also a member of the incident review committee which can assess demerit points against an equipment operator. Mr. Peters indicated that his job requires him to use a computer frequently, to conduct research on safety standards, to write training manuals and to provide direct training to employees.

Mr. Lipp also testified on behalf of RCMMA. Mr. Lipp was an equipment operator II and a member of CUPE before being assigned to the training officer position. For a period of time, he also assisted Mr. Stettner in the equipment office. He estimated that Mr. Stettner spent 20 percent of his time training equipment operators. The current equipment co-ordinator is not engaged in the training of equipment operators. Mr. Lipp also noted that Mr. Stettner's training was more focused on the operation of a particular piece of equipment and did not include training on safety standards, vehicle safety laws and the like which is now included in the training program for equipment operators.

Pat McLellan, President of RCMMA, also testified. Ms. McLellan identified the job description of financial services training officer in the treasurers department which provides training on computer systems. This training position is assigned to RCMMA. Similarly, Ms. McLellan identified a position description related to systems training consultant which provides software training to civic staff. This position is also assigned to RCMMA. The educational requirements of these positions is a two year diploma in information system, and is similar, at least in its duration, to the training required for training officers.

In addition, Ms. McLellan noted that most positions assigned to RCMMA provide services to all parts of the civic administration. This feature is common to the training officers as well. She noted that most of the membership of RCMMA manage programs, not people and the bulk of them are required to have post-secondary education either in the form of a University degree or a college diploma. The list of positions found within RCMMA was provided to the Board through the filing of RCMMA's collective agreement.

Relevant statutory provisions

The unfair labour practice alleged by CUPE is set out in s. 11(1)(c) of the *Act* 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;*

Arguments

Mr. Johnson, counsel for CUPE, framed the issue before the Board as a request to determine the placement of the training officer position. Counsel referred the Board to *Service Employees' International Union, Local 333 v. St. Paul's Hospital (Grey Nuns') et al.*, [1991] 2nd Quarter Sask. Labour Rep. 78, LRB File Nos. 130-90, 205-90, 003-91 & 004-91, where the Board held that an employer in a multi-bargaining unit environment cannot unilaterally assign a new classification to one bargaining unit without bargaining collectively with respect to the position with the competing unions. Counsel also referred the Board to *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Raider Industries Inc. et al.*, [1996] Sask. L.R.B.R. 297, LRB File No. 005-96, which sets out the Board's policy with respect to a dispute over the employee status of a person in an single bargaining unit environment. In that instance, the Board held that the Employer cannot unilaterally determine that a new position is excluded from the bargaining unit and it must refer the matter to the Board for determination unless the Union consents to the exclusion.

Counsel argued that the positions should fall with CUPE's bargaining unit because the training officers are performing work that previously was performed by the equipment co-ordinator in the community services and parks department. At that time, the work was clearly identified as belonging to CUPE.

With respect to the evidence relating to the training officer position that had existed in the public works department, counsel argued that the evidence relating to this position was less than satisfactory. Counsel pointed out that no job description was filed for the position in question and no evidence was presented to the Board to outline the work performed by Mr. Butler, the first training officer in the public works department. By contrast, counsel submitted that there was ample evidence from CUPE's witnesses which demonstrated the training functions performed by the equipment co-ordinator. The training program may have been improved with the establishment of the training officer positions, but counsel argued that the changes have not significantly altered the work so as to take it out of CUPE's bargaining unit. Counsel argued that there is no conflict of interest between the training officers and CUPE's members so as to justify the exclusion.

Mr. McLellan, counsel for the City, argued that the position of training officer has historically been included in the RCMMA bargaining unit. Counsel submitted that the position was an existing position, not a new position and, as such, the City was not obligated to bargain with CUPE with respect to its placement in an appropriate bargaining unit.

With respect to CUPE's position that the training officer positions are just fancied up equipment co-ordinator positions, counsel argued that CUPE was required to bring forward an equipment co-ordinator to testify as to the similarity between the two positions. Counsel argued that there was no credible evidence to suggest that the two positions were equivalent and, as such, the status quo should be maintained. That is, the position of training officer should remain in RCMMA. Counsel noted that the core functions of the equipment co-ordinator position related to the co-ordination of City equipment. Training was not the primary function performed by Mr. Stettner or his replacement. Counsel noted that the sole function of the training officer position is training which type of position has traditionally been assigned to RCMMA.

Mr. Engel, counsel for RCMMA, referred the Board to *City of Regina v. Canadian Union of Public Employees, Local 21 and Regina Civic Middle Management Association*, [1995] 3rd Quarter Sask. Labour Rep. 153, LRB File No. 268-94, and *Regina Civic Middle Management Association v. Regina Professional Firefighters Association, Local No. 181 and City of Regina*, [1994] 4th Quarter Sask. Labour Rep. 164, LRB File Nos. 202-94 and 226-94. Counsel acknowledged that, if a conflict of interest test is applied to the training officer position to determine if it should be excluded from the CUPE bargaining unit and included in the RCMMA, the evidence would not support the exclusion as training officers do not possess authority over the membership of CUPE. Counsel argued instead that considerations of past practice support the inclusion of the training officer position in RCMMA as the evidence demonstrated that training officers in the public works department had been included in the RCMMA bargaining unit since 1991 when a training officer position was first created. Secondly, counsel argued that the training officer positions are similar to other positions in the civic administration, which positions are also assigned to RCMMA. Counsel also submitted that the training officers share a community of interest with other members of RCMMA and that the career opportunities for training officers lie in the RCMMA unit.

Counsel also noted that it did not make labour relations sense to split the training positions. CUPE did not claim that it has jurisdiction over the training of equipment operators who work in the public works department; it only claimed that portion of the work that relates to the training of equipment operators in the parks area. If CUPE's claim was granted, the training officer positions would be assigned to two bargaining units and this would undermine the stability of labour relations.

Analysis

In recent decisions involving the middle management bargaining unit at the City of Saskatoon, the Board adopted a modified conflict of interest test to determine if employees should be assigned to the middle management unit. In *City of Saskatoon v. Canadian Union of Public Employees, Local 59 and Saskatoon Civic Middle Management Association*, [1998] Sask. L.R.B.R. 321, LRB File No. 232-97, the Board set out the test in the following terms:

> *In these situations, the Board has approved the creation of middle management units. In doing so, however, the Board has defined the middle management unit in a restrictive fashion by confining its membership to those positions who, if they were included in a large industrial unit, would be placed in a conflict of interest situation between their obligations to perform supervisory and first rung management functions*

> *in relation to those employees and their membership in the larger unit. The Board has also allowed positions to be included in middle management units which have some peculiar historical reason for being excluded from the industrial bargaining unit. However, these positions are not permitted to be used as a springboard for organizing other positions that otherwise would be included in the larger industrial unit.*
>
> *In relation to defining the community of interest that must be shared by persons assigned to the middle management unit, the Board will focus on the labour relations aspects of their positions. The professional or other status required by the position will not be considered a determining factor, unless the position is one that for historical reasons was included in the middle management unit, or excluded from the industrial unit. This is consistent with the Board's previous decision in City of Regina v. Canadian Union of Public Employees, Local 7 and Regina Civic Middle Management Association, [1986] Sept. Sask. Labour Rep. 69, LRB File Nos. 387-85, 389-85, 031-86 & 032-86 where the Board considered the position of Research and Planning Analysts in the Parks and Recreation Department of the City of Regina and held as follows, at - 70:*
>
> > *. . . after considering all of the circumstances the Board has decided that they ought properly to fall within the bargaining unit represented by the Canadian Union of Public Employees, Local 7. The Board views the Regina Civic Middle Management Association as representative of employees in "middle management" positions, and in its opinion the Analysts do not perform duties of a sufficiently managerial character to warrant placing them in that Association.*

In the *City of Regina* decision (LRB File Nos. 202-94 and 226-94), *supra*, the Board considered the community of interest test in broader terms as indicated as follows, at 169 & 170:

> *Under these conditions, other factors come to the fore which might not be as significant in another context. Among these are community of interest, lateral mobility for the incumbent of the position, and the similarity of this position to other positions in the two bargaining units in which it has been proposed to include the position.*

In that instance, the Board assigned the position of computer and financial systems co-ordinator to the middle management unit based on the factors listed above. The Board did not address the question whether the responsibilities of the position placed the incumbent in a conflict of interest situation with members of the firefighters' bargaining unit. In the second *City of Regina* case (LRB File No. 268-94), *supra*, the Board considered the status of five persons in superintendent and supervisory positions and, based on a conflict of interests test, determined that four of the five positions were properly assigned to the CUPE bargaining unit.

We make reference to the earlier decisions of the Board dealing with the assignment of positions between CUPE and RCMMA to demonstrate the somewhat inconsistent approach taken by the Board when determining whether particular positions should be assigned to the middle management unit or one of the other broader bargaining units. As a result, the middle management unit in the City of Regina has evolved in a fashion that is somewhat incoherent. The positions assigned to RCMMA run the gamut from professional occupations, such as engineering and architecture, to computer analyst positions and to the various levels of middle managers, including co-ordinators, supervisors and managers. Clearly, not all of the positions assigned to RCMMA would meet the conflict of interest test set out in the *City of Saskatoon* case, *supra.*

In the present case, the position of training officer in public works was assigned to RCMMA. There was no evidence presented to the Board which would explain the labour relations rationale for this assignment and we assume from the lack of evidence that the rationale is unknown at this time. The training officer positions evolved to include the training of equipment operators in the parks area, a function previously performed by the equipment co-ordinator. As candidly acknowledged by counsel for RCMMA, the position of training officer would not be excluded from the CUPE unit under the conflict of interest test set out in the *City of Saskatoon* case, *supra.* Although the training officers participate in the incident review committee which can result in the assignment of demerit points to equipment operators and eventually affect their employment, this role is not sufficiently supervisory or managerial in nature to justify the exclusion from the larger bargaining unit.

However, in our view, the history of the position justifies its exclusion from CUPE and its assignment to RCMMA. The training officer position in the public works department was assigned to the RCMMA bargaining unit in the past. Although the rationale for this assignment was lost with the passage of time, the Board views the new training officer positions as containing the same general job functions as had been assigned to the training officer in the public works department. and justifies their inclusion in RCMMA's bargaining unit on purely historical grounds. The primary focus of the training officer position is the development and implementation of training programs for equipment operators; the position is not combined with other functions, such as equipment co-ordination, which would justify its inclusion in CUPE's bargaining unit. For these reasons, the Board finds that the training officer positions properly are assigned to RCMMA.

Given our finding on the merits of the application it is not necessary for the Board to rule on the preliminary objection raised by RCMMA related to delay.

In the hearing, the Board suggested to the parties that it would deal with the assignment of the position without making a determination of the alleged unfair labour practice - that is, whether the City failed to bargain collectively with CUPE with respect to the position as it was required to do. The unfair labour practice charge was really collateral to the main dispute which concerns the proper bargaining unit assignment for the training officer position. This suggestion was not opposed by the parties.

In attempting to determine the proper assignment of newly created positions in multi-bargaining unit structures, employers have an obligation to discuss the assignment with the unions affected and to refer any dispute pertaining to the assignment to the Board if an agreement cannot be reached. The Board would encourage employers to seek expedited hearings of such applications or to request pre-hearing conferences with the Board Vice-chairperson or Registrar to determine if an informal assessment of the position by the Board officer could assist in resolving the matter.

BOARD OF EDUCATION OF THE SASKATCHEWAN RIVERS SCHOOL DIVISION NO. 119 OF SASKATCHEWAN, Applicant and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4195, Respondent

LRB File Nos. 303-97 & 364-97; June 30, 1998
Chairperson, Gwen Gray; Members: Gordon Hamilton and George Wall

For the Applicant: Bill Wells
For the Respondent: Harold Johnson

Successorship - Transfer of business - General principles - Board reiterates that when amalgamating bargaining units under s. 37 of *The Trade Union Act* primary concern is maintenance of bargaining rights of employees.

Successorship - Practice and procedure - Board issues Order with same exclusions as previous units - Parties should negotiate inclusions and exclusions before bringing to Board.

***The Trade Union Act*, ss. 5(a), (b), (c), (i) and 37.**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Board of Education of the Saskatchewan Rivers School Division No. 119 of Saskatchewan (the "Employer") filed an application to create a single bargaining unit and to be named as the successor employer to the Kinistino School Division No. 55, Prince Albert Rural School Division No. 56 and Prince Albert School Division No. 3 under s. 37(2) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (LRB File No. 303-97).

The Canadian Union of Public Employees, Locals 832, 858, 858-01, 1634, 2627 & 2914 (the "Union"), who hold bargaining rights for employees of the predecessor employers, filed a joint reply to the application. In the reply, the Union indicated that it objected to three exclusions in the bargaining unit proposed by the Employer - that is, the exclusion of students employed as summer help, the exclusion of positions that are not funded by the Employer and the exclusion of the then non-unionized employees previously employed by Kinistino School Division No. 55.

At the outset of the hearing, the parties advised the Board that the dispute over the exclusion of summer students was resolved by agreeing to amend the wording of the bargaining unit proposed by the Employer from reading "students employed as summer help or involved in an educational program" to "students employed or involved in an educational program." The parties agreed that an Order should be issued creating a new bargaining unit which reflects the amalgamation of the predecessor employers into the new Employer. They also agreed that Union local 4195 is assigned bargaining rights by its predecessor locals. Therefore, the only outstanding issue is the proposed exclusion of "other positions which are not funded by the Employer."

Union local 4149 applied to be certified as the bargaining agent for the employees who formerly worked for Kinistino School Division No. 55 and who subsequently were amalgamated into the Employer (LRB File No. 364-97). The Employer's reply raised the same issues with respect to the description of the bargaining unit as was raised by its application in LRB File No. 303-97.

At the time of the hearing, the Union held the following certification Orders which are affected by the present application:

1. The Board of Prince Albert School Division No. 3

   (a) Local 858 - The certification Order was issued to cover "teacher aides and teacher aide-secretaries" but the collective agreement limited scope to "caretakers, maintenance employees, all secretarial and clerical staff";
   (b) Local 858-01 - The certification Order was issued to "all secretarial and clerical staff" but these employees were included in the collective agreement negotiated with Local 858;
   (c) Local 2627 - The certification Order was issued to "all employees of the Board of Education" with exceptions for managers, students, other positions which are not funded by the Board of Education, teachers, and members of Union locals 832, 858, 858-01, 1634 and 2914 - the agreement covering this certification applied to teacher aides and teacher assistants. The certification Order was issued on July 23, 1997;

2. Carlton Comprehensive High School Division

(a) Local 858 - The certification Order applied to "all employees" but the collective agreement applied to "caretakers, maintenance employees, all secretarial and clerical staff." These bargaining rights were transferred to the Board of Education and Union local 2914 in 1985;

(b) Local 2914 - This Local is not named in a certification Order but it has replaced Local 858 in negotiations for "all employees" employed at the Carlton Comprehensive High School;

3. Prince Albert Rural School Division No. 56

(a) Local 832 - The certification Order applies to "all employees" of the School Division excluding managers, teachers, teacher aides, teacher aide secretaries, school social worker, and administrative secretaries. The collective agreement applied to "journeymen mechanic - carpenter, mechanic's-carpenter's assistant, labourer, division office clerical, caretaker and bus driver";

(b) Local 1634 - The certification Order applied to "all teacher aides and teacher-aide secretaries" and the collective agreement applied to "general teacher assistant, special needs teacher assistant, special needs tutor, secretary, resource centre technician and resource centre assistant";

4. Kinistino School Division No. 55

No certification Orders or collective agreements existed at the time of this application for the non-teaching staff of this former school division.

Facts

John Coutts, Human Resources Manager for the Employer, testified that the Employer attempted to be a leader in developing community initiatives to resolve educational issues. He testified that the Employer receives its funds from the Department of Education foundation grant, the school division's property tax levy, and from other public and private programs which support various pilot projects and initiatives.

One such program is available through the Official-Language Monitor Program (OLMP) which is funded by the Department of Canadian Heritage. The program places language monitors into various educational centres to assist in the development of second or first languages. The Employer has approximately 200 french language students in its system and uses the OLMP program to supplement its services to these students.

Mr. Coutts provided the Board with a copy of a document entitled Administrative Information which pertains to the operation of the OLMP. In the document, the hours of work are set at 25 hours per week for a full-time monitor and eight hours per week for a part-time monitor. The document provides that the education body to which the monitor is assigned is considered the monitor's employer.

The remuneration to be paid to monitors is also set out in the document. Full-time monitors receive $11,400 per year while part-time monitors receive $3,500 per year, based on the hours of work set out above. The Employer is responsible for paying Canada Pension Plan, Employment Insurance and any other statutory payment required by employers.

The document also sets out provisions for moving allowances, transportation allowances, and taxation.

Mr. Coutts was asked what would be the consequence to the Employer if it attempted to change the terms or conditions of employment for the monitors hired through the OLMP. He indicated that the Employer could lose access to the OLMP as a result. It may then discourage French speaking students from continuing in the public system.

In response to Board questioning, Mr. Coutts indicated that the OLMP monitors have always been outside the collective agreement and certification Orders. He indicated that the selection of monitors for the program is conducted by the Government of Canada and the Province of Saskatchewan. There are no costs incurred by the Employer with respect to the monitors as they are paid in accordance with the Administrative Manual quoted above.

A second position that does not receive funding from the Employer is the position of counsellor at Won Ska Cultural School. This school forms part of the education equity program undertaken by the Employer and is governed by a Governing Council which consists of Elders, other members of the

aboriginal community, Saskatchewan Education Department, the Employer and an administration representative.

Funding for Won Ska Cultural School comes from the Department of Education but this funding is not part of the foundation grant paid to the Employer. The Governing Council administers the school and makes decisions with respect to the hiring of staff. The Employer performs administrative and support functions, such as accounting, for the Won Ska Cultural School but otherwise the Employer has no control over the manner in which the funds for the Won Ska Cultural School are spent.

The Employer does receive foundation funds to provide maintenance and custodial work to the Won Ska Cultural School and these employees are members of the Union. In addition, the teachers hired for the Won Ska Cultural School are members of the Saskatchewan Teachers' Federation and their employment is governed by its collective agreement.

A third program which accesses outside funds is the Indian and Metis Education Development Program (IMED) which provides "seed money" to school divisions to help them develop initiatives which affirm, encourage and value the histories, cultures, languages and perspectives of Indian and Metis peoples. The Employer uses this program to assist in providing honoraria to Elders who provide services in the school system. Mr. Coutts noted that Elders are not considered employees of the Employer. He also referenced a paper entitled "Cultural Enrichment Provided by Aboriginal Resource Persons" which was developed by the Aboriginal Advisory Committee of the Employer to facilitate the use of Elders in school programs.

On cross-examination, Mr. Coutts testified that he was unaware of the concern for Elder abuse, where Elders are not treated with the respect that would traditionally be accorded to them. Mr. Johnson, counsel for the Union, pointed out to Mr. Coutts that traditionally Elders would receive a tipi full of blankets or the finest horses in return for their services. Mr. Coutts was also unaware that Elders could be exempted under the religious exemption provisions of the *Act*.

Mr. Coutts acknowledged that the caretakers at the Won Ska Cultural School were members of the Union. In addition to the use of Elders, the Won Ska Cultural School also employs a cultural co-ordinator and a physical education co-ordinator. On questioning from the Board, Mr. Coutts indicated that the Governing Council of the Won Ska Cultural School hires the two co-ordinators and sets their

wages and working conditions. The positions are comparable to the teacher associate positions which formerly were included in Union local 2627 but the positions at the Won Ska Cultural School are paid more than the rate set for teacher associates.

The Employer is also involved in an inter-agency committee which is attempting to co-ordinate youth services in the community. The committee is comprised of members of the health district, Justice department, Social Services department, the police and education facilities. It decided to hire a person to conduct research on the problem and to report back to the Committee with his or her suggestions. Funds for the project are made available through a grant from Saskatchewan Education which is outside the foundation grant.

Mr. Coutts testified that the Employer also has some special arrangements with a number of Indian Bands in its geographical area. The Bands pay tuition to send their children to school in the Employer's schools. In addition, the Employer asks the Bands to provide additional funds for other services, such as the provision of tutors for aboriginal children. In the case of tutors, the Employer bills the Bands for the cost of providing a tutor.

On cross-examination, Mr. Coutts testified that one position is currently funded through Bands tuition payments. This arrangement depends on the number of students who are enrolled in the Employer's schools. When asked if the Bands would pull their member from working at the Employer if the member was required to join the Union, Mr. Coutts indicated that he was not certain that would occur.

On questioning from the Board, Mr. Coutts indicated that the tutors hired through the Indian Bands were selected by a committee formed of representatives of the Bands and the Employer. If a consensus could not be reached, the Bands could veto the hiring. There are a number of other persons hired as tutors with the Employer, some of whom were included in the bargaining unit assigned to Union local 2627. However, tutors who are not funded by the foundation grant from Saskatchewan Education were not included in the Union.

With respect to all the programs aimed at improving the educational environment and services for aboriginal children, Mr. Coutts claimed that if these services were not provided, the Employer would lose the support of the aboriginal community who would vote with their feet - either by removing their children to the separate school system or by removing them to Band controlled schools.

Mr. Coutts also testified that the purpose of amalgamating the school divisions into one large division was to create a larger educational base in order to provide excellent educational programs for students with the Employer and to maintain the current level of services. He noted that the communities involved in the amalgamation expect big results from the Employer and feared that if externally funded programs were lost, there would be a cry from the public.

Paulette Caron, Union representative, testified on behalf of the Union. Ms. Caron indicated that if the positions in question were included in the bargaining unit, the Union would give care and attention to the positions to ensure that they were not lost due to their inclusion in the bargaining unit. Ms. Caron indicated that the Union would not take positions that would jeopardize the programs for aboriginal students, nor would they oppose a religious exclusion for Elders.

On cross-examination, Ms. Caron agreed that she could not predict the attitude of the Union for the next five to ten years, however, she noted that the Union was involved in equity programs and did believe that the aboriginal community should be an equal partner with the Employer. With respect to employees hired on grants, Ms. Caron indicated that the Union has experience with such hiring at the Wapiti Library in Prince Albert, where the agreement permits the Library to hire persons to work on a grant provided their salaries are "topped up" to the rates contained in the collective agreement.

With respect to the prior exclusion of the positions in question, Ms. Caron testified that the Union had some discussions with the Employer in the fall of 1997. The Union understood that the persons in question were not members of any of the Union locals. However, she attributed this to the confusion caused by the existence of four Union locals. She indicated that the Union may not have been aware of all of the positions in question.

Ms. Caron also raised an issue with respect to the spare bus drivers in the Kinistino School Division. She indicated that the Union had applied for the spare bus drivers in its application but they were not included on the statement of employment. The Employer offered to provide the Board with a list of the spare bus drivers' names and specimen signatures, which the Board received shortly after the hearing.

Relevant Statutory Provisions

5. The board may make orders:

> *(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*
>
> *(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;*
>
> *(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*
>
> ...
>
> *(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or amending an order or decision of the board made under clause (a), (b) or (c) in the circumstances set out in clause (j) or (k), notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*

37. 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.

Although the Employer filed the application as an application to amend a certification Order under s. 5(i) of the *Act*, the case actually raises the issue of successorship and falls to be determined under s. 37 of the *Act*.

LRB File No. 364-97 is an application for certification that will be determined by ss. 5(a), (b) and (c) of the *Act*. It is also affected by the application under s. 37 of the *Act* cited above.

Arguments

Mr. Wells, for the Employer, asked the Board to apply the normal certification rules to the Union's application to be certified for the employees of the former Kinistino School Division. The Employer took no objection or position with respect to this application.

With respect to the amalgamated bargaining structure, the Employer requested the exclusion of "other positions which are not funded by the Board of Education." Mr. Wells argued that the history of the parties demonstrated that this exclusion has not caused any problems for the Union. From the Employer's point of view, the exclusion allows it to respond to initiatives which are funded through sources outside the Employer's foundation grant and tax base.

In addition, Mr. Wells noted that the exclusion had been agreed to by the Union less than one year earlier in its certification application relating to Union local 2627. The Employer is particularly fearful that the collective agreement between the Union and the Employer, if applied to the aboriginal programs, would prevent the hiring of aboriginal employees to carry out the program. Mr. Wells argued that the Union would need to "cut holes in the collective agreement in order to do equity." In addition, he noted that the Employer does not control the hiring and firing in all the programs; for instance, the Elders, the program co-ordinators, the OLMP monitors, and tutors. While the Employer may have some say in matters of hiring and firing, it does not have the ultimate authority. With respect to the tutors hired with Band funds, Mr. Wells argued that such employees are employees of the Bands and the Employer only acts as a conduit of funds to the tutors. A similar approach was taken with respect to the research position which will be hired through the inter-department committee.

Mr. Johnson, counsel for the Union, argued that the source of funding for particular positions is not determinative of the employment status of the positions in question. In this regard, he referred the Board to *Canadian Union of Public Employees, Local 2492 v. Indian Head School Unit No. 19*, [1995] 1st Quarter Sask. Labour Rep. 271, LRB File No. 263-94; *University of Saskatchewan Faculty Association v. University of Saskatchewan*, [1995] 1st Quarter Sask. Labour Rep. 201, LRB File No. 127-94; and *University of Alberta v. Non-Academic Staff Association et al.*, [1996] Alta. L.R.B.R. 523.

Counsel argued that a determination must first be made as to the employment status of the persons in questions. If they are not employees of the Employer, then no exclusion is required in the certification Order. If they are employees of the Employer and a special accommodation is required to permit the equity programs to operate in the manner originally contemplated, then those issues are ones that can be dealt with through the collective bargaining process. Counsel urged the Board not to resolve the matter by excluding such employees from coverage under the collective agreement.

Counsel argued that Elders could bring their own application to be excluded under the religious exemption provisions contained in the *Act*. With respect to the researcher position, counsel acknowledged that such a person may not be an employee of the Employer.

Analysis

Before dealing with the main issue raised on this application, the Board wishes to congratulate both parties for the efforts made in successfully merging the various certification Orders and collective agreements affecting the employees in question. The Board's policy has been to prefer large "all employee" bargaining units. The history of the certification Orders and collective agreements affecting the employees with this new Employer demonstrates the need for a more rational approach to collective bargaining in the school divisions. Hopefully, the bargaining unit rationalization will accompany future amalgamation of school divisions. The Board is aware of the enormous efforts that have been made by the Union, its members and the Employer in attempting to bring the many bargaining units and collective agreements into one comprehensive structure. The parties are to be commended for their efforts.

When amalgamating bargaining units under the successorship provisions contained in s. 37 of the *Act*, the Board is primarily concerned with maintaining the bargaining rights of employees. In *Saskatchewan Government Employees' Union v. Headway Ski Corporation*, [1987] Aug. Sask. Labour Rep. 48, LRB File No. 396-86, the Board outlined the factors to consider when merging bargaining units in the following terms, at 57:

> *In deciding whether a bargaining unit can be appropriately maintained after the transfer of part of a business, the Board on the one hand will wish to honour existing bargaining rights and on the other will wish to maintain its preference for larger and ideally single all employer units. Where there is a conflict between these two goals, the interest of maintaining industrial peace should prevail and undue fragmentation should be avoided.*

In the present case, the parties have agreed that an amalgamation of the bargaining units can take place. There is no labour relations conflict between the existing bargaining rights and the creation of an "all employee" bargaining structure. The only question that arises is whether the Board should continue to exclude positions which are not funded by the Employer. Currently, none of the Union locals represent such positions. Although the exclusion of such positions from the bargaining structure may create some fragmentation in the bargaining unit structure, overall the exclusion affects a very small portion of the bargaining unit.

The Board is of the view that the amalgamating Order which will be issued under s. 37 of the *Act*, should continue to exclude positions which are not funded by the Employer. The parties have achieved a great deal through restructuring the various bargaining units into one new bargaining unit. However, there are, no doubt, many wrinkles that will need to be ironed out over the course of negotiating the next collective agreement. The Board is of the view that the question of the inclusion or exclusion of the persons in dispute in this application should be subject to a round of negotiations in order to permit the parties to consider fully the consequences of including or excluding the positions in question. In some instances, the parties may conclude that the persons in question are not "employees" of the Employer. For other positions, if they are "employees" of the Employer, the parties should discuss the concrete issues that require resolution before determining whether or not to include the positions in the Agreement. If the negotiations are not fruitful, either party may apply to the Board for an amendment to the certification Order to have the matter finally determined in the relevant open period.

The Board encourages the Employer to continue to make available to the Union all relevant information pertaining to the positions which currently are not funded by the Employer's foundation grant or tax base. Such information could include the job description, the reporting and supervising structures, the wages, benefits and other working conditions and the source of the funding.

The Union's application to represent the non-teaching staff who formerly were employed by the Kinistino School Division is supported by evidence of majority support. This will be reflected by including such employees in the bargaining unit that will be described in the amalgamating Order as follows:

> *all employees employed by the Board of Education of the Saskatchewan Rivers School Division No. 119 of Saskatchewan except director of education, assistant, associate or deputy director of education, superintendent of education, superintendent of administration, secretary-treasurer or secretary and treasurer, business manager, administrative assistant, supervisor of maintenance services, supervisor of facilities, supervisor of student services, supervisor of construction and renovations, supervisor of caretaking services, supervisor of technical services, supervisor of transportation services, human resources manager, human resources officer, manager of purchasing, manager of cafeteria services, assistant manager of cafeteria services, communications officer, students employed or involved in an educational program, administrative/confidential secretaries as may be required for the above noted positions, other positions which are not funded by the Board of Education, teachers employed and functioning as such*

The Board removed the reference to "in Prince Albert" which was included in the Employer's proposed bargaining unit description because the geographical nature of the Order is intended to extend to the geographic region covered by the Employer as described in the Minister's Order No. 81/97 establishing the new school district.

The Union described in the Order as the exclusive bargaining agent is Canadian Union of Public Employees, Local 4195.

MATTHEW JUNGWIRTH, Applicant and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 529 and HONEYWELL LIMITED, Respondents

LRB File No. 018-98; July 6, 1998
Vice-Chairperson, James Seibel; Members: Gerry Caudle and Terry Verbeke

For the Applicant: Matthew Jungwirth
For the Union: Drew Plaxton
For the Employer: Kevin Wilson

Duty of fair representation - Contract administration - Board decides that union's decision not to process grievance based upon considerations of timeliness and merits not arbitrary, discriminatory or in bad faith.

Duty of fair representation - Scope of duty - Board reviews general approach to applications under s. 25.1 of *The Trade Union Act*.

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

REASONS FOR DECISION

Background

James Seibel, Vice-Chairperson: International Brotherhood of Electrical Workers, Local 529 (the "Union") was designated by the Board as the bargaining agent for a unit of electricians at Honeywell Limited (the "Employer"). Matthew Jungwirth filed an application which alleged that the Union violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17, by failing to fairly represent him with respect to a grievance under the applicable collective agreement.

Relevant Statutory Provisions

Section 25.1 of the *Act* 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.

Evidence

Mr. Jungwirth testified on his own behalf. By letter dated April 23, 1993, after 18 years of service with the Employer, Mr. Jungwirth was given eight weeks' notice of layoff for lack of work in accordance with the applicable provincial collective agreement between the Union and unionized employers in the electrical trade division of the construction industry. He was the senior electrician in the Employer's construction department. His last day of work with the Employer was June 25, 1993. Two more junior electricians were also laid off at the same time.

Mr. Jungwirth testified that because he thought he would be recalled to work in short order he did not submit a time sheet for his last six hours of work. He thought he would include it on his next time sheet after he was recalled. Mr. Jungwirth was not recalled and has not worked for the Employer since; however, he learned that on July 18, 1993 one of the more junior electricians was recalled to work. Mr. Jungwirth, who was 61 years old at the time, formed the belief that he was not recalled because of his age.

Mr. Jungwirth did not consult the Union about the matter at that time, but instead spoke to a business acquaintance in August, 1993 who told him to take the matter to the Saskatchewan Human Rights Commission.

Mr. Jungwirth met with two of the Employer's managers on November 19, 1993. He said that at the meeting he raised the issue of recalling the junior employee, and also asked to be paid for his last day's work. He was not satisfied with their response. He still did not consult the Union.

Mr. Jungwirth filed a complaint with the Human Rights Commission on April 24, 1994, the substantive portion of which stated that he believed that the Employer had discriminated against him by refusing to continue to employ him because of his age, contrary to s. 16 of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1.

The investigation by the Human Rights Commission took some time. In February, 1996 the Human Rights Commission advised Mr. Jungwirth that it had declined to appoint a Board of Inquiry and dismissed his complaint. By letter dated May 20, 1996 Mr. Jungwirth requested the Minister of Justice to direct a formal inquiry into his complaint. After some intervening correspondence, by letter dated

November 1, 1996 the Minister responded that after a review by the Department of Justice it was determined that the Human Rights Commission had committed no error in its decision.

From time to time during this process, Mr. Jungwirth received work through the Union's hiring hall. He admitted, however, that he did not raise the matter of his alleged unlawful layoff with the Union or any of its officials or representatives, even though he specifically recalled speaking to a business agent of the Union, Gus Gerecke, about other matters once when he had gone to the hiring hall to pick up his dispatch slip.

After speaking to an acquaintance, who was a shop steward in an unrelated union, in or about December, 1996 Mr. Jungwirth consulted a solicitor. As a result, Mr. Jungwirth approached the Union - specifically its business agent, Robert McLeod - about the issue first by telephone and later in person. On January 3, 1997 Mr. McLeod provided him with a grievance form to complete and assisted him in completing documents to apply for pension benefits for which he was eligible. Mr. Jungwirth indicated that, despite Mr. McLeod's frankness in advising him that he had a "big problem" in seeking to file a grievance because of the lapse of time, and that it was unlikely that the Union would proceed with it, he was nonetheless respectful and helpful. The grievance form stated the grievance as follows:

> *Work performed at request after my layoff June 25, 1993, Athletes' World, Market Mall, Saskatoon, 4 hrs @ time and a half. June 28, 2 hrs vehicle return - 19.60 hr + 8% annual.*

While there is no reference in the grievance to an allegation of unlawful layoff, the settlement requested is to be returned to work.

The Union refused to process the grievance. After further consulting with a solicitor, Mr. Jungwirth filed the duty of fair representation application on February 4, 1998.

At the hearing Mr. Jungwirth advised the Board that the adjustment he was requesting was payment for his last six hours of work, an amount equivalent to what he would have earned had he continued to work full time from June 25, 1993 to the date of hearing plus interest at eight percent per annum and punitive damages against the Employer.

In cross-examination, Mr. Jungwirth admitted that he never submitted a timesheet or written request to the Employer with respect to his wages for his last six hours of work. He admitted that when he met with the managers in the fall of 1993, he did not tell them exactly which hours he was seeking payment for.

Mr. Jungwirth confirmed that he raised none of these issues with the Union until December, 1996. He also confirmed that he was generally familiar with the grievance process and time limits in the collective agreement, having been a shop steward for some ten years of his time with the Employer. He said that the reason he had not consulted the Union earlier was because he was afraid that it might prejudice the process he was in with the Human Rights Commission. He was unclear as to how or why he had formed this opinion. He said that if he should have raised the issue with the Union, he would have expected someone at the Human Rights Commission to have told him to do so. He said, "they should know - I did not ask them."

When asked by counsel for the Union why he waited so long to take action, Mr. Jungwirth said that he thought "he was in good hands" with the Human Rights Commission.

When asked whether any of the matters or events raised in his evidence were the fault of the Union, Mr. Jungwirth replied that he "did not say that it was the fault of the Union." When questioned about his claim for punitive damages, he said "I have no claim against the Union, they treated me well."

The Union elected not to call evidence.

Arguments

Mr. Plaxton, counsel for the Union, asserted that the Union had not acted improperly in declining to prosecute Mr. Jungwirth's grievance and had done nothing in violation of s. 25.1 of the *Act*. He said that Mr. Jungwirth should have approached the Union as soon as he felt aggrieved about not being recalled or at least when he realized that his pay for his last hours of work was not forthcoming.

Counsel pointed out that the time limit in the applicable collective agreement for filing an oral grievance was three days. If the grievance was not satisfactorily dealt with, then filed in writing within three more days. Under certain circumstances, it should be filed within 20 days of the subject event, failing which

it shall be deemed that there is no grievance. He argued that while a grievance arbitrator might have jurisdiction to extend or to waive these time limits, it is highly unlikely that on the facts such a discretion would be exercised: Mr. Jungwirth had no credible excuse for not filing earlier. In support of its position, counsel cited the decisions of the Board in the following cases: *Chrispen v. International Association of Fire Fighters, Local 510*, [1992] 4th Quarter Sask. Labour Rep. 133, LRB File No. 003-92, *Yearley v. Service Employees' International Union*, [1993] 4th Quarter Sask. Labour Rep. 57, LRB File Nos. 055-92, 080-92 & 081-92; *Sydiaha v. University of Saskatchewan, et. al.*, [1982] August Sask. Labour Rep. 48, LRB File Nos. 075-82 & 078-82.

In his argument, Mr. Jungwirth took the position that the Human Rights Commission should have advised him to seek the advice of the Union at an early date. He indicated that he felt aggrieved but no one took the initiative to tell him what to do.

Analysis

It is not without sympathy for Mr. Jungwirth that the Board has determined to dismiss this application. The Board has had several recent opportunities to enunciate the principles which pertain to applications under s. 25.1 of the *Act*. Included among these are the following decisions: *Gilbert Radke v. Canadian Paperworkers Union*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File no. 262-92; *Mary Banga v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93; *Gordon Basaraba v. Saskatchewan Government Employees' Union*, [1994] 3rd Quarter Sask. Labour Rep. 216, LRB File No. 086-94; *Gordon Johnson v. Amalgamated Transit Union*, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96; *Ron Marttala, Ron Mulholland and Marshall Desjarlais v. Regina Civic Middle Management Association*, [1997] Sask. L.R.B.R. 556, LRB File No. 337-96; *Weber v. Graphic Communications International Union, Local 206C Bindery*, [1998] Sask. L.R.B.R. 23, LRB File No. 307-97;and *K.H. v. Communications, Energy and Paperworkers Union, Local 1-S*, [1998] Sask. L.R.B.R. 76, LRB File No. 015-97.

A summary of the Board's general approach to such applications is found in *Laurence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, at 71-72:

> *This Board has discussed on a number of occasions the obligation which rests on a trade union to represent fairly those employees for whom it enjoys exclusive status as a*

bargaining representative. As a general description of the elements of the duty, the Board has indicated that it can do no better than to quote the principles outlined by the Supreme Court of Canada in the case of Canadian Merchant Services Guild v. Gagnon, [1984] 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.*

The terms "arbitrary," "discriminatory," and "in bad faith," which are used in the legislative description of the kind of conduct on the part of a trade union which is to be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:

> *... 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 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.*
>
> *This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:*
>
> > *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.*

The only issue which the Board is concerned with here is whether, in determining not to process Mr. Jungwirth's grievance, the Union acted in a manner which could be characterized as arbitrary, discriminatory or in bad faith. On the facts presented, the Board is satisfied that this is not the case. Mr. McLeod was, by Mr. Jungwirth's own account, polite, helpful and honest in his advice and in expressing his doubts about whether the Union would prosecute the grievance, but he did not discourage Mr. Jungwirth from completing the form which he supplied to him.

While it appears that the Union did not provide reasons for its decision in writing, Mr. Jungwirth clearly understood that at least one major reason was the lapse of time of three and a half years, and that the merits of his claim were also considered doubtful because of the lack of recall rights by seniority after a certain period of time in the electrical trade division's collective agreement. We do not here provide an assessment of the substantive legitimacy of the Union's concerns, but it is clear that its decision was not arbitrary, discriminatory, or in bad faith and was based on both practical and legal concerns.

The situation is unfortunate and has obviously been trying for Mr. Jungwirth. But, the Board concludes that the application must be dismissed.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and CUSTOM BUILT AG. INDUSTRIES LTD., Respondent

LRB File No. 112-98; July 6, 1998
Vice-Chairperson, James Seibel; Members: Gloria Cymbalisty and Tom Davies

For the Applicant: Larry Kowalchuk
For the Respondent: R. Shawn Smith, Q.C.

Practice and procedure - Particulars - Board holds that union entitled to particulars and documents requested relating to certain individuals listed on statement of employment.

Evidence - Admissibility - Certification - Board declines to hear evidence from employer to be adduced through employees with respect to organizing drive - Board states that employer should refuse to be involved where employees have complaint about union organizing tactics.

INTERIM DECISION:

REQUEST FOR PARTICULARS

James Seibel, Vice-Chairperson: The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") has applied to be designated as the certified bargaining agent on behalf of a group of employees of Custom Built Ag. Industries Ltd. (the "Employer").

The application was filed on June 4, 1998, and the Union estimated that there were approximately 100 employees in the unit applied for. In its Reply filed June 18, 1998, the Employer stated that the number of employees was 121, and raised an issue alleging improper organizing tactics by the Union as follows:

> 3. *The following statements are specifically commented on:*
>
> *(a) At 5(c) the Applicant Union indicates that if it is determined that it does not represent the majority of employees, it does not wish to have a vote conducted among the employees. The employer asserts the reason for the Applicant Union's lack of confidence in a vote is that it used methods which were inappropriate and deceptive. The tactics of the Union in the organizational drive have totally eroded what modest support the Applicant Union may have had in the first instance. The Applicant Union does not now enjoy the support of the majority of the employees.*

> *4. The following is a concise statement of the material facts which are intended to be relied upon in support of this Reply:*
>
> *(a) Custom Built Ag. Industries Ltd. respectfully suggests that even if the support cards tendered by the Applicant Union equal 50% of the employees of the employer, there should be a vote ordered and conducted by the Labour Relations Board rather than an Order for Certification granted on the basis of the application material alone.*
>
> *(b) The Applicant Union engaged in conduct in this union organizational drive which is inconsistent with the provisions and the spirit of The Trade Union Act. The Applicant Union exercised deception and intimidation towards the employees in the conduct of its campaign to obtain signed union support cards.*
>
> *(c) In all the circumstances, the interests of the employees are best met by way of the conduct of a secret ballot rather than a summary disposition by the Labour Relations Board.*

The matter was set for hearing by the Board on July 6, 1998.

By letter dated June 26, 1998, the Union requested particulars and production of documents both as to this issue and as regards the Statement of Employment, the material portion of which read:

> *Please accept this as a formal request for particulars, as follows:*
>
> *a. on what evidence and on what basis do you assert that the Union does not now enjoy majority support in para. 3(a) of your Sworn Reply?*
>
> *b. what employees have you and/or your management team communicated with in relation to the issue of majority support or lack thereof?*
>
> *c. what organizing methods were used by the Union that were "inappropriate" as stated in para. 3(a) of your Reply?*
>
> *d. what is the source of the evidence about that allegation?*
>
> *e. what methods used by the Union in the organizing drive were "deceptive" as sworn in para. 3(a) of your Reply?*
>
> *f. what is the source of the evidence of these allegations?*
>
> *g. what "deception towards the employees" in the conduct of the campaign to obtain union support cards did the Union engage in as sworn in para. 4(b) of your Reply?*

h. what "intimidation towards the employees" was engaged in as sworn in para. 4(b) of your Reply?

i. what are the names of the employees and the particulars of the allegations with respect to each of the employees as sworn in para. 4(b) of the Reply?

...

We request particulars, as follows, with respect to each of the individuals named thereunder:

a. date that each commenced employment with Custom Built Ag. Industries Ltd.

b. payroll records for each individual, as required to be kept by law and as your records indicate, for the period January 1, 1998 to June 1, 1998 of Custom Built Ag. Industries Ltd.

c. duties performed by each individual for Custom Built Ag. Industries Ltd. on June 3, 1998, June 4, 1998, and in the period of May 1 to June 1, 1998.

d. names of the immediate Supervisors employed by Custom Built Ag. Industries Ltd. to whom each employee reported for the period June 4, 1998, June 3, 1998 and May 1 to June 1, 1998.

e. copies of the last T-4 and Record of Employment issued to each while employed by Custom Built Ag. Industries Ltd.

f. rate of pay, hours of work and contract of employment (if any), for each while employed by Custom Built Ag. Industries Ltd.

In the interim certain employees had sent requests to the Board to withdraw the union support cards that they had signed. These requests were all received after the application had been filed. The Board Registrar provided these individuals with notice of the July 6th hearing date.

In a letter dated June 29, 1998, to the Board, the Employer requested an adjournment of the July 6th hearing. During a conference call with the Executive Officer of the Board on June 30, 1998, the hearing of the application proper was adjourned to August 10 and 11, 1998. However, the parties were advised that a panel of the Board would hear representations on the issue of the request for particulars and production of documents on July 6th.

On July 6, 1998, the Board heard the submissions of the parties on the issue. No employees appeared at that time.

Counsel for the Employer, Mr. Smith, advised that the Employer was prepared to provide the requested particulars with respect to the issue of organizing tactics with the reservation that it ought not to be compelled to disclose the identity of the employee witnesses it plans to call. With respect to the issues regarding the Statement of Employment, the Employer was not willing to provide the particulars or produce the documents requested; it was argued that the information could be elicited from the Employer's witnesses at the hearing proper. Counsel advised that if the Board accepted that the evidence of support was tainted by the tactics used to obtain it, the Employer sought a vote on the representation issue.

Counsel for the Union, Mr. Kowalchuk, argued that the Union objected to the Employer calling employees as witnesses to present evidence about the Union's organizing tactics, but took the position that if same was to be allowed, the Union required all of the information requested, including the names of the Employer's proposed witnesses in that regard in order to properly prepare its case. It was argued with respect to the requests regarding the Statement of Employment issues, that the information was required as well to properly prepare and because there was likely to be evidence adduced at the hearing about the employment status of thirteen of the individuals listed.

The Board retired to consider the issues and delivered an oral ruling on July 6, 1998, with written reasons to follow.

With respect to the issues regarding the Statement of Employment, the Board finds that in these circumstances the Union is entitled to the particulars and documents requested. The Union's request is in respect to thirteen employees listed on the statement and it is not an onerous proposition for the Employer to provide the information; it is likely to narrow the focus of the inquiry at the hearing proper and to expedite the process. The particulars shall be provided and the documents disclosed on or before July 20, 1998.

With respect to the request for particulars regarding the issue of alleged impropriety in the Union's organizing drive, the Board has particular concerns. A major concern is the proposal by the Employer to call as witnesses certain employees who are within the unit applied for with a view to eliciting their evidence as to the Union's organizing tactics and the alleged impropriety or illegality thereof. While counsel for the Employer was most careful in his submission to clarify that the evidence would only go to the manner in which support for the Union was obtained, and the individual employees would not be

asked whether they had signed a support card or did or did not support the Union, it is readily apparent that such an examination-in-chief could not be conducted without the Employer or its agents or counsel carrying out an inquiry or interview of the individuals it planned to call to testify. Likewise, the Union could hardly be in a position to cross-examine or call evidence to rebut the allegations on the dates set for hearing without knowing in advance the identities of the individual witnesses. Of course, this might expose those persons to a corresponding inquiry or interview by the Union, its agents or counsel.

The Board has grave concerns that this places those employees in an untenable position, where potentially they are under extreme pressure, and when they themselves have not sought any redress from the Board.

In the case before the Board cited as *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Western Automotive Rebuilders Ltd.; Harry Dudra, et al v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1993] 1st Quarter, Sask. Labour Rep. 156, LRB File Nos. 239-92 and 263-92, the Union had applied for certification, and in a separate application, 3 employees filed an unfair labour practice application against the Union alleging a violation of s. 11(2)(a) of *The Trade Union Act*, R.S.S. 1978, c. T-17 which provides 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;*

The Board heard the evidence of the employees as concerned the organizing tactics of the Union stating that such evidence may be relevant for one or both of two reasons described at page 160 as follows:

> *As this passage intimates, the Board may take a different view of this evidence if it can be shown that there is something improper about the way in which it was obtained. An*

> *allegation of impropriety in the collection of evidence of support may, in a situation such as the one which faces us here, have one or both of two consequences. It may demonstrate that the trade union which submits the evidence is guilty of an unfair labour practice, which is alleged in this case. It may also be a reason to regard the evidence as sufficiently flawed that it cannot be used in support of the application for certification.*
>
> *That these two implications are closely intertwined is evident in the following comments in the decision of this Board in the case of International Union of Operating Engineers, Hoisting, Portable and Stationary v. K.A.C.R. (A Joint Venture), LRB File No. 275-83:*
>
> *The purpose of the Board's certification procedure is to ensure the protection of the fundamental rights of employees to freely organize in and to form, join or assist trade unions of their own choosing. If the Board believes that the employees' free choice has been affected by interference, restraint, intimidation, threats, coercion or other improprieties on the part of the union seeking their support, it may disregard the evidence of support, or exercise its discretion under Section 6 of The Trade Union Act and order a representation vote. That principle must be applied to the circumstances of this case.*

Ultimately, the Board dismissed the application against the Union. The Board stated at page 162:

> *It is clearly important for this Board to be alert to the possibility that the signature of an employee which is used to support an application for certification has been obtained under circumstances which impair the ability of that employee to make a truly free choice. On the other hand, it would be unduly intrusive, not to mention impracticable, for the Board to attempt to assess the process by which each employee receives and assesses information prior to signing a card. In our view, for us to nullify the evidence of support provided by any signature, it would have to be established that the obtaining of that signature was so contaminated by lack of information, misunderstanding or improper conduct that it could not be regarded as a genuine signature at all.*

The employees in that case had also requested that a vote be ordered on the grounds that the evidence of support filed should be regarded as dubious, but, because of the way in which the case was disposed of, the Board did not find it necessary to deal with that issue.

In the present case, the Employer, not the employees themselves, has raised the issue of impropriety in the organizing drive; and it is the Employer, not any employee or group of employees, that requests a vote on the issue of support for the Union.

Section 3 of the *Act* provides 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.*

It is the right of the employees to make the determinations referred to in s. 3. If there has been illegality on the part of the Union in securing their "support" it is not for the Employer to take up their cause. It matters not that the Employer takes the position that it does not represent the employees alleged to be the victims of an allegedly improper organizing campaign, because for all practical purposes and consequences that is exactly what the Employer is doing. As when an Employer is approached by an employee who seeks advice or support for a proposed application to rescind a certification order, the Employer should refuse to be involved on behalf of the employee; likewise where an employee has a complaint about his or her bargaining agent, the Employer ought not to become involved on their behalf. The employees may seek information from the Board about their concerns and/or may seek independent advice about their rights and the remedies available.

In the present case there is no application before the Board alleging an unfair labour practice by the Union. Nor has any employee provided notice that they wish to raise certain issues or present evidence to the Board with respect to the evidence of support filed with the Board or regarding the organizing campaign.

To expose individual employees to a tug-of-war between the Employer and the Union in the guise of alleged "protection" of the employees by the Employer when they have not independently chosen to put the matter in issue is not conducive to the free exercise of the rights of employees under the *Act*.

No employee or group of employees has requested that a vote be held on the basis that the evidence of support is suspect. None of the employees who requested to withdraw their membership and support evidence has pursued that issue further despite having notice of these proceedings.

Accordingly, at the hearing proper, the Board which will be the same panel as on this application, will not hear the evidence proposed to be adduced by the Employer through employees called as its

witnesses with respect to the issue of the organizing drive, and, therefore, an order with respect to the particulars requested by the Union is not necessary at this time. If the Employer wishes to adduce evidence relating to the propriety of the organizing drive in another form or through witnesses other than employees who are within the scope of the proposed unit, it shall advise the Union of that and, if requested, the Board will consider a further application for particulars.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 296, Applicant and ATLAS INDUSTRIES LTD., Respondent

LRB File No. 011-97; July 16, 1998
Chairperson, Gwen Gray; Members: Judy Bell and Bob Todd

For the Applicant: Drew Plaxton
For the Respondent: Richard Elson

Reconsideration - Criteria - Board reviews and reaffirms criteria for reconsideration application.

Reconsideration - Policy - Reconsideration application raises issue which was before Board on main application - Board holds that there are sound labour relations reasons for refusing to grant reconsideration.

Reconsideration - Policy - Where remedy ordered on application not novel or dramatic, Board will not hear reconsideration application - Parties should be prepared to deal with both substantive and remedial issues at main hearing unless Board agrees to split hearing.

***The Trade Union Act*, s. 5(i).**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: Atlas Industries Ltd. (the "Employer") applied for reconsideration of a Board Order dated January 19, 1998 on LRB File No. 011-97 in which the Board held that the Employer had engaged in an unfair labour practice within the meaning of s. 11(1)(c) of the *Act* by refusing to accept the province wide agreement between the Sheet Metal Workers' International Association, Local 296 (the "Union") and the CLR Construction Labour Relations Association of Saskatchewan Inc. (the "CLR"), the representative employers' organization, as applying to its workforce. The Board held that *The Construction Industry Labour Relations Act, 1992*, S.S. 1992 c. C-29.11 ("CILRA, 1992") applied to the Employer because it performs work in the construction industry.

Arguments on Reconsideration Application

Mr. Elson, counsel for the Employer, argued that the reconsideration application should be permitted by the Board because its initial decision will operate in an unanticipated way, will have an unintended effect and because the decision made by the Board is precedential and amounts to a significant policy adjudication. Counsel cited *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et al.,* [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93, to support the two grounds put forth to justify a reconsideration application.

Counsel argued that the Board's Order under reconsideration conflicts with the Board's earlier decision in *Canadian Iron, Steel and Industrial Workers Union, Local 3 v. Emerald Oilfield Construction Ltd. et al.*, [1994] 2nd Quarter Sask. Labour Rep. 105, LRB File Nos. 019-94, 020-94 & 021-94, which held that the CILRA, 1992 envisaged a system of collective bargaining where all unionized employees in a trade division would be represented by a single trade union, which trade union was designated by the Ministerial Order pursuant to the CILRA, 1992. The effect of the *Emerald Oilfield Ltd.* decision, *supra*, was to remove employee freedom of choice from the representation question in the trades designated in the CILRA, 1992. Counsel argued that this restriction should be narrowly confined and should be restricted to those employees who are actually engaged in construction work.

In a situation of mixed activity, some of which involves employees in construction work, counsel argued that the Board should follow the practice of the Ontario Board which is set forth in *Labourers' International Union of North America, Local 183 v. Keith Holdsworth Consulting Ltd.*, [1989] O.L.R.B. Rep. 619. In that instance, the Board issued a certification Order covering employees engaged in construction work where that work was not inextricably tied to other non-construction work performed by the employer such that it would be impossible or unreasonable for the employees to be organized into separate groupings.

Counsel submitted that applying the separate construction bargaining unit approach to the facts of this case would overcome the unintended effect of applying the *Emerald Oilfield Ltd.* decision, *supra*, to all of the employees of the Employer.

Mr. Plaxton, counsel for the Union, argued that the matters raised by the Employer on the reconsideration application were not raised in the first instance by the Employer. Counsel noted that, in the first hearing, the Employer took the position that none of the work performed by it was construction work. According to the Union, the Employer is now attempting to have the Board tailor its enterprise to avoid the construction agreement. Counsel argued that the Employer failed to meet the criteria set out in the *Remai Investment Corporation* case, *supra*.

The Union took the position that sheet metal fabricating and installation that is done in connection with a construction project falls within the definition of construction under the CILRA, 1992. Counsel argued that off-site fabrication is a large part of the work of the trade. Counsel noted that the Union is certified for approximately 40 sheet metal shops in Saskatchewan and that 90 percent of them perform fabrication work under the terms of the provincial agreement negotiated between the Union and the CLR.

Counsel also complained that it was improper for the Employer to come back to the Board on a reconsideration request when it had failed to comply with the Board's initial Order.

Analysis

The criteria applied by the Board on an application for reconsideration are set out in *Remai Investment Ltd., supra,* as follows, at 107-108:

> *Though the Board has the power under s. 5(i) of the Act to reopen decisions it has arrived at, this power must be exercised sparingly, in our view, and in a way which will not undermine the coherence and stability of the relationships which the Board seeks to foster. In a comment on an application for reconsideration of a decision of the British Columbia Labour Relations Board in Corporation of the District of Burnaby v. Canadian Union of Public Employees, [1974] 1 Can. L.B.R. 128, at 130, the Board asserted that "speed and finality of decisions are especially imperative in labour relations. Of no area of law is it truer to say that justice delayed is justice denied."*
>
> *In the three jurisdictions we have alluded to above - Canada, British Columbia and Ontario - the recognition of the need to balance the claim for reconsideration against the value of finality and stability in decision-making is reflected in the procedures adopted by labour relations tribunals. In all of them, the procedure followed in connection with an application for reconsideration departs from the procedure employed for other kinds of applications. In all three cases, the applicant is required to establish grounds for reconsideration before a decision is made whether a rehearing or some other disposition of the matter is appropriate.*

We have concluded that such a two-step approach is appropriate in cases of this kind. We do not agree with counsel for the Employer that we were mistaken in requiring that an applicant who seeks reconsideration of a decision of the Board must persuade us that there are solid grounds for embarking upon that course.

Counsel for the Employer argued that we should adopt the alternative of entertaining a full rehearing of the case, rather than establishing this intermediate stage. He predicted that this would not have the effect of an uncontrolled increase in the number of such applications. It is difficult to see, however, why allowing an automatic trial de novo to a disappointed applicant would not expose the Board to a growing number of applications to rehear cases in which the contest is serious or the stakes high.

In other jurisdictions, particularly in British Columbia, there has been extensive discussion of the criteria which labour relations boards might use to determine whether an applicant has been able to establish that there are grounds which justify the reopening of a decision. In their decision in the case of Overwaitea Foods v. United Food and Commercial Workers, No. C86/90, the British Columbia Industrial Relations Council set out the following criteria:

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

In the present application, the Employer relied on grounds 3 and 6 to justify its application for reconsideration. As set out in the *Remai Investment Ltd.* decision, *supra*, and cases such as *Saskatchewan Government Employees' Union v. Mary Banga*, [1994] 1st Quarter Sask. Labour Rep. 291, LRB File No. 014-94, the party applying for reconsideration must first establish that there are sufficient reasons to warrant reconsideration before the Board will proceed to hear and determine the application. In this instance, although the threshold arguments with respect to the sufficiency of the grounds for reconsideration and the actual merits of the reconsideration application were heard at the same time, the Board will first determine if the threshold issues have been met.

The Employer, in this instance, does not oppose the Board's determination that the fabrication and installation of sheet metal systems falls within the definition of construction work as that term is used in the CILRA, 1992. Rather, the Employer objects to the imposed collective agreement negotiated between the Union and the CLR on the sheet metal workers who are covered by the Union's certification Order. The Employer argued that the remedy is too broad and should not apply to sheet metal workers who are not engaged in the installation of sheet metal systems for the Employer.

It was clear, however, in the application filed by the Union that it sought an Order to direct the Employer to apply the provisions of the collective agreement between the Union and CLR to its bargaining unit at the Employer. The original application read in part as follows:

> *(a) The respondent company is subject to a certification order, whereby the applicant is representative of employees in a bargaining unit issued December 2, 1974;*
>
> *(b) The respondent company operates in the construction industry and is thereby subject to the Construction Industry Labour Relations Act, S.S. 1992, c. C-29.11.*
>
> *(c) The respondent company has carried on and continues to carry on its construction work without applying the terms and conditions of employment as contained in the collective bargaining agreement bargained and ratified with the representative employers' organization on December 9, 1996 pursuant to Section 14 of the Construction Industry Labour Relations Act. A representative of the applicant has approached Henk Hofstra and Mel Peters advising them of their obligations to apply the collective agreement pertaining to the work being carried out. The respondent consistently refuses to comply with its contractual obligations.*

The original certification Order was issued for the craft unit of "all sheet metal workers and sheet metal welders employed by Atlas Industries Ltd. in the Province of Saskatchewan." Section 14 of the CILRA, 1992 is the provision which assigns a unionized employer's bargaining obligations which are created by the certification Order to the designated representative employers' organization.

At the hearing of the initial application, the Employer opposed the application based on its belief that the work performed by it did not fall within the definition of "construction industry" which is set out in s. 2(e) of the CILRA, 1992. The Employer did not argue that if the Board found its work to fall within the definition of "construction industry," the Board should limit the application of the collective agreement to those employees who perform installation work and not apply it to all of the employees who are covered by the Union's certification Order.

In our view, there are sound labour relations reasons for refusing to grant a reconsideration application in this instance. The remedial issues were clear at the outset of the Union's application and the Board's Order was not unpredictable, if the Board found that the work did fall within the construction industry. Neither party requested the Board to reserve its jurisdiction with respect to the remedial request at the original hearing to permit further arguments, once the main issue of whether the work fell within the construction industry was determined.

In the *Mary Banga* case, *supra*, the Board held that where the remedy ordered on an application was not novel or dramatic, the Board would not hear a reconsideration application. In our view, the *Mary Banga* case, *supra*, signals to the parties who appear before the Board that they should be prepared to deal with both substantive and remedial issues at the main hearing unless the Board agrees to a procedure which would permit the parties to split the hearing into a two stage process, one stage to deal with substantive issues and the second stage to deal with remedial issues.

In this instance, the reconsideration application raises an issue that clearly was before the Board on the main application, that is, the appropriate remedy to be granted in the event the Board found in favour of the Union. If the Board permitted the Employer to now raise the issue through an application for reconsideration, it would be encouraging parties to Board proceedings to use the process of reconsideration as a method of splitting hearings into substantive and remedial hearings. While in some circumstances the Board will agree to reserve on its remedial jurisdiction, this approach is generally taken when the remedial issues may be resolved by agreement between the parties following the

decision of the Board and where the reservation of jurisdiction expedites the hearing of the main application by reducing the evidentiary issues to those raised on the substantive portion of the application. For instance, the question of monetary loss is often reserved on an application for reinstatement of an employee who is discharged in circumstances which are alleged to violate s. 11(1)(e) of *The Trade Union Act*, R.S.S. 1978, c. T-17. Otherwise, the Board does not encourage the practice of splitting off remedial issues from the substantive issues because this practice would result in unnecessary delays in obtaining final resolutions to labour relations disputes.

For these reasons, the Board finds that the grounds relied on by the Employer do not constitute sufficiently compelling reasons to grant a hearing on its application for reconsideration.

SASKATCHEWAN GOVERNMENT EMPLOYEES' UNION, Applicant and SASKATCHEWAN LIQUOR AND GAMING AUTHORITY, Respondent

LRB File No. 037-95

SASKATCHEWAN LIQUOR STORE MANAGERS ASSOCIATION, Applicant and SASKATCHEWAN LIQUOR AND GAMING AUTHORITY, Respondent

LRB File No. 349-96; July 17, 1998
Chairperson, Gwen Gray; Members: Donna Ottenson and Judy Bell

For SGEU: Rick Engel
For SLGA: Heather Heavin
For SLSMA: Ralph Ermel

Bargaining unit - Appropriate bargaining unit - Board policy - Board confirms policy of preferring larger more inclusive units over smaller more fragmented units.

Bargaining unit - Appropriate bargaining unit - Board policy - Board will certify less than ideal "all employee" units in newly organized industries or organizations which may prove difficult to organize on employer-wide basis -However, in context of highly organized public sector Board will place more emphasis on industrial stability and avoidance of fragmentation.

Bargaining unit - Appropriate bargaining unit - Fragmentation - Board holds that middle management unit comprised only of liquor store managers IV, IVA, and V not viable or appropriate - Middle management unit comprised of all middle managers employed by employer may be justified.

Bargaining unit - Appropriate bargaining unit - Community of interest- Board finds that job functions of store managers I, II and III not incompatible with membership in larger unit in labour relations sense.

Bargaining unit - Appropriate bargaining unit - Community of interest - Board finds that job functions of store managers IV, IVA and V are incompatible with membership in larger unit in labour relations sense.

The Trade Union Act, ss. 2(a), 5(a) and 5(k).

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: In an earlier decision dated December 19, 1997 between Saskatchewan Government Employees' Union ("SGEU"), Saskatchewan Liquor Store Managers Association ("SLSMA") and Saskatchewan Liquor and Gaming Authority ("SLGA"), the Board found that liquor store managers are "employees" within the meaning of s. 2(f)(i) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (see [1997] Sask. L.R.B.R. 836). As a result of this finding, the Board is now required to address the issue of the appropriateness of the bargaining unit applied for by SLSMA in LRB File No. 349-96 and the amendment requested by SGEU in LRB File No. 037-95.

A new panel of the Board was established due to the resignation of Mr. Cunningham from the Board. Hearings for the purpose of determining the final issues on the applications filed were held on April 2 and 15, 1998. On April 15, 1998, Ms. Bell, a member of the Board's panel, was absent from the proceedings. However, all parties agreed that the Board could hear the matter in the absence of Ms. Bell on the understanding that the Board would provide transcripts of all of the proceedings to Ms. Bell. Both members of the Board reviewed transcripts of the earlier proceedings and final arguments. The Board Chairperson was a member of both panels hearing the applications.

At the opening of the April 2, 1998 hearings, Mr. Engel, counsel for SGEU, indicated that on SGEU's application, SGEU and SLGA agreed to consolidate the current three SGEU bargaining units into one Order, to change the Employer's name to SLGA, and to provide the Board with a draft version of the Order.

Counsel also requested that the Board not deal with SGEU's application in a final manner as other issues remain outstanding that do not involve SLSMA.

Facts

The factual background to the applications was set out in the Board's earlier decision and all parties agreed that the evidence presented in the first hearing could be applied to the present hearing. At the April 2, 1998 hearing SGEU presented evidence through Randy Werner, chairperson of the liquor board

branch of SGEU and chair of its bargaining committee since 1982, and through Bill Belof, staff representative responsible for the liquor board branch.

Mr. Werner testified that there are approximately 500 SGEU members employed in the liquor store division of SLGA; the licensing branch employs approximately 15 members; and the gaming branch employs approximately 40 members. All three areas were previously represented by SGEU. Mr. Werner testified that SGEU and SLGA also agreed to bring the racing track employees within the scope of the agreement. The parties have been engaged in negotiations over an amalgamated collective agreement which would bring all employees of SLGA into one collective agreement.

Mr. Werner testified that prior to 1984 liquor store managers were included in SGEU's bargaining unit and collective agreement. Mr. Werner did not view the inclusion of liquor store managers as creating any conflict of interest for SGEU and noted that, previously, liquor store managers had held senior positions on the executive and bargaining committee of the liquor store branch. Mr. Werner also noted that the current collective agreement between SGEU and SLGA permits liquor store managers to use their previously acquired seniority in the SGEU unit to bump a more junior employee in the event of a lay-off of a liquor store manager. Mr. Werner suggested that this provision would no longer be available to liquor store managers in the event that they formed a new bargaining unit with SLSMA. Mr. Werner also indicated that SGEU would agree to credit liquor store managers with seniority for the time spent by them as liquor store managers while they were excluded from the SGEU bargaining unit if they are returned to SGEU's unit. This would be done without cost to the liquor store managers.

Mr. Werner also pointed out various provisions in the current collective agreement that were similar to the terms and conditions of employment currently enjoyed by liquor store managers, including the hours of work provisions, office staff provisions, holiday provisions, overtime, pay and allowances.

Mr. Werner noted that his position as an assistant liquor store manager II in the Yorkton liquor store was similar to the position description of a liquor store manager II except that his position contained the words "in the absence of the store manager." Mr. Werner testified that a liquor store manager II position performs the same duties as an assistant liquor store manager II. He noted that the rates of pay for liquor store managers I and II are very similar to the pay rates for assistant liquor store managers I and II.

Mr. Belof testified that SGEU has a history of successfully negotiating the amalgamation of bargaining units with government and has not encountered major difficulties in successfully incorporating new groups into its current collective agreements. Mr. Belof noted that SGEU represents employees across the spectrum of work from professional employees to labourers who are divided into components, with each component having input into collective bargaining.

Mr. Belof did not anticipate that SGEU would have difficulty incorporating the liquor store managers into its current collective agreement with SLGA. He observed that the position of auditor III, which is already included in the SGEU-SLGA agreement, is paid at a higher rate of pay than liquor store managers.

Relevant statutory provisions

There are two provisions in the *Act* which are relevant to the issues in this application. Section 5(a) of the *Act* empowers the Board as follows:

> *5. The board may make orders:*
>
> > *(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*

Section 5(k) of the *Act* empowers the Board to amend previous orders. It states 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;*

SGEU's Arguments

Mr. Engel, counsel for SGEU, argued that the Board has ultimate authority to determine the appropriateness of bargaining units. Counsel noted that SLSMA's application requested the certification of a single occupation bargaining unit, i.e. liquor store managers. Counsel argued that SLSMA's application must be considered in the context of a multi-bargaining unit setting where the majority of the employees fall within an existing bargaining unit and the applicant is attempting to fragment collective bargaining by establishing a new bargaining unit. In this case, counsel observed that in single bargaining unit environments, Board policy permits the certification of "an" appropriate unit, and does not require that unit to be the "most" appropriate unit. However, in the multi-bargaining unit setting, counsel argued that the unit applied for must be sufficiently distinct in its wages and terms and conditions of employment to justify a bargaining unit separate from the main unit. In support of this proposition, counsel referred the Board to *United Civil Servants of Canada, Local No. 1 v. Department of Municipal Affairs & Saskatchewan Civil Service Association*, [1945] 1 Sask. L.R.B. Dec. 24; *Retail, Wholesale and Department Store Union v. United Food & Commercial Workers & Westfair Foods Ltd.*, [1980] July Sask. Labour Rep. 40; LRB File No. 086-80; and *Prince Rupert Grain Ltd. v. International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514* (1996), 135 D.L.R. (4th) 385 (S.C.C.).

Counsel also referred the Board to *Pelkey v. Sask. Civil Service Association,* [1957] 2 Sask. L.R.B. Dec. 20, where professional engineers were permitted to be excluded from the large SGEU bargaining unit largely on the basis of the difficulties of recruiting engineers to a unionized setting; and to the subsequent decision of the Board in *Professional Engineers Employees Association v. Government of Saskatchewan and Saskatchewan Government Employees' Association*, [1974] 3 Sask. L.R.B. Dec. 446,

where the Board refused to permit the professional engineers to establish a separate bargaining unit on the grounds that it would unduly fragment collective bargaining in the public sector.

Counsel also argued that the requirement for exceptional circumstances to justify the creation of a second bargaining unit cannot be influenced by evidence of support filed by the proponent of the second bargaining unit. In this regard, counsel referred the Board to three cases involving agrologists in the Government of Saskatchewan: *D. Grant Griffin v. Government of Saskatchewan and Saskatchewan Government Employees' Association,* [1981] Feb. Sask. Labour Rep. 61; LRB File No. 168-80; *Robert McDonald v. Government of Saskatchewan and Saskatchewan Government Employees' Association,* [1983] Apr. Sask. Labour Rep. 67; and *Wayne Hanna v. Government of Saskatchewan and Saskatchewan Government Employees' Association,* [1985] Aug. Sask. Labour Rep. 31. Counsel noted that these cases also support the Board policy against fragmentation.

SGEU took the position that all liquor store managers should be included in the SGEU bargaining unit as liquor store managers had been part of the SGEU "all employee" unit from 1945 to 1984 and had only been removed from the bargaining unit as a result of an amendment to the definition of "employee" in the *Act* in 1984. In this regard, counsel referred to the Board's decisions in *Liquor Board of Saskatchewan v. Saskatchewan Government Employees' Association*, [1982] June Sask. Labour Rep. 64, LRB File No. 037-81, which concluded that liquor store managers fell within the "all employee" unit held by SGEU; and *Liquor Board of Saskatchewan v. Saskatchewan Government Employees' Union*, [1984] Nov. Sask. Labour Rep. 38, LRB File No. 083-84, where the Board held that under the 1983 amendment to the definition of "employee" in the *Act* liquor store managers were excluded from SGEU's bargaining unit. SGEU's application follows another amendment to the definition of "employee" in the *Act* on October 28, 1994, which removed the 1983 amendment which excluded "any person who is an integral part of his employer's management" from the definition of "employee." The application by SGEU seeks to restore the bargaining rights that it held prior to 1984 and, according to counsel, is justified by the legislative amendment to the definition of "employee." Counsel argued that there are no material facts that would indicate that the work of the liquor store managers had changed significantly to justify their exclusion under the 1994 definition of "employee."

Counsel also argued that there is no conflict of interest between liquor store managers and the "all employee" bargaining unit which would justify their exclusion from the larger unit. Counsel suggested that it would be relatively easy to incorporate the liquor store managers into the current SGEU-SLGA

collective agreement. In addition, counsel observed that there would be more lateral opportunities for liquor store managers if they were included in the "all employee" bargaining unit. Counsel noted that liquor store manager I and II classifications were similar to assistant liquor store manager classifications I and II. Counsel argued that liquor store managers are not sufficiently distinct in their wages or terms and conditions of employment to be removed from the bargaining unit. Their inclusion in the larger bargaining unit would foster the promotion and bumping of career employees from the lowest paid position to the highest paid position.

Counsel also cautioned the Board against permitting a fragmentation by occupational class of the bargaining structures in government. Counsel argued that permitting the liquor store managers to carve out a separate bargaining unit for one occupational classification would encourage other occupational groups to follow suit and would result in the dilution of bargaining strength of the employees and in inefficient operations for the SLGA. In particular, counsel argued that the proliferation of bargaining units would result in increased disputes among the parties over scope issues.

Counsel distinguished SLSMA's application from an earlier decision of the Board 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 File Nos. 018-97 & 031-97, where the Board found that a middle management bargaining unit was possible in the public sector. Counsel noted that in the *PIPSC* case, *supra*, SGEU did not claim to represent all of the employees in the proposed bargaining unit.

Counsel also referred the Board to cases in which the Board had expressed its preference for large bargaining units. In particular, counsel referred to *Westfair Foods Ltd. v. United Food and Commercial Workers,* [1981] Feb. Sask. Labour Rep. 66, LRB File No. 085-80 and *Retail, Wholesale and Department Store Union v. Prince Albert Co-operative Association Ltd.*, [1982] May Sask. Labour Rep. 55, LRB File No. 535-81. Counsel argued that there is a strong philosophical reason for favouring larger units as they are more viable in terms of their economic clout and bargaining power. Counsel also argued that larger, multi-occupational bargaining units increase collective spirit in the work place by ensuring that all employees share common collective bargaining goals and responsibilities.

In the event that the Board finds the unit applied for by SLSMA to be inappropriate for collective bargaining, counsel requested that the Board adjudicate on the status of other positions listed in SGEU's

application and deal at that time with the issue of whether SGEU is obligated to demonstrate support among liquor store managers before they can be returned to the large bargaining unit.

SLSMA's Argument

Mr. Ermel, for SLSMA, argued that the unit proposed by SLSMA need not be the most appropriate unit, but must be sufficient for collective bargaining. In support of this position, Mr. Ermel cited *Retail, Wholesale and Department Store Union v. Prairie Micro-Tech*, [1994] 3rd Quarter Sask. Labour Rep. 90, LRB File No. 088-94 and *Retail, Wholesale and Department Store Union v. Moose Jaw Packers (1974) Ltd.*, [1996] Sask. L.R.B.R. 652, LRB File No. 067-96. Mr. Ermel stated that the Board should consider a number of factors in determining which unit is appropriate, including the history of collective bargaining, the nature of the employer's operations, the size and viability of the proposed unit, the nature of the work performed, the community of interest among employees, the interchange of personnel and the wishes of the employees. Mr. Ermel noted that the Board attempts to balance bargaining stability with the rights of workers to join trade unions of their own choosing.

SLSMA took the position that there are only two options for the Board to consider: either a separate SLSMA unit or inclusion of all liquor store managers in SGEU. No other option is considered possible by SLSMA because of the similarity in the duties performed by liquor store managers.

SLSMA is of the view that liquor store managers lack a community of interest with the SGEU bargaining unit. Mr. Ermel referred the Board to its decision in the *PIPSC* case, *supra*, in which the Board justified the creation of a middle management bargaining unit on the basis of the conflict of interest arising between middle managers and members of the larger bargaining unit. Mr. Ermel noted that liquor store managers are the eyes and ears of management in the stores; that they need to function without their interest being diluted by participation in the activities of the larger bargaining unit. Mr. Ermel noted that liquor store managers perform various functions that place them in a conflict of interest with members of SGEU, in particular, budget preparation, supervision of staff, scheduling of staff, selection of staff, first step grievance handling, discipline imposition, training and assignment of work.

Mr. Ermel noted that the inclusion or exclusion of liquor store managers had been a bargaining issue between SGEU and SLGA for the past 20 years or more, implying that SLGA would prefer a separate middle management unit for liquor store managers and that greater industrial stability would result from the creation of such a unit. Mr. Ermel argued that its proposed unit consisting of approximately 70 employees would be a viable unit with sufficient community of interest to justify a separate bargaining unit.

Mr. Ermel cautioned the Board against the dangers of liquor store managers assuming control of the SLGA unit if they were included in the larger bargaining unit. Mr. Ermel argued that the establishment of a middle management unit would not constitute a "carve out" from the SGEU unit. Rather, it was suggested that the middle management unit was a correction that would lead to greater industrial stability by removing the question of the inclusion or exclusion of liquor store managers from the bargaining table between SGEU and SLGA. Mr. Ermel asked the Board to consider the dismal history of the relationship between SGEU and SLGA on the issue of the inclusion or exclusion of managers and to conclude that the most appropriate unit would be a middle management unit for liquor store managers.

SLGA's Argument

SLGA made no representations on this aspect of the applications before the Board.

Analysis

The Board has carefully reviewed the evidence and arguments made by all parties. The approach of the Board to the creation of multi-bargaining units within the broad public sector was recently set out in *City of Saskatoon v. Canadian Union of Public Employees, Local 59 and Saskatoon Civic Middle Management Association*, [1998] Sask. L.R.B.R. 321; LRB File No. 232-97. In that case, the Board reaffirmed its long standing policy of preferring large bargaining units over small specialized craft or occupational units. The Board stressed that it would take a restrictive approach to defining the scope of a middle management unit and would focus primarily on the existence of a labour relations conflict of interest between members of the proposed middle management unit and the larger unit. The Board stated as follows, at 330:

We start with the observation that this Board, along with other labour relations boards in Canada, generally prefers large units, including as many employees as possible, to small specialized craft or other units. In Hospital Employees' Union, Local 180 v. Health Sciences Association of British Columbia and Kelowna Hospital Society, [1977] 2 Can. L.R.B.R. 58, the British Columbia Labour Relations Board expressed the labour relations policy reasons for favouring large all employee units in the following terms, at 67:

> *The first is the long-standing policy in favour of large industrial units, units covering as many employees as possible. This policy, which is designed to promote industrial stability, administrative efficiency, and common frameworks of employee conditions, has particular force in the public sector . . . Special features must be present to warrant a departure from this norm. In hitherto unorganized sectors of the economy, an exception will be permitted where to insist on the norm would be to effectively deny collective bargaining . . . In other instances, exceptions have been permitted on the basis of s. 41 of the Code or powerful historical or like factors.*

Flowing from this preference for large bargaining units, when faced with multiple bargaining units, the Board will take a fairly restrictive approach to defining the scope of the smaller, specialized unit. In the Kelowna Hospital case, supra, the British Columbia Labour Relations Board adopted this restrictive approach and explained its rationale, at 68:

> *Where two (or more) bargaining units have been established in any undertaking, the first a large industrial unit and the other a smaller craft or special group unit, the boundaries of the latter should be defined or developed with a relatively restrictive frame of mind. There are at least two reasons for adopting that approach. First, to give sanction to a more expansionist view in favour of the smaller unit would be to further dilute the general policy in favour of single industrial units. The smaller, special characteristic unit will have been created to meet particular and compelling circumstances not to give the trade union a beachhead from which it can make further inroads into the larger units and the overriding policy. Secondly, the relatively restrictive state of mind will in many cases be necessary to avoid denuding the industrial or service unit of a significant element of its viability and bargaining strength. When the smaller, exceptional unit is created it frequently creams off and takes into membership the most skilled employees. The unit, although relatively small, derives its bargaining strength from the fact that it contains such skilled persons - persons quite essential even in the short run to the continued operation of the employer. The industrial unit, although larger, will generally contain a number of persons who are not essential in the short run to the employer's operations. Sheer size will be one measure of the bargaining strength of the larger unit. But another measure, often equally significant, will be the extent to which the industrial or service unit includes technical or skilled employees.*

This approach was approved by the Board in Regina Civic Middle Management Association v. City of Regina and City Hall Administrative Staff Association, Local No. 7, C.U.P.E. and Civic Employees' Union, Local 21, C.U.P.E., [1980] 3 Can. L.R.B.R. 390, LRB File Nos. 298-79 & 314-79.

In Saskatoon and Regina, the middle management units were formed from the employees who were excluded by Board Order or by agreement from the large, all employee units, which generally include an outside workers unit, inside workers unit, transit unit, and a fire fighters unit. Special units may also exist in city owned utilities, such as the IBEW unit in the City. Although there may be some historical anomalies that explain the exclusion of some of the positions from the larger industrial units, generally, the exclusions came about because of the potential for a labour relations conflict with membership in the industrial unit arising out of the managerial duties performed by management personnel and because of the close alignment of middle management personnel with decision-making processes that may affect the larger industrial units. In the public sector, it is not unusual to have several layers of management in which the lowest level do not exercise sufficient managerial authority to remove them from the definition of "employee", although their community of interest lies closer to the managerial suite than to the industrial bargaining units.

In these situations, the Board has approved the creation of middle management units. In doing so, however, the Board has defined the middle management unit in a restrictive fashion by confining its membership to those positions who, if they were included in a large industrial unit, would be placed in a conflict of interest situation between their obligations to perform supervisory and first rung management functions in relation to those employees and their membership in the larger unit. The Board has also allowed positions to be included in middle management units which have some peculiar historical reason for being excluded from the industrial bargaining unit. However, these positions are not permitted to be used as a springboard for organizing other positions that otherwise would be included in the larger industrial unit.

In relation to defining the community of interest that must be shared by persons assigned to the middle management unit, the Board will focus on the labour relations aspects of their positions. The professional or other status required by the position will not be considered a determining factor, unless the position is one that for historical reasons was included in the middle management unit, or excluded from the industrial unit. This is consistent with the Board's previous decision in City of Regina v. Canadian Union of Public Employees, Local 7 and Regina Civic Middle Management Association, [1986] Sept. Sask. Labour Rep. 69, LRB File Nos. 387-85, 389-85, 031-86 & 032-86 where the Board considered the position of Research and Planning Analysts in the Parks and Recreation Department of the City of Regina and held as follows, at 70:

> *. . . after considering all of the circumstances the Board has decided that they ought properly to fall within the bargaining unit represented by the Canadian Union of Public Employees, Local 7. The Board views the Regina Civic Middle Management Association as representative of employees in "middle management" positions, and in its opinion the Analysts do not perform duties of a sufficiently managerial character to warrant placing them in that Association.*

Although the Board will certify bargaining units that are less than the ideal "all employee" unit, such units are generally found in newly organized industries or organizations which may prove difficult to organize on an employer-wide basis. The decision of the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd.*, [1992] 4th Quarter Sask. Labour Rep. 75, LRB File No. 182-92, provides an example where the Board granted a certification order for part of an employer's workforce in a situation where organizing on any other basis proved difficult. In that instance, the Board concluded as follows, at 78-79:

> *The Regina Exhibition Association Ltd. is an organization which has been in existence for over a century. During that time, attempts by trade unions to obtain bargaining rights for employees have been sporadic and have enjoyed varying degrees of success. In addition to the bargaining unit composed of the employees of the independent contractor who operates the concessions, there is one small bargaining unit of stage employees represented by the International Alliance of Theatrical Stage Employees.*
>
> *It is not necessary for the Board to decide this application on the basis of whether this unit, composed of those employed as wheelers and dealers, is the most appropriate unit. In some circumstances, the Board might be persuaded by an argument that there is a more appropriate unit than the one proposed. In this case, however, reference to the considerations of policy which give meaning to the idea of "appropriateness" had led the Board to the conclusion that the unit applied for is an appropriate one.*
>
> *In the first place, it is our view that this unit will constitute a viable entity for the purposes of collective bargaining. The employees form a natural group, whose terms and conditions of employment can be the subject of sensible discussion. There is a marked similarity in the training, qualifications, duties and working conditions of each of these employees. It is true that the banking staff work in close proximity to the wheelers and dealers, and that their respective responsibilities are in some senses closely related to each other. There is a clear distinction between the two groups, however, and it is our conclusion that it is no more damaging to the potential viability of the bargaining unit to exclude these employees than it is to exclude the employees in the coat check, the waiters, or other persons who work in the same building as the wheelers and dealers.*
>
> *Secondly, there was no evidence which suggested that the proposed description of the unit would create excessive inconvenience or complication in the industrial relations of this employer. This is not a case where the Board was being asked to examine a highly balkanized workplace, or where, in the words of the Canadian General Electric decision (supra), the "collective bargaining framework" is a weighty factor. Indeed, the witness for the employer conceded that he could foresee little hardship to the employer if the bargaining unit excluded the banking staff.*

> *Finally, both of these issues must be seen in the context of the rights of the employees to have access to collective bargaining if that is their wish. As the British Columbia Labour Relations Board pointed out in B.C. Coal and International Union of Operating Engineers, [1982] 3 CLRBR 177, it is legitimate for a board to consider whether "a broad-based bargaining unit would deny collective bargaining rights to a smaller group of employees."*
>
> *Given the apparent difficulties which have been encountered in attempting to organize the employees of the Regina Exhibition Association Ltd. for the purpose of bargaining collectively, the Board must give some though to the implications for the group of wheelers and dealers - a majority of whom do wish to engage in bargaining with their employer - if it is decided that they do not constitute an appropriate bargaining unit on their own. The result is not, as it is in some cases where the appropriateness of the unit is an issue, that they would be represented by some trade union other than the one they have chosen. They would not be represented by a trade union at all.*

However, in the context of a highly organized public sector when multiple bargaining units are proposed the Board will place more emphasis on industrial stability and avoidance of fragmentation or balkanization than on the right of a small group of employees to select their own trade union. The Board policy of permitting the organization of employees into "an" appropriate bargaining unit, as opposed to the most appropriate bargaining unit, does not apply to the multi-bargaining unit setting. In this setting, the Board requires applicants who propose small craft or occupational units to establish that the members of such units would be placed in a labour relations conflict with the members of the larger bargaining unit.

SLSMA's application requested the Board to certify a bargaining unit consisting only of liquor store managers who are employed by SLGA. In our view, there are two factors which must be considered in determining if the unit applied for is an appropriate middle management unit. First, do the liquor store managers perform functions that place them in a labour relations conflict with members of the larger SGEU unit? Second, if there exists a labour relations conflict for all or some of the liquor store managers, is a separate bargaining unit consisting only of liquor store managers appropriate?

The evidence from the first proceedings, in which the Board found that liquor store managers are employees, established that liquor store managers perform the following functions. See: [1997] Sask. L.R.B.R. 836, at 839-840:

> *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.

SGEU led evidence during the second stage of the hearing which established that the pay range for liquor store managers I and II were closely aligned with the pay ranges for assistant liquor store managers I and II. In addition, the pay rates for liquor store managers III fell largely within the pay ranges established for assistant liquor store manager II's.

As indicated in the earlier hearings, some assistant liquor store managers have more supervisory responsibility than liquor store managers. For instance, level I and II stores operate with only one full-time employee, being the liquor store manager. The main functions of the liquor store managers in Level I and II stores is to perform work that in the Level IV, IVA and V stores have performed by members of the SGEU bargaining unit. These comments are not intended to diminish the value of the work performed either by liquor store managers I and II or the work of store clerks.

However, a quantitative assessment of the work performed by liquor store managers I and II leads to the conclusion that the nature of their work and the conditions in which they work are similar to the conditions for a majority of the employees in the SGEU bargaining unit, that is, they largely perform the "hands on" work of selling liquor and do not play a significant role as a manager. Certainly, the management role performed by liquor store managers I and II is not greater than the role played by assistant liquor store managers in the larger liquor stores. On this evidence, the Board finds that liquor

store managers I and II do not perform functions that would give rise to a labour relations conflict with members of the larger SGEU bargaining unit if they were included in that unit.

The situation for liquor store managers IV, IVA and V is different from the position of liquor store managers I and II. Level IV, IVA and V stores represent relatively large retail operations, involving a staff complement that include assistant liquor store managers, full-time clerks, part-time clerks and casual staff. The majority of the time spent by liquor store managers in these operations relate to the supervision of staff and overall managerial functions related to the store operations, not the hands on work of selling liquor. The managerial component of their work, while it is not sufficient to remove them from the definition of "employees," would nevertheless place them in a labour relations conflict with members of the SGEU bargaining unit, if they were included in that unit.

Liquor store manager III's are caught somewhere in between the two groups already discussed. Mr. Krajewski, Store Manager III at the Fort Qu'appelle liquor store, testified that his staff complement includes one full-time liquor store manager III, three part-time clerks and one casual staff. Store manager III's spend a considerable amount of time selling liquor, although they do have more staff to supervise and do so without the assistance of an assistant liquor store manager. Overall, if the work of a liquor store manager III is quantified according to the types of functions performed, it is similar to the work performed by assistant liquor store managers in the larger stores. As a result, the Board does not conclude that the functions performed by liquor store manager III's create a conflict of interest with members of the SGEU bargaining unit.

In summary, on the first question, the Board finds that SLSMA has not established that there exists a labour relations conflict between the work performed by liquor store managers I, II and III's and the larger SGEU bargaining unit. They function in a manner similar to assistant liquor store managers, who are already included in the larger unit. In our view, it is therefore not appropriate to include liquor store managers I, II and III in a separate middle management unit.

With respect to the liquor store managers IV, IVA and V, the Board must consider if it is appropriate to create a separate middle management bargaining unit for this group of employees. There are approximately 20 managers who would fall into these classifications. They form part of a larger group of managers within SLGA. As indicated in the cases cited above relating to agrologists and engineers, the Board has in the past been reluctant to permit occupational bargaining units outside the construction

and health care industries. With these exceptions, fragmentation of bargaining in the public sector into small occupational groups has been avoided since the introduction of the *Act*. SLSMA's application requested the creation of middle management unit based on the common managerial role played by liquor store managers in SLGA. However, it did not apply to represent all middle managers within SLGA. In our view, while a middle management unit in SLGA may be justified on the principles set out in *City of Saskatoon*, *supra*, and *PIPSC*, *supra*, a middle management unit comprised only of liquor store managers IV, IVA and V is not a viable or appropriate bargaining unit.

With respect to SGEU's claim that all liquor store managers should be included within the scope of its bargaining unit, the Board is of the view that the legislative amendments to the definition of "employee" are important considerations in determining the status of such persons as "employees." However, this determination does not fully answer the question of which bargaining unit they should be assigned, that is, to an "all employee" type unit or to a middle management unit. In this instance, for the reasons stated, the application of the principles contained in the *City of Saskatoon* case, *supra*, would lead to the conclusion that it would not be appropriate to include liquor store managers IV, IVA and V in the larger SGEU unit.

Conclusion

As a result of the above decision, the Board dismisses SLSMA's application for certification. SGEU requested that its application for amendment not be dealt with in a final manner in this hearing. A further hearing will therefore be scheduled to address the remaining issues on LRB File No. 037-95 and includes a request to add liquor store managers to the SGEU bargaining unit. At that time, the Board will address the question of whether SGEU requires evidence of support from liquor store managers I, II and III before they can be included in the existing bargaining unit. This ruling, however, has the effect of excluding liquor store managers IV, IVA and V from possible inclusion in the SGEU Order.

DENNIS KINASCHUK, Applicant and SASKATCHEWAN INSURANCE OFFICE AND PROFESSIONAL EMPLOYEES' UNION, LOCAL 397 and SASKATCHEWAN GOVERNMENT INSURANCE, Respondents

LRB File No. 366-97; July 20, 1998
Vice-Chairperson, James Seibel; Members: Donna Ottenson and Kathie Jeffrey

For the Applicant: David Birchard
For the Union: Rick Engel
For the Employer: Tom Waller

Duty of fair representation - Practice and procedure - Delay - Board finds extreme delay, prejudice to union and employer and no reasonable and credible explanation from applicant - Board dismisses application on the basis of delay.

Duty of fair representation - Contract administration - Union moved grievance through process in timely and efficient manner and ensured matter reviewed by outside counsel before refusing to take to arbitration - Board holds that union did not act in arbitrary, discriminatory or bad faith manner in processing grievance.

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

REASONS FOR DECISION

Background

James Seibel, Vice-Chairperson: Saskatchewan Insurance Office and Professional Employees' Union, Local 397 (the "Union") was designated by this Board as the bargaining agent for a unit of employees employed by Saskatchewan Government Insurance (the "Employer") of which Dennis Kinaschuk was a member. Mr. Kinaschuk filed this application which alleged 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 with respect to a grievance of his termination by the Employer.

Mr. Kinaschuk was employed by the Employer for approximately 15 years when, on September 21, 1994, the Employer terminated his employment as a claims technician because it alleged that he had misappropriated automobile parts from the Employer's salvage compound in Regina.

A grievance of his termination, dated October 5, 1994, was filed on his behalf. After each of the first, second and third steps of the grievance procedure the grievance was denied, the date of the last denial being December 21, 1994. The Union had a further 30 days in which to refer the grievance to arbitration.

At or about this time, Mr. Kinaschuk consulted a firm of solicitors. By letter dated January 1, 1995, the solicitors requested the Union to refer the grievance to arbitration, and further stated that if it did not, it would be in breach of its duty to represent Mr. Kinaschuk.

The Union sought its own legal opinion, and, pending consideration of its position, requested from the Employer an extension to refer the grievance to arbitration to February 7, 1995. The Employer agreed to the extension.

The Union's counsel provided his opinion dated January 10, 1995 in which he expressed the view that he was not optimistic about the chances for success at arbitration and stated that he did not consider the case to be viable for arbitration. He outlined his opinion based on his references to decisions by this Board as to the Union's duty under s. 25.1 of the *Act*.

On January 27, 1995, Mr. Kinaschuk's solicitor wrote to the Union and advised that if the Union did not refer the grievance to arbitration they were instructed to make an application to this Board on the basis of the alleged breach by the Union of its duty of fair representation.

The Union's counsel responded to Mr. Kinaschuk's solicitor by letter dated February 1, 1995 in which he enclosed a copy of his written opinion to the Union and referred to certain specific facts which had since been discovered. The Union's counsel also invited Mr. Kinaschuk's solicitor to advise if Mr. Kinaschuk had any further information that the Union was not aware of as it was prepared to reconsider the matter in that case.

The Union did not hear anything further from Mr. Kinaschuk or his solicitors. It advised the Employer that the grievance would not be referred to arbitration.

Some time later Mr. Kinaschuk consulted a second firm of solicitors. As a result, he commenced an action for wrongful dismissal against the Employer in the Court of Queen's Bench on October 25, 1995. This action was discontinued on January 5, 1996.

The present application was filed with the Board on December 16, 1997. As Mr. Kinaschuk has since moved to Edmonton and obtained other employment, if the grievance was to proceed to arbitration, he would not seek reinstatement, but some form of compensation.

At the hearing of this application, Mr. Engel, counsel for the Union, raised a preliminary issue that the application should be dismissed on the grounds of delay.

Because the entire case could conveniently be heard in the single day scheduled, the Board determined that evidence should be called with respect to the delay issue and with respect to the merits of the case. A decision on the preliminary issue was reserved.

Relevant Statutory Provisions

Section 25.1 of the *Act* 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.*

Union's Evidence

Larry Sheffer testified that he has been employed with the Employer since November, 1967. He became a member of the Union's executive board in 1977, and has held positions as bargaining agent and treasurer. Since 1988 he has been its business representative. Mr. Sheffer testified that he has extensive experience in bargaining, in the past has serviced three other bargaining units, and has had personal involvement in the processing of more than 100 grievances, including mediation and arbitration processes. He stated that he had lots of experience in the processing of grievances against discharge by the Employer.

Mr. Sheffer said that he was assigned to Mr. Kinaschuk's case and drafted the grievance. Through the fall of 1994, he was directly involved in all steps of the grievance process. He stated that, as a result, he had acquired a detailed understanding of the facts of the case. He said that the Union's executive board was provided with an update of the case after the completion of each step.

On January 11, 1995 Mr. Sheffer took the opinion letter of the Union's counsel to the Union's executive board, which discussed and considered it, and decided not to proceed further with Mr. Kinaschuk's grievance subject to anything new and relevant coming to light. Mr. Sheffer was unable to recall what his specific opinion or comments were at the time but said that he did not disagree with counsel's opinion. The Union's counsel was instructed to reply to Mr. Kinaschuk's solicitor and did so by letter dated February 1, 1995. The last paragraph of that letter reads as follows:

> *Once you have had the chance to consider these matters or the issues raised in my letter to the Union, please advise if there are any explanations from Mr. Kinaschuk that the Union has not taken into account or is unaware of. If so, the Union is fully prepared to revisit this file. By the same token, the Union is not prepared to change its decision if nothing new arises.*

Mr. Sheffer said that there was nothing in the Union's files to indicate that Mr. Kinaschuk's then solicitor had replied, and he had no such recollection. He said, however, that since that time the Union's file has fallen into disarray and parts of it appear to be missing, including some original research. Apparently, the auto parts alleged to have been taken by Mr. Kinaschuk are also missing or destroyed.

It was Mr. Sheffer's opinion that the Union (and Mr. Kinaschuk) would be prejudiced if the grievance were to now be heard at arbitration because of the loss of original evidence and research, the lapse of time, fading memories and the subsequent disability of an important witness.

On cross-examination, Mr. Sheffer agreed that the Union had reservations about the viability of the grievance even before the third step of the grievance process. He said that the Employer's general response to even a minor theft was discharge - he recalled an instance where a discharge for a theft of eight dollars was upheld at arbitration. The Union's executive saw little chance of success in Mr. Kinaschuk's case.

Mr. Sheffer testified that if new information had come to light, the Union would have requested a further extension of time to refer to arbitration from the Employer and would have re-visited the situation.

Applicant's Evidence

Mr. Kinaschuk testified on his own behalf. Following his dismissal by the Employer he was unemployed for about ten months. Since July, 1995 he has resided in Edmonton where he is employed as an autobody technician. He said that in 1997 he reached his former level of earnings but only through working overtime.

Mr. Kinaschuk was adamant that the allegations upon which the Employer based his discharge were untrue. He testified that when he received the letter of termination on September 21, 1994, he went to the Union's office where he meet with Mr. Sheffer. Mr. Sheffer assisted him with the grievance and subsequently handled the Union's side of the process through the first two steps which were taken on October 17, 1994 and November 24, 1994. However, he said that, prior to the third step, Mr. Sheffer expressed the Union's reluctance to proceed further. It was shortly thereafter that Mr. Kinaschuk sought his own legal advice. He said that after his solicitor spoke to Mr. Sheffer, the Union agreed to proceed to the third step. After the grievance was denied at the third step, he did not personally consult the Union, but left it with his solicitor to handle.

When asked why there was a delay of nearly two years in filing the present application with the Board, Mr. Kinaschuk said that he was running short of money and "no one wanted to take it on." When asked whether anything else contributed to the delay, he said that, having left it in the hands of his first solicitor, he did not know why his solicitor did not proceed in a timely fashion. On cross-examination, Mr. Kinaschuk said that he had provided his solicitor with instructions to apply to the Board if the Union declined to proceed to arbitration. He claimed that when he contacted his solicitor approximately two weeks later, he was told that his solicitor was still "looking into it." Mr. Kinaschuk said that his solicitor did not advise him of the February 1, 1995 letter from the Union's counsel. Mr. Kinaschuk thought that was the last time he spoke to his solicitor until perhaps as late as August, 1995 who then advised him that nothing further had been done. Mr. Kinaschuk then retained his present counsel who obtained the files from his former solicitor, including the letters between his former counsel and Union's counsel.

Mr. Kinaschuk was of the opinion that the lapse of time would not seriously affect the ability to conduct a successful arbitration of the grievance.

He testified that his primary reason for not applying to the Board until December, 1997 - a period of nearly three years - was because of tight finances. He acknowledged that he had no new information about the grievance to add to what was already known in February, 1995. In the course of giving his evidence, Mr. Kinaschuk outlined the circumstances that led to his termination and which would form at least part of the evidence if the grievance was to be arbitrated. It is not necessary for the purpose of these reasons to set out the details of the events; suffice it to say that it is likely that the evidence of several witnesses would be presented and that issues of credibility would loom large. Also, because it appears that Mr. Kinaschuk was under surveillance for at least part of the relevant period of time, the recollection of each of the witnesses of fairly minute and detailed activity, both on their part and on the part of Mr. Kinaschuk, would be extremely significant.

Arguments

Mr. Engel, counsel for the Union, argued first that the application should be dismissed because of the lengthy delay in applying to the Board, by which the Union would be prejudiced in its ability to prosecute the grievance. In support of this position, counsel cited the decisions of the Board in *Neskar v. Civic Employees Union, Local 21 (CUPE)*, [1995] 4th Quarter Sask. Labour Rep. 70, LRB File No. 122-95, and *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada v. Refrigeration Installations, a Group of Honeywell Limited and National Automobile, Aerospace and Agricultural Implement Workers of Canada*, [1995] 3rd Quarter Sask. Labour Rep. 69, LRB File No. 057-94.

Counsel then argued that, on the evidence, the allegation of a failure to fairly represent Mr. Kinaschuk was not made out. He said that the Union had fairly and seriously considered all factual information, but also had other considerations to take into account. Of these, the primary factors considered were the maintenance of a good long-term relationship with the Employer, the credibility of the Union, the historical position of the Employer in cases of this type and the outcome at arbitration of similar cases. He said that the Union was mindful of its duty of fair representation and had no interest in creating a perception among the membership that it is not properly fulfilling its duty. However, he said, the Union cannot, in the interest of the health of its bargaining relationship with the Employer, afford to process grievances through to arbitration that are weak on the merits of the case.

Counsel said that the evidence demonstrated that the Union had pressed Mr. Kinaschuk's case vigorously through the grievance process, and before making the important decision as to whether to proceed to arbitration, had obtained a legal opinion that was sceptical of the merits of the grievance.

Mr. Birchard, counsel for Mr. Kinaschuk, argued that the delay was not prejudicial to the ability of the Union to prosecute the case. He said that the delay itself was not the fault of Mr. Kinaschuk and was attributable to problems that arise "from time to time between law firms and clients." As well, he said that Mr. Kinaschuk had relocated to Edmonton, was busy establishing a new life and had understandably lost some desire to press the matter.

With respect to the merits of the application before the Board, counsel referred the Board to its decision in *Mary Banga v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93, in which the Board found that the union had committed an unfair labour practice in violation of s. 25.1 of the *Act*.

Mr. Waller, counsel for the Employer, essentially supported the position of the Union on both the preliminary issue and the merits.

Analysis

The Preliminary Issue: Delay

A request to dismiss an application because it is alleged that the applicant has delayed bringing it before the Board for an excessive period of time is not granted lightly. Certain policy considerations underlie the Board's general approach to such a request. These were outlined in the *Neskar* case, *supra*, at 76:

> *The issue of whether the Board should refuse to proceed with the hearing of an issue because of the delay of one of the parties in taking some procedural step is one which has come before us on relatively few occasions. In recent decisions in United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada v. Refrigeration Installations, LRB File No. 057-94; and Saskatchewan Union of Nurses v. South Central Health District, LRB File No. 016-95, the Board made it clear that we are not inclined to take an excessively rigid or technical approach to this question. In keeping with our general aspiration to ensure liberal access to the process of the Board and to examine the core of issues in dispute rather than their procedural undergrowth, we are slow to conclude that technical*

> *deficiencies in applications or procedural missteps on the part of participants in our proceedings should disqualify them from having a full hearing of their allegations on the merits.*
>
> *On the other hand, we must acknowledge that there are occasions when to overlook procedural defects would seriously undermine the ability of the Board to consider fairly the issues raised by both parties, or would constitute a serious source of prejudice to one of the parties.*

Often quoted in decisions on this issue is the following passage from the Ontario Labour Relations Board decision in *McKenly Daley v. Amalgamated Transit Union and Corporation of the City of Mississauga*, [1982] O.L.R.B. Rep. March 420, at 425:

> *It is by now almost a truism that time is of the essence in labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it -including the employees - are entitled to expect that claims which are not asserted within a reasonable time, or involved matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims.*

In the context of civil actions, in its frequently cited decision in *Carey v. Twohig*, [1973] 4 W.W.R. 378 (Sask. C.A.), the Saskatchewan Court of Appeal enunciated criteria for determining whether an action should be dismissed by reason of excessive delay - that the delay be inordinate; that the inordinate delay be inexcusable; and that the defendant be seriously prejudiced by the delay. But the essence of the inquiry expressed in that case was whether justice can be done despite the delay.

However, the differences between consideration of the issue in the context of civil proceedings in the superior court and in the labour relations context was recognized by the Board in *Saskatchewan Union of Nurses v. South Central Health District*, [1995] 2nd Quarter Sask. Labour Rep. 281, LRB File No. 016-95, at 285:

> *The question of delay has a somewhat different resonance in the context of labour relations than in that of civil legal proceedings. As the Ontario Labour Relations Board pointed out in the City of Mississauga case, supra, time is of the essence in labour relations in a dramatic and often urgent way. The basic questions - and particularly the question of whether justice can still be done - are much the same, however.*

In that case, the Board determined that the essential test in the *Carey* decision, *supra*, permitted the Board to consider any factors which may bear on that test in a particular case, and cited with approval the following paragraph from *City of Mississauga, supra*.

> *A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: the length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy consideration, that limit should be measured in months rather than years.*

The Ontario Board has consistently applied this approach in the past several years: See, *Sebastian Studt v. Teamsters, Chemical Energy and Allied Workers, Local Union 1688 and Redpath Sugars, Division of Redpath Ltd.*, [1997] O.L.R.D. No. 3600; *Gisberto Taranto v. The North York Foremen's Association, Local 711 and Corporation of the City of North York*, [1995] O.L.R.D. No. 4579; *Christopher Gaebel v. National Automobile, Aerospace, Transportation and General Workers Union of Canada and Camco Inc.*, [1995] O.L.R.D. 4817; *Victor Carguez v. Canadian Union of Public Employees, Local 229 and Marriott Management Services*, [1994] O.L.R.D. No. 2567; *Salvadore Ingraldi v. Amalgamated Transit Union, Local 113 and Toronto Transit Commission*, [1998] O.L.R.D. No. 234.

Of course, the factors referred to above do not constitute an exhaustive list and any particular case may have additional factors which bear upon this issue.

One of the most important factors that affects the ability to do justice despite the delay is whether the respondent union would be seriously prejudiced in its prosecution of the grievance as a result of the delay. The Ontario Board has determined in several of its decisions that where there is extreme delay, prejudice is inherent to the party that is unaware that its conduct will be called into question, and it is not necessary for that party to establish specific prejudice. In such a situation, absent a credible and reasonable explanation for the delay, the Board will decline to inquire into the complaint: see, *Carguez, supra*, at 29.

The effect of this view is to shift the onus with respect to prejudice to the applicant in cases where the delay is extreme; that is, there is a rebuttable presumption that there is prejudice to the responding parties and the onus is on the applicant to not only provide a credible explanation for the delay, but also to prove that there is no material prejudice to the respondents. In *Evelyn Brody v. East York Health Unit*, [1997] O.L.R.D. No. 152, the Ontario Board described its position as follows, at 20:

> *In terms of prejudice to the responding party, although the Board will normally require parties seeking to have an application dismissed for undue delay to provide evidence of specific prejudice resulting from the delay, in cases where the delay is "extreme", the Board is prepared to assume that the lapse of a significant period of time is corrosive on the memory of witnesses and, therefore, that the ability of a party to prepare its defence to the allegations raised is significantly impaired. In such instances, the opposing party need not establish prejudice because the prejudice is assumed, and the onus of explaining the reasons for the delay shifts to the applicant.*

In the *Redpath Sugar* decision, *supra*, the Ontario Board stated, at 26:

> *The Board, in cases of extreme delay, presumes there is prejudice suffered by the Union and the employer. The relief Mr. Studt seeks is to have grievances filed and actively pursued to arbitration ... The Board recognizes that in cases of extreme delay, the parties are put at a disadvantage because witnesses disappear, memories fade, and documents are no longer available to allow a party to properly defend itself.*

We also accept that excessive delay is inherently corrosive to the memory of witnesses, and that cases which are fact-sensitive are particularly vulnerable in this regard. But what is "excessive" or "extreme" delay? In the *Brody* decision, *supra*, the Ontario Board's opinion was as follows, at 19:

> *In determining whether the delay in a particular case is unreasonable or excessive, the Board will consider, among other things, such matters as the length of the delay, and the reasons for it, the time at which the applicant became aware of the alleged statutory violation, whether the remedy claimed would have a disruptive impact upon a*

> *pattern of relations developed since the alleged contravention, and whether the claim is such that fading recollection, unavailability of witnesses, and the deterioration of evidence would hamper a fair hearing in the dispute. It is generally accepted that the scale of delay that the Board would find acceptable is to be measured in months rather than years (see City of Mississauga, [1982] OLRB Rep. March 420). However, there is no specified limit with respect to delay, and the Board will consider the circumstances in each case to determine whether the delay is undue.*

We are in complete agreement with this statement. In the present case, the period of delay from when Mr. Kinaschuk's first solicitor threatened to bring an application until it was actually brought is a period of nearly three years. There would have been a point during that period when the Union reasonably would have assumed that the application was not going to be made, and after which time it would continue in its labour relations with the Employer on the assumption on both their parts that the matter was at an end. Also, having made that assumption, the integrity of its file material has been compromised.

It is clear to the Board that the basis of the grievance at issue is extremely dependent upon the recollection of the various witnesses and that credibility will be a major issue. While the Board has sympathy for the position Mr. Kinaschuk finds himself in at this stage of his life, having considered all of the circumstances, the Board is of the view that he has not offered a reasonable and credible explanation of the lengthy delay in making this application, that the delay is extreme and that it prejudices the other parties. The time, stress and costs of an arbitration of the grievance, which the Union and its counsel believe has little chance of success, has the potential to negatively affect the ongoing labour relations between the Union and the Employer which have proceeded for some time on the assumption that the matter was no longer an issue.

Mr. Kinaschuk has not established that justice could still be done despite the delay, and, although we have found that he bears the onus in this regard because of the extreme length of the delay, we none the less also find that the respondents have established to our satisfaction that the delay would prejudice either or both of them in their respective prosecution and defence of the case at arbitration.

Accordingly, the Board finds that the application is dismissed on this ground. But, as the case was heard in its entirety, we will also provide reasons on the merits of the case.

The Duty of Fair Representation Issue

In recent years the Board has considered and enunciated the principles which pertain to applications under s. 25.1 of the *Act*. Included among these are the following decisions: *Gilbert Radke v. Canadian Paperworkers Union*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92; *Mary Banga v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. labour Rep. 88, LRB File No. 173-93; *Gordon Basaraba v. Saskatchewan Government Employees' Union*, [1994] 3rd Quarter Sask. Labour Rep. 216, LRB File No. 086-94; *Gordon Johnson v. Amalgamated Transit Union*, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96; *Ron Marttala, Ron Mulholland and Marshall Desjarlais v. Regina Civic Middle Management Association*, [1997] Sask. L.R.B.R. 556, LRB File No. 337-96; *Weber v. Graphic Communications International Union, Local 206C Bindery*, [1998] Sask. L.R.B.R. 23, LRB File No. 307-97; and *K.H. v. Communications, Energy and Paperworkers Union, Local 1-S*, [1998] Sask. L.R.B.R. 76, LRB File No. 015-97.

The Board's general approach to such applications was summarized in *Laurence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, at 71-72:

> *This Board has discussed on a number of occasions the obligation which rests on a trade union to represent fairly those employees for whom it enjoys exclusive status as a bargaining representative. As a general description of the elements of the duty, the Board has indicated that it can do no better than to quote the principles outlined by the Supreme Court of Canada in the case of Canadian Merchant Services Guild v. Gagnon, [1984] 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.*

The terms "arbitrary," "discriminatory," and "in bad faith," which are used in the legislative description of the kind of conduct on the part of a trade union which is to be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:

> *... 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 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.*

This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:

> *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.*

On the facts of the present case, the Board is firmly of the opinion that the Union did not act in a manner that was arbitrary, discriminatory or in bad faith either with respect to the way in which it processed the grievance through the third step of the grievance procedure or in determining not to refer the grievance to arbitration.

By all appearances Mr. Sheffer dealt respectfully and sincerely with Mr. Kinaschuk and moved the grievance through the grievance procedure in a timely and efficient manner. He impressed the Board as a person who takes his responsibilities seriously and pays attention to detail. Despite the fact that he had formed his own opinion of the viability of the grievance, he ensured that the matter was reviewed by outside counsel. That counsel, Mr. Engel, is known to the Board to practice extensively in the area of labour relations. There was no apparent reason for the Union not to respect counsel's assessment of the matter when making its determination regarding referral to arbitration. Furthermore, the Union appears to have carefully considered the facts of the case as well as its *bona fide* policy considerations through the course of the several months of the processing of the grievance. It did not merely abdicate its responsibility to make a final determination to counsel. Indeed, counsel confirmed the doubts that the Union already had.

This situation is very different from the circumstances of the *Banga* case, *supra*, upon which Mr. Kinaschuk's counsel relied. The following excerpt from the Board's reasons for decision clearly demonstrates this, at 105:

> *The circumstances facing Ms. Banga were, however, highly unusual. She was faced with a union which displayed reluctance to give any weight to the resolution of a grievance which was, as far as she knew, of binding effect on both the Employer and her Union. The Union had accepted a further grievance about exactly the same issue. She was faced with arbitration proceedings in which the Union proposed to take a position opposed to her interest, and for which they seemed reluctant to supply her with an advocate who would represent her view. She was, finally, faced with an advocate who regarded himself as bound by the position which the Union proposed to take. Under these conditions, it was reasonable for her to conclude that her interest would not be adequately represented in the arbitration proceedings and that her only hope lay with outside counsel.*

While Mr. Kinaschuk is obviously sincere in his protestations against the allegations upon which the Employer based his termination, the Board finds that the Union did not violate s. 25.1 of the *Act* in its representation of him with respect to the grievance. Accordingly, the application is dismissed.

SASKATCHEWAN GOVERNMENT EMPLOYEES' UNION, Applicant and NAMERIND HOUSING CORPORATION INC., Respondent

LRB File No. 189-97; July 27, 1998
Chairperson, Gwen Gray; Members: Don Bell and Donna Ottenson

For the Applicant: Susan Jeannotte Webb
For the Respondent: Susan McGillivray

Arbitration - First collective agreement - Board agent - Board declines to accept recommendations of Board agent under circumstances.

Arbitration - First collective agreement - Section 26.5 - In determining whether appropriate to impose collective agreement, Board can consider various matters including Board agent's report, length of time since certification, bargaining efforts, nature of business and size of bargaining unit.

Arbitration - First collective agreement - Section 26.5 - Board decides to impose collective agreement as a result of time spent bargaining, size of bargaining unit, nature of business and fact that effective strike or lock-out activity not readily available to parties.

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

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Saskatchewan Government Employees' Union (the "Union") was certified as the bargaining agent for a group of employees of Namerind Housing Corporation (the "Employer") on April 8, 1996. The parties commenced collective bargaining on October 18, 1996. On May 5, 1997 the Union rejected the Employer's final offer and voted to engage in strike activity. The Union then applied to the Board under s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17, for assistance to conclude a first collective agreement. On October 6, 1997 the Board appointed Terry Stevens, Executive Director, Labour Relations, Mediation and Conciliation, Saskatchewan Labour, or his designate, to act as Board agent in order to assist the parties to conclude a first collective agreement and, failing such resolution, to report to the Board on the progress of bargaining and what, if any, issues might be the subject of arbitration by the Board. On December 24, 1997 Mr. Stevens reported to the Board as follows:

Regarding the above referenced file, I designated Ingrid Reid, Labour Relations Officer, to deal with issues as outlined in your order dated October 6, 1997.

Ms. Reid informs me that Namerind Housing Corporation has experienced significant funding reductions since last spring. The Employer feels it cannot honour the monetary package that was contemplated in it's April 30, 1997, final offer to the Union without a resulting layoff of employees. There is another final offer that has not been taken to the membership as yet that could be considered.

The mediator believes that the relationship between the parties is not so damaged that effective collective bargaining cannot occur, even if members were to reject the employer's latest offer. At the outset of the process, both parties indicated a strong desire to conclude a collective agreement without the Board having to impose one. Indeed, the parties have reached agreement on several of the outstanding issues through the mediation process. There is potential to reach agreement in all others, with the possible exception of the question of scope of the agreement, which is scheduled to be the subject of a Board hearing in February in any event.

Therefore, it is our recommendation that the parties be directed to continue bargaining, using whatever tools are available to them in reaching a first collective agreement. The assistance of conciliation from this Branch is available if they deem it necessary. Should they be unable to settle on the scope question, the Board can hear arguments on the matter in January as previously scheduled.

On January 27, 1998 the Union requested that the application be rescheduled before the Board to discuss the recommendations of the Labour Relations, Mediation and Conciliation Branch. The Board reconvened to hear the matter on May 14, 1998.

At the hearing, Ms. Jeannotte Webb, Union Representative, requested that the Board hear and determine the Union's application for a first agreement or appoint an arbitrator to determine the collective agreement. Ms. Jeannotte Webb noted that the Board agent failed to take into account a number of factors when she concluded that the parties could successfully resolve the first agreement on their own. In particular, Ms. Jeannotte Webb noted that bargaining had gone on for over one year; that the Employer made frequent changes to its bargaining committee; that the Employer had pulled its final offer on wages from the table and is arguing an inability to pay the rates proposed; that the Union's committee members have been harassed into resigning from the Employer; that the unit is a small unit of only eight employees; and that a new position has been created by the Employer and placed in an out-of-scope position without negotiating with the Union. Ms. Jeannotte Webb noted that there were approximately five matters that remained outstanding between the parties, although on further

questioning by the Board it became clear that the main items included hours of work, money and the scope of the agreement.

Ms. McGillivray, counsel for the Employer, urged the Board to respect the report of the Board agent by leaving the parties to their own devices in sorting out the first collective agreement. Counsel noted that the Union had not filed an unfair labour practice application against the Employer in which it could allege that the Employer had bargained in bad faith or has engaged in discriminatory treatment of the bargaining committee members. Ms. McGillivray pointed out to the Board that the funding structure for the Employer had changed during the course of bargaining. The Employer is no longer funded by Canadian Mortgage and Housing Corporation and is now funded by Saskatchewan Housing Corporation. This change resulted in a decrease in the funds available to the Employer and restricts its ability to move funds between budget items. Counsel noted that the Board's role under s. 26.5 of the *Act* is to promote, not replace, collective bargaining and, as such, extraordinary circumstances are requested in order to permit the Board to interfere in the collective bargaining process. Counsel argued that there had been a misunderstanding over the rates of pay initially proposed by the Employer in its first final offer. The Employer denied that it had reneged on its wage offer.

Relevant Statutory Provision

The Board must consider the provisions contained in s. 26.5 of the *Act* which provide 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 has bargained collectively and have failed to conclude a first collective bargaining agreement; and*
> >
> > *(c) any of the following circumstances exist:*
> >
> > > *(i) the trade union has taken a strike vote and the majority of those employees who voted have voted for a strike;*
> > >
> > > *(ii) the employer has commenced a lock-out; or*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) argument by the parties or their counsel.

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

Analysis

The general approach taken by the Board on applications for first collective agreements under s. 26.5 of the *Act* is to appoint a Board agent who meets with the parties for the purpose of attempting to conclude a collective agreement. In most instances, as in the present case, the parties consent to a Board Order appointing the agent. In a majority of the applications filed under s. 26.5 of the *Act*, the parties are able to reach agreement with the assistance provide by the Board agent. In the rare instances where the parties are unable to reach agreement, the Board agent is asked to report to the Board on whether the Board should intervene in the dispute, and if so, on what issues it should intervene. When the Board agent is unsuccessful in resolving the bargaining dispute, the Board has the option under s. 26.5 of the *Act* to (1) impose a collective agreement; (2) appoint an arbitrator to impose a collective agreement; or (3) dismiss the application and permit the parties to engage in strike and lock-out activity in order to resolve the outstanding dispute.

The purpose of s. 26.5 of the *Act* is to facilitate the conclusion of the first collective agreement. It was recognized by the Legislature that first agreements are often difficult to obtain within the ten month time frame that is permitted by the *Act* before a rescission application can be brought by employees to displace the union as the bargaining agent. Although not all failed first contract disputes result in rescission applications, there are pressures on a union to quickly demonstrate its effectiveness by obtaining a reasonable collective agreement. On occasion, the union shoots for the moon and is unrealistic in its expectations for a first agreement. As well, there is pressure on the employer to resist significant changes in the terms and conditions of employment for the newly unionized employees. In this regard, some employers also respond negatively to the dilution of their traditional managerial authority and they may resist the collective bargaining process or attempt to drag it out as long as possible.

When mediation efforts fail to bring the parties to a collective agreement, the Board must determine if "it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement." (s. 26.5(1) of the *Act*) In making this determination, the Board can consider various matters including: (1) the report of the Board agent; (2) the length of time that has passed since the union was certified; (3) the bargaining efforts; (4) the nature of the business and the size of the bargaining unit; and (5) any other relevant information.

In the present case, the Board agent's report recommended against the imposition of a first agreement by the Board. The Board agent recommended that the parties be directed to continue bargaining using whatever tools are available to them in reaching a first collective agreement. The tools would include strike or lock-out.

While we are extremely reluctant to second guess the recommendations of the Board agent, in this instance the Board is of the view that the strike/lock-out option is not likely to result in the conclusion of a first agreement. Other factors suggest that, despite the parties' best efforts to reach a collective agreement, neither is in a position to use the blunt instrument of the strike or lock-out weapon to pressure the other into settlement. The Union has a small membership who likely are easily replaced; they work in what is referred to as the "broader public sector" providing important housing services to the aboriginal community in Regina; a lengthy strike could result in a deterioration of the relationship between the employees and the client group. On the Employer's side of the fence, the financial options available are limited and are largely defined by outside sources of income; while the service may be able to sustain a long lock-out, it would cause great inconvenience to the client group and may be an impossible option for the Employer.

Given that it is improbable that the Union could engage in an effective strike or that the Employer could risk a lock-out in order to resolve the collective bargaining impasse, we are of the view that it would be appropriate for the Board to intervene to bring bargaining to a fruitful conclusion. A great deal of time has passed since the parties commenced collective bargaining. They have made significant efforts to conclude a collective agreement. Unfortunately, the normal tools which can be resorted to in order to overcome the impasse are not readily available to the parties because of the size of the bargaining unit, the nature of the Employer's business, the public harm which would result from a strike or lock-out, the limited financial options available to the Employer and the sensitive nature of the relationship between the employees, the Employer and their client group. In these circumstances, the Board, albeit

reluctantly, will not accept the recommendations of the Board agent and will proceed under s. 26.5(6)(b)(i) of the *Act* to conclude the terms of the first agreement between the parties.

The Board Registrar will establish a date for hearing submissions with respect to the terms of the agreement after consultation with both parties. Both parties are reminded that s. 26.5(6)(b)(i) of the *Act* requires the Board to conclude a collective agreement within 45 days of issuing this Order.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Applicant and GRAHAM CONSTRUCTION AND ENGINEERING LTD., GRAHAM CONSTRUCTION AND ENGINEERING (1985) LTD., BFI CONSTRUCTORS LTD., BANFF LABOUR SERVICES LTD., JASPER LABOUR SERVICES LTD., BANFF FINANCIAL CO. INC., PETER BALLANTYNE CONSTRUCTION LTD. and POINTS NORTH CONSTRUCTION LTD., Respondents

LRB File No. 014-98; July 29, 1998
Members: Ken Hutchinson (Panel Chairperson), Tom Davies and George Wall

For the Applicant: Drew Plaxton and Corinne Jamieson
For Graham Construction and Engineering (1985) Ltd. with a name change to Graham Construction and Engineering Ltd.: Larry Seiferling, Q.C.
For Banff Labour Services Ltd., Banff Financial Co. Inc. and Jasper Labour Services Ltd.: Larry Leblanc, Q.C. and Kurt Wintermute
For Peter Ballantyne Construction Ltd.: Garth Bendig
For Points North Construction Ltd.: Jay Watson and David Smith
For BFI Constructors Ltd.: no appearance

Practice and procedure - Application - Irregularities and technicalities - Board will only strike application on basis of factual deficiencies in clearest of cases.

Practice and procedure - Preliminary objection - Board holds that unfair to dismiss union's application without giving union chance to cure any deficiencies through provision of particulars.

Practice and procedure - Preliminary objection - Board holds that objection based on res judicata, issue estoppel and abuse of process premature - Preliminary application dismissed without prejudice to right to raise later in proceedings.

Practice and procedure - Preliminary objection - Board declines to grant union's application for summary determination - Board notes unprecedented nature of relief sought.

REASONS FOR DECISION - PRELIMINARY APPLICATIONS

Background

Ken Hutchinson, Panel Chairperson: United Brotherhood of Carpenters and Joiners of America, Local 1985 ("the Union") filed this unfair labour practice application with the Board on February 2, 1998. In this application, the Union alleges that it holds certification Orders covering the standard

carpenters' unit for PJ Graham and Sons Limited and/or Graham Construction Ltd. ("the certified companies"). The Union goes on to allege that the Respondents to this application should be treated as successors to or related to or one and the same as the certified companies. The Union therefore alleges that the Respondents to this application are bound by the Union's certification Orders against the certified companies and subsequent collective agreements and that the Respondents to this application have breached *The Trade Union Act*, R.S.S. 1978, c. T-17 ("the *Act*") by failing to comply with a request made by the Union pursuant to s. 36 of the *Act*.

Pursuant to a conference call hearing before the Vice-Chairperson and Executive Officer of the Board on June 4, 1998, the following Order was issued on June 5, 1998:

> ***PURSUANT*** *to sections 5.3 and 42 of The Trade Union Act, R.S.S. 1978, c. T-19, IT IS HEREBY ORDERED THAT:*
>
> 1. *The hearing of preliminary applications in this matter shall be held at 9:30 a.m. on June 29 and June 30, 1998, at the Labour Relations Board, Sturdy Stone Building, 2nd Floor, 122 - 3rd Avenue North, Saskatoon, Saskatchewan.*
> 2. *Any party who intends to make an application returnable for June 29, 1998, shall file a notice with the Board specifying the nature of the application and particulars of the grounds upon which the application is based, together with any material relied upon in support of the application, on or before June 12, 1998.*

The Union filed a Notice of Application with the Board on June 12, 1998 seeking an order summarily granting its application due to the failure of the Respondents to file replies and, alternatively, an order directing the Respondents to file replies within a time certain failing which summary orders would be issued without a further application by the Union. The Union's Notice of Application further sought an order granting the Union leave to return to the Board prior to August 17, 1998 to seek orders concerning production of documents and other procedural matters.

Counsel for Points North Construction Ltd. filed an Application for Particulars with the Board on June 12, 1998.

Counsel for Graham Construction and Engineering (1985) Ltd. with a name change to Graham Construction and Engineering Ltd. ("GCEL") filed notice of his client's preliminary objections on June

12, 1998. The preliminary objections raised by counsel related to involvement of the Chairperson of the Board on the panel hearing the application and to particulars.

Counsel for Banff Labour Services Ltd., Jasper Labour Services Ltd. and Banff Financial Co. Inc. ("Banff", "Jasper" and "Banff Financial") filed a Notice of Application on June 12, 1998 seeking an order striking out the Union's application on the grounds that it is devoid of material facts, confusing, inconsistent, ambiguous, vague, incomprehensible, a "fishing expedition", an abuse of process and is barred by res judicata and issue estoppel. Alternatively, the Notice of Application seeks particulars.

On June 18, 1998 the Vice-Chairperson and Executive Officer of the Board wrote to the parties as follows:

> *This will advise that, in order to expedite the hearing of this matter, the panel which will hear the preliminary applications and the hearing proper in August, 1998, shall not include the Chairperson of the Board. It should be noted that this does not constitute a ruling by the Board with respect to the allegation by one or more of the parties respondent that there is bias or the reasonable apprehension of bias on the part of the Chairperson of the Board. It is intended that this long-standing application shall receive a timely hearing.*
>
> *The panel shall be chaired by a Board Member. However, due to the unavailability of the panel on June 29, 1998, the remainder of the preliminary applications will be heard on June 30th only. If additional time is required, it will be dealt with and arranged by the Board on June 30th. . . .*

The Respondent Peter Ballantyne Construction Ltd. filed a reply with the Board on June 25, 1998. The other Respondents have not, to date, filed replies to this application.

At the outset of the hearing on June 30, 1998, the Board heard representations from all counsel present relating to the composition of the panel of the Board hearing the application. After hearing from counsel, the Board adjourned to deliberate and returned with a verbal ruling on this issue. The Board's verbal ruling was that we are a properly constituted panel of the Board pursuant to s. 4 of the *Act* and that we would, as such, proceed to hear this application and would continue to do so unless and until we are ordered by a higher judicial authority to cease hearing this application. The Board encouraged counsel to make any such application to a higher judicial authority quickly.

The Board then proceeded to hear the application of Banff, Jasper and Banff Financial seeking to have the Union's application struck out as against those Respondents and the Union's application for summary disposition. The various applications for particulars were adjourned to July 29, 1998. The application of GCEL relating to the involvement of the Chairperson of the Board with this application is now moot and will not be considered by the Board.

Arguments

With respect to the application of Banff, Jasper and Banff Financial, Mr. Leblanc, Q.C. argued that the Union's application failed to "state clearly and concisely all relevant facts indicating the exact nature of the practice or violation complained of" as required by Form 2. Counsel for these Respondents submitted that the Union's application was confusing, ambiguous, inconsistent and vague and should therefore be declared a nullity and argued that the deficiencies in the application were too serious to be cured by the provision of particulars. In addition, Mr. Leblanc, Q.C. argued that the application filed by the Union amounted to a "fishing expedition" and that the Union's use of the Board's processes in this way is an abuse of process.

Mr. Leblanc, Q.C. referred the Board to its decision in *United Brotherhood of Carpenters and Joiners of America, Local 1867 v. Graham Construction Ltd. et al.*, [1986] June Sask. Labour Rep. 35, LRB File No. 330-84 and to a decision of the British Columbia Labour Relations Board in *United Brotherhood of Carpenters and Joiners of America, 22 Locals v. Graham Construction and Engineering (1985) Ltd. and Jasper Labour Services Ltd.*, B.C.L.R.B. No. C140/92 (September 17, 1992) and B299/93 (September 15, 1993). Counsel argued that the issues raised by this application were determined in these previous decisions and the Union is therefore prevented from re-litigating these issues by the principles of res judicata, issue estoppel and abuse of process.

Mr. Plaxton argued that it was inconsistent for the Respondents to say that this application was so vague that it was incomprehensible and to say that the issues in this application were the same as those previously determined by the Board and the British Columbia Labour Relations Board. Counsel argued that either the Respondents understand the issues raised in this application or they do not. With respect to the res judicata issue, Mr. Plaxton argued that neither the parties nor the issues are the same in this application as they were in the Board's previous decision and that, as such, the principles of res judicata,

issue estoppel and abuse of process do not apply. Mr. Plaxton also argued that the Board is not bound by its previous decisions.

With respect to the Union's application for summary determination, Mr. Plaxton argued that the filing of a reply was required by the *Act*, the *Regulations* and the Board's practice. As none of the Respondents has chosen to file a reply (with the exception of Peter Ballantyne Construction Ltd.), counsel urged the Board to grant the Union's application without hearing further representations from the Respondents. In the alternative, Mr. Plaxton asked the Board to set a date certain by which replies must be filed, failing which the Board would summarily determine the Union's application.

Counsel for the Respondents responded that their clients have every intention of filing replies but cannot do so until the Union provides particulars of its application. Counsel noted that there appear to be no case precedents for the type of summary process contemplated by the Union in this preliminary application.

Analysis

The Board will not order the preliminary relief sought in either of the applications to which these Reasons relate.

With respect to the application of Banff, Jasper and Banff Financial to strike the Union's application outright on the basis of alleged factual deficiencies, the Board will only grant such relief in the clearest of cases. The Board does not feel that this case falls into this category.

The Board has not, to date, ordered the Union to provide particulars to the Respondents. We feel that it would be unfair to the Union to dismiss its application without giving it a chance to cure any deficiencies through the provision of particulars. The Board also sees some merit in the Union's argument that it is inconsistent to claim that the Union's application is incomprehensible and, at the same time, that it raises the same issues previously dealt with by the Board.

Under the circumstances, the Board feels that any deficiencies in the Union's application may be dealt with through the provision of particulars. If an Order is made for particulars and the Union fails to comply with the same, the Respondents or any of them are free to argue at that time that the Union's

application should be dismissed. Alternatively, if the Respondents or any of them feel that the Union has failed to make out a case after its case has been concluded, they are free at that time to make an application for non-suit.

The Board therefore dismisses the portion of the preliminary application of Banff, Jasper and Banff Financial which seeks to strike the Union's application on the basis that it is devoid of material facts, confusing, inconsistent, ambiguous, vague and incomprehensible.

With respect to the allegation that the Union's application constitutes a "fishing expedition", the Board finds that this portion of the preliminary application is premature. The Board dismisses this portion of the preliminary application without prejudice to the right of the Respondents, or any of them, to raise this issue later in these proceedings, for example if and when the Union seeks disclosure and production of documents from them if they disagree with the scope of the Union's request.

With respect to the principles of res judicata, issue estoppel, abuse of process and related doctrines, the Board find that this portion of the preliminary application is premature. Counsel for Banff, Jasper and Banff Financial noted that certain legal requirements had to be met in order to constitute res judicata or issue estoppel including that the parties to both proceedings are the same and, more importantly, that the issues involved in both proceedings are the same.

The two requirements described above cannot be met without a full understanding of who the parties to this application are and what their relationship might be to the parties in the previous proceedings and a full understanding of what the issues in this application are and whether they are the same as those determined in the previous proceedings. In our opinion, neither the Board nor the parties to this application will gain the full understanding required to make a determination on this issue until the evidence of at least the applicant has been heard in full. The Board therefore dismisses this portion of the preliminary application without prejudice to the right of the Respondents or any of them to raise it later in the proceedings.

With respect to the application for summary determination made by the Union, we are unaware of any case in which the Board has granted this extraordinary relief. The Board notes that the Respondents have not, to date, been ordered by the Board to file replies. Even in the absence of replies, it has been

no secret from the outset of these proceedings to the Union or to the Board that the Respondents who appeared at this hearing are opposed to the Union's application.

Under the circumstances, we feel that it would be unfair to these Respondents to curtail their involvement in these proceedings without giving them a reasonable time period to file replies after a decision is made on the issue of particulars. This is what we intend to do. As such, we will dismiss the Union's preliminary application for summary determination.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and LORAAS DISPOSAL SERVICES LTD., CARMAN LORAAS and BILL HUMENY, Respondents

LRB File Nos. 208-97 to 227-97, 234-97 to 239-97; August 6, 1998
Chairperson, Gwen Gray; Members: Carolyn Jones and Don Bell

For the Applicant: Larry Kowalchuk
For the Respondent: Noel Sandomirsky, Q.C.

Remedy - Unfair labour practice - Remedial authority - Board has broad powers to make orders designed to rectify or overcome violations of *The Trade Union Act*.

Remedy - Unfair labour practice - Remedial authority - Board's overriding goal is to place applicants in position they would have been in but for respondent's breach - Board avoids punitive remedies and seeks to design remedies that support and foster underlying purposes of *The Trade Union Act*.

Remedy - Unfair labour practice - Rectification plan - Board reviews employer's rectification plan and proceeds to make remedial orders.

Remedy - Unfair labour practice - Collective bargaining - Duty to bargain in good faith - In order to overcome effects of non-disclosure of sale of part of business, Board orders employer to implement seniority, lay-off and recall provisions with respect to employees affected by sale of part of business.

Remedy - Costs - Board orders reimbursement of union for costs associated with first bargaining meeting which proceeded on false premise due to employer's non-disclosure of sale of part of business.

Remedy - Damages - Board concludes that union would not have been able to bargain lump sum retraining/relocation payment for laid off employees - Board declines to award lump sum retraining/relocation payment.

Remedy - Costs - Legal costs - Board declines to award legal costs to union under circumstances.

Remedy - Monetary loss - Award - Board awards reinstated employees full monetary loss from the date of lay-off to the date of reinstatement subject to mitigation.

Remedy - Monetary loss - Mitigation - Monetary loss award to be subject to mitigation including amounts paid under *The Labour Standards Act*.

***The Trade Union Act*, ss. 5(e), (f), (g), 5.1 and 42.**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") was certified by the Board on March 25, 1997 for an "all employee" bargaining unit at Loraas Disposal Services Ltd. (the "Employer"). The Employer operates a solid and liquid waste disposal business.

On June 23, 1997 the Union filed applications for monetary loss and reinstatement for Henry Franke, 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 Hassman, 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 Ms. James, member of the Union's bargaining committee. This application was filed on July 4, 1997.

On July 15, 1997, the Board issued an interim Order in these matters on the following terms:

> *THE LABOUR RELATIONS BOARD HEREBY ORDERS AS FOLLOWS:*
>
> 1. *within 24 hours of receiving this Order, the Respondent shall provide the Applicant with true copies of all legal documents and agreements relating to the sale of the business or assets of the vacuum truck service division. If the disclosure of these documents leads the Applicant to the conclusion that the sale did not take place to a person or corporation at arms length to the Respondent and that the trucks remain under the control of the Respondent, the Applicant 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 filed herein are reinstated as employees of the Respondent in the status of laid-off employees. Within 24 hours of receiving this Order, the Employer shall arrange to meet with the Applicant to bargain with respect to the laid-off employees. The Applicant 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 Respondent shall arrange to meet and shall meet with the Applicant to continue bargaining collectively for a first collective agreement on four days between the date of this Order and the hearing of the final applications. The Applicant 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 Respondent is prohibited from making any further unilateral changes to any 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 Applicant from the date of this Order to the hearing of the final applications;*
>
> 5. *the Respondent will permit a Board Officer to post copies of the Reasons for Decision and the Order issued in this application in the workplace where they can be seen and read by employees.*

On January 5, 1998, the Board issued its Reasons for Decision and Order with respect to the applications filed by the Union. The Board made the following Order:

> *(a)* ***FINDS*** *that the Respondents, Loraas Disposal Services Ltd. and Carman Loraas, engaged in an unfair labour practice within the meaning of s. 11(1)(c) of the Act by failing to disclose the sale of the vacuum truck division to the Union in bargaining;*
>
> *(b)* ***FINDS*** *that the Respondents, Loraas Disposal Services Ltd. and Carman Loraas, engaged in an unfair labour practice within the meaning of s. 11(1)(e) of the Act in that the Respondents discriminated against employees with a view to discouraging union activity in the manner that the Respondents selected employees for lay-off;*
>
> *(c)* ***FINDS*** *that the Respondents, Loraas Disposal Services Ltd. and Carman Loraas, engaged in an unfair labour practice within the meaning of s. 11(1)(m) of the Act as the Respondents unilaterally altered rates of pay, hours of work or other conditions of employment without bargaining the changes with the Union;*
>
> *(d)* ***FINDS*** *that the Respondents, Loraas Disposal Services Ltd. and Carman Loraas, engaged in an unfair labour practice within the meaning of s. 43 of the Act by failing to provide the Union and Minister of Labour with notice of technological change;*
>
> *(e)* ***ORDERS*** *the Respondents, Loraas Disposal Services Ltd. and Carman Loraas, to refrain from engaging in the said unfair labour practice;*
>
> *(f)* ***ORDERS*** *the Respondents, Loraas Disposal Services Ltd. and Carman Loraas, to file with the Board a written plan for rectifying the violations outlined in paragraphs (a), (b), (c) and (d) of the Order within 10 days of receipt by them of this Order;*
>
> *(g)* ***RESERVES*** *jurisdiction to make further remedial Orders following receipt and consideration of the Respondents, Loraas Disposal Services Ltd. and Carman Loraas, rectification plan; and*
>
> *(h)* ***DISMISSES*** *the application with respect to the Respondent, Bill Humeny.*

Clause (d) of the Order was set aside by the Court of Queen's Bench on an application for judicial review which is currently on appeal to the Court of Appeal. [see [1998] Sask. L.R.B.R. c-15 (Sask. Q.B.)]

On January 23, 1998, Loraas filed a rectification plan with the Board wherein it proposed the following:

> a. *With respect to the finding of an unfair labour practice within the meaning of Section 11(1)(c) of the Act the Respondents say that the disclosure of the sale of the Vacuum Truck Division was made as of June 14, 1997. The Company is willing to commence negotiations with the Union on behalf of the 9 employees whose jobs were affected by the closure of this business. Most of the*

employees have new employment with third party employers. Several of these employees obtained employment within the severance period and payment made at the time of termination. The Company proposes that the negotiations examine the actual monetary loss suffered by each employee as a consequence of the closure and that the parties attempt to compensate each employee for monetary loss which has not previously been paid.

b. *With respect to the finding of an unfair labour practice within the meaning of Section 11(1)(e) of the Act the Respondents say that the closure and layoff which constituted a finding by the Board of discrimination cannot be repeated in the circumstances. The employer intends to continue the present business undertaking of solid waste disposal and management and agrees that if the Company is to entertain any further changes which directly impact on the bargaining unit or the terms and conditions of work of in scope employees exclusive of the defunct Vacuum Truck Service Division, that the Company will advise the Union and the Minister of Labour of the Province of Saskatchewan as required by law and collectively bargain the relevant consequences in good faith and in accordance with the law.*

c. *In respect of the finding of an unfair labour practice within the meaning of Section 11(1)(m) of the Act the Respondents undertake to continue to bargain towards a first Agreement without further alteration of rates of pay, hours of work, or other conditions of employment of existing in scope employees.*

d. *With respect to the finding of an unfair labour practice within the meaning of Section 43 of the Act by failing to provide the Union and the Minister of Labour with notice of technological change the Company agrees that it shall, henceforth, give notice of technological change as required by law.*

The Company submits that the payment of damages to employees determined by negotiation and agreement with the Union in the first instance, or failing agreement by reference to the Labour Relations Board, in concert with the undertakings (b), (c) and (d) above, would rectify the violations addressed by the Board in its Order dated January 5, 1998.

The Company proposes that each employee should participate in bargaining the consequences of his or her termination with agents of the Union and in the absence of any other employee affected. The presence of the employee advancing a claim for monetary loss can then be examined in light of the efforts to obtain employment and mitigate loss and lead to more effective collective bargaining and resolution of the issue.

A hearing on the remedial portion of the applications was held on May 8, 1998.

Facts

At the hearing of the remedial portion of the application, the Union called Mr. Haughey as its witness. Mr. Haughey is the Union representative in charge of bargaining with the Employer. Mr. Haughey testified that bargaining with the Employer commenced on June 2, 1997. The Union committee consisted of Kevin Giest and Ms. James, both of whom were then employees with the Employer, and Gordon Schmidt, Union representative. A strike vote was taken on June 12, 1997, two days prior to the sale of the vacuum truck division.

Mr. Haughey reviewed the make-up of the Union's bargaining committee over the period of collective bargaining and noted that two of its members had been subject to the proceedings before the Board. In addition, another member had quit and one was on maternity leave. Mr. Haughey indicated that the Union was having difficulty finding people who were willing to sit on the bargaining committee. He attributed this loss of support to the action taken by the Employer who sold off one third of the business shortly after employees took the strike vote. Mr. Haughey also testified that the vacuum truck drivers were among the leaders of the Union and were more active in the formation of the Union at the workplace.

Mr. Haughey indicated that the parties did meet to discuss the Board's interim Order. No resolution of the issues related to the lay-off of the eight employees had been found. The Union's first position was to restore the vacuum truck service. According to Mr. Haughey, since then the Union has modified its bargaining stance but to no avail. One of the Union's last positions was that the Employer pay each laid off employee 90 days pay less the severance amount already paid under *The Labour Standards Act*, R.S.S. 1978, c. L-1. To date, there is no agreement between the parties related to the use of seniority or bumping rights, rates of pay or hours of work. In relation to the first collective agreement, Mr. Haughey testified that the parties have reached agreement on the following topics: scope, clarification of terms, union security, dues check-off, union leave, meetings and a requirement for a rest break during overtime work.

Mr. Haughey also testified that a rescission application had been filed by certain employees earlier in the year and is pending before a differently constituted panel of the Board. According to Mr. Haughey, the Union is unable to act on its strike vote as its members are afraid that they may lose their jobs if they engage in strike activity. Mr. Haughey had been told by employees that they are afraid to be seen

having coffee with the Union leaders. In addition, he testified that the Union was having difficulty recruiting shop stewards for the different sections of the workplace.

With respect to the laid-off vacuum truck drivers, Mr. Haughey testified that the Employer hired a new employee to drive a roll-off truck within the month preceding the hearing. Mr. Haughey indicated that he telephoned Carman Loraas and told him that at least three of the former vacuum truck drivers would like to return to work. He suggested to Mr. Loraas that Mr. Franke be recalled to the new position. According to Mr. Haughey, Mr. Loraas did not call Mr. Franke or any of the other vacuum truck drivers, but instead hired a new employee. None of the laid-off drivers have been offered other employment by the Employer.

With respect to Ms. James, Mr. Haughey indicated that she had been offered other employment with the Employer but was unable to accept it. The position was then offered to Ms. Hassman who did accept the position. A subsequent unfair labour practice application was filed in relation to the recall of Ms. Hassman but that matter was settled between the parties. Ms. Hassman no longer works for the Employer and is employed elsewhere.

On cross-examination, counsel asked Mr. Haughey if the Employer had arranged to have a court reporter at the bargaining meetings. Mr. Haughey indicated that the Employer had a court reporter present at approximately nine of the meetings. Mr. Haughey also indicated that the Union opposed the use of a court reporter. Mr. Haughey agreed with counsel's suggestion that the Employer had explained that it wanted a transcript of the proceedings in the event that it was charged with bargaining in bad faith.

With respect to the individual claims for monetary loss, Mr. Haughey acknowledged that the Employer had asked the Union for information on each employee's lost earnings in March, 1998. Mr. Haughey indicated that this information has not yet been provided to the Employer as the Union was only able to get the information together the week before the hearing. When asked by counsel if the monetary loss was not the whole of the subject, Mr. Haughey testified that it was possible for the parties to first discuss principles of settlement and to deal later with individual claims. He indicated that the matter was not confined to the question of monetary loss and would include matters that should go into the first collective agreement.

On further questioning by counsel for the Union, Mr. Haughey indicated that the Union had agreed to provide the Employer with information on the monetary loss suffered by each employee once the parties agreed to a time frame for determining the period of notice. Mr. Haughey indicated that the Union was seeking a severance period of 90 days; $3,000 retraining/relocation fee for each employee who was not returning to the Employer; bumping rights; and a number of other bargaining proposals related to lay-offs and the like. Mr. Haughey testified that Bill Humeny, the Employer's chief negotiator, knows the Union's monetary claim is 90 days pay less the amount received by each employee under *The Labour Standards Act*. The Union took the position that no deduction should be made for wages earned in mitigation. Mr. Haughey testified that the Employer's proposal contained in paragraph (a) of the rectification plan filed in these proceedings had to date not been tabled as an offer at the bargaining table.

With respect to Mr. Franke, Mr. Haughey testified that he was not aware of Mr. Franke advising Mr. Loraas that he had no desire to return to work. As far as Mr. Haughey was aware, Mr. Franke desired to return to work with the Employer.

No other evidence was received by the Board on the remedial question.

Relevant statutory provisions

On the remedial question, the Board may consider the following provisions contained in the *Act:*

> *5. The board may make orders:*
>
> ...
>
> *(e) requiring any person to do any of the following:*
>
> *(i) refrain from violations of this Act or from engaging in any unfair labour practice;*
>
> *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*
>
> *(f) requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice, or otherwise in violation of this Act;*

> *(g) fixing and determining the monetary loss suffered by any employee, an employer or a trade union as a result of a violation of this Act, the regulations or a decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or trade union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;*
>
> *5.1 In making an order pursuant to subclause 5(e)(ii), the board may consider a plan, submitted by a person found to have violated the Act, the regulations or a decision of the board, for rectifying the violation.*
>
> *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.*

Union's Arguments

Mr. Kowalchuk, counsel for the Union, argued that there are no limits on the authority of the Board to fashion an appropriate remedy. He noted that s. 5(e)(ii) of the *Act* permits the Board "to do anything for the purpose of rectifying a violation of the *Act*." Counsel referred the Board to a number of decisions in support of an expansive interpretation of the Board's remedial authority, including the decision of the Supreme Court of Canada in *Royal Oak Mines Ltd. v. Canadian Labour Relations Board and Canadian Association of Smelter and Allied Workers, Local 4*, [1996] 1 S.C.R. 369 (S.C.C.).

Counsel also argued that the Union does not accept the principles established in *United Steelworkers of America and Radio Shack*, [1980] 1 Can L.R.B.R. 99 (Ont. LRB), which restricts the use of the "make whole" remedies to cases of severe or dramatic violations of the *Act*. In the present case, counsel acknowledged that there was not a history of egregious events and that there was no evidence that the Employer would not comply with the orders of this Board. In addition, counsel agreed that the Employer was not a big employer and not influential in the industrial relations community.

Counsel explained that the Union was seeking an expansive remedial order in the present instance because of a number of factors. First, counsel noted that the Union was certified last year and has been unable to reach a first collective agreement. He argued that progress at the bargaining table was a joke.

The Union was not in a position to protest the progress at the table until the Board issued its decision in January, 1998.

Second, counsel argued that the Employer's conduct, while it might not appear to be egregious, had a significant impact on the bargaining unit by removing 35 percent of the employees from the unit, including the Union's core supporters.

Third, the conduct of the Employer in failing to disclose the sale of the vacuum truck division to the Union in a timely fashion prejudiced the ability of the Union to address the effects of the sale such as bumping, seniority, vacancy, promotion, severance pay, retirement and lay-off provisions that would normally come into existence with the conclusion of a first agreement. Counsel argued that the Employer's side of the bargaining table operated at the first bargaining meeting with the knowledge that one-third of the Union's membership would soon be laid off. The sale of the vacuum truck division coming on the heels of the Union's strike vote had a chilling effect on the membership of the Union and undermined the Union's ability to engage in a successful strike strategy against the Employer.

In order to remedy the unfair labour practices, counsel asked the Board to order the reinstatement of the employees in question and payment of monetary loss to each employee. Counsel argued that there was no evidence of a lack of work at the Employer while there was evidence that the Employer had recently added to its workforce. Counsel argued that the onus is on the Employer to establish a lack of work. In addition, counsel noted that 65 percent of the jobs remained after the closure of the vacuum truck division. He requested that employees who were laid off be given an opportunity to bump into the existing positions based on their seniority and ability to perform the work in question after a reasonable period of training. Counsel requested that the Board pick an arbitrary date to determine the monetary loss owing to the employees who were laid off. Counsel argued that the duty to disclose the upcoming sale of the vacuum truck division arose on the date the certification Order issued. In this regard, the Board's remedial orders should attempt to replicate what the Union would have achieved if timely disclosure had been made along with the resulting collective bargaining.

In addition, the Union sought the payment of $3,000 to each employee in the event the Board does not order their reinstatement. This amount was sought by the Union in its bargaining with the Employer and represents an amount which would permit the employees in question to explore employment opportunities that are equal to or better than they had at the Employer.

Counsel also requested that the Board impose certain interim collective agreement provisions. He requested that the Employer be required to table proposals within 15 days of the order to rectify the harm to employees by bargaining employment benefits for the employees based on the principle of seniority.

With respect to the harm to the Union, counsel requested that the Union be compensated for the time spent on the bargaining committee, staff time in servicing the bargaining unit, and the like, to compensate the Union for the waste of its time in bargaining with the Employer on a premise that was known by the Employer to be false.

In order to remedy the violation of s. 11(1)(m) of the *Act,* the Union proposed that all of the employees be put back in the position they were in prior to the closure of the vacuum truck division, that is, on full pay at the same rate of pay.

Finally, counsel requested that the legal costs incurred by it in this matter be recovered from the Employer.

In reply, counsel for the Union argued that the onus to prove mitigation of damages was on the Employer in this instance, not on the Union.

Employer's Arguments

Mr. Sandomirsky, Q.C., counsel for the Employer, noted that the remedy sought on the applications was reinstatement and monetary loss. He argued that reinstatement was not practical; the business was closed and the reasons for its closure were found by the Board to be unrelated to the presence of the Union. It is not practical to order the Employer to resume the vacuum truck operation. Counsel argued that the pragmatic remedy is to pay monetary loss to the employees in question. This was the remedy offered by the Employer in its rectification plan.

In relation to the monetary loss suffered by each employee, counsel argued that the onus of proving loss lies with the Union. Counsel noted that the Union had the employees in question available at the hearing to be examined with respect to their individual losses and efforts to mitigate but the Union failed to call the employees as witnesses. In this event, counsel argued that the Board can draw a

negative inference against the Union for failing to call the employees as witnesses. Counsel also noted that the length of service of the employees would result in common law notice between two to three months. The amount of damages payable to each employee could be calculated based on the common law notions of severance if the Union had provided the Employer with information pertaining to the employees in a timely fashion.

In relation to the remedies sought by the Union, counsel argued that the payment of $3,000 per employee amounted to a punishment, not a remedy.

Analysis

The Board has broad powers under the provisions of the *Act* to make orders which are designed to rectify or overcome, as best as possible, a violation of the *Act*. In this regard, we are guided by the judgment of Cory, J. in *Royal Oak Mines*, *supra*, where His Lordship stated as follows, at 409:

> *There are four situations in which a remedial order will be considered patently unreasonable: (1) where the remedy is punitive in nature; (2) where the remedy granted infringes the Canadian Charter of Rights and Freedoms; (3) where there is no rational connection between the breach, its consequences, and the remedy; and (4) where the remedy contradicts the objects and purposes of the Code.*

In the Board's earlier reasons for decision, it found that the Employer had committed various unfair labour practices in deciding to close its vacuum truck division. For the purpose of this application we will not address any remedial issues that may arise from our finding that the Employer failed to give notice of technological change as that finding is currently under review in the courts.

The overriding goal of the Board in designing an appropriate remedy is to place the Union and its members in the position they would have been in but for the Employer's breach of the *Act*. In so doing, the Board avoids punitive remedies and seeks to design remedies that support and foster the underlying purposes of the *Act*, which include the encouragement of unionized workplaces and the encouragement of healthy collective bargaining.

In the present case, the Employer was obligated by the provisions of the *Act* to make timely disclosure to the Union of its decision to sell the vacuum truck division. Without making a definitive finding on when such disclosure should have been made, it is fair to conclude that, at least, it should have been made at the first bargaining meeting between the parties.

As we indicated in our initial reasons, the Employer created a difficult climate for first agreement collective bargaining by failing to disclose the sale of the vacuum truck division. Whether or not it was motivated by anti-union animus, its conduct in not disclosing the sale undermined the Union's bargaining position and its support among the employees who, no doubt, would draw the conclusion from the coincidence of the sale with the recent unionization that the Employer would go to some lengths to defeat the unionization effort. Although the Employer may not have intended the sale to have this effect on its employees, the evidence of Mr. Haughey makes it clear that the sale and the lack of a timely disclosure of the sale did have a chilling effect on the Union's bargaining efforts.

In order to overcome the effects of non-disclosure and place the Union and its members in the position they would have been in, the Board must consider what the Union might have achieved at the bargaining table if it had been given a timely opportunity to bargain with respect to the sale. Although this process is a mere approximation of what would have resulted, we are of the view that, at a minimum, the Union, with its bargaining strength intact and unaffected by the Employer's unfair labour practice, would have achieved the following:

(a) lay-off by seniority on a plant-wide basis;
(b) severance based on one months' pay per year of service;
(c) a three month training period during which employees would be entitled to establish their ability to perform the work of the positions which they are entitled to bump based on their seniority; and
(d) recall for a period of one year to any position that becomes available on a plant-wide basis.

We do not accept the Employer's position that the only remedy is monetary loss calculated on the basis of the severance that would be owing to the employees based on common law principles. This position fails to take into account one of the main fruits of unionization which is the application of the principle of seniority to lay-offs and recalls. The Employer is no longer operating in a non-union environment.

In the ordinary course of collective bargaining, seniority based lay-off and recall would be achieved for the employees in question. The Board in its interim Order in this matter attempted to encourage the parties to negotiate such provisions for the employees in question by reinstating the employees to the position of laid off workers and by requiring the Union and the Employer to meet for the purpose of resolving all issues related to the lay-off. It was possible for the Employer and Union to apply a seniority based system to the lay-offs in question while they are in the process of negotiating a first collective agreement. In our view, this would be the usual approach to a downsizing that was scheduled to occur before a first collective agreement could be concluded.

The Board will therefore issue an Order directing that the Employer implement these provisions with respect to those employees who were affected by the sale and who applied to the Board for reinstatement and monetary loss. Incidental orders will also be made to deal with any other employees who may be affected by the Board's remedial orders.

Within ten days of receipt of the Order, the Employer shall provide the Union with a current list of employees, including those employees who were laid off, indicating the start date of each employee. Seniority shall be calculated solely on the basis of start date. Within ten days of receiving the list of employees, the Union shall advise the Employer of the names of those laid-off employees who wish to exercise the right to bump an employee who is junior to the returning employee. Bumping rights shall flow for each employee who is displaced until the least senior employees are displaced. Any dispute regarding the application of the bumping procedure shall be referred to the Board.

Employees currently on lay-off who elect not to return to work and employees who may be laid-off as a result of the bumping procedure shall receive severance as set out above for each year of service or portion of a year of service. Severance shall be subject to mitigation including any severance payments already paid pursuant to *The Labour Standards Act*. Any dispute regarding the calculation of severance may be referred to the Board.

Employees who are reinstated under the bumping provision are entitled to full monetary loss covering the period of time from the date of lay-off to the date of reinstatement, subject to mitigation including any amounts already paid pursuant to *The Labour Standards Act*. Any disputes related to the calculation of the monetary loss shall be referred to the Board.

Any positions that become available during the course of one year from the date of the Order shall be offered to employees who are laid-off as a result of the Employer's conduct or this Order and who have indicated to the Employer in writing that they wish to remain on the seniority list for the purpose of recall. Employees who were subject of applications before the Board and who are eligible to exercise bumping rights under the terms of this Order but who elect not to exercise such rights shall not be eligible for recall.

We conclude that the Union would not have been able to bargain payment of the sum of $3,000 for each employee who was subject to lay-off. Similarly, we conclude that the Union would not have prevented the sale of the vacuum truck division. The sale had been under contemplation for some time and it is doubtful that the Employer would have changed its mind with respect to the sale.

In relation to the Union's costs, in our view it is appropriate to reimburse the Union for the costs associated with the first bargaining meeting. The meeting proceeded on a false premise caused by the Employer's failure to disclose the sale of the vacuum truck division. It amounted to a waste of time and money for the Union which, in part, can be made whole by reimbursing the Union for the cost of preparing for and attending the meeting. The Employer will be directed to reimburse the Union for all wages and/or per diems paid by the Union to members of the Union's bargaining committee to enable them to attend the June 2, 1997 meeting between the Union and the Employer. In addition, the Employer is directed to pay the Union an amount equal to one week's pay based on the wages of Mr. Haughey to take into account the time and effort spent by the Union staff in preparing for and attending the June 2, 1997 meeting. Any dispute regarding the calculation of the amounts owing with respect to the Union's expenses shall be referred to the Board.

The Board also found that the Employer violated s. 11(1)(e) of the *Act* in the manner in which it selected employees for lay-off. In our view, this violation is rectified by the Orders made above and does not require an additional order.

With respect to the violation of s. 11(1)(m) of the *Act*, the Board cannot as a practical matter order the Employer to resume its vacuum truck division and restore the employees to their former positions. However, those employees who elect to exercise their rights to bump more junior employees shall be paid at the rates of pay which they received prior to their lay-off, or the rate of pay paid to the employee who they are displacing, whichever rate is greater. Employees who are displaced by the bumping

procedure to lower paying positions shall not have their pay reduced as a result of the bumping process. Any changes in the pay or other conditions of work shall be subject to negotiations between the Union and the Employer.

The Union also sought to be reimbursed for the legal costs associated with the conduct of the Board hearings. In our view, legal costs are not appropriate in these circumstances and no order will be made with respect to them.

BEN SCHAEFFER AND LARRY LANG, Applicants and SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION and LORAAS DISPOSAL SERVICES LTD., Respondents

LRB File No. 019-98; September 1, 1998
Vice-Chairperson, James Seibel; Members: Bruce McDonald and Tom Davies

For the Applicants: R. Shawn Smith, Q.C. and Jayne Krueger
For the Union: Larry Kowalchuk
For the Employer: N/A

Vote - Decertification - Employer influence - Failure of negotiations to progress to first collective agreement lies squarely on employer - As a critical result, confidence in union eroded - Board holds that, under the circumstances, vote would not accurately reflect the true wishes of frustrated, confused and/or frightened employees.

Decertification - Employer influence - Board concludes that influence may be exercised or received unknowingly or without consciousness or deliberation - Board therefore concludes that employer influence exists absent evidence of direct employer interference.

Decertification - Discretion of Board - To grant decertification in climate created by employer could constitute denial of employees' rights under *The Trade Union Act* to bargain collectively through the union they have chosen -Board dismisses application.

***The Trade Union Act*, ss. 3, 5(k), 9, 18 and 42.**

REASONS FOR DECISION

Background

James Seibel, Vice-Chairperson: The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") was designated as the bargaining agent for a unit of employees at Loraas Disposal Services Ltd. ("Loraas"), which operated a solid and liquid waste disposal business, by a certification Order dated March 25, 1997. On February 9, 1998, Ben Schaeffer and Larry Lang filed this application on behalf of themselves and other employees seeking rescission of the certification Order pursuant to s. 5(k) of *The Trade Union Act*, R.S.S. 1978, c. T-17.

The matter came before the Board on May 6, 1998 to hear arguments as to who should be on the statement of employment and whether, in light of the Board's previous decisions concerning Loraas and the Union, the Board should summarily dismiss the application on the ground of employer influence pursuant to s. 9 of the *Act* in that the conduct of Loraas had created an environment or atmosphere which had a chilling effect on, and undermined, the Union's ability to represent the employees and bargain effectively on their behalf. The Board reserved decision on these issues until after the evidence on this application was heard on June 4, 1998.

It is useful to summarize the main events in the relationship between Loraas and the Union and their previous proceedings before the Board.

The Union was certified on March 25, 1997. Notice to bargain was served on Loraas on April 28, 1997. Bargaining commenced on June 2, 1997. The Union obtained a strike mandate on June 12, 1997. Seven employees worked as vacuum truck drivers until their employment was terminated on June 14, 1997 when Loraas closed the vacuum truck division. Loraas had not disclosed its intention to close the division during prior bargaining. On June 23, 1997 the Union filed applications for monetary loss and reinstatement for Henry Franke, Steve Mayer, Robin Melnyk, Kevin Wood, Rick Lissel, Pat Quartly and Les Carroll.

On July 7, 1997 the Union filed similar applications on behalf of two office workers, Elaine James and Karen Hassman, both of whom had their employment terminated on July 4, 1997. Ms. Hassman's case has since been settled.

On July 4, 1997 the Union filed two unfair labour practice applications against Loraas. In the first unfair labour practice application, designated as LRB File No. 238-97, the Union alleged that Loraas violated ss. 11(1)(a), 11(1)(c), 11(1)(e), 11(1)(m) and 43 of the *Act* 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 Loraas 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 on July 4, 1997.

On July 15, 1997 the Board issued an interim Order in these matters on the following terms:

THE LABOUR RELATIONS BOARD HEREBY ORDERS AS FOLLOWS:

1. Within 24 hours of receiving this Order, the Respondent shall provide the Applicant with true copies of all legal documents and agreements relating to the sale of the business or assets of the vacuum truck service division. If the disclosure of these documents leads the Applicant to the conclusion that the sale did not take place to a person or corporation at arms length to the Respondent and that the trucks remain under the control of the Respondent, the Applicant 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 filed herein are reinstated as employees of the Respondent in the status of laid-off employees. Within 24 hours of receiving this Order, the Employer shall arrange to meet with the Applicant to bargain with respect to the laid-off employees. The Applicant 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 Respondent shall arrange to meet and shall meet with the Applicant to continue bargaining collectively for a first collective agreement on four days between the date of this Order and the hearing of the final applications. The Applicant 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 Respondent is prohibited from making any further unilateral changes to any 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 Applicant from the date of this Order to the hearing of the final applications;*

5. *the Respondent will permit a Board Officer to post copies of the Reasons for Decision and the Order issued in this application in the workplace where they can be seen and read by employees.*

On January 5, 1998, the Board issued its Reasons for Decision and Order (reported at [1998] Sask. L.R.B.R. 1) with respect to the applications filed by the Union. The Board made the following Order:

> ***THE LABOUR RELATIONS BOARD**, pursuant to Sections 5(d), (e), (f), (g), 5.1, 42 and 43 of The Trade Union Act, **HEREBY**:*
>
> *(a) **FINDS** that the Respondents, Loraas Disposal Services Ltd. and Carman Loraas, engaged in an unfair labour practice within the meaning of s. 11(1)(c) of the Act by failing to disclose the sale of the vacuum truck division to the Union in bargaining;*
>
> *(b) **FINDS** that the Respondents, Loraas Disposal Services Ltd. and Carman Loraas, engaged in an unfair labour practice within the meaning of s. 11(1)(e) of the Act in that the Respondents discriminated against employees with a view to discouraging union activity in the manner that the Respondents selected employees for lay-off;*
>
> *(c) **FINDS** that the Respondents, Loraas Disposal Services Ltd. and Carman Loraas, engaged in an unfair labour practice within the meaning of s. 11(1)(m) of the Act as the Respondents unilaterally altered rates of pay, hours of work or other conditions of employment without bargaining the changes with the Union;*
>
> *(d) **FINDS** that the Respondents, Loraas Disposal Services Ltd. and Carman Loraas, engaged in an unfair labour practice within the meaning of s. 43 of the Act by failing to provide the Union and Minister of Labour with notice of technological change;*
>
> *(e) **ORDERS** the Respondents, Loraas Disposal Services Ltd. and Carman Loraas, to refrain from engaging in the said unfair labour practice;*
>
> *(f) **ORDERS** the Respondents, Loraas Disposal Services Ltd. and Carman Loraas, to file with the Board a written plan for rectifying the violations outlined in paragraphs (a), (b), (c) and (d) of the Order within 10 days of receipt by them of this Order;*
>
> *(g) **RESERVES** jurisdiction to make further remedial Orders following receipt and consideration of the Respondents, Loraas Disposal Services Ltd. and Carman Loraas, rectification plan; and*
>
> *(h) **DISMISSES** the application with respect to the Respondent, Bill Humeny.*

Clause (d) of the Order was set aside by the Court of Queen's Bench on an application for judicial review which is currently on appeal to the Court of Appeal. [see [1998] Sask. L.R.B.R. c-15 (Sask. Q.B.)]

On January 23, 1998, Loraas filed a rectification plan with the Board wherein it proposed the following:

> a. *With respect to the finding of an unfair labour practice within the meaning of Section 11(1)(c) of the Act the Respondents say that the disclosure of the sale of the Vacuum Truck Division was made as of June 14, 1997. The Company is willing to commence negotiations with the Union on behalf of the 9 employees whose jobs were affected by the closure of this business. Most of the employees have new employment with third party employers. Several of these employees obtained employment within the severance period and payment made at the time of termination. The Company proposes that the negotiations examine the actual monetary loss suffered by each employee as a consequence of the closure and that the parties attempt to compensate each employee for monetary loss which has not previously been paid.*
>
> b. *With respect to the finding of an unfair labour practice within the meaning of Section 11(1)(e) of the Act the Respondents say that the closure and layoff which constituted a finding by the Board of discrimination cannot be repeated in the circumstances. The employer intends to continue the present business undertaking of solid waste disposal and management and agrees that if the Company is to entertain any further changes which directly impact on the bargaining unit or the terms and conditions of work of in scope employees exclusive of the defunct Vacuum Truck Service Division, that the Company will advise the Union and the Minister of Labour of the Province of Saskatchewan as required by law and collectively bargain the relevant consequences in good faith and in accordance with the law.*
>
> c. *In respect of the finding of an unfair labour practice within the meaning of Section 11(1)(m) of the Act the Respondents undertake to continue to bargain towards a first Agreement without further alteration of rates of pay, hours of work, or other conditions of employment of existing in scope employees.*
>
> d. *With respect to the finding of an unfair labour practice within the meaning of Section 43 of the Act by failing to provide the Union and the Minister of Labour with notice of technological change the Company agrees that it shall, henceforth, give notice of technological change as required by law.*
>
> *The Company submits that the payment of damages to employees determined by negotiation and agreement with the Union in the first instance, or failing agreement by reference to the Labour Relations Board, in concert with the undertakings (b), (c) and (d) above, would rectify the violations addressed by the Board in its Order dated January 5, 1998.*

> *The Company proposes that each employee should participate in bargaining the consequences of his or her termination with agents of the Union and in the absence of any other employee affected. The presence of the employee advancing a claim for monetary loss can then be examined in light of the efforts to obtain employment and mitigate loss and lead to more effective collective bargaining and resolution of the issue.*

A hearing on the remedial portion of the applications was held on May 8, 1998.

The decision of the Board with respect to the remedial portion of the applications is reported at [1998] Sask. L.R.B.R. 556, LRB File Nos. 208-97 to 227-97, 234-97 to 239-97. In summary, that decision directs that each of the eight laid-off employees may exercise bumping rights based on seniority; those who elect not to return to work are entitled to receive severance; those reinstated are entitled to recover full monetary loss.

Evidence

Because of the basis on which this decision has been made it is unnecessary to review the evidence respecting the issue of the contents of the statement of employment.

Mr. Lang and Mr. Schaeffer relied upon the material filed on their application and were cross-examined by counsel for the Union.

Mr. Lang, a mechanic for Loraas, said that in his opinion the majority of the employees "did not agree with the bargaining tactics of the Union." When pressed for specifics, he said that they were not kept informed about the parties' proposals and the main issues of dispute and that they received short notice of Union meetings. Although he admitted that his co-applicant was an alternate member of the Union's bargaining committee and had attended the meeting where the strike vote was taken, Mr. Lang claimed that he had no knowledge of the Union's bargaining efforts or Loraas's position. However, Mr. Lang said he was aware of the Union's proposals.

When asked how he found out that he could make an application for rescission of the certification Order, Mr. Lang said that he spoke to someone at the Board and to "certain other people;" he could not recall whether one of them was Bill Humeny, a member of Loraas's negotiating team.

Mr. Lang agreed that with respect to this application he had several meetings with his counsel totalling several hours. He said he simply told the shop foreman and member of management, Rick Laturnas, that he was going downtown or to see a lawyer and would then punch out. He was not sure whether he lost any pay for these absences or for his time before the Board. However, Mr. Lang acknowledged that he was paid for time spent at a previous hearing at the Board. He said that he did not hide the fact that he was garnering support for this application and that the evidence of support for this application was gathered during work time, on coffee breaks and outside of work. Mr. Lang said that he, Mr. Schaeffer, a company salesperson, Ken Reiser, and fellow employee, Dale Laturnas, brother of manager Rick Laturnas, were paying the legal fees for this application. He said that he believes the terminated employees were union supporters.

Mr. Schaeffer was also cross-examined. When asked what Union tactics he did not agree with, he responded that he did not like the fact that the results of the strike vote were counted in private and that he thought the Union was asking for too much from Loraas. He acknowledged that he was an alternate on the Union bargaining committee but said that he had not been involved in bargaining since the closure of the vacuum truck division.

Mr. Schaeffer agreed that he thought that the unfair labour practice applications brought by the Union against Loraas had had a deleterious effect on the relationship between Loraas and the employees and said that he did not think the Union should have filed them. He agreed that he got the impression from Loraas that it had hurt the ability of the Union to obtain a collective agreement; he did not say how or from whom he acquired this impression.

Mr. Schaeffer acknowledged that at the time he decided to make this application he was aware that the Board could bring the drivers who were terminated in June, 1997 back to work, and that he was concerned that this would affect the employment status of the remaining employees. He believed that if the rescission application succeeded they would not be back at work and said "we don't want them working there, because they support what we don't support."

On the subject of how he found out about how to make a rescission application, Mr. Schaeffer said that he spoke to people at other companies who had made such applications in the past but he did not know who they were.

Mr. Schaeffer said that all of the employees knew the views of Loraas's owner, Carman Loraas, about unions "because of talk over the years" and that "he had an inkling" that this included his getting out of the business if a union came in. He agreed that it was well known that Mr. Loraas was not in favour of a union and would try to get rid of it. Mr. Schaeffer said that Mr. Loraas would know that he was a supporter of the rescission application "because he knows me." He said that in his opinion Mr. Loraas would be happy if the rescission application succeeded.

Mr. Schaeffer agreed that since the Union and Loraas had the first bargaining meeting in June, 1997, the leaders of that bargaining committee and several of the original shop stewards are no longer employed by Loraas.

On a question from the Board as to why, if he was opposed to the Union from the start, would he stand for inclusion on the bargaining committee, Mr. Schaeffer replied that he had been "brainwashed."

Brian Haughey testified on behalf of the Union. He is employed by the Union and is responsible for the servicing of and bargaining on behalf of the unit at Loraas. He said that the Union had been unable to conclude a first collective agreement with Loraas. He said that only a few items had been agreed upon since bargaining began on June 2, 1997: the scope clause; union security clause; clarification of definitions and terms such as gender neutrality, etc.; dues check-off clause; a clause regarding visits by Union representatives; and a clause on health and safety. He said that there was no agreement on such important issues as the grievance procedure, seniority, promotions, lay-offs and management rights, and that Loraas had not made any offer on wages.

Mr. Haughey maintained that the termination of the nine employees in June and July of 1997 drastically changed the mood of the employees - people who had provided the strike mandate on June 12, 1997 were "nervous and scared." He said that it negatively affected the ability of the Union to bargain an agreement. There had only been two, one-day bargaining meetings since the first one; approximately eight days had been spent with a conciliator.

Despite this application, Mr. Haughey said that no one in the unit had asked for their membership card to be returned and, in response to the application, the Union purported to file evidence of majority support for the Union. However, he did admit that some members are frustrated because bargaining is slow and seems to have bogged down.

Union Argument

Counsel for the Union argued that Loraas's conduct during the time since the certification Order had undermined the Union's ability to bargain a first collective agreement and had had a chilling effect upon the willingness of the membership to lend support to the Union. In particular, counsel referred to the closure of the vacuum truck division and the consequent termination of nine employees who Mr. Schaeffer said he believed were supporters of the Union.

Counsel emphasized the fact that this application was apparently largely motivated by the belief that if any of the nine employees were returned to work, they could displace at least some of those who continued working. Counsel argued that to allow the application in such circumstances would encourage employers to dismiss Union supporters in the hope that the remaining non-supporting employees would launch a decertification campaign prior to obtaining a collective agreement.

He suggested that the Union was obligated to file and pursue the unfair labour practice applications related to the terminations, but that Loraas's conduct throughout had the effect of creating the perception that the Union's effectiveness and ability to obtain redress was weak and the remaining supporters were reluctant to overtly lend assistance. He said that the present application is a reflection of the frustration of the employees with the lack of progress, but that Loraas is responsible.

Counsel also referred to the fact that the technological change issue is still before the Court of Appeal and that the outcome of that issue may affect the structure of the bargaining unit.

Counsel pointed out that shortly after the decertification application was filed, the Union re-signed a majority of members in the unit, the inference being that the employees are confused, intimidated or both.

It was argued that the application should be dismissed pursuant to s. 9 of the *Act* because there was evidence that it was made as a result of influence by Loraas, at the very least in the broad sense that Loraas had created an atmosphere such that the employees could not feel that they could exercise a free choice without fear of repercussion. That is, he said, if there is any hint that if you support the Union it can affect your job; no one can exercise a free choice.

Cases relied upon by the Union included: *Jeff Gabriel v. United Food and Commercial Workers, Local 1400 and Saskatchewan Science Centre*, [1997] Sask. L.R.B.R. 232, LRB File No. 345-96; *Robert Monahan v. United Steelworkers of America and Capital Pontiac Buick Cadillac GMC Ltd.*, [1993] 4th Quarter, Sask. Labour Rep. 109, LRB File No. 169-93; *Betty Wilson v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Remai Investment Co. Ltd.*, [1990] Fall Sask. Labour Rep. 97, LRB File No. 088-98; *Robert Flaman v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry and Western Automatic Sprinklers (1983) Ltd.*, [1989] Spring Sask. Labour Rep. 45, LRB File No. 045-88; *Dale Dreher v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and WaterGroup Canada Ltd. and Aquafine Water Inc.*, [1993] 3rd Quarter Sask. Labour Rep. 131, LRB File No. 033-93; *Troy Davies v. Service Employees International Union, Local 33 and Dutchak Holdings Ltd.*, [1997] Sask. L.R.B.R. 636, LRB File No. 117-96; *Dennis Pepper v. Construction and General Workers Union and Interprovincial Concrete*, [1989] Spring Sask. Labour Rep. 30, LRB File No. 143-88.

Applicant's Argument

Counsel for Mr. Lang and Mr. Schaeffer stated that they are simply seeking a vote. Counsel conceded that the Board, in certain circumstances, may not order a vote even where there is evidence filed of majority support for the application. Counsel urged that the test to be applied was whether the evidence disclosed a situation that demonstrated that employees could not exercise independent judgment in a free vote. It was argued that there was no evidence of pressure to sign in favour of the application.

Counsel cited the decisions in *Shane Reese v. Holiday Inn Ltd. and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1989] Spring Sask. Labour Rep. 72, LRB File No. 207-88 and *Walter Choponis v. United Food and Commercial Workers, Local 1400 and Madison Development Group Inc.*, [1996] Sask. L.R.B.R. 511, LRB File No. 226-95, as examples of situations in which the evidence respecting alleged employer influence was far more compelling than in the present case and yet was not sufficient to cause the Board to dismiss the application. With respect to the allegation that Loraas had created a "poisoned environment" which influenced the support for the application, it was argued that the employees were certainly capable of seeing beyond that.

Statutory Provisions

Relevant provisions of the *Act* include the following:

> *3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
>
> *5. The board may make orders:*
>
> > *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*
> >
> > ...
> >
> > *(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 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;*
>
> *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.*
>
> *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.*
>
> *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

Section 3 of the *Act* sets forth the purpose and intent of the *Act*, and to the ends expressed in that section the legislation is not neutral. The broad goal is to foster economic democracy and human dignity in the workplace through collective bargaining. The Board has consistently recognized the fragility of the nascent collective bargaining relationship and that a recently certified bargaining agent for a unit of employees inexperienced in collective bargaining is often in a vulnerable and tenuous position prior to being able to demonstrate its ability to represent the employees and achieve a first collective agreement.

With respect to an employer's duty in such situations, in *United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc.*, [1996] Sask. L.R.B.R. 75, LRB File No. 131-95, the Board summarized the nature of the duty to bargain, at 108:

> *The duty to bargain with the certified trade union is a legal obligation, not a responsibility which the employer may take up or not according to whim. The duty to bargain includes, but is not limited to, the conclusion of a collective agreement at the bargaining table. It covers all aspects of the dealings an employer may have with employees with respect to terms and conditions of employment, and requires that the employer deal with the trade union, and only with the trade union, in connection with these questions. It requires that the employer make a genuine and positive effort to resolve issues raised by the trade union on behalf of the employees.*

It is beyond doubt that the closure of its vacuum truck division by Loraas without prior notice to the Union and the subsequent termination of the nine employees had a corrosive effect on the perception of the Union as an effective agent to obtain and maintain fair terms and conditions of employment and on its actual ability to bargain a first agreement. The labour relations harm caused by Loraas's actions was described by the Board in its interim decision reported at [1997] Sask. L.R.B.R. 517, at 527-528:

> *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.* [Emphasis added.]

The evidence heard by the Board on the present application leads us to conclude that little has occurred since July, 1997 to ameliorate the irreparable labour relations harm which was demonstrated at that time. Little progress has been made in bargaining and the Union has had to dedicate significant resources to the pursuit of redress for Loraas' actions. Those actions had been previously determined by the Board to constitute several unfair labour practices. In its Reasons for Decision dated January 5, 1998, reported at [1998] Sask. L.R.B.R. 1, the Board found as follows, at 22:

> *The Board makes the following findings:*
>
> *(1) Loraas failed to bargain in good faith as required by s. 11(1)(c) of the Act by failing to disclose the sale of the vacuum truck division to the Union in bargaining, and its failure cannot be excused based on its alleged fear of vandalism to its equipment;*
>
> ...
>
> *(3) Loraas terminated the employment of the nine employees in violation of s. 11(1)(e) of the Act, in that it discriminated against employees with a view to discouraging union activity in the manner that it selected employees for lay-off;*
>
> *(4) Loraas unilaterally altered rates of pay, hours of work or other conditions of employment without bargaining the changes with the Union contrary to s. 11(1)(m) of the Act.*

The Board's reasons made reference to the deleterious effect of these violations on the Union's ability to effectively represent the employees in the unit and to the manner in which the employees' confidence in the Union was undermined to the point that it was not unlikely that they would be fearful of their jobs. The Board stated, at 17:

> *In this instance, Loraas created a difficult climate for first agreement collective bargaining by failing to disclose its decision to sell the vacuum trucks and by suggesting that its basis for failing to disclose the decision was related to culpable conduct on the part of its long standing employees. The Union and its members are rightly suspicious of Loraas' motives, given that the sale came on the heels of the Union's strike vote. Whether or not Loraas acted with anti-union animus in deciding to sell the vacuum trucks, the Board finds that its conduct in failing to disclose the sale of the assets to the Union at the bargaining table constitutes a failure to bargain in good faith.*

And the Board stated, at 19 - 20:

> *With respect to the first aspect of the Union's argument, the Board is troubled by the coincidence of the strike vote and the lay-off. In the eyes of the Union's members, it must appear to them to be a clear message from Loraas that they are losing their jobs because they joined the Union.*
>
> ...
>
> *With respect to the second aspect of the Union's argument, however, the Board is of the view that Loraas's evidence is less than convincing with respect to the manner of selecting employees for lay-off. This aspect of the decision to close the vacuum truck division was made on or about June 14, 1997. Although the lay-offs flowed from the decision to close the vacuum truck division, the selection of employees who would be laid off was reached at a time when Loraas was aware of the union activity. In this sense, there is a nexus between the union activity and Loraas's decision to select certain employees for lay-off.*
>
> *The Union established that employees or some of them had been engaged in union activity in three forms: the organizing effort, the negotiations on June 3, 1997 and the strike vote on June 10, 1997. Subsequently, Loraas selected certain employees for lay-off but its rationale for deciding which employees would be laid-off and which would be retained was not convincing. Loraas kept a junior and apparently less experienced and qualified driver on staff; it also retained two junior and less experienced office staff. Loraas did not inquire of the staff who were selected for lay-off if they were willing to perform the work that was ultimately allocated to more junior staff.*

The evidence that the present Board heard in this case leads us to agree that those conclusions were justified; Loraas's unlawful conduct and unfair labour practices have created a perception among some employees at least that the Union is ineffective in its ability to bargain with Loraas and represent the rights of the employees in the unit. The expressed perception of Mr. Lang and Mr. Schaeffer in this case that the Union was not forthcoming and open with respect to the status and progress (or lack thereof) of negotiations demonstrates either a lack of understanding of, or an unwillingness to acknowledge, the effect of Loraas's conduct on the bargaining relationship and the perceived status of the Union.

In its reasons for decision on the remedial portion of the unfair labour practice applications, dated July 15, 1998, and reported at [1998] Sask. L.R.B.R. 556, the Board commented further on the issue and also came to a conclusion about some of what the Union would have obtained in bargaining but for Loraas's unfair labour practices. The Board stated, at 569:

> *As we indicated in our initial reasons, the Employer created a difficult climate for first agreement collective bargaining by failing to disclose the sale of the vacuum truck division. Whether or not it was motivated by anti-union animus, its conduct in not disclosing the sale undermined the Union's bargaining position and its support among the employees who, no doubt, would draw the conclusion from the coincidence of the sale with the recent unionization that the Employer would go to some lengths to defeat the unionization effort. Although the Employer may not have intended the sale to have this effect on its employees, the evidence of Mr. Haughey makes it clear that the sale and the lack of a timely disclosure of the sale did have a chilling effect on the Union's bargaining efforts.*
>
> *In order to overcome the effects of non-disclosure and place the Union and its members in the position they would have been in, the Board must consider what the Union might have achieved at the bargaining table if it had been given a timely opportunity to bargain with respect to the sale. Although this process is a mere approximation of what would have resulted, we are of the view that, at a minimum, the Union, with its bargaining strength intact and unaffected by the Employer's unfair labour practice, would have achieved the following:*
>
> *(a) lay-off by seniority on a plant-wide basis;*
>
> *(b) severance based on one months' pay per year of service;*
>
> *(c) a three month training period during which employees would be entitled to establish their ability to perform the work of the positions which they are entitled to bump based on their seniority; and*

(d) recall for a period of one year to any position that becomes available on a plant-wide basis.

The Board issued an Order directing Loraas to implement these provisions with respect to those employees who were affected by the sale and who applied to the Board for reinstatement and monetary loss.

In the present case, the Union argued that the conduct of Loraas has so affected the status and credibility of the Union that an expression of opinion by the employees concerning whether they wish to continue to be represented by the Union cannot be relied upon. In *WaterGroup, supra*, the Board commented on this type of situation, at 142-143:

> *As always in these cases, we begin with the purpose of the Act which is found in s. 3. It states that employees have the right to determine for themselves whether or not they will bargain collectively and, if so, through which union. Various sections of the Act prohibit the employer from interfering with this right and s. 9 makes it clear that the Board has a duty to reject any application by employees to renounce their right to bargain collectively that in reality reflects the will of the employer (see: Confederation Flag Inn (1989) Limited, 1990, Summer Sask. Labour Report, p. 61).*
>
> *The rational for vesting this discretion in the Board was the recognition by the legislature that the employee's right to bargain collectively would be without substance if an employer was allowed to make work life so miserable for employees who chose to bargain collectively that they file for decertification at the first opportunity. It would say to employers that if they are prepared to be ruthless and miserable enough, although they may not be able to stop certification, they can probably force a decertification application to be filed within 10 months. All they have to do is shut the door in the face of the union, make sure no progress is made towards a first agreement, retaliate against identifiable union supporters, tamper with wages and other terms and conditions of employment, bypass the union by dealing directly with the employees and above all, make it clear that things will never get back to normal until the employees "fix it." Never waiver, and if the pressure is great enough, the employees will get rid of the union all on their own. That is not the scheme of the Act.*
>
> *When faced with an employer of this variety, a union may well find itself in difficulty whether it resists the employer's conduct or whether it does not. If it resists and files unfair labour practices it risks being labelled as confrontational, litigious and even petty and vindictive. This risk exists whether the Union wins or loses the unfair labour practices. If the union does nothing in order to avoid being perceived as litigious or militant, it appears in-effectual against the employer and this further undermines employee support and confidence in the union and their willingness to align themselves with the union when sides must finally be chosen.*

> *This is not the way the legislature intended collective bargaining to work and a choice between collectively bargaining that doesn't work because of the employers non-co-operation or no collective bargaining at all is not the choice that the legislature intended employees to have to make when a decertification application is filed. When the Board is satisfied that this is the choice that the employer has managed to place before the employees, the Board will disregard any expression by the employees of a desire to give up their right to bargain collectively. For the Board to do otherwise and fall into line by directing a vote would amount to complicity in the employer's subversion of the law.*

The Board addressed the issue again in *United Food and Commercial Workers, Local 1400 v. F.W. Woolworth Co. Limited*, [1994] 1st Quarter Sask. Labour Rep. 169, LRB File Nos. 148-93, 151-93, 192-93, 193-93 & 194-93, at 202-203:

> *The Employer submitted that the Board, in order to dismiss an application under s. 9 of the Act, must have evidence that directly connects the Employer in some way to one or more of the employees who initiate or pursue the application, or to the gathering of evidence of employee support. He relies upon the Board's decision in Holiday Inn, 1989 Spring, Sask. Labour Report, p. 72.*
>
> *Certainly, the Holiday Inn decision, supra, is correct as far as it goes, but the better and more comprehensive view, when a decertification application is brought after a union has been certified for only ten months and after the employer has been found guilty of numerous unfair labour practices, including ones intended to discourage employees from supporting the union and, then having lost the certification battle, further unfair labour practices designed to ensure that collective bargaining is a failure and that the union provides no useful service, was set forth earlier in these reasons (see: the quotations from WaterGroup, supra).*
>
> *In making these comments in WaterGroup, supra, and then applying them to this case, the Board was not unmindful that at times the Act permits a bare-knuckle power struggle between unions and employers, but what concerns the Board is when the parties ignore the clear limits which the Act sets for this struggle. These limits were commented on by the Board in WaterGroup, supra:*
>
> > *In making this decision the Board is not unmindful that in one sense collective bargaining and the Act are about conflict and the use of power. The Act itself contemplates a power struggle between employers and unions that can become quite unpleasant. A certain kind of conflict falls well within the statutory scheme and cannot provide the basis for dismissing an application under s. 9 of the Act. However, the Act clearly provides limits to this conflict, and in particular the Act makes it clear that this conflict is to be over the content of collective bargaining agreements, not over whether employees are entitled to bargain collectively at all. The Act does not contemplate, and in fact expressly prohibits, any opposition by the*

> *employer to the exercise by employees of their s. 3 rights. When the conflict shifts from the content of a collective bargaining agreement to the employee's right to bargain collectively, the Board must be extremely cautious if the employees attempt to decertify their union during such a conflict.*

In each of those decisions the Board dismissed the application for decertification under s. 9 of the *Act*, not because of evidence of direct interference, but rather because the employer had initiated and maintained conflict over the employees' entitlement to bargain - that is, in denial of rights under s. 3 of the *Act* - as opposed to permissible conflict over the content of collective bargaining. In *F. W. Woolworth*, *supra*, the Board stated, at 201:

> *However, the Union's ability or inability to prove the Employer's direct participation with the applicant is not determinative of the Section 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. This is especially important when the decertification application is brought during the first open period following a certification, which was unlawfully opposed by the Employer and where the Union was subsequently prevented from providing any useful service to the employees because of the obstruction and non-cooperation of the Employer.*

In *WaterGroup*, *supra*, the Board expressed its task as follows, at 13-14:

> *The difficult task for the Board is to put both sides of this case together and then determine whether a vote on the representation issue, in the conditions and atmosphere in which these employees work, would be an exercise of employee prerogative as is their right by s. 3 of the Act, or whether it would be using the prestige of the secret ballot and democratic process to whitewash the very process of influence and coercion that the Act is supposed to protect employees from.*

The Board confronted the issue again in *Choponis v. United Food and Commercial Workers, Local 1400 and Madison Development Group Inc.*, [1996] Sask. L.R.B.R. 511, LRB File No. 226-95, a decision cited by counsel for Mr. Lang and Mr. Schaeffer in this case in support of their position. But the nature of the employer's conduct in that case was radically different from that in issue in *WaterGroup*, *supra* or *F.W. Woolworth*, *supra*. As the Board explained, at 517:

> *This case differs in important respects from the situations in WaterGroup, supra, and F.W. Woolworth Co. Limited, supra. With a few exceptions, the conduct of the Employer in this case was not characterized by punitive or discriminatory action against individual employees, or by attempts to influence the thinking of employees through coercive or intimidating communications. Rather, as the quotations from earlier Board decisions involving these parties suggest, the Employer failed and refused to carry on with the Union a collective bargaining relationship of any substance, and approached negotiations with the Union in a way which prevented any substantial progress towards the conclusion of a collective agreement.*

In contrast, the impugned behaviour in *Madison*, *supra*, was that of a pattern of delays, recalcitrance, distractions during bargaining and challenges to the Union's right to manage its affairs. The Board concluded that, in all the circumstances of that case, suspension of the vote on decertification until after the disposition of the application for first contract arbitration and a subsequent period of time during which the Union could present the contract and explain it to the employees, would be sufficient to counteract the employer's conduct and ensure that it was not a factor which would affect the outcome of the vote.

Loraas' conduct in the present case, however, is more serious and of a nature that has created an atmosphere of extreme insecurity among the employees and has driven a wedge between the employees who were unlawfully terminated and those who remain. Regardless of whether this was Loraas' intention, it is the clear result. The labour relations harm identified by the Board in its ruling last July apparently had not been remedied by the time this application was filed.

The failure of negotiations to progress towards a first contract lies squarely upon Loraas. A critical result of its conduct and unfair labour practices has been to erode confidence in the Union among the employees in the unit and to create a climate of frustration, tension and insecurity. The Board finds that this is what has motivated the present application for rescission. Had bargaining progressed in a fair and reasonable manner on all issues, including the consequences of the sale of the vacuum truck division, the atmosphere in the workplace and the relationship between the Union and Loraas and the perception of the status and effectiveness of the Union would in all likelihood be much different.

The Board is satisfied that the application in the present case was made in whole or in part as a result of the influence of Loraas within the meaning of s. 9 of the *Act*. The definition of "influence" according to Webster's Dictionary includes the following:

> *The act or power of producing an effect without apparent exertion of force or direct exercise of command; the power or capacity of causing an effect in indirect or intangible ways.*

Accordingly, influence, as that term is used in s. 9 of the *Act*, may be exercised or received unknowingly or without consciousness or deliberation. It may emanate vaporously from the employer like a miasma or cloud rather than be exercised directly. This is not a new concept. Indeed, some 35 years ago the Board addressed such a situation in *Diehl v. Army & Navy Department Store and Retail, Wholesale and Department Store Union, AFL-CIO/CLC*, [1955-1964] 2 Sask. L.R.B.D. 48 (upheld on judicial review at [1955-1964] 2 Sask. L.R.B.D. 213) as follows, at 51:

> *From all this and more it was made apparent that the store was more preoccupied with a desire to get rid of the union than with the promotion of industrial peace through collective bargaining in good faith, which is the primary purpose and objective of The Trade Union Act. Accordingly, though admittedly there is no direct evidence on the point, the sum total of the facts and circumstances of the case lead the majority members of the Board to the firm conclusion that this application to rid the store of the union is in fact the direct result of the influence by conduct exerted by the employer upon its employees and that as such it should not be granted.*
>
> *As an alternative to rescission, counsel for both the applicant and the employer asked that a vote be ordered to determine the extent of union support among the employees. It is the firm opinion of the majority members of the Board that the true wishes of the employees cannot be determined by a vote at this time having regard to the prevailing atmosphere in the store and until such time as the confusion and fears of the employees have been dispelled by the employer's willingness to negotiate a collective bargaining agreement in good faith.*
>
> *It is felt that in view of what has transpired in this store the parties have had neither the necessary climate nor the time to conclude the desired agreement.*

In addition to the chilling effect of the climate created by Loraas referred to above, the inference from Mr. Lang's evidence on the issue of how he found out that he could make this application is that it could have been from Mr. Humeny. Also, Mr. Lang admitted that during work hours he did not hide the fact that he was eliciting support for this application, that his supervisor, Mr. Laturnas, allowed time off from work to see the lawyer about the application and that he may have been paid for these absences as well as absences to attend Board hearings. Mr. Schaeffer testified that Mr. Loraas would know that he was a supporter of this application because he had known him for some 20 years - this despite the fact that Mr. Schaeffer was an alternate on the Union's bargaining committee.

Although not an issue raised directly by counsel, in these circumstances the evidence has also given the Board cause to be concerned about the "apprehension of betrayal" among the employees which, briefly stated, is a state of affairs where the relationship between Mr. Lang and Mr. Schaeffer and Loraas would cause employees to support the application out of fear that if they did not, it would be made known to management. More likely than not this would explain why Mr. Lang and Mr. Schaeffer have filed evidence of majority support for the rescission and the Union was able to file evidence of majority support for the Union shortly thereafter.

The Board has a grave concern that in all the circumstances a vote on the present application would not accurately reflect the true wishes of the employees who are frustrated or confused or frightened, or all of the above, by what has occurred over the past year. To order a vote would be to subject them to what will surely be an intense campaign for their support by both sides. In the present climate, which has been created by Loraas, to grant this application or order a vote in the circumstances of this case could constitute a denial of the employees' rights under s. 3 of the *Act* to bargain collectively through the Union they have chosen before there has been the fair opportunity to do so through no fault of the Union.

Accordingly, the application is dismissed.

Because of the grounds upon which the application is dismissed it is unnecessary to deal with the issues raised concerning the statement of employment.

SASKATCHEWAN GOVERNMENT EMPLOYEES' UNION, Applicant and SASKATCHEWAN INSTITUTE OF APPLIED SCIENCE AND TECHNOLOGY and SASKATCHEWAN INDIAN INSTITUTE OF TECHNOLOGIES, Respondents

LRB File Nos. 114-98 & 162-98; September 2, 1998
Vice-Chairperson, James Seibel; Members: Don Bell and Carolyn Jones

For the Applicant: Rick Engel
For SIAST: Rob Gibbings
For SIIT: Don Worme

Remedy - Interim order - Unfair labour practice - Board grants injunctive relief to applicant to protect it and its members against damage and loss which Board likely could not compensate for through Board's remedial powers at final hearing.

The Trade Union Act, ss. 2(g), 5.3, 11(1)(a), 11(1)(c), 18 and 42.

INTERIM ORDER: REASONS FOR DECISION

Background

James Seibel, Vice-Chairperson: Saskatchewan Institute of Applied Science and Technology ("SIAST") is an adult education institution and offers courses in academic, scientific, trade, technical and vocational fields. It was established in 1988 by *The Institute Act*, S.S. 1986-87-88, c. I-9.1 and continued by *The Saskatchewan Institute of Applied Science and Technology Act*, S.S. 1996, c. S-25.2. SIAST provides programs through several established campuses and also by extension. Part of its statutory mandate is to provide credit programs through regional colleges as defined in *The Regional Colleges Act*, S.S. 1986-87-88, c. R-8.1, and to provide services to other bodies with respect to courses or programs or expertise, on any terms that it considers appropriate.

Saskatchewan Government Employees' Union ("SGEU") is designated as the bargaining agent for academic staff members of SIAST pursuant to a certification Order dated April 22, 1988 (LRB File No. 001-88). The current collective agreement between those parties expired June 30, 1997 and they are presently in negotiations for a new contract.

Saskatchewan Indian Institute of Technologies ("SIIT") is a college established pursuant to *The Regional Colleges Act*. Part of its statutory mandate is to deliver educational programs through courses provided by way of contract between SIIT and universities or technical institutes.

In 1991, SIAST and SIIT entered into an academic partnership agreement to provide SIAST academic programming at facilities operated by SIIT. The academic partnership agreement was renewed on November 24, 1995 to continue until terminated by either party upon one years' notice. The operating procedures for the academic partnership agreement were established by an operating protocol agreement dated December 15, 1995. The academic partnership agreement commits SIAST and SIIT to integrate academic program and service planning development, delivery and evaluation. The credit courses offered through the academic partnership agreement are SIAST courses. SIAST provided its own instructors to teach the credit courses at SIIT facilities. The collective agreement with SGEU applied to those instructors.

SGEU alleged that in August, 1997 SIAST consented to a demand by SIIT to terminate the employment of four of the SIAST instructors at the SIIT location in Prince Albert. SIIT then rehired them as SIIT instructors to teach the same SIAST courses. In addition, SGEU alleged that SIIT hired an instructor to teach another SIAST program at SIIT in Prince Albert; this person had been employed by SIAST. These five instructors were part-time.

Through the 1997-98 academic year there were 12 instructors delivering SIAST programs at SIIT facilities in Prince Albert and Fort Qu'Appelle, seven of whom remained directly employed as full-time, permanent employees of SIAST and were covered by the collective agreement with SGEU. SIIT has refused to apply the terms and conditions of the collective agreement to the five instructors hired in 1997 to teach SIAST courses.

Earlier this year, SIIT undertook to hire its own instructors for SIAST credit courses, immediately affecting the continuation of the teaching services of the seven SIAST instructors.

In the file designated as LRB File No. 114-98, SGEU applied to the Board on June 9, 1998 for a declaration that SIIT is the agent or contractor of SIAST within the meaning of s. 2(g)(iii) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), with respect to the "hiring or discharging or any of the terms or conditions of employment of the employees" who deliver SIAST programming, and for a

declaration that SIAST and SIIT have committed an unfair labour practice in violation of ss. 11(1)(a) and (c) of the *Act* by interfering with the right of the instructors who teach the SIAST credit courses to enjoy the benefits of the SGEU collective agreement with SIAST, and by failing to negotiate any of the changes with SGEU. It sought a declaration that all 12 instructors affected by the situation are covered by the SGEU certification Order and collective agreement with SIAST.

As the 1998-99 academic year was to commence on August 24, 1998, SGEU applied for an interim Order pursuant to s. 5.3 of the *Act* (LRB File No. 162-98) directing SIAST and SIIT to immediately extend the employment of the seven SIAST instructors at SIIT facilities and for an order that SIAST and SIIT take no further steps to change the arrangements under the academic partnership agreement pending a final decision of the application.

The Evidence

In support of the application for interim relief, SGEU relied upon the application in LRB File No. 114-98 and filed two affidavits of Barry Barber sworn August 13, 1998 and August 21, 1998. SIAST and SIIT each filed a reply in LRB File No. 114-98 which the Board has reviewed. SIAST filed the affidavit of Claude Naud sworn August 12, 1998 and SIIT filed copies of a memorandum from SIAST to SIIT dated August 26, 1996 and a letter dated May 27, 1997 from SGEU to SIAST.

In addition to the background information set forth above, the first affidavit of Mr. Barber deposed that in late May of 1998 SGEU obtained information that led it to believe that SIIT was hiring its own instructors to teach the SIAST courses and that, as a result, the seven SIAST instructors would be replaced. Assuming the seven SIAST instructors exercised bumping rights under the collective agreement it would likely mean their re-location and a reverberation through the SIAST system.

Mr. Barber further deposed that both SIAST and SIIT have refused to involve SGEU in any of their discussions on these issues, and that the issue of employee status in relation to SIAST extension programming is a significant issue in the protracted contract negotiations between SIAST and SGEU. SGEU views the replacement of its members as instructors of SIAST courses by non-union instructors as an assault on its bargaining unit and it is having a detrimental effect on the negotiations.

Mr. Barber further deposed that the SIIT course materials are identical to the SIAST courses, the observation and evaluation standards are the same, the students are registered jointly at SIAST and SIIT and receive a SIAST certificate upon successful completion.

Exhibited to Mr. Barber's second affidavit was a copy of a letter dated June 24, 1998 from SIAST to SIIT which provides as follows:

> *The following is in reply to your letter dated 26 May 1998 which proposed a new arrangement for the delivery of Business programs that are currently partnered by the Saskatchewan Institute of Applied Science and Technology and the Saskatchewan Indian Institute of Technologies. The changes to the Operating Protocol Agreement, in their current forms, are unacceptable to SIAST for the reasons explained below.*
>
> *Your desire for developing a simpler academic and economic relationship is recognized and supported. However, the impact of implementing such an arrangement at this point of the academic year could be detrimental to our collaborative relationship and could adversely impact the students currently enrolled in Business programs. In particular and given the short notice, the status of the seven SIAST employees that would be affected by the proposed changes is of considerable concern. Similarly, the impact of the changes contemplated in the area of relationship and responsibilities is not fully understood and is of some worry to us. Lastly, I firmly believe that both institutions are committed to meeting the terms and expectations set out at the time of enrollment for the students currently in our Business programs. The proposed departure from existing practices would inevitably result in disruptions to our learners. In the best interest to our students, it would be preferable to perhaps introduce agreed changes in a phased approach.*
>
> *In light of the above, it would be inappropriate to proceed with the new arrangement without some form of joint consultation and formal review of the current agreement. Furthermore, the recent application by the Saskatchewan Government Employees' Union for unfair labour practices complicates the matter. Until such time as this issue is resolved, it is our desire to continue with the current arrangement.*

In the affidavit of Mr. Naud, SIAST denied that it had aided SIIT to replace SIAST instructors at SIIT facilities, and joins issue on the main application by opining that SIIT may decide unilaterally to employ its own academic staff.

The memo of August 26, 1996 and the letter of May 27, 1997 disclosed that the proposal by SIIT to change the "ownership" of the instructors of the credit courses has been the subject of discussion between SIAST and SIIT for some time. In the August 26, 1996 memo SIAST referred to the impact upon SIAST that such a change would cause. The memo provided in part as follows:

> *In response to our conversation about the ownership of the instructors at the programs in Prince Albert and Fort Qu'Appelle, as you are aware these instructors have been in place for a large number of years under our collective agreement and to change this would cause considerable problems for Palliser Institute SIAST. The problems are as follows:*
>
> *1. The SGEU collective agreement requests that we pay the instructors and that they are part of our agreement.*
>
> *2. These instructors have bumping rights if their job is terminated or their locale is changed. Because of their considerable seniority it would have tremendous impact on our staff at Moose Jaw. The majority of them would be able to bump into positions at Palliser Institute or some other SIAST location.*
>
> *3. Our partnership agreement calls for us to negotiate who will pay the instructors; in the newer programs that we do with SIIT, we have made an agreement with you to have the ownership of the instructors in your organization.*

Counsel for SIAST advised the Board that, of the seven full-time SIAST instructors that would be affected by the impending changes by SIIT, four of them were offered employment by SIIT; the other three would be entitled to exercise bumping rights within SIAST, and could immediately obtain part-time positions at SIAST's Palliser campus in Moose Jaw.

However, upon inquiry by the Board, counsel for SIIT advised that the offers of employment to the four instructors had lapsed and SIIT was making alternate arrangements. The parties advised the Board that the 1998-99 academic year was to start on Monday, August 24, 1998; the interim application was heard by the Board on Friday, August 21, 1998. Upon further inquiry by the Board, counsel for SIIT confirmed that SIIT did not have any contractual obligations to replacement instructors for August 24, 1998 but advised that there would be instructors in the classrooms on Monday and that students would not suffer hardship.

Arguments

Mr. Engel, counsel for SGEU, argued that there was a serious issue to be determined and that SGEU had a strong case based in part on the fact that the only thing that SIIT had changed by replacing the instructors was the name of the employer - from SIAST to SIIT - and that everything else remained the same. That is, he argued, SIIT is acting as an agent of SIAST. Counsel stated that the formal

partnership documents are of little assistance and what the Board will have to look to on the main application is the actual working relationship between SIAST and SIIT.

Counsel advised that SGEU had grave concerns that it has not been included in any discussions between SIAST and SIIT on the matters in issue, and is frustrated that it has had no input regarding the layoff of its members. SGEU's position is that the *Act* requires negotiation with SGEU regarding the issue and that SIAST and SIIT cannot hide behind the partnership agreement to exclude SGEU from the process. He said that while SGEU was not alleging bad faith on the part of SIAST, a violation of the *Act*, even if committed innocently, is nonetheless a violation.

Counsel argued that irreparable harm will result if an interim Order preserving the status quo was not granted by the Board and this was apparent from the June 24, 1998 letter from SIAST to SIIT: permanent full-time staff who have taught at their present locations for seven or eight years would be forced to change the locus of their employment and have to uproot and move their homes and families. The bumping that will ensue will reverberate further through the SIAST system to affect an unknown number of SIAST instructors and all of this will occur at the very start of the academic year with resulting upset to students and other staff. In addition, if any SIAST instructors are offered and accept employment with SIIT because they do not want to move, they will be forced to relinquish membership in the SIAST unit of SGEU and the benefits of collective bargaining. If SGEU is ultimately successful on the main application, counsel said, the harm that will have been done cannot be adequately remedied.

Mr. Gibbings, counsel for SIAST, stated that while SIAST strongly opposed the main application and the allegation that SIIT is an agent of SIAST, he agreed that there was a serious issue to be determined and that SIAST is greatly interested in having a final resolution because the issue has a potentially wide-ranging effect upon SIAST extension programs and arrangements with other institutions. He said that, from SIAST's point of view, it would "not be a bad result" if the Board were to grant an Order preserving the status quo pending a final determination.

Mr. Worme, counsel for SIIT, stated at the opening of his argument that "SIIT would agree that there is a serious issue to be resolved" and that SIIT looked forward to a final resolution. However, counsel argued that SGEU had not satisfied the criteria laid down by the Saskatchewan Court of Appeal for the granting of an interlocutory injunction in *Potash Corporation of Saskatchewan v. Todd*, (1987) 2

W.W.R. 491. He argued that SGEU must demonstrate that the right to final relief is clear, a strong *prima facie* case and a strong possibility of success on the final application.

Citing the Board's decisions in *Canadian Union of Public Employees, Local 3237 v. Gabriel Dumont Institute*, [1997] Sask. L.R.B.R. 8, LRB File No. 192-96 and *Canadian Union of Public Employees, Locals 832-02 & 832-03 v. Conseil Scolaire Fransaskois De L'ecole Saint Isidore*, [1995] 3rd Quarter Sask. Labour Rep 184, LRB File No. 110-95, he said that there was little possibility that SGEU would succeed at the final hearing.

Counsel further urged that the Board should not grant the interim application because the relief requested would effectively dispose of the application.

Finally, counsel argued that the assertion of irreparable harm was purely speculative and that, if necessary, the Board could grant appropriate remedies on the final determination. And, in any event, he stated that the balance of convenience favoured SIIT because classes were starting in two days and it needed to hire instructors; the students had paid their tuition. Counsel said that SGEU has known of the situation for some time, but waited until the eleventh hour to bring this application.

In reply, counsel for SGEU stated that the *Gabriel Dumont*, *supra*, and *Conseil Scolaire*, *supra*, cases were irrelevant as they concerned the issue of s. 37 successorship, and not the agency issue raised on the main application in this case.

Statutory Provisions

The following provisions of the *Act* are relevant:

> *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;*

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:

> *(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;*

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.

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

None of the parties raised any challenge to the jurisdiction of the Board to hear and dispose of the application for interim relief.

The Board has considered the grounds on which interim injunctive relief will be granted in several decisions and has determined that it is not bound by the criteria established by the courts. The reasons for this include the fact that the Board's main focus is on the labour relations implications of granting or not granting the relief. The Ontario Labour Relations Board described this distinction as follows in *United Steelworkers of America v. Tate Andale Canada Inc.*, [1993] O.L.R.B. Rep. October 1019, at 1027:

> *In the first place, we might observe that the Board is not a court; and there is no reason to expect that either its adjudicative or remedial approach should mirror that of a court. Civil practice may sometimes provide a useful analogy, but when the Act so clearly involves policy considerations, so systematically modifies common-law premises, and so clearly excludes judicial involvement, it would be curious for the Board to make common-law criteria a governing principle of interpretation. This is not to say that the Board's approach to dispute resolution will never resemble that of the courts; however, the criteria applied, and the result reached, are more likely to be based upon the scheme and purpose of the Act, the Board's own experience, and the norms and needs of the industrial relations community.*

Accordingly, the Board's policy is to exercise its discretionary power to grant or withhold interlocutory injunctive relief based on a determination of what will best promote the objects and purposes of the *Act*, and that is what the Board has done in this case.

In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Loraas Disposal Services Ltd.*, [1997] Sask. L.R.B.R. 517, LRB File Nos. 208-98 to 227-97 & 234-97 to 239-97, the Board summarized the criteria upon which interlocutory injunctive relief may be granted as requiring the following elements, at 522:

> *(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, 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.

There is no doubt that SGEU has established that there is a serious issue to be determined on the main application. Indeed, all of the parties are agreed on that point.

The harm to the seven instructors is serious: they and their families will likely have to move with the attendant disruption and expense; other instructors and their families will be disrupted by the results of bumping; some of the instructors may be forced to have to choose whether to accept employment with SIIT because they do not want to relocate and that choice would result in relinquishment of the rights and benefits afforded by the SGEU collective agreement.

In the larger scheme of things, if the replacement of SIAST instructors is allowed to occur prior to final determination of the issue it will likely negatively affect the contract negotiations between SIAST and SGEU: the result of the instability created cannot be predicted. Both SGEU and SIAST are convinced that preservation of the status quo is beneficial to, or is at least neutral in its effect on, their contract negotiations, but that failure to do so may have highly undesirable consequences.

We do not agree that preserving the status quo pending a final determination will effectively decide the ultimate issue - there is no evidence to suggest this.

The Board is convinced that injunctive relief is necessary to protect SGEU and the individual instructors against damage and loss that likely could not be adequately compensated through the Boards's remedial powers at the final hearing.

Even if we are wrong and it could be said that doubt exists as to the available remedy, the violation of SGEU's alleged rights or the irreparable nature of the loss, the balance of convenience is clearly in favour of SGEU. Indeed, SIIT admitted that it did not have firm arrangements for replacement instructors for courses that were to begin in two days' time. On the other hand, the disruption to any number of SIAST instructors and to the collective bargaining between SIAST and SGEU is certain to occur if the interim application is not granted. The potential for harm demonstrated by both SGEU and SIAST is overwhelming in comparison to any considerations advanced by SIIT.

For the foregoing reasons and because of the urgency of the situation, the Board issued the following Order on August 21, 1998:

> *The Labour Relations Board hereby Orders as follows:*
>
> 1. *The Respondent, Saskatchewan Indian Institute of Technologies ("SIIT") shall reinstate and continue to use the instructing services of the academic staff of the Respondent, Saskatchewan Institute of Applied Science and Technology ("SIAST") in its facilities including the services of Dearle Calder, Sue Carle, and Raye Davie at Prince Albert, Saskatchewan and Allan Bray, Paul Debrushini, Mavis Gessner and Rick Gellsinger at Fort Qu'Appelle, Saskatchewan (the "instructors") until the hearing and disposition of the matters in issue between the parties in the application in LRB File No. 114-98 or until further Order of the Board.*
>
> 2. *The Respondent, SIIT, is prohibited from making any unilateral changes to the existing terms and conditions of work of the instructors or to the manner in which the work is carried on without obtaining the consent of the Applicant and of the Respondent ("SIAST") until the hearing and disposition of the matters in issue between the parties in the application in LRB File No. 114-98 or until further Order of the Board.*

The Board Registrar has been directed to expedite a hearing date for this matter. The parties are strongly urged to attempt to resolve the issues raised on the interim application and to avail themselves of the assistance of the Labour Relations, Mediation and Conciliation Branch of Saskatchewan Labour.

SASKATCHEWAN GOVERNMENT EMPLOYEES' UNION, Applicant and NAMERIND HOUSING CORPORATION INC., Respondent

LRB File No. 189-97; September 4, 1998
Chairperson, Gwen Gray; Members: Don Bell and Bruce McDonald

For the Applicant: Susan Jeannotte Webb
For the Respondent: Susan McGillivray

Collective agreement - First collective agreement - After hearing representations from parties, Board imposes collective agreement terms in areas on which parties unable to agree.

Collective agreement - First collective agreement - Board reviews scope of s. 25(1) of *The Trade Union Act* in fashioning grievance provision for first collective agreement.

***The Trade Union Act*, ss. 25(1) and 26.5.**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: The Saskatchewan Government Employees Union (the "Union") was certified to represent employees at Namerind Housing Corporation Inc. (the "Employer") on April 8, 1996. The history of the collective bargaining between the parties is set out in the Board's Reasons for Decision dated July 27, 1998. On August 17 and 18, 1998, the Board convened a hearing to determine the terms of the first collective agreement between the parties. These Reasons set forth the terms that the Board will impose on the parties pursuant to the Board's powers under s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17.

The parties had achieved considerable success in arriving at an agreement on the majority of the terms of the first collective agreement which are set out in Exhibit U4 filed with the Board. The outstanding issues that remain for Board determination include: (1) grievance procedure; (2) hours of work; (3) sick leave; (4) wages and term of agreement. The Board deferred the issue of the inclusion or exclusion of the new position admin/controller from the bargaining unit to a hearing of the Employer's application seeking exclusion of the position.

We will address each outstanding issue in the order indicated above.

1. Grievance Procedure

Union's position

The Employer proposed language which would permit the Employer to file a grievance against the Union. The Union recognized that the Employer is entitled to commence grievance proceedings against the Union under s. 25(1) of the *Act*; however, it argued that the Employer's proposal failed to set out a clear procedure. The Union would restrict the Employer's rights to those set out in the *Act*.

The Union also opposed an Employer proposal which would restrict access to the grievance procedure to persons who are not employees at the time the agreement is imposed.

The Union objected to the reference, in Step 2 of the Employer's proposed grievance procedure, to the admin/controller as that position is currently in dispute between the Union and the Employer.

The Union proposed that employees be permitted to leave work with no loss of pay for up to 30 minutes in order to discuss a grievance with a Union representative. The Union also proposed a provision which would require each party to provide full disclosure of all information at each step of the grievance proceeding.

Employer's position

The Employer raised three issues with respect to the grievance procedure. First, it wished to limit retroactive filing of grievances by persons whose employment was terminated prior to the entering into of the first agreement. The Employer also sought language to restrict access to the grievance procedure to persons who are employees within the scope of the agreement. Second, the Employer opposed a Union proposal which would permit employees to leave work for up to 30 minutes in order to discuss potential grievances. Third, the Employer opposed a Union proposal to require full disclosure of all information available regarding the grievance at each step of the grievance procedure.

Board Ruling

The wording of the entire grievance provision is set out in Appendix "A" attached hereto. The bulk of the wording comes directly from the Employer and Union proposals with some minor adjustments in wording. On the contentious portions of the provision, the Board concluded as follows:

(a) Access to the grievance process is mandated by s. 25(1) of the *Act* which provides 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.*

The purpose of s. 25(1) of the *Act* is to ensure that all disputes arising under the terms of a collective agreement are resolved through the mechanism of grievance arbitration. In the Board's opinion, any restriction on access to this process would run contrary to the statutory intention expressed in s. 25(1) of the *Act*. As a result, the Board directs that the collective agreement contain no restrictions on access to the grievance and arbitration procedures.

(b) Similarly, s. 25(1) of the *Act* requires both the Employer and the Union to refer disputes that arise under the terms of the agreement to the grievance and arbitration provisions. Various decisions of the Supreme Court of Canada such as *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.) and *O'Leary v. The Queen*, [1995] 2 S.C.R. 967 (S.C.C.) make it clear that provisions mandating grievance and arbitration provisions apply equally to employers and employees. In this instance, the Employer proposed the following provision to address the Employer's right to grieve:

> *5(b) In the event the Employer finds it necessary to file a grievance, it will do so by reducing the grievance to writing and forwarding it to the Chief Shop steward. If the grievance is not satisfactorily resolved within fourteen days the Employer will take it to the arbitration process.*

This provision does not contain a time limit for filing the initial grievance. Under the main grievance provisions, the Union is required to file a grievance within 15 days of the occurrence of the matter leading to the grievance or the time that the employee became aware of the occurrence. The Board is of the view that the obligation to resolve grievances in a timely fashion should be reciprocal for Union and Employer. A time limit of 15 days is therefore included in the clause which permits the Employer to file a grievance. In addition, following the notion of reciprocal obligation, a second step in the grievance process is added to require the Employer to submit the grievance to the president of the Union, or his or her delegate, within 14 days of receiving a written response at Step 1. These parallel obligations are set out in appendix A.

(c) The Employer's proposal names the admin/controller as the management person responsible for receiving employee grievances at Step II. The Union disputed that the admin/controller is excluded from the scope of the bargaining unit. This issue is the subject of an application made by the Employer to amend the certification Order which is scheduled to be heard after the resolution of the present application. To avoid any potential confusion, the Board amends Step II of the Employer's proposal to require the Union to refer the grievance at Step II to the general manager, or his or her designate.

(d) The Board has considered the Union's request for paid leave up to 30 minutes for discussion of potential grievances with Union officials. Generally, an employee first discusses a grievance with the shop steward. This discussion can take place during lunch or coffee breaks while at work. The shop steward likewise has access to the Union's staff representatives by telephone during the day and after hours. Employees can also access their Union staff representatives on their Earned Days Off ("EDO"). In the Board's view, there is ample opportunity for employees to access Union officials. If, over the course of the term of this agreement, access to Union officials proves to be difficult the parties may wish to address this issue in the next round of bargaining.

(e) The Union proposed a clause requiring both parties to provide full disclosure of all information available regarding the grievance at each step of the grievance procedure. The Board finds that this provision is consistent with the overall duty imposed on both parties to bargain in good faith with respect to grievances and will impose the requirement in the collective agreement.

2. Hours of Work

Union's Position

The Union proposed that the normal hours of work be set from 8:00 am to noon and 1:00 pm to 5:00 pm, Monday to Friday, with every second Friday being an EDO. The Union further proposed that the work schedule be subject to change by agreement between the Union and the Employer. The Union argued that this arrangement is currently in place in the Employer's Policy Manual.

Employer's Position

The Employer desired some flexibility to change the daily hours of operation on 30 days notice to the Union.

Board Ruling

The Union's proposal on hours of work is in conformity with the present practice of the Employer. Its proposal, in essence, codified the existing practice of the Employer to require employees to perform work Monday to Friday between the hours of 8:00 am and noon, 1:00 pm and 5:00 pm, with one EDO in every 10 day period. The Board agrees with the Union that hours of work are a central part of the contract of employment. In this instance, the Employer wished to retain the right to unilaterally alter the regular hours of work without seeking the Union's agreement. In our view, the *Act* reflects the centrality of hours of work to the process of collective bargaining when it defines a "collective bargaining agreement" in subsection 2(d) of the *Act* as "an agreement in writing ... setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions of employees." The Union, in this instance, does not request that regular

hours of work be confined to the periods specified above and it is willing to enter into negotiations with the Employer during the life of the collective agreement to alter the regular hours of work should they require variation. In our view, the Union's position is preferable to the Employer's position and will be incorporated into the collective agreement as set out in Appendix A.

3. Sick Leave

Union's Position

The Union proposed that employees be entitled to draw five days on future sick leave credits. It also wants to restrict the right of the Employer to require a medical certificate to verify illness or absences due to illness of more than three days. The Union opposed any cap on the accumulation of sick leave. It also opposed the Employer's proposal which would permit the Employer to withhold the first day of sick leave allowance at its discretion.

Employer's Position

The Employer wanted to restrict access to unearned sick leave credits to two days. In addition, it desired an open-ended ability to require an employee to produce a medical certificate, regardless of the length of the illness. It also sought to impose a cap of 60 days on the accumulation of sick leave credits. The Employer's proposal also contained a provision permitting it to withhold the first day of sick leave allowance at its discretion.

Board Ruling

During the life of the agreement, the parties may wish to reconsider all of the benefit packages applying to sick leave. Under the proposed agreement, employees are entitled to sick leave, short term disability and long term disability. They are also statutorily entitled to employment insurance for illness. The Board did not receive any indication from the parties that they have discussed applying for employment insurance reduction in employer's premiums under s. 69 of the *Employment Insurance Act*, S.C. 1996, c. 23 ("EI Act") and Regulations. A consideration of the EI Act may necessitate some changes in sick leave, short term and long term disability plans to ensure integration with the EI Act. These matters

were not addressed by the parties in the hearing and the Board simply raises the issue for potential future bargaining or discussion.

It is the Board's view that employees should have access to three days of unearned sick leave. Should an employee be unable to return to work, recovery of the unearned sick leave allowance would not cause an undue hardship to the employee or an undue expense for the Employer should the advance not be recoverable from the employee.

The Board finds that it is unreasonable to expect an employee to produce a medical certificate for an illness lasting three days or less. If abuse of sick leave is suspected the Employer has other options available to challenge the legitimacy of the alleged illness. For instance, a pattern of absences can give rise to a reasonable inference that an employee is abusing sick leave benefits.

When constructing a collective agreement, the Board has some obligation to consider the social cost of provisions such as the mandatory production of medical certificates. Such certificates for short illnesses, such as colds and influenza, are wasteful of publicly funded health care services. If sick leave usage is unexplainably high, the parties may wish to consider incorporating a joint Union-Management committee to discuss sick leave usage and to offer various forms of assistance to employees with records of high sick leave usage.

In its current policy manual the Employer has imposed a cap of 36 days on the accumulation of sick leave. In its bargaining proposal, the Employer has offered to raise this cap to 60 days. The Union opposed any cap on unused sick leave. In our view, with the provision of short term and long term disability plans, a cap of 60 days on the accumulation of sick leave is not unreasonable. Employees have access to full pay for a three month period after which they are eligible for short term and long term disability payments. The cap on accumulated sick leave prevents an escalation of unfunded liability for the Employer.

The Board finds that the Employer's proposal to permit the withholding of sick leave pay for the first day of illness at the discretion of the Employer represents a somewhat misguided attempt to control sick leave usage by discouraging the use of occasional days of sick leave. In our view, control of sick leave usage is better accomplished through the mechanism of a Union-Management Committee as suggested

above and through the identification of employees at risk and in need of special assistance. This is an area that the parties may wish to develop in the next round of collective bargaining.

The text of the sick leave provisions is set out in Appendix A hereto.

3. Wages

Union's Position

The Union put forth a wage proposal which slightly altered the job classification plan established by the Employer. The Union's proposal deleted the Accountant position and placed the accounting clerk in the secretary/clerk/receptionist classification. In addition, it changed the classifications of maintenance person 1, 2, maintenance person - not regular, and part-time painter to maintenance 1, 2 and 3. The Union proposed a five step increment process where annual increments would be granted to employees. At the end of the five step process, the employee would receive general economic increases only. The Union indicated that its wage rates were based on the Employer's offer of April 30, 1997. The employees have been without a wage increase for a number of years. The Union opposed the Employer's earlier offer to create a minimum and maximum salary plan which would permit the Employer to unilaterally place an employee anywhere on the continuum between the minimum and maximum. In this regard, the Union stressed the need for equal and fair treatment. The Union's proposed wage scale is set out in Appendix "B".

Employer's Position

The Employer offered a wage scale based on its classifications of accountant, secretary-receptionist, tenant relations officer, maintenance person 1 and 2, maintenance person - not regular, and part-time painter. It offered a six step increment process with employees being placed at their current hourly wage on the wage scale with an increment in January, 1998. In subsequent years, employees would move up one step on the wage scale subject to funding increases being received by the Employer from its funding agencies. When the top of the scale was reached, employees would receive two percent annual increases to certain maximum levels of pay. The Employer's December 12, 1997 wage offer

also included a signing bonus totalling $9,760 if the offer was accepted before December 23, 1997. The Employer's wage offer is set out in Appendix "C".

The Employer led evidence with respect to its financial affairs and its ability to pay the various wage and benefit costs which are included in its and the Union's proposals. Don Lussier, General Manager, testified that funding for the Employer's housing program has been transferred under the Federal Transfer Agreement from the federal government to the provincial government. As a result, the initial funding target set by Saskatchewan Municipal Government for the fiscal year 1998 is frozen at the 1996 actual operating subsidies and actual mortgage payments for 1998. The 1996 operating expenses equalled $1,396,874. Salary and employee benefits in 1996 totalled $395,565, which included salaries for both union and managerial staff. The Employer calculated the cost of its total package, which included wage increases, pension, benefits, workers' compensation premiums, tool and travel costs at $245,469. This amounts to a 6.7 percent increase over and above the amount currently paid to its staff. This figure is based on implementation effective the issuing of this Order with no retroactivity. It also included the cost of the group Registered Retirement Savings Plan ("RRSP") (three percent of payroll) and the maximum possible mileage allowances.

Mr. Lussier testified that the funding freeze at the 1996 operational level will cause financial problems for the Employer. He indicated that spending in 1996 was unusual in that a number of maintenance projects were put on hold during that fiscal year due to problems with the accounting system and computerization. As a result of the funding freeze, the Employer expected to lose approximately $140,000 in permanent funding. In addition, the Employer did not expect to meet its rental target. According to its economic forecasts, the Employer expected to incur a deficit of $50,000 in the year 2000 and to be bankrupt by the year 2003 if no drastic change in funding is forthcoming. As a result, the Employer is involved in various negotiations with funding and other agencies to attempt to improve its overall financial picture.

The Employer complained that it had tabled its last financial offer with the Board but the Union had not tabled its final offer which had been made during mediation with the Board agent.

Board Ruling

In the course of the hearing, the Board asked the Employer to file its audited financial statement for the year 1997 and its budget for the year 1998. The Board was of the opinion that some cogent evidence of the Employer's financial position should be provided to the Board where the Employer's arguments centred on its ability to pay. In this instance, the audited financial report provided the Board with a relatively useful global view of the Employer's financial situation. However, the Employer was not willing to provide the Board with details of its 1998 budget. We assume therefore that its budget is the same as its 1996 budget and that its salary and benefits amounts are the same as were spent in 1996. These figures appear to form the basis of the initial funding target set by Saskatchewan Municipal Government for the fiscal year 1998.

The Board also requested at the conclusion of the hearing that the Union provide the Board with details of its final financial offer made during the course of collective bargaining with the Employer. The Board was of the view that s. 26.5(5) of the *Act* requires such disclosure. Details of this offer are contained in Appendix "D" attached hereto.

In determining an appropriate wage adjustment, the Board's overall objective is to attempt to replicate the results that would be achieved through collective bargaining. This, of course, is easier said than done. The parties' proposals were based on a five or six year increment pattern. Neither party led evidence to justify the difference in starting wages for the different classifications, for instance, why clerical staff start at a lower salary than maintenance staff. This task is not a simple one and requires some method for comparing the relative worth of each job classification in order to ensure that equity issues are not overlooked in the setting of wages. We note that the parties have agreed to a classification review system in their collective agreement. For the purpose of setting wages in this application, the Board will not address equity issues. We will however attempt to not exacerbate any such issues. This can be achieved by ordering a wage increase in a dollar, as opposed to a percentage, amount. The parties will be able to rationalize the wage scale on equity principles over the course of the next bargaining round.

In addition, it seems to the Board that in order to develop an incremental wage scale covering a period longer than the terms of a collective agreement, the comparative worth of the various classifications requires some examination. As indicated above, the Board concludes that this task is one that the parties need to undertake over the course of their bargaining a second collective agreement. Therefore, we will only set wages for the term of the collective agreement. In addition, a start wage will be set for each classification in order to provide for any new employees who are hired during the term of the agreement.

In order to set the actual wage rates, the Board has considered all of the costs to the Employer of the current agreement, which includes wages, Canada Pension Plan contributions, employment insurance contributions, workers' compensation assessments, Co-operators' Insurance policy for short term and long term disability and other benefits, the negotiated Group RRSP pension plan of three percent per annum, travel allowance (which was calculated based on the maximum cost to the Employer), and tool allowance. The Board has also considered the Employer's 1997 audited statement and its initial funding target set by Saskatchewan Municipal Government for the fiscal year 1998, the Employer's December 12, 1997 wage offer, the Union's wage proposal and its final offer.

The Employer and the Union did not rely on comparative collective agreements to establish "market worth" of the various positions. In part, this may have been due to the lack of direct comparables between the Employer and other unionized settings, although some comparisons would have been useful for the Board. The Employer justified its proposal almost entirely on an ability to pay argument. The Union justified its proposal based on the Employer's April 30, 1997 offer. Neither position was particularly convincing.

The Employer argued that it would suffer a $140,000 budget decrease according to its new funding arrangements. At the same time, it pointed out to the Board that its funding is on a line-by-line basis, not a global sum, so that funds assigned to wages and benefits cannot be assigned elsewhere and vice versa. It appears from the audited 1997 statement and the initial finding target set by Saskatchewan Municipal Government for 1998 that the 1998 budget amount for administration is unchanged from 1996, that is, it remains set at $1,396,874, with salary and employee benefits totalling $395,565, which included salaries for both union and managerial staff. The Employer did not provide the Board with the salary and benefit figures paid to management staff.

The Union argued that its wage proposal was the same as the Employer's wage proposal of April 30, 1997. There are some similarities in the two proposals. For instance, the maximum salary for tenant relations officer proposed by the Union is $19.35/hour while the Employer's maximum salary proposal for this position on April 30, 1997 was $19.02/hour. A similar position exists for the maintenance 3 position. Otherwise, the Union's starting wages are substantially higher than the minimum wages referred to in the Employer's April 30, 1997 offer.

Neither party justified the increment steps which were contained in their proposals. The Employer's increments ranged from one percent per year for administrative staff to five percent per year for maintenance staff. No evidence was led to justify the different treatment of employees. Similarly, the Union's increments were not explained by reference to percentage increases or other logical guides.

Overall, the Board must decide a wage increase that takes into account the matters raised by the parties including the limited funds available to the Employer and the lack of wage progress made by employees over the years preceding the organization of the Union. The Board notes that the parties have agreed to establish a pension plan in the form of a group RRSP which costs the Employer and employees three percent of base pay. This is a significant factor in setting the new wage rates. Based on all of these factors, the Board orders an increase of $.75/hour/annum assuming 1872 hours per annum. The hourly rates of pay for existing staff are set as follows:

	First year	**Second year**
Receptionist (including part-time receptionist)	$10.75	$11.50
Accountant	$12.25	$13.00
Senior Tenant Relations Officer	$17.47	$18.22
Junior Tenant Relations Officer	$15.25	$16.00
Maintenance Person 1	$16.46	$17.21
Maintenance Person 2	$13.25	$14.00
Maintenance Person 2 (Junior)	$10.75	$11.50
Part time Painter	$11.75	$12.50

The minimum start rate for all classifications for any new employee who is hired after the date of this Order shall be as follows:

Receptionist (including part-time receptionist)	$10.00
Accountant	$11.50
Tenant Relations Officer	$14.80
Maintenance Person 1	$13.91
Maintenance Person 2	$10.00
Part time Painter	$10.00
Maintenance Person (not regular\casual)	$ 7.00 - 8.25\hour

With respect to retroactivity, the Union requested that the agreement be made retroactive to June, 1997, which coincides with the date of its application to the Board. The Employer sought to avoid retroactivity. In our view, given the length of time it has taken to conclude a collective agreement, it would be unfair to the current employees to delay the implementation of the Order past the date the Union applied for first collective agreement assistance. Normally, in first collective agreement bargaining, the Union strives to achieve an agreement dating back to the date of certification. In this instance, the Union is prepared to forego one year of retroactivity. In our view, this is a fair approach. The cost to the Employer in the current year is a factor to be considered, however, this cost is not unexpected. The cost of retroactivity is limited in part by the delay of the implementation of the mileage rates and the group RRSP.

The effective date of the collective agreement is therefore set at June 1, 1997 with an expiry date of May 31, 1999. The wage scale ordered will be retroactive to June 1, 1997. The implementation of the group RRSP requires contributions from both the Employer and employees. As a result, the group RRSP plan will be implemented on the first pay period following the issuing of this Order. The Union requested that the travel allowance, which has been changed from a lump sum travel allowance to a mileage allowance, be implemented effective January 1, 1998, which from a tax point of view is practical for both the Employer and employees. A provision dealing with retroactivity is included in Appendix "A".

We estimate the cost of the first year of wages and benefits to be $240,396 or an operational increase of $13,484 (approximately 5.9 percent). In the second year, with the addition of the RRSP and increased travel allowance which is calculated at the maximum possible cost, the cost of wages and benefits is approximately $260,708 or an operational increase of $20,257 (or 8.4 percent) over the first year. The Board is of the opinion that these increases are reasonable given the relatively low starting salaries of the employees in question, the absence of a pension plan prior to collective bargaining, the Employer's financial situation, the Employer's wage offers and the Union's wage proposals.

The Union will prepare a final draft of the terms of the collective agreement which incorporates the terms already agreed to by the parties, which are set out in Exhibit U4, and Appendix "A" to this Order. In addition, a wage schedule shall be attached to the agreement as outlined above. If there is any dispute between the parties as to the wording of the actual agreement, either party may refer the matter to the Board for determination.

APPENDIX "A"

Article 6 - Grievance Procedure

1. Definition of a Grievance

(a) A grievance shall be defined as any difference or dispute, pertaining to this collective bargaining agreement, between the Employer and the Union on behalf of any employee(s), or any difference or dispute, pertaining to this collective bargaining agreement, between the Employer and the Union.

(b) The Employer shall receive a grievance only when it is submitted in writing on the SGEU Grievance Claim Form by an authorized Union steward or by a paid SGEU Staff Representative.

2. Grievance Procedure - Union/Employee Grievance

(a) An earnest effort shall be made to settle grievances as fairly and promptly as possible in the following manner:

Problem Resolution (Informal Process)

(i) An employee who believes that he/she has a justifiable request or complaint may discuss such matter with the supervisor in an effort to resolve the problem. The supervisor shall convene a meeting with the employee within seven days at a time mutually agreed upon. The employee may request the attendance of the shop steward at the meeting.

(ii) Utilizing this process will not deny the employee access to the grievance/arbitration procedure. If an employee accesses this process the time frame to launch a grievance will be extended to commence on the date that the supervisor provides a decision.

(iii) The supervisor shall provide a decision within seven days of the meeting and the decision shall be presented to the employee and the shop steward (if one was in attendance).

Grievance Procedure (Formal Process)

Step 1 - Supervisor

(i) The employee or the shop steward will submit the employee's grievance in writing to the employee's supervisor within 15 days of the occurrence of the matter leading to the grievance or the time that the employee became aware of the occurrence. The supervisor will hear the grievance and submit his/her decision in writing to the grievor, the shop steward and the Union within seven days.

(ii) **Step 2 - General Manager or Designate**

If a satisfactory settlement cannot be effected at Step 1, the Union may, within 14 calendar days of receiving the written response at Step 1, submit the grievance to the General Manager or his/her designate. A Step 2 meeting will be scheduled at a time agreed to by the parties. The General Manager or his/her designate will render a decision in writing within 14 calendar days of the meeting held to discuss the grievance at Step 2.

Step 3 - Arbitration Board

(i) In the event that a grievance is not settled to the satisfaction of the Union or the Employer at Step 2, then the grievance may be referred to arbitration as prescribed under the Arbitration article in this agreement.

(ii) The time limits above may be extended by mutual agreement between the parties.

(iii) The grievor(s) and shop steward shall receive leave with pay to attend grievance meetings with the Employer.

(iv) It is agreed that any member(s) of the paid staff of the Union may assist at any step of the grievance procedure.

(v) After a grievance has been initiated by the Union, the Employer's representative shall not enter into any discussions or negotiations with respect to the grievance, either directly or indirectly, with the aggrieved employee(s).

3. Group Grievance

(a) Where a group of employees has a grievance, Step 1 of this Article may be bypassed.

4. Union Grievance

(a) The Union shall have the right to file a grievance on its own behalf or on behalf of an employee or group of employees and to seek adjustment with the Employer in the manner provided for in this Agreement. The Union may also file a policy grievance where a dispute involves a question of general application or interpretation of this Agreement. Such a grievance shall commence at Step 2.

5. Employer Grievance

(i) **Step 1 - Shop Steward**

The Employer's representative will submit the Employer's grievance in writing to the shop steward within 15 days of the occurrence of the matter leading to the grievance or the time that the Employer became aware of the occurrence. The shop steward will hear the grievance and submit his/her decision in writing to the Employer's representative within seven days of the Step 1 meeting.

(ii) **Step 2 - President of SGEU (Provincial)**

If a satisfactory settlement cannot be effected at Step 1, the Employer may, within 14 calendar days of receiving the written response at Step 1, submit the grievance to the President of SGEU (Provincial) or his/her delegate. A Step 2 meeting will be scheduled at a time agreed to by the parties. The President of SGEU or his/her delegate will render a decision in writing within 14 calendar days of the meeting held to discuss the grievance at Step 2.

(iii) **Step 3 - Arbitration Board**

(a) In the event that a grievance is not settled to the satisfaction of the Union or the Employer at Step 2, then the grievance may be referred to arbitration as prescribed under the Arbitration article in this agreement.

(b) The time limits above may be extended by mutual agreement between the parties.

(c) The shop steward shall receive leave with pay to attend grievance meetings with the Employer.

(d) It is agreed that any member(s) of the paid staff of the Union may assist at any step of the grievance procedure.

6. Full Disclosure of all Information

The parties to the grievance process shall provide full disclosure of all information available regarding the grievance at each step of the grievance procedure.

7. Arbitration

(a) Where a difference arises between the parties to this collective agreement respecting its meaning, application or alleged violation, including a question as to whether a matter is arbitrable, a party to the agreement may, after exhausting any grievance procedure in this agreement, elect to have the matter determined by an arbitration board.

(b) Written notice of intent to have a matter heard by an arbitration board shall be submitted to the other party within 30 calendar days after the completion of the grievance procedure as provided in this agreement.

(c) Such written notice shall contain the name of the person appointed to the arbitration board by the party giving the notice.

(d) Within seven days after receiving the notice, the party to whom notice is given shall furnish the name of its appointee to the party who gave notice to arbitrate.

(e) The two appointees named by the parties to this Agreement shall, within ten calendar days after the appointment of the second of them, appoint a third member of the arbitration board who shall be the chairperson of the arbitration board.

(f) If the party receiving the notice fails to appoint a member of the arbitration board, the Chairperson of the Labour Relations Board, on the request of a party to this Agreement, shall appoint a member on behalf of the party failing to make an appointment as set out in *The Trade Union Act*.

(g) If the appointees fail to appoint a third member of the arbitration board, the Chairperson of the Labour Relations Board, on the request of a party to this Agreement, shall appoint a person to act as chairperson of the arbitration board.

(h) Upon mutual agreement of the parties, a single arbitrator may be agreed to and used.

(i) The decision of the arbitrator/arbitration board shall be final, binding and enforceable on all parties.

(j) The arbitrator/arbitration board shall not have the power to change this Agreement or to alter, modify, or amend any of its provisions. Subject to the foregoing, the arbitrator/arbitration board shall have the power to dispose of the grievance by any arrangement which the arbitrator/arbitration board deems just and equitable.

(k) Should the parties disagree as to the meaning of the arbitrator's/arbitration board's decision, either party may apply to the arbitrator/arbitration board to clarify the decision.

(l) Each party shall pay the fees and expenses of their appointee to the arbitration board. The fees and expenses of the chairperson and any other common expenses shall be shared equally by both parties.

Article 11 - Hours of Work

1. Hours of Work

(a) Each employee will be assigned an hours of work designation in accordance with Article 11-1(b).

(b) All employees shall work an eight-hour work day, from 8:00 am to noon, and 1:00 pm to 5:00 pm from Monday to Friday the first week, and from Monday to Thursday the second week. Every such second Friday shall be an Earned Day Off (EDO) Saturday and Sunday shall be designated days of rest.

(c) The hours of work set out above may be varied by written agreement between the Employer and the Bargaining Committee.

(d) Normal working hours shall consist of 72 hours in a 14 day period composed of ten (10) working days with two (2), two (2) consecutive-day periods of rest.

(e) An employee who has completed his/her work day and left the Employer's premises and who is called back to perform work shall be paid for a minimum of one and one half hours at the rate of one and one half times the employee's regular rate of pay.

2. Earned Days Off

(a) Regular full-time employees and temporary employees working full-time hours shall earn one day off every 14 day period by working nine (9) eight (8) hour days in a 14 day period. The day off will be taken on a rotational basis every other Friday.

(b) While on sick leave or vacation leave, the number of days charged against the employee's sick or vacation leave shall not include EDO's during that period.

(c) When an employee is authorized or directed to attend a training course that falls on his/her EDO it will be rescheduled by the supervisor.

3. Pay Calculation

(a) For the purpose of pay calculation, approved vacation, sick leave or any other leave with pay shall be included as actual hours worked subject to the following:

(i) In no event shall the number of hours included as actual hours worked, taken on sick leave or taken as vacation, exceed a maximum of eight (8) hours per day.

(ii) In the event an employee has actually worked a part day, the maximum number of hours which will be included as actual hours worked shall not exceed that number of hours required to bring about a combined (hours actually worked plus approved leave with pay) maximum of eight (8) hours per day.

(iii) The foregoing shall have no application if the employee was not scheduled to work on any such day.

(iv) Leave without pay shall not be included as hours actually worked.

(b) Employees working less than full time shall have their benefits prorated accordingly.

4. Overtime

(a) Employees will be paid overtime or given time in lieu for all hours worked beyond eight on a regular work day, at the rate of time and one half.

(b) Employees will be paid overtime or given time in lieu at the rate of time and one half for all hours worked on their EDO, with a minimum one and one half hour guarantee at overtime rates.

(c) Overtime shall be worked when authorised by the employer. Employees shall cooperate with the employer in performing overtime. However, when the employer determines that it is necessary to work overtime and there are insufficient volunteers, the employer has the right to assign overtime. The employer will provide, when possible, 24 hours notice of overtime.

(d) Overtime shall be paid out with the employee's regular pay.

(e) Overtime for hours worked on a designated holiday will be paid in accordance with Article 11-4(b).

5. Rest Periods

All employees shall have a paid 15 minute rest period for every four (4) hours worked.

6. Travel Time

Travel time between the employer's head office and a work site and between work sites shall be considered as time worked.

Article 14 - Sick Leave

1. Definition of Sick Leave

Sick leave means the period of time an employee may be absent from work with full pay by virtue of being sick, quarantined, disabled or because of an accident for which compensation is not payable under The Workers' Compensation Act.

2. Eligibility for Sick Leave - Over Three Months' Service

Regular employees shall earn and accumulate sick leave credits on the basis of one and one quarter (1 1/4) days per month of continuous service from commencement of employment. Maximum accumulated sick leave credits shall be 60 working days.

3. Drawing of Future Sick Leave Benefits

At the discretion of the employer, an employee whose sick leave benefits are exhausted may be permitted to draw on his/her future credits to a maximum of three (3) days. In the event that he/she separates, dies or retires, an overdrawn amount owing will be recovered.

4. Use of Sick Leave Benefits

An employee absent from duty on account of sickness must inform his/her immediate supervisor at the earliest possible opportunity on the first day of absence.

5. Medical Certificate

The employer may require an employee to provide a certified medical doctor's certificate for sick leave in excess of three (3) consecutive days. If the employee's physician charges the employee for producing the certificate, the employer will pay for it.

6. Designated Holiday During Sick Leave

Holidays designated in Article 13-1 and occurring during the period when an employee is on sick leave, shall not be charged against the employee's sick leave credits.

7. Exceeding the Sick Leave Benefits

An employee leaving the service of the employer who has been granted more leave for sickness than was due him/her shall have deducted from any monies owed to him/her by the Employer an amount calculated on the basis of the number of days over-expended at the rate of salary on separation.

8. General

(a) Sick leave will be available to employees who have completed the initial probationary period. Time taken because of sickness or injury before the completion of the probationary period will be without pay.

(b) An employee who is entitled to payment of wages during sick leave shall be paid at the rate of pay that would apply if the employee were not absent on sick leave to the limit of his/her accumulated sick leave credits.

(c) All sick leave usage will be deducted from sick leave credits.

(d) Sick leave allowance payments shall not extend beyond normal retirement age.

(e) If an employee becomes ill while on vacation the employee will call the general manager immediately upon becoming ill and provide the employer with a medical certificate, for each day they are claiming, upon return to work.

Article 20 - Term of Agreement

1. This Agreement shall be effective June 1, 1997 and shall remain in effect until May 31, 1999. The Pension Benefits provided for in Article 22 of this Agreement shall come into effect on the first pay period following the issuing of the Labour Relation Board Order establishing the terms of this Agreement. The mileage allowance set out in Appendix II to this Agreement shall be implemented effective January 1, 1998.

2. A written notice to terminate this Agreement or to negotiate a revision thereto must be given by either party not less than 30 days or more than 60 days before the expiry date of this collective agreement.

Appendix "B"

Union Proposal - November 25, 1997

Secretary/Clerk/Receptionist

$11.50	$12.80	$13.25	$14.00	$14.85

Accountant

$18.00	$19.00	$20.00	$21.00	$22.00

Tenant Relations Officer

$15.35	$16.25	$17.00	$18.25	$19.35

Maintenance 3

$14.20	$15.20	$16.20	$17.20	$18.20

Maintenance 2

$13.70	$14.50	$15.25	$16.00	$17.10

Maintenance 1

$10.50	$11.50	$12.50	$13.50	$14.50

Appendix "C"

Appendix I - Job Classifications and Wage Scales

Classification	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6
Accounting						
Accountant	11.50	11.62	11.74	11.86	11.98	12.10
Administration						
Secretary/Receptionist	10.00	10.10	10.20	10.30	10.40	10.50
Tenant Relations						
Tenant Relation Officer	14.65	15.11	15.57	16.06	16.72	16.89
Maintenance						
Maintenance Person 1	13.77	14.20	14.63	15.09	15.71	15.87
Maintenance Person 2	10.10	10.60	11.10	11.00	12.50	12.63
Maintenance Person - Not Regular	7.00	7.25	7.50	7.75	8.00	8.25
Part-time Painter	9.64	9.94	10.25	10.56	11.00	11.11

All employees who are employees at the date of signing shall enter the wage scale at their hourly rate on date of signing.

[On January 1, 1998 all employees who are employees at the date of signing shall move up one step on the wage scale. If an employee's hourly rate on date of signing is below scale, that employee shall move to step 1 on the wage scale on January 1, 1998.]

Subject to budgetary increases from Namerind's funding source, on January 1st of each following year, each employee shall move up one step on the wage scale and once at the top of the scale, each employee shall receive an increase of two percent to the following maximums.

Classification	**Maximum**
Accounting	
Accountant	$30,000
Administration	
Secretary/Receptionist	$24,000
Tenant Relations	
Tenant Relation Officer	$35,600
Maintenance	
Maintenance Person 1	$37,700
Maintenance Person 2	$26,700
Part-time Painter	$12.50/hour

Appendix III - Signing Bonus

If the Union has accepted the Employer's offer and the parties have signed the agreement by the close of business of December 18, 1997, the following signing bonuses shall be paid to the following employees on or before December 23, 1997:

Joe McNab	$1,900.00
Bud Obelman	$1,900.00
Joseph Pelletier	$1,900.00
Hank Parisian	$1,200.00
Clifford Goodwill	$ 900.00
Alice Genila	$ 900.00
Sean Banin	$ 560.00
Dawn _____	$ 500.00

Appendix "D"

Signing bonus of $0.45\hour for all employees for all hours worked since the date of certification.

Pay grid effective January 1, 1998.

Drop bottom two steps for classes.

Part-time painter would be placed in the Maintenance Person 2 pay grid (i.e no separate pay grid).

New range for positions would be:	Accountant	$11.50 - $14.85\hour
	Receptionist	$10.00 - $13.50\hour
	Tenant Relations Worker	$14.80 - $19.00\hour
	Maintenance Person 1	$13.91 - $18.50\hour
	Maintenance Person 2	$11.07 - $14.25\hour
	Maintenance Person (not regular\casual)	$ 7.00 - $ 8.25\hour

Annual movement to next step of the pay grid.

Term of agreement: ends December 31, 1999.

2% wage increase effective January 1, 1999 to all steps of pay grid.

SASKATCHEWAN GOVERNMENT EMPLOYEES' UNION, Applicant and NORTH CENTRAL HEALTH DISTRICT and CHATEAU PROVIDENCE, Respondents

LRB File Nos. 327-97 & 328-97; September 22, 1998
Chairperson, Gwen Gray; Members: Bruce McDonald and Brenda Cuthbert

For the Applicant: Rick Engel
For the Respondents: Bonnie Reid

Health care - Previously unrepresented employees - Board holds that it has authority under s. 10(2) of *The Health Labour Relations Reorganization Act* to impose a collective agreement on previously unrepresented employees.

Health care - Previously unrepresented employees - Applicable collective agreement - Board applies collective agreement in place between employer and union successful on representation vote to previously unrepresented employees.

Health care - Previously unrepresented employees - Board considers past decisions on add-on groups and health care pattern bargaining practice in determining which collective agreement applies to previously unrepresented employees.

Duty to bargain in good faith - Change in bargaining position - Board finds that employer failed to bargain collectively with union by withdrawing offer to apply union's collective agreement to previously unrepresented employees.

The Trade Union Act, s. 11(1)(c)

The Health Labour Relations Reorganization Act, ss. 5(6), 6(2), 8 and 10(2).

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: *The Health Labour Relations Reorganization (Commissioner) Regulations* ("Regulations") established one bargaining unit for health services providers in the North Central Health District (the "District"). Prior to the enactment of these Regulations, Saskatchewan Government Employees' Union ("SGEU") represented employees in this bargaining unit at Parkland Regional Care Centre in Melfort, which formed part of the District facilities. Service Employees' International Union

("SEIU") represented employees in the health services provider unit at Melfort Union Hospital and Nirvana Pioneer Villa.

Under the Regulations, the Board conducted a vote between SEIU and SGEU to determine which union would represent employees in this bargaining unit. On April 30, 1997, SGEU was certified as the bargaining agent.

The health services providers unit in the District included employees in a long term health care facility known as Chateau Providence at St. Brieux, Saskatchewan. Prior to the Regulations, employees at Chateau Providence were not represented by a trade union. Pursuant to s. 5(2)(a) of the Regulations, "all health service providers who are employed by the district health board" were included in the bargaining unit whether or not they were unionized prior to the enactment of the Regulations. SGEU represents the health service providers at Chateau Providence through this regulatory process and vote.

In LRB File No. 327-97, SGEU alleged that the District failed to bargain in good faith and violated s. 11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), by reversing its bargaining position with respect to the inclusion of the formerly non-union health service providers at Chateau Providence in the Parkland Regional Care Centre collective agreement (the "Parkland Agreement").

In LRB File No. 328-97, SGEU sought an Order of the Board pursuant to s. 10(2) of *The Health Labour Relations Reorganization Act* ("HLRRA") to include the health service providers at Chateau Providence in the Parkland Agreement.

The District filed a reply to this application in which it denied that it had failed to bargain collectively with respect to the health service providers at Chateau Providence. In its reply, the District asserted that the negotiation of the collective agreement for employees of Chateau Providence is to be determined under the provisions of the *Act*, not the HLRRA. The District also disputed SGEU's understanding of the matters that transpired between SGEU and the District concerning the inclusion of Chateau Providence employees in the Parkland agreement. In particular, the District denied that it had agreed to include the employees in the Parkland agreement. The District took the position that the wages and benefits of Chateau Providence employees followed the terms of the SEIU provincial agreement.

Both applications were heard at hearings on June 15, 16 and 17, 1998.

Facts

Chateau Providence opened in January, 1992 as a 30 bed long term care facility for level 2, 3 and 4 patients. Dale Bortis, a member of SGEU's negotiating team at Chateau Providence, has been employed as a maintenance worker from the opening of Chateau Providence. Initially, the salary and conditions of work were set by the Board of Directors of Chateau Providence. Mr. Bortis testified that the employees at Chateau Providence were solidly opposed to unionizing. He explained that there is a large manufacturing plant located in St. Brieux which operated on a non-union basis and that employees at Chateau Providence did not want to "get anything started" with respect to unionizing St. Brieux workplaces.

On January 1, 1994, Chateau Providence amalgamated with the District. Employees at Chateau Providence now reported to various co-ordinators for the District who are situated in Melfort. Subsequent to the amalgamation, the District initiated some changes to the terms and conditions of employment at Chateau Providence. In 1994 the employees received a wage increase from the District. In addition, some of the employees received an increase in shift differential although this increase was not made available to all employees. According to Mr. Bortis, dietary employees were unhappy that they did not receive the increase. No explanation of the increases were provided to the employees. Other changes were made around the same time to the hours of work for various employees, including the activities and laundry employees. Mr. Bortis relayed one experience he had with the District in which Chateau Providence's policy manual was not followed with respect to his entitlement to bereavement leave.

On cross-examination, Mr. Bortis testified that his current wage rate is $13.46/hour which conforms to the wage rate set for Maintenance Worker II in the SEIU collective agreement; however, Mr. Bortis was not aware that his rate of pay was set in accordance with the SEIU agreement. Similarly, Mr. Bortis was unaware that the increase in shift differential was the same as that agreed to between SEIU and the District in its agreement dated January, 1992. Mr. Bortis had not seen the SEIU agreement until approximately two weeks before the hearing of this application.

Charri Lynn Laszko holds three different positions and is also a member of SGEU's negotiating committee at Chateau Providence. She testified that the employees at Chateau Providence became aware in early December, 1997 that they may be swept into a union as a result of the "Dorsey Commission" into the reorganization of health care labour relations. Ms. Laszko was opposed to "forced" unionization that was being promoted by James Dorsey and she organized a local campaign to oppose the recommendations. Ms. Laszko testified that a group of employees of Chateau Providence met with Mr. Dorsey on December 11, 1996 to discuss his recommendations. At that time, there were no discussions about collective agreements. Ms. Laszko had not seen a collective agreement and was unaware of the terms that might be contained in either SGEU's or SEIU's agreements. Ms. Laszko testified that on one occasion during her employment at Chateau Providence, she had requested a copy of what she now understands to be the SEIU collective agreement, but was told that the document was not for her eyes.

Prior to the representation vote which was conducted by the Board on April 17 and 18, 1997, the employees at Chateau Providence met with both SGEU and SEIU. At the meetings, the employees received copies of the collective agreements then in force in the District for SGEU and SEIU members. The employees compared the two collective agreements. According to Ms. Laszko, the employees of Chateau Providence understood, from the information that had been provided to them by SGEU, SEIU and Mr. Dorsey, that their employment would be governed by the terms of the collective agreement of the union that won the run off vote. In particular, employees relied on Information Bulletin #9 from the Health Labour Relations Reorganization Commission dated November 29, 1996 which indicated that newly represented employees in a vote situation would be covered by the collective agreement of their choice regardless of the outcome of any run off vote. Also, Ms. Laszko noted that SEIU had published a notice to Chateau Providence employees which indicated that "workers who previously have no union will now be covered under the terms of the contract presently administered by the union certified within the district - SEIU or the Government Employees Union."

Audrey Yaremy, chair of SGEU's provincial health sector, spearheaded SGEU's campaign in the District. Ms. Yaremy testified that SGEU sent individual letters to employees at Chateau Providence. SGEU premised its campaign on the assumption that the non-union employees at Chateau Providence would be swept into the Parkland Agreement if SGEU won the run off vote. During the campaign, SGEU prepared a side-by-side document comparing SGEU and SEIU agreements. Ms. Yaremy

indicated that, in most areas, the Parkland agreement was the superior document and that these differences did have some impact on the vote.

On cross-examination, Ms. Yaremy agreed that in the health service providers' bargaining unit there are approximately 125 employees at Parkland Regional Care Centre, 52 at Chateau Providence, 168 employees at Melfort Hospital and Nirvana Villa, 30 employees in home care and eight to 11 employees in the community health division of the District. Ms. Yaremy explained that if the Chateau Providence employees are not placed under the Parkland Agreement, the District gains an upper hand in the negotiation of a new district agreement. From her perspective, there would be more employees in the district who would need to catch up to the SGEU wages.

Mona Laurans also testified for SGEU. Ms. Laurans is a special care aide at Chateau Providence and she impressed the Board with her knowledge of the SGEU and SEIU agreements. Ms. Laurans obviously took a difficult situation with the imposition of the Regulations to the workplace that desired to stay non-union and, through quick study, became a dedicated advocate for her colleagues at Chateau Providence. Ms. Laurans prepared a report for her co-workers which compared the existing terms and conditions of work from the Chateau Providence policy manual with the SGEU and SEIU agreements. In the document, Ms. Laurans identified a number of provisions contained in the SEIU agreement which were not applied at Chateau Providence. Ms. Laurans indicated that employees at Chateau Providence did not have a say in their terms or conditions of work; they were unaware of the SEIU agreement prior to the Regulations; they did not have a say or an opportunity to vote on the SEIU agreement which the District wishes to impose on them; and they voted as a group for SGEU after carefully examining the SGEU and SEIU agreements and concluding that the Parkland Agreement was the preferred agreement. The SEIU provincial agreement covering facilities like Chateau Providence was signed April 25, 1997, just prior to the certification of SGEU.

Susan Saunders, staff representative for SGEU, testified with respect to the negotiations between SGEU and the District regarding the inclusion of Chateau Providence employees in the Parkland Agreement. Ms. Saunders was the staff advisor to SGEU's campaign in the District during the vote.

Previously, Ms. Saunders had been employed as an organizer for SGEU and was responsible for the organization of home care throughout the province. She testified that, in the home care sector, when new groups were certified the process for negotiating a first agreement that evolved between SGEU and Saskatchewan Association of Health Organization ("SAHO"), the representative employers' organization, was a process of rolling the newly certified unit into the existing SGEU home care agreement, with letters of understanding attached to deal with local issues and "better thans." The parties did not negotiate separate new agreements for each home care employer. Ms. Saunders expected that this process would be followed with the Chateau Providence employees when SGEU was successful in winning the vote in the District.

Ms. Saunders testified that after the certification Order was issued, she contacted Laura Scott at SAHO to discuss how to roll the Chateau Providence employees into the Parkland Agreement. At the same time, SGEU was also organizing the employees at Chateau Providence in terms of electing a negotiating committee so they could effectively participate in the discussions with SAHO and the District. On December 22, 1997, SGEU wrote to the District advising them of SGEU's dues structure and invoking s. 36 of the *Act*. The letter also requested that the District have new employees sign union membership cards, which Ms. Saunders indicated was not complied with by the District.

Ms. Saunders said that after the negotiating committee was elected, it reviewed the Parkland Agreement and Chateau Providence policies. A list of "better thans" was constructed by the committee and it continued to discuss with SAHO a method for implementing the Parkland Agreement at Chateau Providence. Ms. Saunders testified that on September 10, 1997, SAHO, through Ms. Scott, agreed to apply the Parkland Agreement to Chateau Providence. According to Ms. Saunders, a meeting was then set up between SGEU's negotiating committee and SAHO for October 15, 1997. At that meeting, the "better thans" were reviewed and other matters in the Parkland Agreement were discussed. Another meeting was set for October 21, 1997 at which time Ms. Scott and Patti Dodds, Director of Human Resources for the District, advised SGEU's committee that the District was not willing to pay Chateau Providence employees wages in accordance with the Parkland Agreement. Instead, the District offered to pay the wages set out in the latest SEIU agreement. The District advised SGEU that the cost of implementing the Parkland Agreement at Chateau Province would result in the loss of one full-time position. According to Ms. Saunders, the District indicated at the meeting that it viewed the Parkland Agreement as a cadillac agreement in health care and the District and SAHO did not want the Parkland Agreement to become a precedent for the rest of the Province.

According to Ms. Saunders, SGEU responded in an angry fashion to the District's proposal. Later, SGEU noted that the District had a surplus for the 1996/97 fiscal year of $114,098. This information was not provided to SGEU in its negotiating meetings with the District and contradicted the District's claim that it could not finance the Parkland Agreement at Chateau Providence. After the October 21, 1997 meeting, SGEU filed this unfair labour practice application and requested that the Board make an Order pursuant to s. 10(2) of HLRRA.

In the time since SGEU was certified as the bargaining agent for employees at Chateau Providence, it has not been party to any negotiations or discussions with the District wherein it agreed to changes in the terms or conditions of employment for those employees. Ms. Saunders identified a "replacement of shifts" policy implemented by the District at Chateau Providence since the certification Order which was not discussed with or agreed to by SGEU.

Ms. Saunders indicated that SGEU sought an early hearing of these applications and had agreed to dates in February, 1998. Counsel for SAHO later indicated that those dates were not available and that the next available dates were in May and June, 1998. As a result, the hearing was delayed to June, 1998. Ms. Saunders indicated as well that negotiations for the district-wide agreement for the health service providers bargaining unit are delayed by the lack of resolution of the Chateau Providence issue.

On cross-examination, Ms. Saunders acknowledged that the parties applied for mediation in March, 1998 which was conducted by Saskatchewan Labour.

Ms. Dodds testified on behalf of the District. Ms. Dodds testified that the District is predicting a budget deficit for the fiscal year 1998-99.

With respect to the sweeping in of other non-union employees into bargaining units as a result of the Regulations, Ms. Dodds testified that home care workers, physiotherapists, pharmacists and district board staff were included in other bargaining units. Nurses in the district had generally all followed the collective agreement negotiated on a provincial basis by the Saskatchewan Union of Nurses ("SUN") and SAHO. A Letter of Understanding between SAHO and SUN was filed which indicated that previously non-unionized facilities and agencies were brought under the SUN's provincial agreement with some minor adjustments.

A Letter of Understanding between SAHO and the Canadian Union of Public Employees ("CUPE") was also filed which dealt with employees who were not previously represented by a trade union. The parties set out various provisions dealing with different factual circumstances as follows:

> *It is agreed between the parties that effective September 1, 1997 employees not previously represented by a trade union now represented by CUPE shall be covered by a collective agreement as follows:*
>
> 1. *Employees who were previously out-of-scope of a unionized facility - will be covered by the collective agreement applicable to that facility.*
>
> 2. *Employees employed at a facility that had previously been non-union - will be covered by the collective agreement that the facility had been following.*
>
> 3. *Home Care employees who had previously been non-union - will be covered by the SAHO/SGEU Provincial Home Care collective agreement.*
>
> 4. *District Office employees who had previously been non-union - will be covered by the SAHO/CUPE Acute/Long Term Care Provincial collective agreement. This collective agreement will be considered to be a separate unit.*
>
> 5. *Employees who were employed by the health district in a program/service that had previously been non-union and was not following or there is no appropriate collective agreement to follow (e.g. ambulance employees) - will be covered by the SAHO/CUPE Acute/Long Term Care collective agreement. This collective agreement will be considered to be a separate unit.*
>
> *All terms and conditions of the applicable collective agreement shall be implemented except for Hours of Work; Rate of Pay (and classification); and Benefits and Premiums (including vacation, sick leave, statutory holidays, shift premium, overtime, stand by, transportation, etc., as well as pension, group life, dental and disability plans). Increments shall be granted in accordance with past practice for that employee. Where economic adjustments were previously granted in accordance with a union collective agreement, such practice shall continue.*
>
> *The current Hours of Work; Rates of Pay (and classification); and Benefits and Premiums (including vacation, sick leave, statutory holidays, shift premium, overtime, stand by, transportation, etc., as well as pension, group life, dental and disability plans) shall not be unilaterally changed until collectively bargained between CUPE and SAHO.*

Ms. Dodds noted that the cost difference between SGEU and SEIU rates for the Chateau Providence employees is approximately $80,000 per year. Ms. Dodds informed the Board that the total budget for the District is approximately $17 million, of which approximately 75 to 80 percent related to staffing costs. On cross-examination, Ms. Dodds acknowledged that a portion of the $80,000 increase in staff costs at Chateau Providence would occur by either applying the SGEU or SEIU agreement.

Relevant Statutory Provisions

The unfair labour practice application alleges a violation of s. 11(1)(c) of the *Act* which provides as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> ...
>
> > *(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 application under HLRRA raises an issue with respect to the Board's powers under s. 10(2) of HLRRA which reads 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 addition, the following provisions contained in HLRRA must be considered:

> *5(6) In conducting the examination, the commissioner shall consider the following:*
>
> ...
>
> *(c) the need to facilitate the development over time of consistency in terms and conditions of employment amongst health sector employers and employees.*

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:

...

(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.

...

(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.

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.

Arguments

Mr. Engel, counsel for SGEU, argued that the provisions of HLRRA permit the Board to make an order imposing the Parkland Agreement on the Chateau Providence employees. Section 10(2) of HLRRA empowers the Board to "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." This provision is subject to s. 8 of HLRRA which prohibits the Board from amending, varying or rescinding a bargaining unit description and designation of trade union which are set out in the Regulations for a three year period.

Mr. Engel pointed out that in s. 6(2) of HLRRA, Mr. Dorsey had the general power to "make regulations reorganizing labour relations between health sector employers and employees and resolving issues out of that reorganization." This power was supplemented by specific powers which were listed in s. 6(2)(a) to (i) of HLRRA. Included among the specific powers were (1) the power to make regulations respecting the integration of employees in any bargaining unit [s. 6(2)(c) of HLRRA]; (2) the power to make regulations "respecting any matters the commissioner considers appropriate arising out of the integration of employees in any appropriate unit..." [s. 6(2)(d) of HLRRA]; (3) the power to make regulations "determining which one of the collective bargaining agreements will apply to all employees in a bargaining unit" [s. 6(2)(g)(i) of HLRRA].

Counsel also noted that Mr. Dorsey's general and specific powers were guided by the terms of reference set out in HLRRA which included "the need to facilitate the development over time of consistency in terms and conditions of employment amongst health sector employers and employees" [s. 5(6)(c) of HLRRA].

Counsel argued that if Mr. Dorsey did not make regulations addressing which agreement would apply to the non-union employees at Chateau Providence when they were swept into the bargaining unit, then the Board could make such determination pursuant to s. 10(2) of HLRRA. Counsel noted that under the Regulations, Mr. Dorsey addressed the questions of which collective agreement applies to already unionized employees [s. 9 of the Regulations], seniority [s. 11(1) and (2) of the Regulations], and trade union membership [s. 11(3) of the Regulations]. Counsel noted that the Regulations do not address the question of which one of the collective agreements will apply to formerly non-union employees who were swept into bargaining units.

As a result of the lack of regulation, counsel was of the view that the Board can exercise its powers under s. 10(2) of HLRRA and impose the Parkland Agreement on the employees at Chateau Providence.

Counsel justified the imposition of the Parkland Agreement on a number of bases. First, the employees voted for SGEU and based their decision to a large part on the quality of the Parkland Agreement which they had been led to believe would apply to them if SGEU won the representation vote. Second, SGEU is of the view that the historical pattern of bargaining in health care and in other sectors supports its view that the agreement of the certified union provides the foundation for bargaining for the add-on of

new employees. In this regard, counsel relied on the District's inclusion of Chateau Providence nurses into the SUN agreement. Counsel also relied on two decisions of the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Kindersley Co-operative Association Limited*, [1995] 2nd Quarter Sask. Labour Rep. 278, LRB File No. 034-95, reconsidered at [1996] Sask. L.R.B.R. 140 (set aside on judicial review at (1996), 151 Sask. R. 112) and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Moose Jaw Packers (1974) Ltd.*, [1996] Sask. L.R.B.R. 652, LRB File No. 067-96. In these decisions, the Board held that an add-on group automatically is covered by the terms of a collective agreement except to the extent that there are matters arising from their inclusion in the bargaining unit which require some additional collective bargaining between the parties. Counsel also argued that the objectives of HLRRA, which include "the need to promote the integration of the delivery of health services" [s.5(6)(b) of HLRRA] and "the need to facilitate the development over time of consistency in terms and conditions of employment" [s. 5(6)(c) of HLRRA], are better served if the Chateau Providence employees are included in the Parkland Agreement. This agreement was the choice of the majority of the employees in the district.

Counsel also complained that SAHO and the District did not approach this matter with clean hands. According to counsel, the District reneged on its bargaining position. In addition, after the certification of SGEU at Chateau Providence, the District altered the terms and conditions of employment without negotiating the same with SGEU.

On LRB File 328-97, counsel argued that the District's withdrawal of its previous offer from the table with no compelling reason, its unreasonable demands at the bargaining table, and its unilateral and arbitrary implementation of changes to the conditions of work for employees at Chateau Providence after certification constitute a failure to bargain in good faith.

Ms. Reid, counsel for SAHO and the District, argued that the Board does not have any authority under s. 10(2) of HLRRA to impose the Parkland Agreement on the employees at Chateau Providence as collective bargaining was addressed in ss. 5(1), 9, 10 and 11 of the Regulations. In addition, counsel argued that the Board had no authority to act under s. 14(2)(f) of the Regulations to impose the collective agreement. Section 14(2)(f) of the Regulations permits the Board to amend or vary the relevant appropriate units if "there are unanticipated circumstances" arising after the issuing of the Regulations. Counsel pointed out that, at page 84 of the Commissioner's Report to the Minister of Labour Mr. Dorsey indicated that the unions representing previously non-unionized employees and

SAHO would need to determine which collective agreement applies to the employees in question and to make the appropriate adjustments to include the newly certified employees. According to counsel, the Regulations and the Orders issued pursuant to the Regulations contemplated that the parties would engage in collective bargaining with respect to the inclusion of previously unrepresented employees in a collective agreement. Counsel argued that this process was the normal process to be followed when new employees are added to a bargaining unit.

With respect to the *Kindersley Co-operative Limited* case, *supra*, counsel referred the Board to the decision of Mr. Justice Klebuc on the application for judicial review where the learned Justice concluded that the Board improperly intervened and substituted its opinion for the arbitral process contemplated by s. 25 of the *Act* and the collective agreement when it applied the collective agreement between the union and the co-operative to the add-on group of employees.

Counsel also referred the Board to its decisions dealing with the imposition of first collective agreements under s. 26.5 of the *Act* and argued by analogy that the Board's practice when it intervenes in collective bargaining is to support and supplement the collective bargaining process, not replace that process. In this regard, counsel relied on *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, and *United Food and Commercial Workers, Local 1400 and Madison Development Group Inc.*, [1996] Sask. L.R.B.R. 777, LRB File No. 053-96.

Counsel noted that ss. 9 and 10 of the Regulations maintain the status quo for employees who were previously represented by a trade union until the newly certified bargaining agent and the employers negotiate a new collective agreement. Counsel argued that the "status quo" situation should also be applied to previously unrepresented employees. She also argued against providing SGEU "a break through contract which is significantly better than other contracts for Special Care Home employees in the health district and in the Province of Saskatchewan." In these circumstances, counsel argued that it would be unreasonable and inappropriate for the Board to impose the Parkland Agreement on the Chateau Providence employees. Instead, the District favoured a return to the bargaining process.

With respect to the unfair labour practice, counsel disputed SGEU's version of the bargaining meetings and argued that the telephone exchange between Ms. Saunders and Ms. Scott on September 10, 1997 was an informal exchange that was not meant to form the basis of the District's bargaining position. According to counsel, there has been no failure on the part of the District to bargain in good faith with SGEU; it has not refused to meet with the Union; it has engaged in a conciliation process; and it has been willing to continue to meet with SGEU.

Analysis

The arguments of the parties are both compelling. On the one hand, it is reasonable and understandable for the Chateau Providence employees to expect that the Parkland Agreement would apply to them. This group of employees did not choose to be unionized. When they were forced by the Regulations to choose a trade union after having resisted unionization for a number of years, they did so based on an assessment of the respective benefits of the SGEU and SEIU collective bargaining agreements. Their assessment was not superficial - it was a studied and thoughtful analysis of the respective agreements. They approached the dilemma with which they were faced in a rational and constructive manner.

On the other hand, the District is the only district represented by SGEU. SGEU's main collective agreement in long term care is richer than the two other predominant agreements in health care -that is, the SEIU and CUPE agreements. The District and SAHO are fearful that the Parkland Agreement rates will take hold and dominate discussions at the other provincial bargaining tables. They are mindful of the broader implications of the Parkland Agreement.

Having set out the broad interests of the parties, the Board must assess SGEU's applications by considering (1) does the Board have authority under s. 10(2) of HLRRA to impose a collective agreement on the employees at Chateau Providence; (2) if so, should the Board impose a collective agreement; and (3) has the District refused or failed to bargain in good faith with respect to the issues in question?

(1) Does the Board have authority under s. 10(2) of HLRRA to impose a collective agreement on the employees at Chateau Providence?

The Board has adopted a purposive approach to the interpretation of the statutes which it administers. This approach was set out in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Pepsi-Cola Canada Beverages (West) Ltd.*, [1997] Sask. L.R.B.R. 696, LRB File No. 166-97, as follows, at 715-716:

> *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, 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, 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 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.*

The legislative purpose of HLRRA was succinctly captured by the Commissioner's Report as follows, at 3:

> *At the request of the trade unions representing over 96% of unionized employees in the health sector and the organization representing employers directly affected by health care restructuring, the Saskatchewan legislature adopted a special, single purpose process to undertake a comprehensive redefinition of relationships and rights for the trade unions, the employees they represent and their employers...*
>
> *More flexible in procedure that a quasi-judicial administrative tribunal and divorced from ballot box politics, the commissioner is mandated to make regulations. The task is to redefine rights and reshape relationships to support the health reform restructuring and its service delivery goals; to enable the development of consistency in terms and conditions of employment over time; and to promote orderly collective bargaining relationships within new structures. This is to be done in the context of change and the history of union representation.*

In Saskatchewan, health care reform resulted in the amalgamation of various government operated health care facilities and services, such as community health programs and community operated facilities including 132 hospitals, 83 special care homes, 43 home care services and 108 ambulance services, into 30 health districts each run by a separate district health board. Although the governing structures of health services changed dramatically with the introduction of *The Health Districts Act*, S.S. 1993, c. H-0.01, the collective bargaining structures remained by and large unchanged. At the time of Mr. Dorsey's report under HLRRA, there existed 25 collective agreements covering approximately 30,000 employees and 81 employers in 538 separate bargaining units in the health sector. The bargaining structure no longer suited the governance model that had been adopted for health care and a radical overhaul was required to fit the bargaining structure to the newly created health districts. Mr. Dorsey's task was to make quick progress in realigning the bargaining unit structure in order to decrease

the opportunity for inter-union disputes and to allow for the seamless delivery of health services by reducing the number of collective agreements in each district.

When making his recommendations in the form of the Commissioner's report and the Regulations, Mr. Dorsey recognized that there were many matters that required further decision-making. For instance, in s. 14 of the Regulations, the Board is permitted, among other things, to amend Mr. Dorsey's bargaining unit descriptions in a number of circumstances and is authorized to address "any unanticipated circumstances." In his report to the Minister of Labour, Mr. Dorsey acknowledged that not all of the questions raised by the Regulations could be answered in full and would require references to the Board. For instance, at 63, Mr. Dorsey indicated that the exclusion of chiropodists, chiropractors, dentists, optometrists and physicians from all bargaining units is an issue left for the Board to address. Similarly, in defining who is a manager in the new district structure is left to the Board. The issue of the right of unrepresented employees of affiliated employers to join a trade union was also left to the Board. At 66 of the Commissioner's report, the precise definitions of certain occupations in the community health sector which were assigned by Mr. Dorsey to the health support practitioner unit was also left to the Board. The date for calculation of existing membership support was also left to the Board, at 83 of the Commissioner's report. Mr. Dorsey expected the Board to fill in the gaps that were deliberately or inadvertently left by the Regulations in re-organizing health care labour relations.

Clearly, not all matters that might arise in the course of radically reorganizing health care bargaining units could be resolved by Mr. Dorsey in the short time frame afforded to him for the production of the Regulations. There would be matters that required the attention of the Board arising out of the reorganization of labour relations. Given the unique nature of the restructuring process which resulted in legislated bargaining units, as opposed to Board determined bargaining units for at least a three year period, the Board was relied on to fill any gaps arising out of the reorganization that were not addressed in the Regulations.

In this context, the meaning of s. 10(2) of HLRRA seems relatively straight forward. The Board is authorized to deal with matters arising from the reorganization that Mr. Dorsey did not deal with in the Regulations. This general grant of power to the Board is not limited in s. 10(2) of HLRRA by any other wording except s. 8 of HLRRA which prevents the Board from re-aligning the bargaining unit structure and trade union representation for a period of three years from the date of the Regulations which does not come into play in the current application. Keeping in mind the statutory purpose of HLRRA,

however, any action taken by the Board under s. 10(2) of HLRRA should be consistent with the overall purpose and goals set out in HLRRA and Regulations. Part of the express legislative purpose of HLRRA was to develop a bargaining structure in health care that "promoted the integration of the delivery of health services" and "facilitate(d) the development over time of consistency in terms and conditions of employment amongst health sector employers and employees" [see s. 5(6)(b) & (c) of HLRRA].

In answer to the question posed at the beginning of this section, the Board is of the opinion that it is entitled to make an order to address any matters arising out of health labour relations reorganization in circumstances where Mr. Dorsey did not address the matter in the Regulations.

The Board must then consider whether Mr. Dorsey addressed the question posed by the SGEU application in the Regulations. Ms. Reid argued that the matter had been addressed in ss. 5(1), 9, 10 and 11 of the Regulations and, therefore, does not fall to the Board for determination under s. 10(2) of HLRRA. The Board does not view these sections as addressing the issue at hand.

Section 5 of the Regulations sets out the prescribed units for health services providers. Subsection (1) provides a general summary of the intent of the provision, that is, to set out the prescribed bargaining units for health services providers. It does not address the question of which, if any, collective agreement applies to employees of district boards who, prior to the implementation of the Regulations, were unrepresented.

Section 9(1) of the Regulations reads in part "if a health sector employee was entitled to the benefits of a collective bargaining agreement in force on the day these regulations come into force (a) the health sector employee remains covered... ." In order to apply this section to the employees at Chateau Providence, it is necessary to conclude that the employees at Chateau Providence were entitled to the benefits of a collective bargaining agreement prior to the implementation of the Regulations. Ms. Reid argued that the terms and conditions of employment at Chateau Providence followed the SEIU collective agreement. In our view, however, this fact, even if it were established, it is insufficient to bring the employees within s. 9(1) of the Regulations. In our view, s. 9 of the Regulations, when read as a whole, contemplates that the employees referred to in s. 9(1) of the Regulations must be employees who were previously represented by a trade union. This interpretation is made clear in subsection (2) which states:

> *(2) If a trade union becomes, by or pursuant to section 7, the trade union to bargain collectively on behalf of health sector employees who were represented by a different trade union, the trade union is bound by and* ***shall administer the collective agreement negotiated by the different trade union on behalf of all health sector employees who were covered by that collective bargaining agreement.***
>
> *(emphasis added)*

It is perhaps trite to say that collective bargaining is a two-way process, one that involves a trade union agreeing to represent certain employees and an employer who voluntarily or through Board Order is required to negotiate with the trade union with respect to the terms and conditions of work of those employees. In this instance, no union had agreed to represent the employees at Chateau Providence prior to the Regulations. If the employer unilaterally implemented the terms and conditions of employment set down in the SEIU agreement to the employees at Chateau Providence, it did so without the knowledge of the employees and any union. At best, from the evidence, it can be said that the terms and conditions of employment for Chateau Providence employees was similar to those set out in the SEIU collective agreement. Clearly, certain key elements were missing such as the right to union representation in the negotiation of the agreement itself, grievances, grievance representation and the like. On our view, therefore, s. 9(1) of the Regulations does not apply to previously unrepresented employees.

Section 10 of the Regulations leaves in place various agreements, namely local agreements, transfer and merger agreements, devolution agreements, itinerant movement agreements, laboratory framework agreements, global posting agreements, and agreements respecting the Saskatoon Veterans' Home. All of these agreements were entered into between health sector employers and health sector unions and, in some instances, the Government of Saskatchewan and the Government of Canada. They formed part of the early efforts on the part of health sector employers, unions and government to address some aspects of the transition from multiple health agencies to district boards. No evidence was led to establish that any of the agreements enumerated in s. 10 of the Regulations apply to the employees at Chateau Providence to determine which collective agreement, if any, should apply to them.

Section 11 of the Regulations addresses the integration of health sector employees into the new bargaining units. It has the effect of ensuring that all health sector employees, including those who formerly were unrepresented, retain their seniority, when they are included in a new bargaining unit. The section, however, does not address the question of which collective agreement will apply to formerly unrepresented employees.

Section 14(2) of the Regulations empowers the Board to act in certain circumstances to deal with matters relating to the reorganization. The Board in this instance was not requested in SGEU's application to exercise its authority under s. 14 of the Regulations and no purpose is served by determining the extent of the Board's power under s. 14(2) of the Regulations in circumstances where we are not requested to draw upon its authority to act.

We conclude from this review of the Regulations that Mr. Dorsey did not address the question of which collective agreement, if any, should apply to formerly unrepresented employees when the prescribed bargaining units were implemented. Clearly, the question as to which collective agreement should apply to the employees at Chateau Providence arose from the reorganization of labour relations between SGEU and the District. In our view, the Board is authorized by s. 10(2) of HLRRA to deal with SGEU's request.

(2) Should the Board impose a collective agreement?

This question poses a more difficult problem for which there is little guidance in HLRRA, Regulations or the *Act*. Mr. Engel argued that including Chateau Providence employees in the Parkland Agreement was a logical outcome of pattern bargaining in the health sector and of the Board's decisions in cases like *Kindersley Co-operative Limited*, *supra*. Ms. Reid argued that the Board was wrong to extend the collective agreement to the add on group in the *Kindersley Co-operative Limited* case, *supra*. She also argued that the Board's practice in first collective agreement situations is to foster collective bargaining as the primary format for resolving collective bargaining issues and to intervene only with respect to matters that go to the heart of the collective bargaining regime, such as grievance and arbitration rights. Ms. Reid also argued that the practice of other unions such as SUN and CUPE has been to negotiate the inclusion of formerly unrepresented employees into existing agreements.

It is not reasonable to conclude that the formerly unrepresented employees would remain without the benefit of a collective agreement during the transitional period which, depending on the date of signing of the other collective agreements in the District, could extend to almost a three year time span. In our view, when Mr. Dorsey included such employees in the prescribed bargaining unit, he did so on the assumption that they would be included within the scope of a collective agreement during any transitional period. In addition, both parties to this application approached the problem from the perspective that the Chateau Providence employees would be covered in the transitional period by some collective agreement. An overall sense of fairness and equity would suggest that some benefits should flow to employees who are legislated into a trade union.

There remains then the question of how to choose the most appropriate agreement. Ms. Reid maintained that the parties should negotiate the issue and arrive at their own solution; Mr. Engel said the normal pattern with an add-on group is to include them into the main agreement. Ms. Reid argued that other unions in health care such as CUPE have taken positions consistent with leaving formerly unrepresented employees under the collective agreement which their employer was following with respect to their employment prior to the Regulations.

The Board concludes that it should impose a collective agreement on the parties in these circumstances. Our primary concern is to ensure that Mr. Dorsey's efforts to streamline collective bargaining in health care are permitted to take hold and grow into a district-wide collective agreement. This goal should be the primary focus of the District and SGEU. The Regulations froze labour relations for a three year time period to ensure that the re-organization efforts took hold before any changes could occur in the description of bargaining units or the selection of trade union representation. The parties are already half way through the freeze period with no real progress having been made on reaching a district-wide agreement. The Board is concerned that a relatively minor transitional issue is being permitted to stall the implementation of the Regulations. By ordering the Chateau Providence employees to be included in an existing collective agreement for the transitional period until a district-wide agreement is concluded, the Board is not unduly interfering in the bargaining process but is attempting to facilitate the negotiation of the district-wide agreement, which is the main objective of the Regulations. The parties through their own efforts and with the assistance of a mediator have not been successful in resolving the issue. In these circumstances, the Board considers it appropriate to order that the health service providers at Chateau Providence be included in an existing collective agreement until such time as a district-wide agreement is entered into between SGEU and the District. The delay in reaching a

district-wide agreement is frustrating the main objectives of the HLRRA and Regulations by preventing the better integration of delivery of health services and the development of consistent terms and conditions of employment among employees in the health service providers' bargaining unit.

The choice of agreements is between the Parkland Agreement and the SEIU agreement. The Board is familiar with the normal pattern of bargaining in the health care sector that existed prior to the implementation of the Regulations. Typically, newly certified bargaining units would be included in an existing collective agreement. As Ms. Saunders testified, in the home care service newly certified bargaining units were brought into the standard agreement with some adjustments to take into account existing work conditions in the particular home care service. This pattern was followed by other health sector unions. All health sector unions negotiated collective agreements at a provincial table on a voluntary basis with SAHO representing health sector employers. The practice of applying the certified union's main agreement to a new group of employees is certainly the normal practice followed in this sector.

The pattern of bargaining in the health care sector is also consistent with the Board's Orders in *Kindersley Co-operative Limited*, *supra,* and *Moose Jaw Packers (1974) Ltd., supra.* Although the *Kindersley Co-operative Limited* case, *supra*, was quashed on judicial review by Klebuc, J., its overall principles in this situation remain sound. In this instance, the Board relies on its authority under s. 10(2) of HLRRA to make its Order and is not relying on the general powers contained in s. 42 of the *Act*. The principle established in *Kindersley Co-operative Limited*, *supra*, was that employees added to an existing bargaining unit should be included in the scope of the existing collective agreement. Even though they may work at a different work site, such employees are not significantly different than new employees who are hired into the original bargaining unit and who are immediately included within the scope of the existing collective agreement.

Although we are cognisant of the bargaining dilemma that may face the District and SAHO as a result of the imposition of the Parkland Agreement to the Chateau Providence employees, in our view, the Parkland Agreement is the logical agreement to apply to these employees. The employees were asked to select a trade union under the Regulations and, after careful study, they selected SGEU. They have a reasonable expectation that the Parkland Agreement should be available to them, at least in the interim. The application of the Parkland Agreement follows the pattern bargaining practice that has been

established in health care and is consistent with the Board's policy expressed in cases like *Kindersley Co-operative Limited, supra.*

It seems to the Board that the broader concern raised by the District and SAHO that the Parkland Agreement not be made the model for a district-wide settlement in the District is best discussed and resolved at the main table where the parties will negotiate the district-wide agreement. At that point, both parties can exercise their full economic strength to achieve their bargaining ends.

For the reasons stated, pursuant to s.10(2) of HLRRA, the Board orders that the Parkland Agreement in existence at the time of the implementation of the Regulations be made applicable as of that date to all health service providers employed at Chateau Providence until such time as a new collective agreement is concluded between SGEU and the District.

(3) Has the Employer refused or failed to bargain in good faith and if so, what remedy should be granted?

On the testimony of Ms. Saunders and uncontradicted by any evidence called by the District, the District withdrew its offer to apply the Parkland Agreement to the Chateau Providence employees. The change of bargaining position was not denied, explained or rationalized by any evidence presented by the District at the hearing. In argument, Ms. Reid suggested to the Board that the conversation between Ms. Saunders and Ms. Scott was informal and therefore, not binding as the bargaining position of the District. In our view, this assertion lacks an evidentiary basis as Ms. Scott was not called to testify although she was present throughout the hearing. In these circumstances, the Board can draw a negative inference from the failure of Ms. Scott to testify that the District's evidence would not contradict the testimony of Ms. Saunders. Based on this limited evidentiary basis, we find that the District had failed in its duty to bargain collectively with SGEU with respect to the Chateau Providence employees. However, given the remedy ordered on the application made pursuant to s. 10(2) of HLRRA, no remedial Order will be made with respect to the unfair labour practice application.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2067, Applicant and THE POWER CORPORATION OF SASKATCHEWAN, Respondent

LRB File No. 199-98; October 14, 1998
Chairperson, Gwen Gray; Members: Michael Geravelis and Gordon Hamilton

For the Applicant: Rick Engel
For the Respondent: Brian Kenny

Remedy - Interim order - Unfair labour practice - Board finds that, although union established serious question to be tried on main application, interim order not required to prevent irreparable harm to union and its members - Board dismisses application for interim order.

***The Trade Union Act*, ss. 2(j.2), 2(k.1), 11(1)(a), 11(1)(c), 11(1)(e), 11(1)(f) and 11(1)(o).**

REASONS FOR DECISION

Gwen Gray, Chairperson: The International Brotherhood of Electrical Workers, Local 2067 (the "Union") and The Power Corporation of Saskatchewan (the "Employer") have been engaged in collective bargaining for a new collective agreement since November, 1997. On September 24, 1998, the Union served strike notice on the Employer. The notice took effect at 12:00 pm on Saturday, September 26, 1998. In response, the Employer served lock-out notice effective September 26, 1998 at 5:00 pm. The Union notified the Employer that its members would refuse overtime work as part of its strike activity. On September 29, 1998, the Union also advised the Employer that its day employees would refuse to accept changes to their regular shifts.

In this interim application, the Union sought the reinstatement of three employees, Wayne Sorge, Scott Sears and Rob Labensky, to their positions. Mr. Sorge is a journeyman power lineman who was locked out by the Employer on October 1, 1998 after Mr. Sorge refused to perform overtime work in accordance with the Union's ban on overtime. On Sunday, October 11, 1998, the Employer requested all Union members, except those who are locked out at the Employer's generation stations, to report to work to deal with power outages caused by a snowstorm. The Board was informed by counsel for the Employer that Mr. Sorge returned to work in response to the Employer's general request and remains at work at this time.

Mr. Sears and Mr. Labensky are day employees at Boundary Dam Power Station near Estevan. On September 29, 1998, the Employer assigned them and three other day employees to work four evening shifts. The employees were notified of the shift change half-way through their day shift on September 29, 1998. The shift change was to commence at 1600 hours on September 29, 1998. Normal hours of work for day employees run from 0800 hours to 1430 hours while the evening shift runs from 1600 hours to 2400 hours. When the employees received notice of the shift change, they assumed that they would be required to work a continuous 16 hour shift from 0800 hours to 2400 hours on September 29, 1998. This schedule would result in eight hours of overtime work on September 29, 1998, which they refused to do in accordance with the Union's instructions.

On September 30, 1998, Mr. Sears and Mr. Labensky, along with three other day employees, reported for work at 0800 hours. They were asked three times by managers at the Boundary Dam Power Station to leave the site and report to work at 1600 hours. They were also given written instructions to the same effect. All five employees refused to leave work and continued to work their regular shift.

On October 1, 1998, the five employees again reported for work at 0800 hours. At a meeting with management on October 1, 1998, Mr. Sears and Mr. Labensky were asked if they would leave the site and return at 1600 hours, to which they both answered "no." The Employer responded by suspending Mr. Sears and Mr. Labensky "pending discipline for insubordination." After a few minutes, both employees were asked again if they would leave the site and return to work at 1600 hours to which they again responded "no." At that time, the employees were suspended from work "pending termination for further insubordination."

The Board was advised by counsel for the Employer that all generation station employees were locked out by the Employer on October 5, 1998.

The Union alleged that Mr. Sorge has been improperly disciplined for engaging in union activity contrary to ss. 11(1)(a) and (e) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "Act"). The Union concluded from the evidence that the Employer's purpose in purporting to lock-out Mr. Sorge was not for the purpose of "compelling employees to agree to terms and conditions of employment." According to the Union, the Employer may only engage in lock-out activity if its purpose for the activity is to advance its collective bargaining agenda; on this theory, the Employer cannot use the weapon of lock-out to intimidate or coerce employees who have engaged in strike activity. The Union relied on the

purposive element contained in the definition of "lock-out" in s. 2(j.2) of the *Act* which states 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;*

According to the Union, the purpose of the Employer's conduct in relation to Mr. Sorge was to intimidate and coerce other employees to refrain from exercising their right to strike. The Union relied on a press release issued by the Employer which read in part:

> *SaskPower's decision yesterday to lock out an IBEW member who walked away from a power outage to 5,000 customers in the Dalmeny district appears to have sent a clear message to the IBEW leadership that we will not tolerate any action which threatens the safety of our customers, and there were no further such incidents over night ...*

For its part, the Employer acknowledged that Mr. Sorge was engaged in lawful union activity by refusing to work overtime. However, the Employer asserted a countervailing right to impose a selective lock-out by preventing Mr. Sorge from performing further work during the lock-out period. The Employer relied on its right to engage in a defensive lock-out; that is, one that responds to the strike measures taken by the Union.

With respect to Mr. Labensky and Mr. Sears, the Union alleged that the Employer violated ss. 11(1)(a), (e), (f) and (o) of the *Act* by disciplining them for engaging in strike activity and by interrogating them with respect to the exercise of their rights under the *Act*.

The Employer took a different view of the matter and argued that it simply disciplined the two employees for refusing to leave the premises of the Employer when told to do so. The Employer denied that it disciplined the employees for engaging in lawful strike activity. The Employer pointed out that it did not discipline employees who refused to report to work for the changed shift.

Ruling

In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Loraas Disposal Services Ltd. et al* [1997] Sask. L.R.B.R. 517, LRB File No. 208-97, the Board summarized the criteria to be applied to an interim application as follows:

> *(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, 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 398-399.*

In our view, the Union has established that there is a serious question to be decided on the main application. The Board is particularly concerned with two aspects of the allegations raised by the Union in its application: first, the materials filed with the Board raise a serious question with respect to the purpose of the Employer's actions in locking out Mr. Sorge. It may be that the Employer can establish at the hearing of the final application that the purpose of the lock-out of Mr. Sorge was to compel employees to agree to terms and conditions of employment. However, the materials filed with the Board might suggest that the Employer used the lock-out tool to discourage other employees from

exercising their right to engage in strike activity which, if established, would constitute a breach of ss. 11(1)(a) and (e) of the *Act*.

The Board also has concerns with the discipline imposed on Mr. Sears and Mr. Labensky. The term "strike" is broadly defined in s. 2(k..1) of the *Act* as follows:

> *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;*

The dividing line between protected strike activity and unprotected strike activity is not well defined either by the *Act* or decisions of this Board. In the present case, the employees at Boundary Dam Power Station believed that they were acting within the parameters of lawful strike activity. According to the Union, a refusal to accept the shift change implied that the employees could report to work for their normal day shift.

On the other hand, the Employer assumed that it was entitled to direct the work force by using its traditional disciplinary tools when it concluded that employees stepped over the line between protected strike activity and unprotected or illegal strike activity.

The rights to strike and lock-out are central values in the *Act*. As a general matter, we would suggest that employers should take a cautious approach to discipline during a lawful strike. The Board will carefully scrutinize discipline that is imposed during a strike to ensure that it is not aimed at discouraging employees from engaging in strike activity. The employer has other options to choose from to regulate strike activity that may be outside the activity contemplated by s. 2(k..1) of the *Act*, including applying to this Board for a determination that a particular strike activity falls outside the definition of "strike." In this instance, the affidavit material filed by the Union and the Employer raises a serious issue with respect to the discipline imposed on Mr. Sears and Mr. Labensky.

The Board must also consider whether the Union will suffer irreparable harm in a labour relations sense if interim relief is refused. In this instance, we are not convinced that such harm will befall the Union.

First, the Employer has ended its purported lock-out of Mr. Sorge. The harm to Mr. Sorge and the Union is now limited to the period from October 1, 1998 to on or about October 11, 1998. An interim Order would not alter or change the loss suffered in any significant fashion. Interim relief to restore the status quo, that is, return the employee to the work place, is redundant in this circumstance.

The Board came to a similar conclusion in *Graphic Communications International Union, Local 75M v. Sterling Newspaper Company*, [1997] Sask. L.R.B.R. 742, LRB File No. 323-97 where the Employer reinstated an employee in the period between the filing of an unfair labour practice application and the hearing of an interim application.

The Board makes a similar finding with respect to Mr. Labensky and Mr. Sears. The purpose of an interim Order is to restore the status quo pending a determination of the issues in dispute. In most cases, the status quo is restored by returning the employee to the workplace until the Board can hear and decide the unfair labour practice application. In the present case, however, the Employer locked out all of the Union's members at the generation stations, including the employees at Boundary Dam Power Station. The Union conceded that the lock-out is not improper. In these circumstances, an interim Order could not restore the status quo which existed before the Employer disciplined Mr. Labensky and Mr. Sears because of the intervening general lock-out. The continuing harm to the Union, in terms of any chill of union activity which might be experienced by its members as a result of the discipline of Mr. Sears and Mr. Labensky, is confined to the period prior to the general lock-out and cannot be cured by an interim Order.

In the circumstances of this case, the Board finds that the Union has failed to establish that an interim Order is required to prevent irreparable harm to the Union and its members. It is therefore unnecessary for the Board to consider the third branch of the test, the balance of convenience.

The application for an interim Order is dismissed. The Union may request that the hearing of the application be expedited.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and CUSTOM BUILT AG. INDUSTRIES LTD. (TRAIL TECH), Respondent

LRB File No. 112-98; October 27, 1998
Vice-Chairperson: James Seibel; Members: Gloria Cymbalisty and Tom Davies

For the Union: Larry Kowalchuk
For Employer: Gord Kuski, Q.C. and Jane Brindle
For Brian Luft, Don Birss and Michael Grund: Larry LeBlanc, Q.C.

Bargaining unit - Appropriate bargaining unit - Board policy - Board reviews situations where it has certified less than all-employee units - Board finds that unit composed of employees engaged in the production process and ancillary activities and excluding clerical, administrative and professional employees appropriate.

Bargaining unit - Appropriate bargaining unit - Board policy - Board excludes second tier managers from unit - Second tier managers considered by employees to be representatives and allies of senior management - Inclusion of second tier managers could have destabilizing effect and be potential impediment to initiation and progress of collective bargaining.

Bargaining unit - Appropriate bargaining unit - Board policy - Board includes production supervisors in unit - Board declines to configure bargaining unit based only upon shape of employee support - Board also expresses concern that production supervisors could be practically prevented from future organization through exclusion from unit.

Certification - Membership - Improper organizing tactics - Threats to job security should be considered cautiously where individual making threats has no authority to bring about threatened result - Test is whether a reasonable person would perceive statements as coercive or intimidating such that affects free choice - Board declines to order representation vote.

Certification - Statement of Employment - Board removes United States citizens and "experimental" employees without sufficiently regular and substantial connection with employer from statement of employment.

***The Trade Union Act*, ss. 2(a), 2(b), 2(f), 3, 5(a), 5(b), 5(c), 6, 10, 11(2)(a), 18 and 42.**

REASONS FOR DECISION

Background

James Seibel, Vice-Chairperson: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") applied to be certified as the bargaining agent for a unit of employees at Custom Built Ag. Industries Ltd. (the "Employer"), a manufacturer and distributor of trailers for the agricultural industry, with its production plant and administrative offices located at Gravelbourg.

The Union filed its application for certification on June 4, 1998. It estimated that there were 100 employees in the proposed bargaining unit which was described as follows:

> *All employees . . . except the President, Human Resources Manager, General Manager, Plant Manager, Fabrication Manager and Final Assembly Manager.*

On June 18, 1998, the Employer filed a reply which indicated that the number of employees in the proposed unit was 121. The Employer raised no issue with respect to additional exclusions from the unit.

Subsequently, by letter to the Board dated June 26, 1998, the Union sought to amend the description of the unit applied for as follows:

> *All employees ... except the President, Human Resources Manager, General Manager, Plant Manager, Fabrication Manager, Final Assembly Manager, Materials Supervisor, Finish Supervisor, Pre-Paint Supervisor, Jigsaw Supervisor, Finish Supervisor (Nights), Weld Supervisors (4 positions) and office employees.*

The parties therefore joined issue with respect to the unit description and the contents of the statement of employment.

In addition, the Employer's reply alleged that the Union did not have majority support. It also raised an issue alleging improper organizing tactics by the Union, including deception and intimidation in obtaining signatures of support. On this basis, the Employer requested that the Board order a vote even if the Union filed evidence of majority support.

On an interim application heard by the Board on July 6, 1998, the Board advised counsel for the Employer that, because no individual employees had raised a concern with or sought redress from the Board concerning the Union's organizing tactics, the Board would not allow the Employer to adduce evidence on this issue through employees called as its own witnesses. The reasons for that decision are reported at [1998] Sask. L.R.B.R. 497.

The Board also received notice from employees who sought to withdraw evidence of their support for the Union; all were advised of the location, date and time of the hearing before the Board. At the hearing, three employees, Brian Luft, Don Birss and Michael Grund, were represented by separate counsel. They advised the Board that they wished to make representations with respect to the issue of the alleged impropriety of the Union's organizing methods, and that they supported the Employer's request that the Board order a vote on the issue of support.

Company Organization and the Statement of Employment

As indicated at the outset, the Employer manufactures agricultural trailers in Gravelbourg, Saskatchewan and distributes them throughout Canada and the United States. The Employer's administrative office is located at Gravelbourg in a separate building a block or so away from the production plant.

Keith Brown is president of the Employer. He entered in evidence two organizational structure charts dated March 1, 1998 and May 8, 1998 which are appended to these reasons as Schedules 1 and 2 respectively. Two changes had occurred to the organizational structure by the time of hearing: the operations manager position was filled by Lorne Dennis, and night pre-paint supervisor, Doyle Bentson, had left the employ of the Employer.

Mr. Brown deposed in the reply that, as of June 4, 1998, there were 121 employees. Fourteen employees work out of the office and the rest at the plant. However, only 120 names appear on the statement of employment. At the hearing, it was also revealed that two of the "plant" employees were residents of the United States at a sales office in Kansas City.

The Employer requested five exclusions from the bargaining unit: Mr. Brown, the president; Rosemarie Brown, co-owner and human resources manager; Art Covey, production manager; Bob Ratzlaff, fabrication manager; and Al Strieb, final assembly manager.

The Employer requested that the following nine persons be included in the bargaining unit:

	Name	***Occupational Classification***	***Title***	***Location***
1.	*Brad Harvey*	*Sales*	*Sales and Marketing Manager*	*Office*
2.	*Gerald Geffrion*	*Customer Support*	*Manager of Information Services*	*Office*
3.	*Charmaine Keck*	*Comptroller*	*Financial Officer/ Comptroller*	*Office*
4.	*Kenneth Peakman*	*Engineer*	*Engineer*	*Office*
5.	*Bruce Frank*	*Labourer*	*Materials and Delivery Supervisor*	*Materials Dept. (Plant)*
6.	*Leo Michaud*	*Purchaser*	*Purchasing Manager*	*Office*
7.	*Alfred Eason*	*Maintenance*	*Maintenance Supervisor*	*Plant*
8.	*Royce Jantz*	*Sales*	*Sales*	*U.S. office*
9.	*Allen Seeber*	*Labourer*	--	*U.S. office*

The first seven persons above are referred to in these reasons as the "second-tier managers." The Union requested that all of these persons should be excluded from the bargaining unit as amended except Alfred Eason, the maintenance supervisor. In its amended application, the Union also sought to exclude the office staff, five of whom are among the nine listed above, that is: Mr. Harvey, Mr. Geffrion, Ms. Keck, Mr. Peakman and Mr. Michaud.

The Union also sought to exclude production supervisors. This group of eight persons are described on the statement of employment as welders or labourers. However, on Schedule 2 they are listed as production supervisors. This group of employees includes Herman Gerbrandt, Allen Chevrier, Grant Whittaker, Robert Filson, Jean Croteau, Don Birss, Doyle Bentson, and Steve Grainger.

The Union also sought to remove John Wiebe and Don Strieb from the statement of employment because they are independent truck drivers. Both are listed on the statement of employment as "labourers." The Employer states that they both became employees on May 23, 1998.

At the hearing, Mr. Brown described another group of employees as "experimental employees" who started work on May 23, 1998. This group includes Adrien Boire, Vic Baron, Leonard Lafreniere, Ron Pinsonneault, Ray Ratzlaff, and Don Strieb. The Union alleged that this group are contractors, not employees. In the alternative, the Union alleged that this group were not employees at the date of filing the application for certification and were added to "salt" the statement of employment.

The Union's amended bargaining unit description includes 88 production line employees out of the 120 persons listed on the statement of employment as at June 4, 1998.

Evidence

All parties agreed that counsel for the three employees, Mr. LeBlanc, would lead his evidence first.

Brian Luft

Mr. Luft is a parts person who has been employed for approximately 10 months. He reports to Mr. Frank, the materials and delivery supervisor.

Mr. Luft testified that he was approached at his residence by a union representative, Gordon Schmidt, and by a fellow employee, whom he knew only as "Phil," around May 29, 1998. They wanted Mr. Luft to join the Union and described what it involved and answered any questions that he had. Mr. Luft claimed that he was told that if the Union was certified "there was the possibility that [those who did not sign in support] would lose their jobs." He said that he felt pressured to sign in order to keep his job.

In cross-examination, however, Mr. Luft admitted that he told Mr. Schmidt that he wanted some time to think about it before making a decision. Mr. Schmidt and the other gentleman then left. However, before they had gone far, Mr. Luft called them back so he could sign up with the Union. He agreed that he was told by the Union representatives that, after the Union was certified, new employees would have to join the Union. He further agreed that the Union's representatives were polite and respectful.

In cross-examination, Mr. Luft testified that between June 3 and June 10, 1998, he approached Mr. Frank to advise him that, although he had signed a support card for the Union, he had had a change of heart. Mr. Frank asked him to write down what had occurred during his discussion with the Union organizers and to pass it on to him which Mr. Luft did. Mr. Frank did not say what he would do with Mr. Luft's notes. Shortly afterwards, perhaps the next day, Mr. Luft sent a letter to the Board seeking to withdraw evidence of his support for the Union. Mr. Luft testified that "[he] found out about doing that from Bruce Frank."

On June 3 or 4, 1998, an outdoor meeting of employees took place on an empty lot adjacent to the Employer's property. At the meeting form letters were circulated for employees to sign indicating non-support for the Union. Mr. Luft completed one of these letters. On July 29, 1998 he was asked by Mr. Frank to sign a petition addressed to the Board seeking to withdraw evidence of his support. Mr. Luft said that Mr. Frank did not indicate to him at that time what he intended to do with the petition.

In cross-examination, Mr. Luft was also asked about Don Strieb's employment at the plant. Mr. Luft thought that Don Strieb, who was listed as a labourer on the statement of employment, was not an employee of the Employer, but was an independent truck driver who hauled for various customers with his own equipment.

Don Birss

Mr. Birss has been employed at the Employer for approximately five years and is presently a production supervisor. On the evening of June 2, 1998 as he was leaving a restaurant in Gravelbourg with his family, Art Currie, a welder at the Employer's plant, motioned to him to cross the street. Mr. Currie asked him to sign a card in support of the Union. According to Mr. Birss, Mr. Currie told him that "having a blue card would save - protect [his] job . . . by not signing, the Union would find a way to terminate [his] job."

In cross-examination, Mr. Birss admitted that "[Mr. Currie] tried to coerce [him], but [he] did not sign." Instead, Mr. Birss told Mr. Currie that he needed a couple of days to think about it, and was then given a pamphlet. According to Mr. Birss, Mr. Currie was polite and respectful. Mr. Birss never did sign a union support card.

With respect to the statement of employment, Mr. Birss did not think that either Don Strieb or Mr. Wiebe were employees. With respect to Ray Ratzlaff and Mr. Pinsonneault, who are both listed on the statement of employment as labourers, Mr. Birss did not recall them working at the plant.

Michael Grund

Mr. Grund has worked as a welder at the Employer's plant for approximately four and one-half years. Mr. Grund was also approached by Mr. Currie to sign a union card. He claimed that Mr. Currie told him that if he did not sign a card he would be out of a job. In cross-examination Mr. Grund admitted that he did not sign a card. When he told Mr. Currie that he was not interested in the Union, in his words, "that was pretty much it."

Mr. Frank also asked Mr. Grund to write down his experience with the Union organizer. Mr. Grund did not tell Mr. Frank who had approached him about the Union. At the hearing he read aloud what he wrote down, which was substantially as follows:

> *Gravelbourg: I was stopped on the street and asked about the Union. The person who stopped me promised me a starting wage of $14.75 an hour and I was told that if I did not sign a card I, and others who did not sign, would be the first to lose our jobs because management could not afford to keep us around anymore.*

Mr. Grund testified that Mr. Frank set up a meeting for him to talk to a lawyer. When asked if he was paying for the lawyer, he said that Mr. Frank told him he could contribute to the cost if he wanted. When asked how he got to the Board hearing, he said that it was on a bus arranged by Mr. Frank. Mr. Grund indicated that he was not asked to pay but was told that he could contribute to the cost if he wished. Many employees attended the first day of the hearing, travelling on the same bus. Mr. Grund believed that he was not being paid for time spent at the hearing but he did expect that he could make up the missed hours by working weekends.

With respect to the statement of employment, although Mr. Grund has worked the day shift for the last several months, he had not been asked to train any new welders. He did not know Mr. Seeber, Ray Ratzlaff, Mr. Pinsonneault or Mr. Lafreniere who were listed on the statement of employment as labourers. In his opinion, Don Strieb was not an employee and he had never seen Mr. Wiebe work at the plant.

Keith Brown

Mr. Brown testified on behalf of the Employer. He is the president and founder of the Employer and co-owner with his spouse, Ms. Brown.

Mr. Brown started the company in 1986 as a small welding shop doing custom repairs and later expanded into trailer manufacturing for the agricultural industry operating under the "Trail Tech" and "Jantz" names. The Employer acquired Jantz trailer assets from the Kansas City based Jantz-Femco Co., where the Employer now maintains a sales office staffed by Mr. Jantz and Mr. Seeber. Mr. Brown confirmed that these two gentlemen are United States citizens, reside in Kansas City, are paid from a United States bank account and are subject to United States labour laws.

Mr. Brown maintained that only six positions should be excluded from the bargaining unit: president, operations manager, plant manager, human resources manager, fabrication manager and final assembly manager. He provided the Board with position descriptions for the plant manager, fabrication manager and final assembly manager, as well as those for materials supervisor, maintenance and the production supervisor positions. All the position descriptions, except that of the plant manager, are quite brief.

Mr. Brown testified that the plant manager, Mr. Covey, has overall responsibility for all aspects of the production plant, including supervision, hiring, discipline and firing of production employees. Mr. Brown maintained that no other member of the production staff had overlapping responsibility for personnel management except for the fabrication manager and the final assembly manager. However, the position descriptions for these two positions do not specifically indicate such responsibilities. Mr. Brown acknowledged that all other manager/supervisor positions are limited in the exercise of managerial authority. They conduct performance appraisals and make recommendations concerning wages, discipline, hiring and firing.

The eight production supervisors spend 50 per cent of their time on employee supervision and paper work and spend the remaining time performing hands-on production work along side the employees they supervise. At one time the company was going to designate them as lead hands rather than production supervisors. According to Mr. Brown, the production supervisors conduct employee performance appraisals and make recommendations on pay increases and discipline.

Mr. Brown confirmed that in late May, 1998 the company hired six people whom he referred to as "experimental employees." As background, he explained that most of the company's employees come from the town of Gravelbourg and the surrounding rural area and many of them are farmers. Prior to May, 1998 the company hired only full-time employees. This hiring practice was hard on employees who farmed as they were required to take vacation time in spring and fall to farm. As a result, the hiring practice reduced the pool of potential employees. After discussing the matter for some time with the executive group, Mr. Brown decided in early April, 1998 to try hiring part-time employees.

Six persons were brought on staff as labourer or welder trainees in late May, 1998. Initially, the Employer planned to schedule them to work on Saturdays only, and perhaps would add a Sunday shift later on. For three and one-half hours on four consecutive Saturday mornings starting May 23, 1998, the part-time employees attended an orientation program at the conference room in the company's administrative office building. After the orientation sessions, they were to start working in the production plant for three and one-half hours each Saturday on an "experimental" basis.

Mr. Brown could not say whether, or how long, the program would last. He clearly indicated, however, that the training process for these six was unusual; other production employees received their training on the plant floor. Each of the six was paid $8.00 per hour as a labourer or as a welder trainee, which is, apparently, less than the welder regular rate and more than the labourer starting rate of $7.00/hour. Payroll summaries for each of the six individuals indicated that they were paid for seven hours work for each of the two-week pay periods ending June 6 and June 19, 1998 - this would be for the period of the four orientation sessions. No subsequent payroll information was tendered, and Mr. Brown said that there were no Saturday hours presently scheduled for this group of employees.

Mr. Brown speculated that other employees were unaware of the part-time group of new employees because the new group had trained at the office building on Saturdays.

One of the six experimental employees was Don Strieb whom the Union maintained was an independent trucking contractor. Mr. Brown testified that Don Strieb had been employed to drive truck when needed and then started on May 23, 1998 as one of the experimental labourers.

When asked how the six were hired, that is by referral from other employees or otherwise, Mr. Brown said only that "they would have known we were interested in this." Mr. Brown denied that the experimental use of part-time employees was an attempt to stack the statement of employment. He claimed that the company had decided to proceed with the experiment in April, 1998, obviously before it became aware of the organizing drive.

Mr. Brown also testified that the Employer hired Mr. Wiebe as driver/labourer on May 23, 1998 to work an average of 15 hours per week. However, the payroll summary information for Mr. Wiebe shows only seven hours worked for each of the pay periods ending June 6 and June 19, 1998, the same as for the experimental employees. Mr. Brown said that he believed that Mr. Wiebe no longer worked for the Employer and had another job in full-time sales.

According to Mr. Brown, Shannon Tindall was hired June 1, 1998 as a part-time seasonal employee to care for the park area west of the plant.

Mr. Brown maintained that all of the 14 office employees, who worked in a separate building, should be included in the bargaining unit with the production employees. Positions in the office include comptroller, clerical, reception and payroll staff, engineer, CAD engineering technician, sales persons, dealer development managers, systems administrator and purchasers.

Mr. Brown acknowledged that the comptroller has access to company financial records, including budgets, profit and loss information, and personnel information. Despite these facts, the Employer was not seeking exclusion of the position from the bargaining unit. With respect to the engineer, Mr. Brown testified that this position is involved in the Employer's strategic planning, but likewise he did not seek its exclusion. The sales and marketing manager is responsible for assigning the sales persons' territories and he earns a monthly salary of nearly $4000.00. In fact, the incumbent in this position, Mr. Harvey, had been the company's general manager for seven years prior to his re-assignment in the spring of 1998. The Employer, however, did not seek the sales and marketing manager's exclusion from the bargaining unit.

On cross-examination, when asked on what information he based the statement in the reply that the Union does not represent or have the support of a majority of the employees, Mr. Brown said that he had no specific information and that he just "feels that." He did not recall when he first became aware of the Union's organizing drive. He testified that it was Mr. Frank who first raised the issue of alleged improper organizing methods with him.

Mr. Brown acknowledged that a certain production employee had made threats to Mr. Currie, who actively supported and assisted the Union. That employee has been charged, convicted and imprisoned in relation to the incident sometime after June 4, 1998. Mr. Brown testified that his spouse and co-owner, Ms. Brown, attended at the trial or sentencing of the employee in question and had provided a letter to the court respecting the accused's employment. Despite the close involvement of his spouse in this matter, Mr. Brown was extremely vague about the details of the incident and whether the Employer had advised the court that the accused would have continued employment with the company when he was released. Mr. Brown did not deny the suggestion by counsel for the Union that the Employer had provided such assurance to the court.

It was clear from Mr. Brown's evidence that he was in close contact with the managers and supervisors and received information from them regarding the Union's organizing drive. Mr. Brown also met several times with Mr. Frank who provided him with copies of the notes given to him by several employees regarding their experiences with the Union organizers.

Gord Schmidt

Mr. Schmidt, the Union representative responsible for the organizing drive, testified on behalf of the Union. He said that the Union had received an expression of interest in organizing the Employer's plant from an employee via a third party. He spoke to an employee on the telephone prior to meeting with a small group of employees for the first time on May 28, 1998. A spokesperson for this group contacted Mr. Schmidt again over the weekend and arranged for him to meet with a larger group of employees on June 1, 1998. At that meeting, which lasted approximately three hours, Mr. Schmidt described the benefits and obligations of union membership, including the union security requirement for newly hired employees once the Union became certified.

After this meeting, Mr. Schmidt was followed by Mr. Harvey, sales and marketing manager, who confronted Mr. Schmidt on the main street in Gravelbourg and asked Mr. Schmidt to explain what he was doing. Although Mr. Schmidt left Gravelbourg on the evening of June 2, 1998, Mr. Lee, who was assisting him, stayed on to continue the organizing.

On June 3, 1998, Mr. Schmidt received a copy of a communication to the employees published by the Employer; it is the subject of an unfair labour practice application filed by the Union under s. 11(1)(a) of the *Act* and yet to be heard by the Board. He also heard that there was to be a general meeting of employees the next day. Mr. Lee advised him that new signatures of support had ground to a halt and that the employees appeared to be apprehensive. Mr. Schmidt decided to file the application for certification the next day.

Mr. Schmidt testified that a few days after filing the certification application the Union decided to apply to the Board to amend its application with respect to the configuration of the bargaining unit as described above, because he had heard of the almost uniform opposition to the Union, expressed and latent, by the second-tier managers, production supervisors and office staff, and also because of alleged threats made to two employees who had assisted in the organizing campaign.

Mr. Schmidt learned that on June 3, 1998 a key employee organizer was verbally attacked by some supervisors and has since failed to return to work. He also learned that another employee organizer, Mr. Currie, who worked the night shift, was allegedly threatened that there could be an accident at work, and that Mr. Currie then took a leave of absence. He said that he also heard of alleged threats respecting Alfred Eason by a manager.

In cross-examination, Mr. Schmidt admitted that when the Union filed the application on June 4, 1998, he considered the unit as described to be appropriate; however, he said that by June 10, 1998, after learning about the opposition described above, he began the process that led to the application for amendment which could not be completed until the Union received the specimen signatures.

Aaron Eason

Aaron Eason is 21 years old. His father is Alfred Eason. At the hearing he identified one of the managers present in the hearing room, whom he said he knew from himself having worked at the Employer's plant for a period of time. He said that on a visit back to Gravelbourg, while walking past the manager's home on the way to his father's home, the manager said to him, "your dad is dead." In cross-examination he admitted that he did not take the comment seriously himself, but that he told his father about it right away.

Alfred Eason

Alfred Eason testified that he has been employed at the Employer's plant since October, 1997. On the plant organization chart (Schedule 2), he is described as "Maintenance" on the second management tier. His basic job duties are to lubricate and maintain plant equipment according to maintenance schedules, and to organize and maintain the manufacturers' service manuals.

He testified that, for varying reasons that he described in relation to each person, he believed that the second-tier managers and the production supervisors oppose the Union, with the exception of Mr. Peakman and Mr. Michaud about whom he offered no opinion. He said that several of them attended a June 10, 1998 meeting of employees and boisterously spoke against the Union or interrupted the Union's representative when he tried to answer questions.

Alfred Eason said that he had not seen the job description for his position, entered in evidence through Mr. Brown, until the hearing before the Board. In comparing the relative level of his position to others in the secondary management and production supervisor tiers on Schedule 2, he said that he gave limited instructions to a single cleaner and had no responsibility or authority for the review of her performance or discipline. According to him, the other supervisors directly supervised five to ten employees each. As an example, he said Mr. Frank directly supervises five employees and he believed that he had been involved in the termination of employment of one employee. He said that he did not approve the cleaner's request for time off, and that he had never been privy to a budget, production, or executive level meeting of any kind. Alfred Eason said that he was surprised when he saw Schedule 2 and his relative position as shown on it.

Alfred Eason confirmed that at one point during the organizing drive, a production supervisor, whom he identified at the hearing, had pushed him up against a wall in an aggressive manner and told him he was against the Union.

He testified that he had reported to the police the incident of the alleged threat made by a manager as relayed to him through his son, but that nothing had come of it. The manager in question, who was present at the hearing, did not testify.

Statutory Provisions

Statutory provisions considered by the Board include the following sections of the *Act*.

> *2. In this Act:*
>
> > *(a) 'appropriate unit' means a unit of employees appropriate for the purpose of bargaining collectively;*
> >
> > *(b) 'bargaining collectively' means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;*
> >
> > ...
> >
> > *(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.*
>
> *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.*

5. The board may make orders:

> *(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*
>
> *(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;*
>
> *(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*

6(1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board may, in its discretion, subject to subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.

(2) Where a trade union:

> *(a) applies for an order of the board determining it to represent the majority of employees in an appropriate unit for which there is an existing order of the board determining another trade union to represent the majority of employees in the unit; and*
>
> *(b) shows that 25% or more of the employees in the appropriate unit have within six months preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining*

the board shall, subject to clause 5(k), direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:

> *(c) is satisfied that another trade union represents a clear majority of the employees in the appropriate unit; or*
>
> *(d) has, within six months preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit.*

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.

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;*

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.

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.

Arguments

Counsel for the Union, Mr. Kowalchuk, argued that little credence should be afforded to the allegations of coercion, intimidation and deception by Union representatives during the organizing drive. No allegation of an unfair labour practice under s. 11(2)(c) of the *Act* had been made. Put in its strongest light, he said, the alleged behaviour had no effect on the three people who testified about the issue: two of them did not sign in support, and the third, who initially declined to sign, actually later called the Union's representatives so he could sign. There was no evidence, he said, of any threatening behaviour or condemnatory actions; rather information was provided and questions

answered forthrightly; the cross-examination of Mr. Luft, for example, ultimately showed confusion about what he thought he had been told about support for the Union and job security.

With respect to the issue of the configuration of the bargaining unit, counsel argued that the amended description was of an appropriate unit. While acknowledging that the Board prefers all-employee units, he cited several cases regarding the factors to be considered. Counsel directed the Board to many decisions that demonstrate that the Board does not adhere to the preference for the most inclusive unit possible with such obstinacy so as to deny the benefits of collective bargaining to a viable unit with a sufficient community of interest.

Counsel argued that the unit proposed by the Union in the amended unit description has a sufficient community of interest: all the members are production employees; all work in the same facility; there is no interchangeability of employees with the office staff. He maintained that the proposed unit is capable of establishing a viable collective bargaining relationship with the Employer. He also pointed out that there was no evidence that certification of the unit would result in undue organizational difficulties for the Employer or that it would result in a fragmented work force, the onus of proof of which lies on the Employer.

With respect to the exclusion of certain groups from the proposed bargaining unit, counsel argued that the office and administrative employees work at a location separate from the production facility and there is no interchangeability between them, the office employees as a group have expressed no interest in being represented by the Union, and they have no community of interest with the production employees. He said that in the manufacturing sector it is not uncommon to find separate units of production employees and administrative employees.

Counsel argued that the group of six "experimental employees" were hired "secretly"; the other employees did not know of their existence and they are not employees at all. At the time the application was filed, he said, they were merely at best in classroom orientation and had no "reasonable employment relationship" with the Employer.

With respect to the production supervisors and second-tier managers, counsel argued that as a group they had expressed no interest in being represented by the Union. Indeed, he said, there was evidence of anti-union activity or statements by several of them that disclosed that they were intent on defeating the organizing drive. Again, it was argued, they had no community of interest with the production line employees.

The Board has considered the following cases cited by counsel in support of the Union's position: *Health Sciences Association of Saskatchewan v. St. Paul's Hospital, Saskatoon*, [1994] 1st Quarter Sask. Labour Rep. 269, LRB File No. 292-91; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Centre of the Arts*, [1995] 4th Quarter Sask. Labour Rep. 52, LRB File No. 175-95; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Institute of Community Living Inc.*, [1996] Sask. L.R.B.R. 705, LRB File No. 157-96; *United Food and Commercial Workers, Local 1400 v. Argus Guard and Patrol Ltd.*, [1995] 2nd Quarter Sask. Labour Rep. 192, LRB File No. 017-95; *International Alliance of Theatrical Stage Employees and Moving Pictures Machine Operators v. Saskatchewan Centre of the Arts*, [1992] 3rd Quarter Sask. Labour Rep. 127, LRB File No. 126-92; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd.*, [1992] 4th Quarter Sask. Labour Rep. 75, LRB File No. 182-92; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd.*, [1993] 4th Quarter Sask. Labour Rep 85, LRB File Nos. 202-93 & 212-93; *Canadian Union of Public Employees v. The Board of Education of the Northern Lakes School Division No. 64*, [1996] Sask. L.R.B.R. 115, LRB File No. 322-95; *University of Saskatchewan Faculty Association v. University of Saskatchewan*, [1995] 1st Quarter Sask. Labour Rep. 201, LRB File No. 127-94; *Professional Institute of the Public Service of Canada v. Government of Saskatchewan*, [1997] Sask. L.R.B.R. 530, LRB File No. 018-97; *International Brotherhood of Electrical Workers, Local 529 v. A-Lert Canada Ltd.*, [1996] Sask. L.R.B.R. 156, LRB File No. 294-95; *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; *Public Service Alliance of Canada v. Casino Regina and Saskatchewan Gaming Corporation*, [1996] Sask. L.R.B.R. 454, LRB File No. 068-96; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, [1994] 3rd Quarter Sask. Labour Rep. 87, LRB File No. 088-94; *United Food and Commercial Workers, Local 1400 v. Peak Manufacturing Inc.*, [1996] Sask. L.R.B.R. 234, LRB File No. 011-96; *United Food and Commercial*

Workers, Local 1400 v. Argus Guard and Patrol Ltd., [1998] Sask. L.R.B.R. 113, LRB File No. 292-97; *Retail, Wholesale Canada, A Division of the United Steelworkers of America v. United Cab Ltd.*, [1996] Sask. L.R.B.R. 337, LRB File No. 115-95; *United Steelworkers of America v. Develcon Electronics Ltd.*, [1981] March Sask. Labour Rep. 35, LRB File No. 263-80; *Sheet Metal Workers' International Association, Local 296 v. KD Mechanical Ltd.*, [1995] 4th Quarter Sask. Labour Rep. 127, LRB File No. 242-95; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Moose Jaw Packers (1974) Ltd.*, [1996] Sask. L.R.B.R. 652, LRB File No. 067-96; and *Health Sciences Association of Saskatchewan v. Regina District Health Board*, [1995] 3rd Quarter Sask. Labour Rep. 131, LRB File Nos. 025-95 & 118-95.

Counsel for the Employer, Mr. Kuski, argued that a bargaining unit is not appropriate unless it is viable for the purposes of harmonious collective bargaining and long-term stability. He pointed out that Mr. Schmidt admitted in cross-examination that when the application was filed on June 4, 1998 the Union considered the unit it described in its original application to be appropriate and that it now wanted to artificially exclude the production supervisors and office employees. He said that the Union's motivation was simply to exclude dissident voices rather than to base the unit description on rational grounds.

With respect to the six experimental employees, he argued that there was no evidence of an attempt by the Employer to "stack" the statement of employment. Counsel did agree that there was no real basis on which to continue to maintain that the two United States employees should be included on the statement of employment.

Finally, counsel argued that because the employees had been led to believe that the unit applied for would be an all-employee unit, they should have the opportunity to vote on the issue of certification.

Mr. LeBlanc, counsel for Mr. Luft, Mr. Birss and Mr. Grund, argued that the evidence disclosed that there were "improprieties of a serious kind" committed by the Union during the organizing campaign, and that his clients had suffered threats to their livelihood. Counsel referred the Board to an excerpt from G.W. Adams, *Canadian Labour Law*, 2d ed.(Aurora: Canada Law Book Inc., 1998) at 7:1190 ff. and the authorities cited there, in support of his client's position. The Board has considered these.

Counsel said that the cases examine whether the impugned actions and statements of union organizers would affect a free choice by employees. He said that while there was a strong argument on which to seek rejection of the application as a whole, his clients would be satisfied if the Board was to order a vote.

In reply, Mr. Kowalchuk suggested that the serious nature of the allegations of deception and intimidation required proof of a more cogent and compelling nature than was presented to the Board. He reiterated that the evidence of Mr. Luft had indicated that the alleged remarks , if made at all, could have been made in the context of new hires.

Analysis

1. Appropriate Unit:

The amended description of the bargaining unit sought to be certified by the Union includes only the production line employees and does not include the clerical, office, technical, professional and administrative staff, the second-tier managers with the exception of the "maintenance" position, and the eight production supervisors or lead hands.

The jurisdiction of the Board to determine what is an appropriate unit pursuant to s. 5(a) of the *Act* is both exclusive and unfettered. The superior courts of this Province have enunciated this fact on several occasions in the context of judicial review as has the Supreme Court of Canada. In *Sterling Crane v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 771* (1994), 122 Sask R. 20, (Sask. Q.B.), Barclay, J. stated as follows:

> *It is clear that the board has the jurisdiction to determine what constitutes an appropriate unit. In the determination of that issue, the Board is not subject to any direction contained in the Act and it could therefore consider any factor it deemed relative.*
>
> ...
>
> *The Supreme Court of Canada in Noranda Mines Ltd. v. R. (1969), 7 D.L.R. (3d) 1, addressed the scope of judicial review of a certification order granted by the Saskatchewan Labour Relations Board at p. 5:*

> *... Whether or not a unit is appropriate for the purposes of collective bargaining is a matter which requires determination, and, while s. 5(a) is not as clearly worded, in this connection, as it might be, it is my view that, reading ss. 3, 5(a) and (b) together, the Act obviously contemplates that the determination is for the Board. By virtue of s. 20, the jurisdiction of the Board in this matter is made exclusive.*

There is no doubt that the Board's longstanding general policy has been to favour more inclusive units rather than smaller specialized units, but the Board's jurisprudence is replete with examples where it has deviated from this policy. The Board's overarching concern in this regard is to facilitate viable, healthy and harmonious collective bargaining in balance with the exercise of the rights of the employees under s. 3 of the *Act*.

Accordingly, a unit which is the most inclusive possible, depending on the circumstances, may not be appropriate for these purposes. And, the Board will not necessarily reject a proposed unit simply because it is not the **most** appropriate unit. The function and duty exercised by the Board is to ensure that the rights of employees guaranteed by s. 3 of the *Act* to organize and bargain collectively are not defeated solely by the dogmatic application of a policy regarding the configuration of the bargaining unit.

In the *St. Paul's Hospital* decision, *supra*, the Board explained it as follows, at 271:

> *The Board has long held the belief that collective bargaining is most effective if the participants are defined on the basis of the most inclusive possible bargaining unit, and has favoured larger bargaining units as the model which represents the appropriate bargaining unit. As we have often pointed out, however, the Board does not adhere to this preference with such obstinacy as to blind us to the fact that we should be ready to allow employees the benefits of collective bargaining if it can be conducted in a bargaining unit which is viable, and therefore appropriate, even if it is not comprehensive enough to match an ideal.*
>
> *Thus, to choose one example of many, in a decision in Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd., LRB File No. 182-92, this Board determined that a group of employees in the Casino at the Regina Exhibition Park constituted an appropriate bargaining unit, given that the alternative would be to deny these employees the opportunity to be represented by a trade union for an unforeseeable length of time.*

In past cases, the Board has set out various criteria to assist in the determination of the unit description. While each is relevant, no one factor alone is necessarily determinative, and each case is examined on its facts in order to assess whether a bargaining unit configuration will promote and satisfy the purposes of the *Act* and the rights of employees. In the *St. Paul's Hospital* decision, *supra*, the Board stated, at 270:

> *The significance of this decision in the foundation of a collective bargaining relationship can hardly be overstated. The definition of the bargaining unit identifies the scope of the employee group which will be represented by a particular trade union for the purpose of bargaining collectively with an employer. It sets the jurisdictional limits within which employees will be entitled to exercise their democratic rights, and in which a trade union may cultivate its strength and influence as a bargaining agent. It may, in some cases, have an effect, not only on the relationship between employees and their employer, but between them and other groups or categories of employees. The way in which a bargaining unit is defined may have an impact on the effectiveness of collective bargaining which takes place on behalf of the employees within it.*
>
> *This Board has, from its earliest days, been mindful both of the importance of its responsibility to define appropriate bargaining units, and of the complexity of this question. A range of more or less common factors may be considered in cases where the bargaining unit is to be determined, but these factors may have a different resonance or weight in different circumstances. The primary obligation of the Board is not to devise a set of principles or a formula to which it will adhere in a dogmatic way, but to make a pragmatic assessment of each case which is brought before it, and to determine what definition will best serve the overall objectives of promoting collective bargaining and allowing employees access to such bargaining.*

Some common considerations which may bear on this issue were listed by the Board in *Saskatchewan Union of Nurses v. Quill Plains Centennial Lodge*, [1985] Dec. Sask. Labour Rep. 64, LRB File No. 063-85, at 66 :

> *In exercising its discretion to determine an appropriate unit the Board attempts to apply many relevant criteria in a consistent manner. In addition to the purpose and intent of the legislation the Board considers, among other things, the community of interest of employees in the proposed unit, the history and pattern of collective bargaining in the industry, the expressed wishes of the employees, the employer and the proposed unit, the interchangeability of personnel, the regular, occasional or part-time nature of the work performed, the economic viability of the proposed unit, and the geographical composition of the employer's operation.*

The Board reiterated these factors in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd.* [1992] 4th Quarter Sask. Labour Rep. 75, LRB File No. 182-92, at 77, but explained that the list is not exhaustive and the issue must be approached on the facts of each case bearing in mind the policy objectives of the legislation:

> *There is a range of factors which may enter into the consideration of these policy objectives, and which may affect the weight which is given to any of them. An impressive volume of cases has emerged in which these factors are enumerated. They include such things as whether there is sufficient community of interest among the employees concerned, whether recognition of a unit will result in undue fragmentation of the total complement of employees, whether there is a history of successful collective bargaining between any employer and a union or unions, and whether other groups of employees may be disadvantaged in some way by the description of a unit. It must be kept in mind, however, that the articulation of these factors is not meant to provide an exhaustive list of necessary conditions for a finding that a unit is appropriate. The list of items results rather from attempts by labour relations boards, after examining specific employment situations, to identify the aspects of those relationships which suggest that certain definitions of bargaining units will better satisfy the policy objectives which are being pursued.*
>
> *In Canadian Union of Public Employees v. Hospital for Sick Children [1985] OLRB Rep. Feb. 266, the Board made this point in the following terms:*
>
> > *We might make an additional observation. We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive and time-consuming process for deciding a relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer?*

In the *Regina Exhibition case, supra*, the Union sought to be certified to represent a unit of employees engaged in the Employer's casino operation which included only the "wheelers and dealers," those employees who operated the games and dealt cards, despite the fact that there were several other types of employees involved in the casino operation. In particular, the Board had to decide if the banking staff, employees who handled and exchanged the chips and money for wheelers and dealers should be included in the bargaining unit. The employer argued that the banking staff were integral to the casino operation and had such close contact with the wheelers and dealers that a

sensibly defined bargaining unit would include them. The union argued that, while the proposed unit was not the most appropriate unit, it was nonetheless appropriate and enjoyed the support of a majority of the employees.

In arriving at its decision, the Board considered the policy objectives that bear upon the issue and stated, at 76-77:

> *In defining what bargaining unit is an appropriate one, the Board must keep several important policy objectives in mind. These objectives were suggested in the decision of the Ontario Labour Relations Board in International Federation of Professional and Technical Engineers v. Canadian General Electric Co. Ltd., [1979] OLRB Rep. Mar. 169, at 171:*
>
> > *In assessing the suitability of a proposed unit, the Board is generally guided by two counter-balancing concerns. Firstly, having regard to the proposed unit itself the Board looks to whether the employees involved share a sufficient community of interest to constitute a cohesive group which will be able to bargain effectively together. Secondly, looking to the employer's operation as a whole, the Board assesses whether a proposed unit is sufficiently broad to avoid excessive fragmentation of the collective bargaining framework. A proliferation of bargaining units is not normally conducive to collective bargaining stability. Not only may it place significant strains on an employer who would be required to bargain with each group, but it may also hamper the employees' ability to bargain effectively with the employer. Under the umbrella of these two guiding principles, the Board seeks to give effect to an equally important concern: the freedom of association guaranteed to employees in section 3 of the [Ontario] Act.*
>
> *The importance of these criteria was reasserted by that Board in Canadian Union of Public Employees v. Hospital for Sick Children [1985] OLRB Rep. Feb. 266, at 271:*
>
> > *Quite simply, it is an effort to inject a public policy component into the initial shaping of the collective bargaining structure, so as to encourage the practice and procedure of collective bargaining and enhance the likelihood of a more viable and harmonious collective bargaining relationship.*

In *Regina Exhibition*, *supra*, the Board stated that neither the argument of the employer nor the union was determinative of the issue, and the Board's paramount concern and responsibility was to ensure that the unit would satisfy the relevant policy objectives. It stated, at 77-78:

> *If the only argument of the employer in this case were that the unit applied for is less appropriate than a unit which would include the banking staff, that argument in itself is not sufficient to defeat the application made by the union. On the other hand, the fact that the union has identified a group of employees which it wishes to represent, and in which the majority of employees apparently want such representation, does not in itself determine the issue either.*
>
> *The Board has a responsibility to decide whether, in this employment situation, the unit applied for will meet, to a reasonable degree, the policy objectives described earlier. There are several aspects of this situation which the Board examined in coming to its decision.*

As part of its analysis of the situation, the Board considered the implications of denying the application based solely upon the "inclusiveness factor" given the difficulty encountered by the union in attempting to organize the employees, at 79:

> *Given the apparent difficulties which have been encountered in attempting to organize the employees of the Regina Exhibition Association Ltd. for the purpose of bargaining collectively, the Board must give some thought to the implications for the group of wheelers and dealers - a majority of whom do wish to engage in bargaining with their employer - if it is decided that they do not constitute an appropriate bargaining unit on their own. The result is not, as it is in some cases where the appropriateness of the unit is an issue, that they would be represented by some trade union other than the one they have chosen. They would not be represented by a trade union at all.*

At the same time, however, the Board must also consider the impact that certification of a less-inclusive unit might have on the ability of excluded employees to ever become certified and obtain the benefits of collective bargaining. This was a major factor in the Board's denial of an application for certification by a group of security guards located at one of many sites serviced by their employer in *Argus Guard and Patrol Ltd.*, *supra*.

In the present case, the Union initially applied to represent an all-employee unit, but has applied to amend the proposed bargaining unit description to include only production employees below the supervisor or lead hand level.

There are numerous examples where the Board has certified less than all-employee units in the industrial and manufacturing sectors as a result of balancing the policy objectives referred to above. In such situations the unit certified has been one composed of either clerical employees or production employees. An illustration of this is the decision of the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie MicroTech Inc.*, [1994] 3rd Quarter Sask. Labour Rep. 87, LRB File No. 088-94. In certifying a bargaining unit comprising the employees directly involved in the manufacturing process as well as the employees in the warehouse and a truck driver, the Board stated, at 89:

> *Though, as these extracts make clear, the Board has been guided by a wide range of factors in assessing the appropriateness of proposed bargaining units, the general approach has been to attempt to balance a policy interest in stable and coherent bargaining units as a basis for healthy collective bargaining, with the right of employees stated in Section 3 of The Trade Union Act to have access to collective bargaining as a means of dealing with their employers. Not every configuration of employees suggested can provide a foundation for strong collective bargaining. On the other hand, the Board has pointed out on numerous occasions that a proposed unit need not be the most appropriate bargaining unit which can be imagined; it is sufficient for it to be an appropriate unit.*

Similarly, in *United Food and Commercial Workers, Local 1400 v. Peak Manufacturing Inc.* [1996] Sask. L.R.B.R. 234, LRB File No. 011-96, and in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Brown Industries (1976) Ltd. et al*, [1995] 2nd Quarter Sask. Labour Rep. 71, LRB File Nos. 010-95 and 012-95, the Board certified bargaining units comprising production employees only.

However, as the Board stated in *Saskatchewan Centre of the Arts*, *supra*, at 55-56:

> *... the Board has also pointed out that a trade union cannot hope that every bargaining unit which happens to conform to what is convenient or easily achieved from the point of view of organizing employees will also satisfy the public policy requirements which we must keep in mind.*

The Board concludes in the present case that a bargaining unit composed of the employees engaged in the production process and ancillary activities like materials provision, maintenance of production equipment and physical plant and transportation of product, constitutes an appropriate unit for the purposes of bargaining collectively. The Board is satisfied that such a unit would be coherent and

viable for the purposes of engaging in healthy collective bargaining with the Employer. The production employees in this plant form a natural grouping. They receive similar training and all have similar working conditions that can be the subject of sensible discussion. There is no interchangeability, and little contact, with the office, clerical, administrative, professional and technical employees, the bulk of whom are situated in a physically separate work place. There was no evidence that suggests that such a configuration would create inconvenience or complication in the industrial relations of the Employer. And, there was no evidence that certification of a unit of production employees would be detrimental to the ability of the clerical, administrative and professional employees to become organized.

But that is not the end of the matter in this case. The Union also sought to exclude the second-tier managers of the production process and the eight production supervisors.

Second-Tier Managers:

The Employer took the position that the following positions which occupy the secondary tier on the organizational charts should be included in the bargaining unit:

Position	*Incumbent*
Purchasing Manager	*Les Michaud*
Materials & Delivery Supervisor	*Bruce Frank*
Engineer	*Ken Peakman*
Comptroller	*Charmaine Keck*
Manager of Information Systems	*Gerald Geffrion*
Manager of Sales and Marketing	*Brad Harvey*
Maintenance Supervisor	*Alfred Eason*

The Union sought the exclusion of all, except the maintenance supervisor, from the bargaining unit, not on the basis that they are not employees within the meaning of the *Act* (although that is questionable with respect to several of their number) but rather because they do not have a sufficient community of interest with the production line employees. In the case of Alfred Eason, however, it was asserted that his community of interest does lie with the latter group. We have already determined that the purchasing manager, engineer, comptroller, manager of information services and manager of sales and marketing are excluded because they are office, administrative or professional

employees and not within the unit of production employees. The materials and delivery supervisor and maintenance supervisor are, however, situated at the plant, and are at least tangential to the production process.

The position description for Alfred Eason's position, entered in evidence by the Employer, reads as follows:

Title: *Maintenance*

Reports to: *Plant Manager*

Job elements:
- *Develop list of all plant equipment*
- *Perform scheduled preventative maintenance on plant equipment*
- *Perform required maintenance on plant buildings and yard*
- *Direct cleaning personnel re: plant buildings and yard*
- *Repair or sub-contract repair of equipment failures*
- *Maintain log of all equipment maintenance and repairs*
- *Develop library of equipment manuals*
- *Maintain inventory of recommended spare parts*
- *Install new plant equipment*
- *Assist in fixture development and repair*
- *Update Manager on all maintenance related issues*

The evidence disclosed that Alfred Eason works in the production plant and has regular contact as part of his job duties with the production employees. He has little contact with managers excepting his direct supervisor, the plant manager. He is not part of the Employer's strategic planning group as are others among the second-tier managers. He directs the work of a single cleaning person but does not have any authority to admonish or to appraise performance; in this regard his authority is, in fact, below that of the production supervisors.

Clearly, Alfred Eason cannot be excluded from the bargaining unit on the basis of the definition of "employee" under the *Act*. There is no evidence of any significant conflict of interest in the labour relations sense if he is included in the bargaining unit. Maintenance personnel are generally included in the unit that they serve, in this case the production unit. The Board finds that the maintenance classification in this workplace is within the unit of employees engaged in production.

The other second-tier managers, including the materials and delivery supervisor, are clearly administrative, sales or professional personnel, and, whether their respective offices are located in the office building or at the plant, they have a clear community of interest with the office and clerical staff rather than with the production employees.

Furthermore, there was ample evidence to convince the Board that as a group the second-tier managers were considered by the employees to be representatives and allies of senior management. For example, the evidence showed that Mr. Frank obtained information and statements from employees on the shop floor and made direct reports to Mr. Brown, as well as arranging for bus transportation to the Board hearing for, apparently, only employees opposed to the application and at no cost to them. He also organized a petition opposing the Union's certification application in July, 1998. Mr. Frank, though present at the Board hearing, did not testify. The Board is concerned that the inclusion of these managers will have a potentially extremely destabilizing effect on what would otherwise be a viable and stable bargaining unit, and a potential impediment to the initiation and progress of collective bargaining.

The Board therefore finds that all of the second-tier managers listed above, with the exception of the maintenance manager, are excluded from the bargaining unit of production employees.

Production Supervisors:

Counsel for the Employer raised a legitimate concern that the bargaining unit not be artificially designed to conform to the support that the Union was able to garner amongst the employees. It was argued that the only reason the Union did not want the production supervisors included in the unit was because it had not obtained any support from the eight incumbents in those positions. The Board does not disclose or comment here upon the level of support among this group or any group of employees.

The Board is cognizant that it is not desirable to configure the bargaining unit based only upon the shape of employee support. In the present case, the Union argued that the production supervisors do not have a sufficient community of interest with the production line employees to warrant their inclusion in the bargaining unit. In the alternative, the Union argued that the production supervisors

have demonstrated hostility towards the Union or have engaged in conduct that shows them to be essentially agents of the Employer.

Production supervisors spend approximately half their time on clerical and supervisory functions and half their time hands-on at the production line. The rather sketchy job description for the position entered in evidence by the Employer provided as follows:

Title: *Production Supervisor*

Reports to: *Fabrication/Final Assembly Manager*

Job elements:
- *Direct supervision of employees*
- *Employee Performance Appraisals*
- *Manufacturing quality*
- *Assist employees with production related issues*
- *Develop and implement Productivity Improvements*
- *Co-ordinate with Materials Department on delivery and shop storage of materials*
- *Co-ordinate with Maintenance Department on equipment repair and scheduled maintenance*
- *Co-ordinate with Engineering on design and drawing issues*
- *Work centre organization and clean up*
- *Employee safety*
- *Scheduled Output*
- *Update Manager on all production related issues*

In his evidence, Mr. Brown clearly downplayed any of the elements of their job duties that even hinted at managerial qualities. On the statement of employment he, it seems, disingenuously represented their job classification as either "welder" or "labourer," rather than "supervisor" or "lead hand."

Be that as it may, production supervisors are clearly "employees" within the meaning of the *Act*, and the Board is satisfied that they have a much greater community of interest with the production line employees rather than the clerical, office and administrative staff. The Board is concerned that their exclusion from a unit comprising production employees will effectively exclude them from the ability to be represented by a trade union. While the Union has taken the position that they should not be included in the bargaining unit, the Board heard no direct evidence of anti-union activity on the part of any of them. The sense we gathered from the evidence is that the Union fears they may in some way be subversive of the activities of a certified bargaining unit.

Apparently, a few of the production supervisors asked questions at a meeting held by the Union on June 10, 1998, interrupted the representative in his reply and prevented him from answering. While such conduct may be indicative of opposition to union representation, the Union is not entitled to a bargaining unit particularly defined so as to exclude detractors and dissidents if the unit is otherwise appropriate.

Counsel for the Employer argued that because employees were told by Union organizers at the time they were asked to sign support cards that the Union was applying for an all employee unit the Board should not amend the application requesting a smaller unit. The significance of the signing or not signing of a membership card only expresses whether or not an employee wishes to be represented by the particular trade union; it does not indicate anything about his or her opinion or wishes respecting the definition of the bargaining unit. The Ontario Labour Relations Board addressed this issue in *United Food and Commercial Workers International Union v. Homewood Health Centre*, [1992] OLRB Rep. Feb. 181, as follows, at 185:

> *In any event, it is important to appreciate that the signification by an employee that s/he wishes to be represented by a trade union (usually by signing a membership card) does not, in itself, indicate anything about that employee's views respecting the appropriate bargaining unit: the grouping with whom s/he "should" from a labour relations/public policy perspective be included for collective bargaining purposes. A membership card determines only whether the employee has selected a particular trade union as his/her bargaining agent. It tells us nothing about the employee's wishes with respect to bargaining unit description; that is, it tells us nothing about that employee's opinion on the classifications that should be grouped together in the bargaining unit and might ultimately be represented by the union if it can establish majority support. And of course, the absence of a membership card from one or more employees within a classification provides no reliable information at all about their views respecting the bargaining unit. There are no submissions from the employees themselves on this issue. We have only the employer's submission that membership evidence is an indication of employee views. It is not.*

In recent decisions regarding the determination of appropriate units of production employees in manufacturing plants, the Board has included the lead hand classification in such units: see *Peak Manufacturing*, *supra*, and *Brown Industries*, *supra*.

In *Peak Manufacturing, supra*, the situation was described as follows, at 239 to 241:

> *Several of the employees who gave evidence on behalf of the Union said that they would be reluctant to contemplate having the lead hands included in the bargaining unit because they view them as representatives of management on many issues. They said they felt they might be uncomfortable discussing bargaining issues in the presence of the lead hands. Mr. Glenn Stewart, the staff representative of the Union who was responsible for the organizing campaign, said that he felt it would be a "disaster" from the point of view of collective bargaining if the lead hands were included in the bargaining unit.*
>
> *Mr. Power said that, from the point of view of the Employer, the exclusion of the lead hands would create the possibility of a rift between employees in the work teams which might have a negative impact on the co-operative relationships the Employer wishes to foster. He conceded that he could not foresee how this might affect collective bargaining in a concrete sense.*
>
> *Insofar as their duties include responsibility for directing and instructing other employees, it is not surprising that there is ambivalence on the part of employees and on the part of the lead hands themselves about their position. Though, as we have said, their actual managerial authority is negligible, the responsibilities of the lead hands include the transmission of instructions and information from management, and the admonition of employees who, because of inexperience or otherwise, are not performing at a level which might be considered acceptable. In the course of carrying out these responsibilities, there are no doubt occasions when the instructions which are transmitted are unwelcome and the criticisms resented. The evidence made it clear that there are also instances of personal antipathy between certain lead hands and certain employees.*
>
> *In the City of Regina case, supra, the Board commented on this feature of supervisory positions:*
>
> > *It is our view that there is nothing about the functions carried out by the persons in these positions which creates a conflict between the interest of their employer and the interest of their bargaining unit colleagues of a kind which would justify removing the positions from the bargaining unit. Two of them said that they felt their status as members of the bargaining unit had created "problems" with the performance of their duties. Our assessment of this evidence is that such problems did not go beyond the awkwardness and discomfort which is experienced by many employees who must direct or admonish fellow employees. Such tension is not sufficient to qualify as a conflict of interest of the sort which would justify the exclusion of a position on managerial grounds. In order to justify the exclusion, the position must be subject to competing loyalties which render it impossible for an incumbent to bring them into balance.*

> *Those comments were made in the context of the issue of whether or not those supervisors were employees within the meaning of Section 2(f)(i) of The Trade Union Act, but they seem to us to have some relevance as well to the question of whether a bargaining unit which would exclude these employees is appropriate.*
>
> *In determining whether a bargaining unit from which certain groups are excluded is appropriate, the Board must balance a number of considerations. As we commented in Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Saskatchewan Centre of the Arts, LRB File No. 175-95, the Board does not recognize less inclusive bargaining units simply because a trade union would prefer that unit or because the unit matches the organizing efforts they have undertaken.*
>
> *Among other factors, the Board considers whether the proposed bargaining unit has boundaries which create a definable and rational entity for the purpose of collective bargaining, and whether the acceptance or rejection of a bargaining unit will unnecessarily deny access to collective bargaining to some group of employees.*
>
> *We have concluded that the proposed bargaining unit would not be an appropriate one. It is clear that the duties of the lead hands are entangled with those of the other employees on their respective teams in a way which makes it impossible to separate them. The lead hands spend a significant part of their time working on the tools as other employees do, and the responsibilities which distinguish them still involve working closely with those other employees. There seems to us no rational way to sever the determination of their terms and conditions of employment from those of the other members of their teams, and any attempt to draw a line between the two groups would be artificial.*
>
> *Whatever awkwardness or personal friction may exist between ordinary employees and the lead hands, it does not seem to us significant enough to destroy the possibility of sound collective bargaining on the basis of the more inclusive unit.*

The analysis in *Peak Manufacturing*, *supra*, is apposite to the present situation. Accordingly, we have determined that the appropriate bargaining unit of production employees includes the production supervisor classification.

2. Membership Evidence and the Request for a Vote:

Mr. Luft, Mr. Birss and Mr. Grund were granted standing to present evidence to the Board regarding allegations of impropriety in the Union's organizing methods, and each waived his right to privilege respecting his views on the representation issue. On that basis they sought to have the Board order a vote, rather than disallow some or all of the membership evidence.

Fortunately, challenges to membership evidence on the grounds that it was obtained by intimidation, coercion, undue influence or misrepresentation are uncommon. The issue is whether the conduct that is established on the evidence is such as would dissuade a reasonable employee from making his or her own decision.

When a union demonstrates the necessary membership support for certification, a representation vote will only be granted in exceptional circumstances. One such situation is where there has been intimidation, fraud, illegal or unethical conduct or a serious air of unfairness in the manner in which the union obtained majority support. If such conduct occurs, the Board may disallow the individual card, when the conduct was isolated; or it may order a vote, if it is judged that a vote will "cure" the defect; or it may dismiss the application entirely.

In dealing with such a situation in *Oxford Hotels Ltd. v. British Columbia Government and Service Employees' Union*, [1996] B.C. L.R.B.D. 206, the British Columbia Board stated:

> *I find the statement made by Vos to Fossen to the effect that he was free to not sign a membership card now but at some point in the future he would be required to join the Union, does not constitute a threat or* ***coercion*** *nor is it a material* ***misrepresentation*** *which goes to the heart of his free choice concerning membership in the Union.*

The British Columbia Board adopted the following definition of "coercion" in *Insurance Corporation of British Columbia v. Office and Professional Employees' International Union, Local 378*, [1998] B.C. L.R.B.D. 171:

> *Coercion involves a type of unfairly forceful pressure which expressly or implicitly involves a threat of adverse consequences to the individual if s/he fails to do what a union representative want them to do, or an unreasonable promise of beneficial consequences if s/he does what is requested.*
>
> *A threat may be implied, unspoken, or assumed. Words or actions which may seem innocuous on their face may constitute a threat to certain employees ... A misrepresentation may cross the line from being merely a persuasive statement, to constituting coercion or intimidation. This occurs when the misrepresentation is so outrageous or inflammatory that it places undue or excessive pressure upon the employee...*

While Mr. Luft was the only one of the three intervenors to sign a support card, the British Columbia Board in *ICBC*, *supra*, held that whether the coercion or intimidation has the desired effect is not determinative. However, many other decisions have adopted a "no harm, no foul" principle to disregard allegations made by complaining employees who were not moved to sign a support card.

We agree that a "no harm, no foul" principle should not be adopted as a matter of policy, because it is unnecessary. The real inquiry is essentially objective: whether a reasonable person would perceive the statement as coercive or intimidating such that if affects his or her free choice. We find that in the case of Mr. Luft, there is considerable doubt as to what was actually said to him, such that the burden of proof has simply not been satisfied. First, it is unclear from the evidence if Mr. Schmidt told Mr. Luft that if the Union was certified, Mr. Luft would lose his job or if Mr. Schmidt told Mr. Luft that if the Union was certified, the Union would require membership as a condition of employment. The former comment may well constitute coercive conduct on the part of the Union organizer, while the latter comment would constitute a minor misrepresentation. The alleged coercion is not strictly proven.

Second, Mr. Luft availed himself of an opportunity to consider and reflect on the information before choosing to sign the card. He told Mr. Schmidt that he wanted to think the matter over; he then called Mr. Schmidt back so that he could sign the card. Mr. Schmidt was polite throughout. This evidence does not support an inference of coercion.

In the cases of Mr. Birss and Mr. Grund, we find they were obviously not moved by the alleged remarks which were purportedly made by Mr. Currie, who in Mr. Grund's case is a peer, and in Mr. Birss's case is a subordinate. Mr. Currie did not have the objective authority to carry out the consequence even if the remarks were made as alleged. In the circumstances of this case, the Board finds that a reasonable person would not be dissuaded from making a free choice on Union membership.

If the allegations were strictly proven, there is no evidence that such remarks were widespread. There was not a serious air of unfairness regarding the organizing campaign that would justify disregarding all of the membership evidence. Even if the Board was to vitiate the membership evidence of Mr. Luft, the effect on the Union's level of support would not be material.

Accordingly, the Board declines to order a vote on the representation issue. With respect to the requests for withdrawal of evidence of support received by the Board, all requests were received after the application for certification was filed. No evidence was presented that would move the Board to depart from its long-standing policy to reject such evidence received after the date of filing and the Board exercises its discretion pursuant to s. 10 of the *Act* to reject such evidence.

3. The Statement of Employment:

The United States Office Employees:

The jurisdiction of the Board is restricted to the geographic boundaries of the province of Saskatchewan. In *Eastern Bakeries Ltd.*, [1961] C.L.L.C. 15,432, the Supreme Court of Canada stated:

> *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 instances 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.*

This Board has previously approved of this statement in *Canadian Union of Public Employees, Local 3432 v. Lloydminster School Division*, [1990] Winter Sask. Labour Rep. 70, LRB File No. 013-90. Accordingly, the Board finds that it has no jurisdiction with respect to the two persons listed on the statement of employment who are United States citizens living and working for the Employer in the United States. Their names are to be deleted from the statement of employment.

The "Experimental" Employees:

The Board is satisfied that the so-called "experimental" employees should be deleted from the statement of employment. It is clear from the evidence that they were not performing bargaining unit work on or before the date of application, or, indeed, afterwards.

At best, they had attended for a few orientation sessions which by all accounts appear to have been held in unusual circumstances. Unlike the method of training other production employees, sessions were held at the office conference room on Saturday mornings. Other employees, including Mr. Birss, a production supervisor, was not aware that they were employed by the Employer. There were few particulars given about the nature and subject matter of these sessions and why these individuals who, it was said, were to be part-time welders and labourers, required apparently intensive classroom training while other production employees received their initiation and training on the shop floor.

The evidence disclosed that, in fact, they had not performed bargaining unit work at any time; they did no welding, they performed no labour. Certainly, they were not engaged in performing any of the job duties of any existing employment classification at the plant. The "experiment" appears not to have taken flight. The whole of their relationship with the Employer is murky and unclear, and appeared to no longer exist at the time of hearing.

In *Canadian Union of Public Employees, Local 3077 v. Lakeland Regional Library Board*, [1987] April Sask. Labour Rep. 59, LRB File No. 116-86, the Board stated:

> *However, the Board has also applied the principle that before anyone will be considered to be an "employee", that person must have a reasonably tangible employment relationship with the employer. If it were otherwise, regular full-time employees would have their legitimate aspirations with respect to collective bargaining unfairly affected by persons with little real connection to the employer and little if any monetary interest in the matter.*

At the date of the filing of the application, the Board is satisfied that these persons did not have a sufficiently regular and substantial connection with the Employer to warrant inclusion on the statement of employment.

Accordingly, the Board has determined that their names should be deleted from the statement of employment, as should that of Mr. Wiebe, who was "hired" at the same time under similar circumstances.

Deletions from the Statement of Employment:

For the reasons outlined above, the Board has determined that the following 23 names shall be deleted from the statement of employment:

Vic Baron	Leo Michaud
Adrien Boire	Doug Nichol
Bill Carefoot	Lauren Numrich
Terry Carefoot	Kenneth Peakman
Bruce Frank	Ron Pinsonneault
Greg Freeman	Raymond Ratzlaff
Gerald Geffrion	David Roth
Brad Harvey	Allen Seeber
Royce Jantz	Don Strieb
Charmaine Keck	Jeanette Strieb
Leonard Lafreniere	John Wiebe
Roger Loiselle	

Accordingly, 97 names remain on the statement of employment for the purposes of determining the representation issue.

4. The Geographic Scope of the Unit:

The Union has requested a province-wide certification Order. Although this was not raised as an issue by the Employer at the hearing, the Board is concerned that because the evidence was that the Gravelbourg plant is this Employer's only production operation, the scope of such an Order is over-inclusive and may have an unintended adverse effect in the future. The Board described the issue as follows in *Saskatchewan Institute on Community Living Inc., supra*, at 709-710:

> *The Board was referred to a principle stated in our decision in Tricil Limited-Tricil Limitee v. Chauffeurs, Teamsters and Helpers Local Union No. 396, [1986] May Sask. Labour Rep. 48, LRB File No. 334-85, 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 s. 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 chose their own bargaining agent [see: United Steelworkers of America v. Industrial Welding (1975) Limited, [1986] Feb. Sask. Labour Rep. 45, LRB File No. 274-85.*
>
> *The Board has reiterated this notion in a number of cases. It should be noted, however, that these statements have been made in circumstances where the issue is whether the description of a bargaining unit is over-inclusive in that it lays claim to employees, locations or facilities which are not yet in existence or in some cases, even in contemplation.*

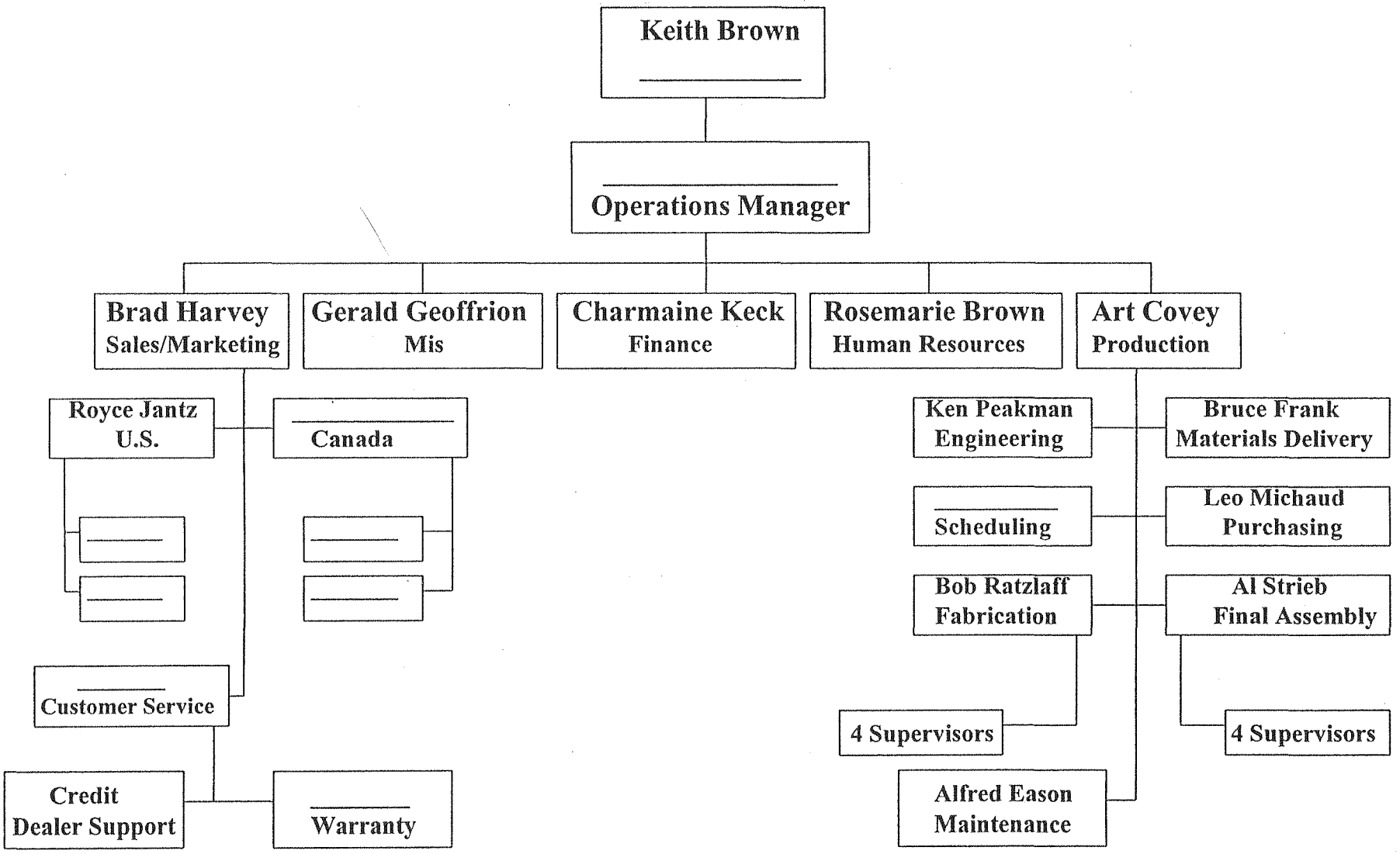
The Board has held that the principle is applicable to manufacturing operations: see, *Brown Industries*, *supra*. In the present case, we have determined that the geographic scope of the bargaining unit should be restricted to the Employer's existing Gravelbourg production facility.

Decision

For the reasons described above, and on all of the evidence, the Board has determined that the bargaining unit shall include all employees employed at Custom Built Ag. Industries Ltd., operating as Trail Tech, at or in connection with its production plant at Gravelbourg, Saskatchewan except the president, operations manager, production manager, human resources manager, comptroller/financial officer, sales and marketing manager, manager of information systems, fabrication manager, purchasing manager, materials/delivery supervisor, final assembly manager, engineer and office, clerical, sales and technical staff.

On the basis of the bargaining unit described, the Union has demonstrated that it enjoys majority support and a certification Order will issue accordingly.

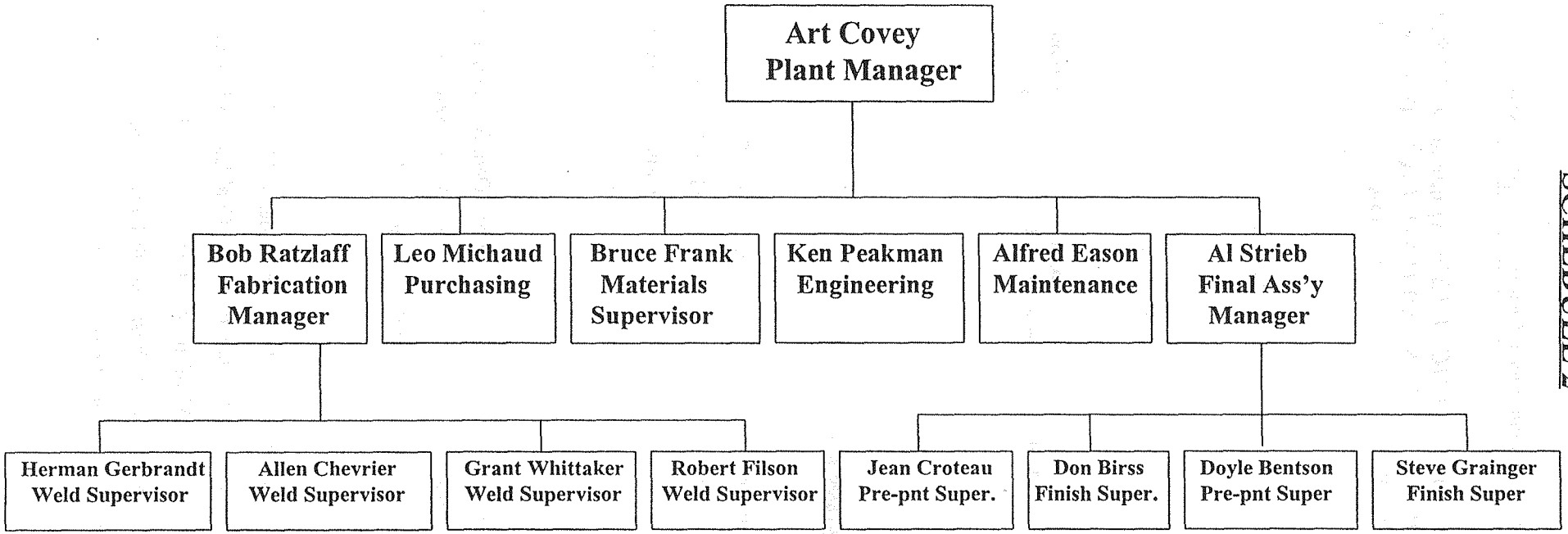
TRAILTECH MARCH 1998



SCHEDULE 1

PLANT ORGANIZATION CHART

05/08/98



SCHEDULE 2

UNITED STEELWORKERS OF AMERICA, LOCAL 9279, Applicant and ESTEVAN COAL CORPORATION, A SUBSIDIARY OF LUSCAR COAL INCOME FUND AND PRAIRIE COAL LTD., A SUBSIDIARY OF MANALTA COAL INCOME TRUST AND UNITED MINE WORKERS OF AMERICA, LOCAL 7606, Respondents

LRB File No. 215-98; October 30, 1998
Vice-Chairperson: Gwen Gray; Members: Gloria Cymbalisty and Don Bell

For the Applicant: Angela Zborosky
For the Respondents Estevan Coal Corporation, a subsidiary of Luscar Coal Income Fund and Prairie Coal Ltd., a subsidiary of Manalta Coal Income Trust: Dennis Ball, Q.C.

Remedy - Interim order - Successorship application - Board finds no underlying breach of *The Trade Union Act* on which to base interim order - Application for interim order dismissed.

***The Trade Union Act*, ss. 5.3, 37 and 42.**

REASONS FOR DECISION

Gwen Gray, Chairperson: The United Steelworkers of America, Local 9279 ("USWA") is certified to represent employees at the Utility and Costello mines which are operated by Prairie Coal Ltd. in the Estevan area of Saskatchewan. Prairie Coal Ltd. is a subsidiary of Manalta Coal Income Trust ("Manalta"), which recently was subject to a corporate takeover by Luscar Coal Income Fund ("Luscar"). USWA and Manalta are parties to a collective agreement.

Luscar also operates other mines in the Estevan area, namely the Boundary Dam/Shand mine and the Bienfait mine through its subsidiary, Estevan Coal Corporation. The United Mine Workers of America, Local 7606 ("UMWA") represent the employees at these mines. UMWA has a collective agreement with Estevan Coal Corporation.

After the corporate takeover of Manalta, Luscar applied to the Board under s. 37 of *The Trade Union Act*, R.S.S. 1978, c. T-17, to obtain a declaration that the sale of Prairie Coal Ltd. to Luscar is a sale or disposition of a business within the meaning of s. 37 of the *Act*; that Prairie Coal Ltd. and Estevan Coal Corporation are related employers and constitute one business; that a bargaining unit consisting of all the employees of Estevan Coal Corporation and Prairie Coal Ltd. be created; that a vote be

held among the employees of both corporations to determine which of the two unions will represent the employees; and that the Board make certain directives with respect to the collective agreements, including a directive that seniority lists of the two existing bargaining units be merged.

USWA opposed the application and filed a reply indicating that it seeks to retain its existing bargaining unit. In the alternative, if the Board orders the amalgamation of the two bargaining units, USWA asked the Board to order a vote among employees to select the new bargaining agent.

The main application is set to be heard by the Board on November 9 and 10, 1998. UMWA was notified of the interim application. Its solicitor, Gwen Randall, Q.C., notified the Board that she was unable to attend the hearing due to the short notice. UMWA's executive officers were present at the hearing.

The material filed by USWA centers on a union-management meeting which took place on October 20, 1998 in which it is alleged as follows:

(1) Mr. Watts, the Area Superintendent and General Manager, advised USWA that he was upset with the delay by the USWA in selecting a hearing date for Luscar's s. 37 application before this Board;
(2) Luscar also advised USWA that it was implementing a new shift schedule for coal hauling. The coal haul schedule was moved to a 24 hour schedule as worked by employees at Boundary Dam (UMWA members);
(3) Luscar announced that two USWA members would be laid off effective November 6, 1998;
(4) Mr. Watts indicated that machinery would be moved resulting in further lay-offs to USWA;
(5) Management also indicated that there would be a change in the source of coal supply with greater supplies coming from the mines represented by UMWA.

USWA interpreted the events of the October 20, 1998 meeting as an attempt by Luscar to weaken support for the USWA among its own members and potentially among UMWA members by making it appear as though USWA is unable to protect its members against lay-offs. USWA argued that the use of selective lay-offs by Luscar permits it to favour one union against the other in the event that the Board orders a vote among the membership of the two unions.

The material filed by Luscar on the application alleged as follows:

(1) On October 8, 1998, USWA was informed by Luscar that some job losses would result from the merger of the two mining corporations;

(2) On October 20, 1998, Loretta Miller, Manager - Human Resources, met with USWA and advised that Luscar was implementing the same shift schedule for employees at the Utility and Costello Mines (USWA) as applied to the UMWA mines. Ms. Miller deposed that she advised USWA at the same time that this change in shift schedule would result in the lay-off of two USWA members;

(3) Ms. Miller denied that the lay-offs were improperly motivated;

(4) Luscar stated that it has maintained the "status quo" by implementing the two collective agreements. It asserted a right to impose a change of shift schedules for coal hauling and to lay-off the two USWA employees under the terms of its collective agreement with USWA.

Ruling

This application for interim relief is somewhat unusual in that it is filed in respect of an application in which USWA is a respondent, not the applicant. Luscar's application seeks to amalgamate the two bargaining units into one unit to conform to the employer's newly amalgamated corporate structure. As part of the application, the Board is asked to direct that a vote be conducted among USWA and UMWA members to determine which of the two unions the majority of employees want as their bargaining agent. The process of selecting a bargaining agent, although initiated by Luscar's application, is a matter over which Luscar must maintain a neutral stand. Section 3 of the *Act* enshrines the principle that employees choose their own bargaining agent. Section 11(1)(a) of the *Act* prohibits employers from interfering with the selection process.

USWA, in this instance, claimed that Luscar is interfering in the selection process by reducing the work performed by USWA members which, in turn, caused the lay-off of two of its members. USWA alleged that Luscar is attempting to "chill" support for USWA by laying off its members and demonstrating the ineffectiveness of USWA as a bargaining agent. USWA seeks an interim order to prevent any further lay-offs of USWA or UMWA members. USWA did not claim that Luscar has

violated the collective bargaining agreement, nor did it claim that Luscar has violated s. 11(1)(a) of the *Act*.

Luscar maintained that it is entitled to continue to operate its business in accordance with the terms of the collective agreement between Prairie Coal Ltd. and USWA. According to Luscar, the "status quo" includes lay-off for lack of work. It denied that it has been improperly motivated by a desire to interfere in employees' selection of a trade union should the representation question be put to a vote of the members of USWA and UMWA.

The Board is aware of the many difficulties that surround the amalgamation of bargaining units comprising members of more than one union. Loyalties to one organization or the other are generally strong among union members: their cultures are different; their histories are different; they have different leadership opportunities within their national structures. In addition to the institutional differences, there are usually very real differences in the collective agreement provisions, most notably in the wage area, seniority area and bumping and lay-off areas.

The climate of an employer amalgamation or take-over generally is one of creating greater efficiencies through the more efficient use of capital, equipment and labour. Labour savings are achieved through lay-offs. The downsizing of the labour force is a reality in the current amalgamation and one that has not been hidden or soft peddled by Luscar.

It would seem to the Board that Luscar has acted in a responsible manner by bringing an application to the Board to amalgamate the bargaining units and to deal with the collective bargaining and representational issues that surround such an amalgamation. It sought an early hearing of the matter to avoid any unnecessary confusion or conflict between the two bargaining units. It has not taken sides in its formal application but, instead has asked that the representational issue be dealt with through the mechanism of a vote. In the meantime, until the application is heard and decided by the Board, Luscar is obligated to manage its business in accordance with the *Act* and the terms of the collective agreements.

There is nothing in the material filed by USWA that convinces the Board that Luscar is acting in violation of the *Act*. The Board may be willing to make interim orders to prevent the lay-off or termination of employees during organizing campaigns in new bargaining units based on allegations that such conduct "chills" the applicant union's organizing drive. However, the organizing union always seeks an unfair labour practice order against the employer under s. 11(1)(a) of the *Act*. The interim order is designed to maintain the status quo for the employee in question until such time as the Board may determine the main application. In the present case, the main application may determine the representation question; however, the main application will not determine if Luscar, through its conduct in laying off the two USWA members, inappropriately took sides in the representation question. This issue is not before the Board in any formal application.

It may be possible for the Board to exercise such a power under s. 5.3 as a way of controlling its own process - that is, to prevent one party from gaining an unfair advantage prior to making a determination of a matter before the Board. In other circumstances, we may be willing to consider such an application.

However, in the present case, it would appear to the Board that the parties must be guided by the respective collective agreements, unless and until the Board makes an "otherwise" order under s. 37 of the *Act*. USWA has a long history of representation in the mining sector, as does UMWA. Both groups of miners in the Estevan area have a long and rich tradition of trade unionism. There will be uncertainty for both groups until the main application is decided. It seems to the Board that requiring Luscar to adhere strictly to the terms of the collective agreements during the interim period will provide members of both unions with the greatest degree of security that can be achieved in this difficult period.

As a result, the Board dismisses the application for interim relief.

SASKATCHEWAN GOVERNMENT EMPLOYEES' UNION, Applicant, and NAMERIND HOUSING CORPORATION INC., Respondent

LRB File No. 189-97; November 12, 1998
Chairperson: Gwen Gray; Members: Don Bell and Bruce McDonald

For the Applicant: Susan Jeanotte Webb
For the Respondent: Susan McGillivray

Collective agreement - First collective agreement - At request of parties, Board reconsiders portion of previous decision in which first collective agreement imposed.

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

REASONS FOR DECISION

Gwen Gray, Chairperson: The Board issued its Reasons for Decision imposing a first collective agreement on the parties on September 4, 1998. In its Reasons, the Board imposed a mileage allowance retroactive to January 1, 1998. At the hearing of the main application, the implementation of the change in the mileage allowance was not explored in detail by the parties. Subsequently, the Employer notified the Union and the Board that there were some difficulties caused by the Board's direction to implement the mileage allowance retroactive to January 1, 1998. The Board reconvened a hearing to reconsider its previous Order with respect to the mileage allowance.

At the reconsideration hearing, both parties agreed that the implementation date of the mileage allowance should be set at October 13, 1998. The employees were advised on that date to begin recording their work-related mileage which now forms the basis of the mileage payment. The new system will result in a tax-free mileage payment calculated on the basis of actual work-related mileage.

The Board, therefore, reconsiders its previous decision, directs that the mileage allowance be implemented effective October 13, 1998, and amends Appendix A, Article 20, Paragraph 1 to the Reasons for Decision in the following manner:

1. This Agreement shall be effective June 1, 1997 and shall remain in effect until May 31, 1999. The Pension Benefits provided for in Article 22 of this Agreement shall come into effect on the first pay period following the issuing of the Labour Relations Board Order establishing the terms of this Agreement. The mileage allowance set out in Appendix II to this Agreement shall be implemented effective October 13, 1998.

ESTEVAN COAL CORPORATION, A SUBSIDIARY OF LUSCAR COAL INCOME FUND AND PRAIRIE COAL LTD., A SUBSIDIARY OF MANALTA COAL INCOME TRUST, Applicants and UNITED MINE WORKERS OF AMERICA, LOCAL 7606 and UNITED STEELWORKERS OF AMERICA, LOCAL 9279, Respondents

LRB File No. 186-98; November 12, 1998
Chairperson: Gwen Gray; Members: Tom Davies and Bruce McDonald

For the Applicant: Dennis Ball, Q.C.
For UMWA: Gwen Randall, Q.C.
For USWA: Angela Zborosky

Successorship - Vote - Board orders vote to determine which union represents employees in unit created as a result of successorship involving two unionized employers.

Successorship - Collective agreement - Board determines that collective agreement in place between employer and union successful on representation vote will be the collective agreement in force for all employees in unit created as a result of successorship involving two unionized employers - Board orders amendment of collective agreement to reflect its application to new unit.

Successorship - Collective agreement - Board orders dovetailing of seniority in unit created as a result of successorship involving two unionized employers.

***The Trade Union Act*, ss. 37 and 37.3.**

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: Estevan Coal (1996) Corporation ("ECC"), a subsidiary of Luscar Coal Income Fund ("Luscar"), and Prairie Coal Ltd. ("PCL"), a subsidiary of Manalta Coal Income Trust ("Manalta") applied to the Board for the following Orders:

(1) determining that the disposition of PCL's Utility and Costello Mines by Manalta to Luscar carrying on business as ECC constitutes a disposition of part of a business within the meaning of s. 37 of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the *Act*);

(2) determining that PCL operating Utility and Costello Mines and ECC operating Boundary Dam, Shand and Bienfait mines are associated businesses and constitute one employer for the purpose of the *Act*;

(3) determining that all employees of ECC and PCL at the Utility, Costello, Boundary, Shand and Bienfait mines with certain managerial, confidential and other exceptions, constitute an appropriate bargaining unit;

(4) directing a representation vote among employees in the merged bargaining unit and amending the collective agreements to reflect the scope of the proposed bargaining unit;

(5) directing that the collective agreement that will apply to all employees be applied in a manner that will recognize all seniority acquired by employees, whether with the predecessor employer or the new employer.

In its reply, the United Steelworkers of America, Local 9279 ("USWA") agreed that the sale of PCL to Luscar did constitute a disposition of a business under s. 37 of the *Act*. It also agreed that PCL and ECC are related employers within the meaning of s. 37.3 of the *Act*. It disagreed, however, that the employees of PCL and ECC should be amalgamated into one bargaining unit. In the alternative, it proposed that if the Board was inclined to amalgamate the bargaining units, it should order a representation vote between it and the United Mine Workers of America, Local 7606 ("UMWA"). It also agreed with the Applicants' proposal to dovetail the seniority lists of the two bargaining units if the Board ordered the amalgamation of bargaining units.

In its reply, the UMWA agreed that the sale of PCL to Luscar was a disposition within the meaning of s. 37 of the *Act* and that PCL and ECC are related employers. UMWA agreed with the Applicants that the employees of PCL and ECC should be amalgamated into one bargaining unit. However, UMWA disagreed that the Board should order a representation vote and it disagreed with the request for dovetailing of seniority by the Board.

An interim application for relief was brought by USWA and was heard but dismissed by the Board on October 30, 1998 (see [1998] Sask. L.R.B.R. 702, LRB File No. 215-98).

At the hearing of the main application, all parties agreed with the Applicants' requests outlined in points (1), (2) and (3) above. The issues dealt with at the hearing revolved around the request for a vote and the request for ordering the dovetailing of seniority.

Facts

ECC, a subsidiary of Luscar Coal Income Trust, operates three mines in southeastern Saskatchewan, which are known as the Boundary, Bienfait and Shand mines. The hourly paid employees in the mines are represented by UMWA and are subject to a certification Order that was last amended on October 8, 1996. UMWA has represented the miners of ECC since the 1930's. Its current collective agreement expires on June 30, 1999. The Boundary and Shand mines produce coal for the Saskatchewan Power generating stations located at Boundary Dam and Shand. The Bienfait operation produces coal for Ontario Hydro. It also produces charcoal briquettes. The mining operations are performed by strip mining techniques using large draglines. ECC employs approximately 200 hourly paid workers in its three mine sites.

PCL, a subsidiary of Manalta Coal Income Trust, operates two mines in the same region of Saskatchewan, namely the Utility and Costello mines. The hourly paid employees of PCL have been represented by USWA since February 1, 1990 when the predecessor union, Saskatchewan Strip Miners Union, Local 1573 transferred its bargaining rights to USWA. The predecessor union was certified on July 28 and 29, 1958. USWA has a current collective agreement with PCL that expires August 31, 1999. PCL employs 94 hourly paid employees at the Costello mine site.

In September 1998, Luscar purchased a controlling interest in Manalta and assumed ownership and control of PCL, including the Utility and Costello mines. Since the take-over, Luscar, acting through ECC and PCL, has amalgamated the management of ECC and PCL into one management team and is in the process of consolidating the work processes of the two mining operations into one larger, more efficient, unit. As a result of the takeover and the reorganization of the mines, the employees of the existing bargaining units will be intermingled and will work together to mine the area now known as the new Boundary Dam mine. The Bienfait mine will continue to operate as it has in the immediate past. Mining equipment will be moved from the Costello mine site to the Bienfait site to extend its use. The Costello mine will be mined in a contiguous fashion with the Shand mine, while the Utility mine will be abandoned. The Applicants estimate that 25 to 30 jobs will be lost in the process of streamlining the mining operations. The Applicants request the Orders outlined above in order to structure the collective bargaining relationships into a design that resembles the new corporate structure and work processes.

Relevant Statutory Provisions

The Board must consider the following provisions contained in the *Act*:

> *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.*
>
> *(2) On the application of any trade union, employer or employee directly affected by a disposition described in this section, the board may make orders doing any of the following:*
>
> *(a) determining whether the disposition or proposed disposition relates to a business of part of it;*
>
> *(b) determining whether, on the completion of the disposition of a business, or of part of the business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be:*
>
> *(i) an employee unit;*
> *(ii) a craft unit;*
> *(iii) a plant unit;*
> *(iv) a subdivision of an employee unit, craft unit or plant unit; or*
> *some other unit;*
>
> *(c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);*
>
> *(d) directing a vote to be taken among all employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);*

(e) amending, to the extent that the board considers necessary or advisable, an order made pursuant to clause 5(a), (b) or (c) or the description of a unit contained in a collective bargaining agreement;

(f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).

37.3(1) If, in the board's opinion, associated or related businesses, undertakings or other activities are carried on by or through more than one corporation, partnership, individual or association, or a combination of them under common control or direction, the board may treat them as constituting one employer for the purposes of this Act and grant any relief, by way of declaration or otherwise, that the board considers appropriate.

(2) Subsection (1) applies only to businesses, undertakings or other activities that become associated or related after the coming into force of this section.

Arguments

Ms. Zborosky, counsel for USWA, cited previous cases where the Board has ordered a representation vote to determine which of two competing unions will represent employees in an amalgamated bargaining unit. In particular, counsel referred the Board to *Service Employees' International Union, Local 333 v. The Board of Governors, Fairhaven Long-term Care Centre and Canadian Union of Public Employees,* [1991] 2nd Quarter Sask. Labour Rep. 33, LRB File No. 212-86; *Service Employees' International Union, Local 336 v. Wolf Willow Lodge et al.,* [1992] 3rd Quarter Sask. Labour Rep. 93, LRB File Nos. 091-92, 092-92 & 155-92; *Saskatchewan Government Employees' Union v. Headway Ski Corporation*, [1987] Sask. Labour Rep. 48, LRB File No. 396-86; *Saskatchewan Union of Nurses v. Twin Rivers District Health Board,* [1994] 3rd Quarter Sask. Labour Rep. 132, LRB File No. 109-94; and *Saskatchewan Union of Nurses v. Prince Albert and District Health Board*, [1996] Sask. L.R.B.R. 368, LRB File No. 304-95.

Counsel for USWA also noted that the Board has authority under s. 37(2)(f) to order the dovetailing of seniority lists for the new bargaining unit. The current collective agreements contain similar provisions for the acquisition of seniority that are based on the date of hire. They use the seniority principle for similar purposes, namely lay-off, recall, promotion and vacation. In addition, both agreements contain plant wide seniority provisions. Counsel urged the Board to settle the seniority question before a

representation vote is held to prevent the seniority issue from colouring the outcome of the vote. Counsel noted that the Board addressed its preference for the dovetailing of seniority in an amalgamated bargaining unit in *Wolf Willow Lodge, supra.*.

Ms. Randall, Q.C., Counsel for UMWA, argued that no vote was necessary in this instance because UMWA represents two-thirds of the combined membership of the amalgamated unit. Counsel argued that a vote would be a waste of resources and would cause unnecessary disruption to the process of amalgamating the two work forces. Although acknowledging the Board's jurisdiction under s. 37 to order a vote, counsel argued that the exercise of that power was discretionary and was not justified in this instance.

UMWA also proposed that the seniority issue be left to collective bargaining between the successful union and the Employer. Counsel argued that the Board should not sell short the abilities of the bargaining agents to resolve the matter through negotiations. Counsel urged the Board to direct the parties to negotiate with respect to seniority after the bargaining agent has been chosen in order to ensure that the seniority issue is resolved through collective bargaining when all the circumstances of intermingling are fully understood by the parties. Counsel noted that both Unions are under a legal obligation to act fairly with respect to all members of an amalgamated unit.

UMWA asked that if the Board was intending on exercising its discretion to order a vote, that it direct the vote to occur as soon as possible. Counsel informed the Board that a vote held on Monday and Tuesday next would be the best time from UMWA's perspective to hold a vote.

Mr. Ball, Q.C., counsel for the Applicants, noted that s. 37 of the *Act* has been extensively amended with respect to the Board's powers to more fully address the issues that arise when bargaining units are amalgamated. The Applicants have undertaken not to move the draglines from the Costello mine site until such time as the representation issue is resolved. As a result, they request that the vote occur as soon as possible to permit the Applicants to proceed with the changes planned. Counsel also noted that the Applicants were prepared to negotiate any transitional issues that arise once the representation issue is resolved.

Analysis

There is agreement among all parties that there has been a disposition of a business or part of a business by the corporate take-over of Manalta by Luscar. In addition, it is agreed that ECC and PCL are related employers under s. 37.3 and that they may be treated as one employer by the Board. It was also agreed that an amalgamated bargaining unit composed of the employees currently covered by the USWA and the UMWA collective agreements and their respective certification Orders are an appropriate unit. The parties agreed to retain current exclusions from the bargaining units of both units. As a result of these agreements, the Board determines that the bargaining unit proposed in the Applicants' application is appropriate for collective bargaining. The only amendment that will be made to the proposed bargaining unit description is the deletion of (iii) "Unit foreman, office staff, warehouse and technical staff" which is repeated in paragraph (i). At some later point, the parties may wish to amend the unit description, especially with respect to the description of excluded positions. Implicit in this finding is a determination that PCL and ECC are related employers and may be treated for the purposes of the *Act* as one employer.

With respect to the determination of a bargaining agent, the Board directs that a vote be taken among the employees of ECC and PCL to determine which union represents a majority of the employees in the amalgamated bargaining unit. The practice of the Board is to direct a vote in circumstances where members of two or more bargaining units are intermingled unless the number of employees in one unit is insignificant to the overall representation issue. For instance, in a raiding situation, s. 6 of the *Act* requires the Board to direct a vote if the applicant union demonstrates 25% support for its application. This provision provides an indication of the level of support required in ordinary circumstances to place the representation issue in dispute. In this case, as the result of a corporate take-over and the reorganization of the mines, one union will cease to represent the employees that it has ably represented for many years. Both unions represent more than 25% of the employees in the combined bargaining unit. It would seem to the Board that the objectives of the *Act*, which stress the right of employees to bargain collectively through a trade union of their own choosing, are best met in this situation by ordering a vote.

The vote shall take place at a time to be determined by the Board agent. However, the date selected shall not be later than November 30, 1998. The Board agent will be in contact with all the parties to

determine the time and location of the vote. The voters' list will be constructed from the list of names provided to the Board by the Applicants. In the event there are any disputes concerning the voters' list, the parties shall bring the matter to the attention of the Board agent for a determination. Any remaining disputes over the voters' list may be dealt with through s. 29 of the regulations to the *Act*, which sets out the procedure for objecting to the conduct of a vote.

The Board has also determined that it is appropriate for it to make a direction with respect to the dovetailing of the seniority lists. We appreciate the comments of counsel for UMWA that the Board should not underestimate the ability of either bargaining agent to deal with the matter of seniority in a fair manner with the Employer once the representation issue is decided. However, in this situation, there has been a disposition of Manalta's business to Luscar. As the successor employer, Luscar is bound to the certification Order issued to USWA and to its collective agreement, including its seniority provisions. If there was no amalgamation of the USWA and UMWA bargaining units, USWA members would retain the seniority they accumulated with Manalta in accordance with the terms of their collective agreement. While there may be a need to discuss the application of the seniority provisions to the amalgamated bargaining unit, in our view, these discussions should not be used as a method of undermining the basic seniority entitlements of either group of employees.

When major amalgamations have occurred in other sectors, notably in the health care sector, the Legislature has taken care to ensure that seniority is not lost as a result of changes in the bargaining structures. When bargaining units in health care were radically restructured by *The Health Labour Relations Reorganization Act,* S.S. 1996, c. H-0.03, health care employees were permitted to retain the seniority they had earned in a former appropriate bargaining unit. In our view, this is a fair and just approach and is one that accords with the general principles set out in s. 37 of the *Act.* Such an Order will be made in this instance.

The Board does not consider it necessary to order the Employer and the successful Union to engage in mid-contract bargaining. The Employer has expressed its willingness to address any transitional issues that arise with the Union. We anticipate that the parties will be able to negotiate solutions to transitional issues without the necessity of a Board order. However, in the event that a dispute arises with respect to a transitional issue, either party may refer the matter to the Board for a further order.

The Board, therefore, orders as follows

(1) a vote be conducted to determine if UMWA or USWA represents a majority of employees in the following described bargaining unit:
all employees of Estevan Coal (1996) Corporation and Prairie Coal Ltd. in mining operations at Boundary Dam, Shand and Bienfait Mines and Utility and Costello Mines at Estevan, in the Province of Saskatchewan except:

(i) unit foreman, office staff, warehouse and technical staff;

(ii) supervisory employees with the authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action;

(iii) mine manager, area manager, assistant manager, superintendents, engineering, planning personnel, surveyors, foremen, office manager, clerical staff, bookkeeper, warehouseman, laboratory man, scale man, tipple foreman, pit foreman, mechanical superintendent, electrical superintendent, garage foreman, the training/safety supervisor and purchasing agents.

(2) the collective agreement that currently is in force with respect to the successful Union shall be the collective agreement in force for all employees in the bargaining unit described in (1) above;

(3) the collective agreement described in (2) above shall be amended to reflect its application to the bargaining unit described in (1) above;

(4) every employee described in the bargaining unit above is entitled to retain the seniority he or she earned in his or her former appropriate bargaining unit and to have such seniority recognized under the terms of the collective agreement described in (2) above.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Applicant and GRAHAM CONSTRUCTION AND ENGINEERING LTD., GRAHAM CONSTRUCTION AND ENGINEERING (1985) LTD., BFI CONSTRUCTORS LTD., BANFF LABOUR SERVICES LTD., JASPER LABOUR SERVICES LTD., BANFF FINANCIAL CO. INC., PETER BALLANTYNE CONSTRUCTION LTD. and POINTS NORTH CONSTRUCTION LTD., Respondents

LRB File No. 014-98; November 13, 1998
Members: Ken Hutchinson (Panel Chairperson), Tom Davies and George Wall

For the Applicant: Drew Plaxton and Corinne Jamieson
For Graham Construction and Engineering (1985) Ltd. with a name change to Graham Construction and Engineering Ltd.: Larry Seiferling, Q.C.
For Banff Labour Services Ltd., Banff Financial Co. Inc. and Jasper Labour Services Ltd.: Larry Leblanc, Q.C. and Kurt Wintermute
For Peter Ballantyne Construction Ltd.: Garth Bendig
For Points North Construction Ltd.: Jay Watson and David Smith
For BFI Constructors Ltd.: no appearance

Construction industry - Related employer - Board holds that related employer provisions in *The Trade Union Act* do not apply to construction industry - Related employer status in construction industry is to be determined under *The Construction Industry Labour Relations Act, 1992.*

***The Trade Union Act*, s. 37.3.**
***The Construction Industry Labour Relations Act, 1992*, s. 18.**

REASONS FOR DECISION

Background

Ken Hutchinson, Panel Chairperson: United Brotherhood of Carpenters and Joiners of America, Local 1985 ("the Union") alleges that Graham Construction and Engineering Ltd. and the other Respondents are associated or related businesses pursuant to either or both of s. 37.3 of *The Trade Union Act*, R.S.S. 1978, c. T-17 ("the *TUA*") and s. 18 of *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11 ("the *CILRA, 1992*"). The Union seeks a declaration that the Respondents are one unionized employer under the certification Order issued by the Board with respect to Graham Construction and Engineering Ltd. that went into receivership in 1985.

Relevant Statutory Provisions:

Section 37.3 of *TUA* reads as follows:

> *37.3(1) If, in the board's opinion, associated or related businesses, undertakings or other activities are carried on by or through more than one corporation, partnership, individual or association, or a combination of them under common control or direction, the board may treat them as constituting one employer for the purposes of this Act and grant any relief, by way of declaration or otherwise, that the board considers appropriate.*
>
> *(2) Subsection (1) applies only to businesses, undertakings or other activities that become associated or related after the coming into force of this section.*

Section 18 of the *CILRA, 1992* reads as follows:

> *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.*
>
> *(2) Subsection (1) applies only to corporations, partnerships, individuals and associations that commence carrying business, undertakings or other activities in the construction industry after the coming into force of this Act.*
>
> *(3) In exercising its discretion pursuant to subsection (1), the board may recognize the practice of non-unionized employers performing work through unionized subsidiaries.*
>
> *(4) The effect of a declaration pursuant to subsection (1) is that the corporations, partnerships, individuals and associations:*
>
> > *(a) constitute a unionized employer in a specified trade division; and*

> *(b) are bound by a designation of a representative employers' organization by the minister pursuant to section 10 or a determination of a representative employers' organization pursuant to section 11.*
>
> *(5) The board may make an order granting any additional relief that it considers appropriate where:*
>
> *(a) the board makes a declaration pursuant to subsection (1); and*
>
> *(b) in the opinion of the board, the associated or related businesses, undertakings or activities are carried on by or through more than one corporation, partnership, individual or association for the purpose of avoiding:*
>
> *(i) the effect of a designation of the minister or an order of the board determining an employers' organization to be the representative employers' organization with respect to a trade division; or*
>
> *(ii) a collective bargaining agreement that is in effect or that may come into effect between the representative employers' organization and a trade union.*
>
> *(6) Where the board is considering whether to grant additional relief pursuant to subsection (5), the burden of proof that the associated or related businesses, undertakings or activities are carried on by or through more than one corporation, partnership, individual or association for a purpose other than a purpose set out in subclause (5)(b)(i) or (ii) is on the corporation, partnership, individual or association.*
>
> *(7) An order pursuant to subsection (5) may be made effective from a day that is not earlier than the date of the application to the board pursuant to subsection (1).*

Analysis

As a preliminary matter, the Respondents asked the Board for guidance in understanding the interplay between the related employer provisions contained in s. 18 of the *CILRA, 1992* and s. 37.3 of the *TUA*. These provisions have not received extensive review by the Board. In *Sheet Metal Workers International Union, Local 296 v. Crosstown Heating and Ventilating Ltd. et al.*, [1997] Sask. L.R.B.R. 608, LRB File No. 366-96, the Board was asked to comment on the two provisions but declined to do so as it was unnecessary in the circumstances of that case. However, in this case we agreed to set out our preliminary understanding of the interplay between the two statutory provisions in order to assist the parties in their preparation of the evidence and argument on the main case.

This ruling reflects the Board's understanding of the provisions. We do not wish to comment on how this interpretation applies to any particular factual situation. The application of the provisions to the facts of this case will be the subject of further argument before the Board after the evidence has been tendered by the parties.

Both provisions are remedial provisions designed to prevent the erosion of a trade union's bargaining rights through the establishment of a new corporate entity (see Adams, Canadian Labour Law, 2nd ed., para. 6:510). Under the provisions, the Board can declare associated or related businesses to be one employer for the purposes of the two statutes. However, before the Board can make a declaration, it must apply the tests set out in the statutes to determine if the companies are indeed "related."

Section 18 of the *CILRA, 1992* sets out two tests to determine if corporations are "related employers." The first test, which is set out in s. 18(1)(a), can be called a "common control and direction test." It asks if associated or related businesses, undertakings or other activities are carried on under common control or direction by or through corporations, partnerships, individuals or associations.

The second test, which is set out in s. 18(1)(b), can be called a "sufficiently related" test. It asks if corporations, partnerships, individuals or associations are sufficiently related to a unionized employer that, in the opinion, of the Board, they should be treated as one and the same.

Section 37.3 of the *TUA* sets out a threshold test that is similar to the test set out in s. 18(1)(a) of the *CILRA, 1992*, that is, the "common control or direction" test. However, s. 37.3 of the *TUA* is not as broad in its language as s. 18(1) in the *CILRA, 1992* because it does not contain the second test, that is, the "sufficiently related" test which we described above.

The second area of divergence between the related employer provisions in the *CILRA, 1992* and the *TUA* relates to their general application. Section 18(2) of the *CILRA, 1992* limits the application of s. 18(1) to corporations, partnerships, individuals and associations that commence carrying on business, undertakings or other activities in the construction industry after the coming into force of the *CILRA, 1992*, which was proclaimed in force on September 22, 1992. This test sets up another hurdle to be met before a related employer declaration can be made by the Board. Although the provision is less than clear as to which corporations, partnerships, individuals or associations are "grandfathered," the date of grandfathering nevertheless is clear and is set at September 22, 1992.

Section 37.3(2) of the *TUA* contains a similar limitation which is worded slightly different than the limitation contained in s. 18(2) of the *CILRA, 1992*. It limits the application of s. 37.3(1) to businesses, undertakings or other activities that become associated or related after the coming into force of the provision, which occurred on October 28, 1994.

Overall, s. 18(1) of the *CILRA, 1992* and s. 37.3 of the *TUA* attempt to achieve a similar remedial goal by limiting the ability of unionized employers to engage in the practice of double breasting. They achieve this goal, however, by using slightly different criteria and different time frames for applying those criteria. There is nothing in either *Act* to suggest that one provision ought to be preferred over the other provision when the Board is dealing with employers in the construction industry. The application of s. 18(1) does not implicitly or explicitly preclude the application of s. 37.3 of the *TUA*.

However, the *CILRA, 1992* preceded the enactment of s. 37.3 of the *TUA*. Section 18 of the *CILRA, 1992* was designed to address specific issues related to spinoff corporations in the construction industry and it does do so in some detail. The *CILRA, 1992* indicates that the Board may declare more than one corporation or entity to be one employer for the purposes of both the *CILRA, 1992* and the *TUA*. In s. 18(4), the effect of such a declaration is set out in more detail. The Board is also given additional powers to act when there is evidence that the related businesses are carried on for the purpose of avoiding the provincial scheme of collective bargaining that is set up under the *CILRA, 1992* or the collective agreements that result from such a bargaining scheme. Overall, given the earlier implementation of the related employer provisions in the *CILRA, 1992* its explicit application to both the *CILRA, 1992* and the *TUA*, and the specific timing of the grandfathering provision, we would conclude that s. 18 of the *CILRA, 1992* is intended to cover the entire subject of "related employers" for employers in the construction sector. If we were to interpret the *CILRA, 1992* and the *TUA* as both applying to the construction industry, we would be left with a conflict with respect to the appropriate date for determining when the provision applies. Section 18 sets the grandfathering date at September 22, 1992 while the *TUA* sets the grandfathering date at October 28, 1994 creating unnecessary uncertainty in the application of the related employer provisions.

In our view, s. 18 of the *CILRA, 1992* governs the question of related employers in the construction industry while Section 37.3 of the *TUA* applies to all other sectors.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 296, Applicant and SUER & POLLON MECHANICAL PARTNERSHIP, Respondent

LRB File No. 157-98; November 13, 1998
Vice-Chairperson, James Seibel; Members: Carolyn Jones and Don Bell

For the Applicant: Gunnar Passmore and Bert Ottenson
For the Respondent: Brent Suer

Construction industry - Appropriate bargaining unit - Standard construction unit - Board excludes plumber apprentices from statement of employment for sheet metal workers' unit.

Construction industry - Appropriate bargaining unit - Statement of employment - Individuals not registered with Apprenticeship and Trade Certification Branch - Board removes individuals from statement of employment.

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

REASONS FOR DECISION

James Seibel, Vice-Chairperson: Sheet Metal Workers' International Association, Local 296 (the "Union") applied, pursuant to ss. 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17, to be designated as the bargaining agent for a unit of employees employed by Suer & Pollon Mechanical Partnership (the "Employer"). The bargaining unit applied for complied with the standard bargaining unit for the sheet metal trade division set out by the Board in *Construction and General Workers' Union, Local 890 v. International Erectors and Riggers, a Division of Newbery Energy Ltd.*, [1979] Sept. Sask. Labour Rep. 37, LRB File No. 114-79. The Union estimated that there were seven employees in the bargaining unit. Copies of the application were sent by the Board to the Employer, the representative employers' organization and the building trades including the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Nos. 179 and 264 (the "Plumbers' and Pipefitters' Union").

Only the Employer filed a reply to the application. In its reply the Employer took issue with the application on the basis that its employees, including any sheet metal workers, were "signed with" a local of the Plumbers' and Pipefitters' Union. In the statement of employment filed by the Employer it was declared that there were 11 employees in the proposed unit, including the following five persons:

Bob Dustyhorn, Randy Debray, Gary Reiter, Dean Strasser and Corey Bautz, each described as an apprentice. In Saskatchewan, the sheet metal, plumbing and pipefitting trades are all "compulsory trades." That is, in order to work at the trade, one must be registered as an apprentice or hold a journeyperson's certificate under *The Apprenticeship and Trade Certification Act*, S.S. 1984-85-86, c. A-22.1. There was no dispute between the parties that the other six (6) persons listed on the statement of employment were properly described as journeyman sheet metal workers or sheet metal workers' apprentices. However, the Union did dispute whether the five (5) persons named above were within the description of the proposed unit.

The Union filed a copy of a letter dated September 24, 1998, from the Apprenticeship and Trade Certification Branch advising that, of these five persons, Mr. Strasser and Mr. Bautz are registered with the Branch as plumber apprentices; the other three persons have no registered status with the Branch.

Brent Suer, one of the partners of the Employer, testified that the employees have been working in both the commercial and industrial sectors under agreement with the Plumbers' and Pipefitters' Union, Local 179 for close to two years; he thought that the Plumbers' and Pipefitters' Union had a certification Order covering the Employer. With respect to the five employees named above, he said that each of them performed some measure of both plumbing and sheet metal work. However, he said that only Mr. Dustyhorn performed a majority of sheet metal work.

Mr. Suer said that all of the employees performing sheet metal work were registered with the Plumbers' and Pipefitters' Union as "utility workers" so that they could obtain the benefits negotiated under the contract for that trade division.

The records of the Board disclose that the Plumbers' and Pipefitters' Union does not hold a certification Order for any unit of employees of the Employer; and certainly employees within the sheet metal trade would not be covered by such a certification Order in any event. While apprenticeship and trade certification status is not necessarily determinative of the issue of who is in and out of the proposed unit, for the reasons described by the Board in its recent decisions in *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Dominion Bridge Inc.*, [1998] Sask. L.R.B.R. 365, LRB File No. 302-97 and *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada v. Comfort Mechanical Ltd.*, [1998] Sask. L.R.B.R. 422, LRB File No. 082-98, we have determined that the names of Randy Debray, Gary Reiter, Dean Strasser, Bob

Dustyhorn and Corey Bautz shall be deleted from the statement of employment as they do not perform work within the sheet metal bargaining unit.

As the Union has filed evidence of support from a majority of the employees in the proposed unit, a certification Order will issue.

SASKATCHEWAN CONSTRUCTION LABOUR RELATIONS COUNCIL INC., Applicant and CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF SASKATCHEWAN INC., Respondent

LRB File No. 023-94; November 25, 1998
Chairperson: Gwen Gray; Members: Gloria Cymbalisty and Brenda Cuthbert

For the Applicant: Larry Seiferling, Q.C.
For the Respondent: Alan McIntyre

Reconsideration - Practice and procedure - Board decides to conduct reconsideration hearing due to error in sending Order to wrong address.

The Trade Union Act, s. 13

REASONS FOR DECISION

Gwen Gray, Chairperson: On September 17, 1998, the Board conducted a hearing to establish the final voters' list on the application brought by the Saskatchewan Construction Labour Relations Council Inc. ("SCLRC") to replace Construction Labour Relations Association of Saskatchewan Inc. ("CLR") as representative employers' organization in the carpenters' trade division. CLR indicated at the hearing that it sought to add three employer names to the list of names being considered by the Board. The names included Comstock, Hall Mechanical Maintenance Ltd. ("Hall") and Thorpe Brothers Limited ("Thorpe"). CLR had suggested the addition of these three employers by letter to the Board dated January 9, 1997, following a pre-hearing meeting of all parties to discuss a proposed voters' list which was conducted on October 28, 1996 by the then Vice-Chairperson of the Board.

At the Board hearing on September 17, 1998, SCLRC objected to the addition of any further employers to the voters' list based on CLR's non-compliance with the earlier directions of the Board. The Board ruled that CLR would be permitted to lead evidence with respect to the three additional employers. However, because of the inordinate delay in getting this matter resolved, the Board directed CLR to provide SCLRC with particulars of its claim that the three additional employers are "unionized employers" within the meaning of *The Trade Union Act*, R.S.S. 1978, c. T-17, on or before 12:00 noon, Thursday, September 24, 1998. The Board made this ruling orally at the hearing and repeated it in a written order dated September 18, 1998. The Board specified both orally and in

writing that if CLR did not comply with the time frame, the Board would proceed to direct a vote among those unionized employers who already were agreed to by the parties.

CLR did not comply with the Board's directions to provide SCLRC with the particulars of its claim by 12:00 noon on Thursday, September 24, 1998. Counsel for SCLRC notified the Board of CLR's non-compliance with the Board directive by letter received at 2:28 pm on September 24, 1998. At 3:58 pm on the same day, the Board received a copy of a letter sent from the solicitors for CLR to the solicitors for SCLRC which contained particulars of CLR's claim with respect to the three additional employers.

The Board notified CLR that unless it could establish that the information had been provided to SCLRC in accordance with the Board's order of September 17, 1998, the Board would proceed to order a vote among the employers without considering CLR's claim with respect to the three additional employers. On September 25, 1998, counsel for CLR wrote the Board advising that he had not received a fax from the Board indicating that there was a 12:00 noon deadline on providing the information.

As it turned out, the Board had forwarded its September 17, 1998 written order by mail to counsel for CLR at his law firm's old address. It would not be reasonable to conclude that the written Order had actually been received by counsel for CLR before the 12:00 noon September 24, 1998 deadline given the mailing error. However, a review of the audio tape of the September 17, 1998 hearing indicated that the 12:00 noon September 24, 1998 deadline was mentioned twice by the Chairperson in making the direction for the provision of particulars. After considering the matter, the Board then notified counsel for CLR that it would proceed to order a vote using the list of employers that had already been agreed to by the parties at the prehearing meeting and with the inclusion of Alpine Drywall & Plastering (Saskatoon) Ltd. SCLRC had first proposed the inclusion of Alpine and CLR had agreed to its inclusion by letter dated August 21, 1997.

On September 28, 1998, CLR asked the Board to reconsider its position about not allowing Hall, Thorpe or Comstock to be added to the voters' list.

These reasons set out the Board's decision with respect to the request for a reconsideration hearing.

We will review some of the history surrounding this application to properly explain our decision. This application was filed with the Board on January 28, 1994. The Board had conducted several pre-hearing and formal hearings to deal with various aspects of the application. A pre-hearing meeting was conducted by the Vice-Chairperson of the Board (now Chairperson) on October 28, 1996 to determine a voters' list. After the meeting, the Board forwarded to all parties a memorandum which recorded the agreements reached at the meeting. The Board asked the parties to review the memorandum and to provide the Board with any comments or corrections. The Board advised the parties that the memorandum would be placed before the Board panel hearing the application subject to any amendments the parties would make. The memorandum stated in part as follows:

> *The current state of the Statement of Employers which are filed on LRB File No. 023-94, is as follows applying the criteria set down in the Board's Reasons issued on April 4th, 1996:*
>
> *Remove from Voters' List:*
>
> *Alpine Drywall & Plastering (Regina) ltd.*
> *Atco Structures Ltd.*
> *Commonwealth Construction Co. Ltd.*
> *Jasper Labour Services Inc.*
> *Kincaids Interiors Ltd.*
> *Lockerbie & Hole Company Ltd.*
> *Saskatoon Custom Drywall (1978) Ltd.*
> *Shaw Drywall Ltd.*
> *Queen City Lathing & Plastering Ltd.*
> *Thermal Systems Western Ltd.*
>
> *In Dispute:*
>
> *Alpine Drywall & Plastering (Saskatoon) Ltd.*
>
> *Agreed To:*
>
> *BFI Constructors Ltd.*
> *Flaminio Ceiling & Wall Systems Ltd.*
> *Gabriel Contracting Ltd.*
> *PCL Industrial Construction Inc.*
> *SWB - Wright Construction Inc.*
> *Systems Scaffolding Ltd.*
> *Patent Construction Systems Ltd.*
> *Steeplejack Services Ltd.*
> *Skyhigh Scaffold Construction Inc.*
> *Dominion Construction Ltd.*
> *UMACS of Canada Inc.*

Delta Catalytic Ltd.
Fuller Austin Ltd.
Lloydminster Maintenance Ltd.
Bird Construction Co. Ltd.
PS & E Contractors Ltd.

It was understood at the pre-hearing meeting that CLR was going to apply to the Board for reconsideration of the Board's earlier reasons which set out the criteria for determining if an employer was a "unionized employer" within the meaning of *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11 ("*CILRA*"). Also, it was understood that SCLRC did not accept that the Board's criteria were correct, and it agreed to the list contained in the January 9, 1997 memorandum only to the extent that the employers listed did or did not meet the criteria set by the Board.

On January 9, 1997, CLR responded to the Board's January 8, 1997 memorandum by requesting the addition of Comstock, Hall and Thorpe to the voters' list. CLR did not take any other issue with the names listed as "agreed" in the memorandum.

CLR then applied to the Board to reconsider its earlier reasons for decision which set out the criteria for determining which employers were "unionized employers" under *CILRA*. Reasons for decision with respect to this reconsideration application were issued on March 11, 1997 and contained the following direction to the parties:

> *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.*

On March 19, 1998, SCLRC indicated that all of the employers that had been agreed to by the parties at a pre-hearing conducted by the Board on October 28, 1996 with the addition of Alpine Drywall & Plastering (Saskatoon) Ltd. constituted the construction employers who were eligible to vote in accordance with the eligibility rules established by the Board.

Due to a family illness, counsel for CLR requested a postponement of the time for complying with the Board's March 11, 1997 time limits to March 24, 1997. On April 1, 1997, the Board indicated by letter to the parties that the matter would be held in abeyance until counsel for CLR could return to his office. By letter dated April 4, 1997, counsel for SCLRC objected to the indefinite adjournment and asked that the matter proceed to a vote. This objection was renewed on June 23, 1997. On July 29, 1997, the Board directed CLR to reply to the voters' list within ten days. On August 5, 1997, counsel for CLR advised that his client was away until August 18, 1997 and he would be unable to obtain instructions until his return. On August 21, 1997, counsel for CLR wrote the following letter to the Board:

> *I have now had a chance to meet and review your July 29, 1997 correspondence with Mr. Matthews. At the outset, I do not recollect agreeing to Mr. Seiferling's list during our meeting in Saskatoon. Having said that, it may not be a real issue. Former Chair Beth Bilson considered all relevant factors in the application to reconsider. In my view, it is appropriate to apply those factors to those contractors on Mr. Seiferling's list and others. In my view, the list should be as set forth in the attachment which also has the factors for consideration set forth.*
>
> *It may be that some evidence is necessary with respect to some of these businesses.*
>
> *In summary then, I believe that the following can be appropriately added to the list:*
>
> 1. *Alpine Drywall & Plastering (Saskatoon) Ltd.;*
> 2. *Comstock;*
> 3. *Hall Mechanical;*
> 4. *Thorpe Bros.*

In a letter dated September 3, 1997 the Board asked SCLRC and CLR if agreement had now been reached on the voters' list, given CLR's August 21, 1997 letter. Counsel for SCLRC replied to the Board that he would review CLR's list with his client and get back with his instructions to the Board. No further response came from SCLRC until January 16, 1998 when counsel for SCLRC asked the Board to fix the voter's list and allow the vote to take place. Various attempts were made by the Board to schedule the matter which was not achieved until September 17, 1998.

In its September 28, 1998 letter to the Board, CLR commented as follows:

> *This letter is to deal with some housekeeping issues and also the position taken by the Labour Relations Board in setting the voter's list in the upcoming raid vote.*

By way of housekeeping, I enclose a copy of the following:

1. Articles of Incorporation for CLR;

2. Copy of the By-Laws with one By-Law Amendment.

You have asked us to provide the Board with our thoughts on the mechanism to conduct the vote. The members of the Carpenters' Trade Division do not all reside in Regina. Therefore, it would seem appropriate that this vote be conducted by registered mail forwarded by the Labour Relations Board. An issue, however, is how the Board satisfied itself on who the appropriate party should be to cast a vote on behalf of any organization and that the organizations themselves are qualified. We believe all voters should be required to indicate on what basis they are a unionized employer within the trade division. In our view, the simple form to be checked off and signed by the appropriate voter indicating their qualifications would be appropriate. The type of form proposed was like the one attached to my letter of August 21, 1997, which is before the Board. We believe that all voters should have a minimum of three weeks to vote because we are unaware of all voters' schedules and general availability.

By this letter, I am also asking the Panel to reconsider its position about not allowing Hall, Thorpe, or Comstock to be added to the voters' list. I acknowledge that the transcribed portion of the hearings indicates that the deadline was Thursday at noon. As well, a copy of the Board's Order was to be provided. Our filing in fact occurred at about 3:30 on Thursday, September 24th.

Both CLR and I have some difficulty with respect to the service of the Board's Order. In all other matters we have had before the Labour Relations Board, there have been various documents served directly on CLR and on counsel by mail, and as well, forwarded by fax. All have been previously received without problem. However, the Board's Order which contained the most stringent timelines of any other Order it granted in proceedings involving CLR, was not received by either CLR or myself, by mail or fax. It had been sent only by mail to the previous address of Robertson Stromberg, which became redundant in 1994. I mean no disrespect to the Board and apologize to it and my friend. However, with a busy schedule, sometimes precise details get forgotten.

It seems unfair that the party which is to provide documentation is not given the Board Order while others are. The prejudice suffered by CLR is quite different than any prejudice suffered by Mr. Seiferling's clients by my late filing. Initially, the potential effects on my client's rights may result in review by others. I am sure they would want to know if I have asked the Board to reconsider this point should the matter proceed along those lines.

SCLRC proposed the following voting procedure in its letter to the Board dated October 2, 1998:

> *With regard to the vote we are in agreement with CLR's proposal that the vote be conducted by mail-in ballot over a period of three weeks. The ballots would be mailed to the officer of the Labour Relations Board.*
>
> *With regard to eligibility to vote, unionized employers on the list would be eligible to vote, provided they are still in business. The officer of the Board would require a letter of authorization from the business which would state that they are still in business in the Province of Saskatchewan, and that that person has the authority to vote on the representation question.*
>
> *During the three week process, if either SCLRC or CLR wish to contest the eligibility to vote on the basis that that organization is not in business in the Province of Saskatchewan, they would inform the officer of the Board in order that that ballot could be set aside. The rest of the votes could be counted to determine if that vote would affect the result. If that vote could affect the result, there could be a hearing before the Board to deal with the eligibility of that unionized employer.*

Both parties filed their constitutions and bylaws with the Board and the Board is satisfied that they both have collective bargaining as the representative of unionized construction employers as an object of their constitutions.

The Board exercises general reconsideration powers under s. 13 of the *Act*, which is incorporated into s. 6(1) of the *CILRA*. The Board, however, has indicated in past decisions that it will reconsider decisions only if certain criteria are established. The specific criteria were set out by the Board in *Remai Investment Corporation v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et al.*, [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93, where it adopted the criteria established for a similar power by the British Columbia Industrial Relations Board, at 108:

> 1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
>
> 2. *if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
>
> 3. *if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*

4. *if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,*

5. *if the original decision is tainted by a breach of natural justice; or,*

6. *if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

An applicant for reconsideration must demonstrate to the Board that there are solid grounds for embarking on reconsideration, which grounds must include one or more of the criteria set forth above. A procedural ruling such as the one under consideration in the present case is not likely to attract attention under any criteria except on the grounds that the rule itself or the manner in which it was applied breached the rules of natural justice. In the present case, counsel for CLR complained that it "has some difficulty with respect to service of the Board's Order." In particular, counsel noted that "the Board's order which contained the most stringent timelines of any other Order granted in proceedings involving CLR, was not received by either CLR or [counsel], by mail or fax."

In these circumstances, because of the Board's error in sending the Order to the wrong address, the Board will conduct a reconsideration hearing. At the hearing, both parties will address the following issues:

1. Should the Board proceed to order a vote (without deciding whether the three employers sought to be included by CLR are "unionized employers") as a result of the failure of CLR to comply with the Board's Order directing the provision of particulars by 12:00 noon, on September 24, 1998;

2. What voting procedure should be used;

3. In the event that the Board reverses its decision with respect to its September 18, 1998 Order, are Comstock, Thorpe and Hall "unionized employers" who should be added to the voters' list; and

4. What criteria, if any, should be used to determine if employers listed on the voters' list are qualified to vote on the voting day? Counsel for SCLRC suggested that the employers should be asked if they are still in business in Saskatchewan. Counsel for CLR suggested that each employer be requested to complete a statement indicating its current status as a unionized employer.

Both parties must be prepared to present evidence and argument with respect to all issues outlined above and any issue that they wish to raise on their own accord. If there is a requirement for further particulars with respect to the issue of the addition of Comstock, Thorpe or Hall, the parties may discuss the matter with the Vice-Chairperson by telephone.

Ms. Cuthbert dissents from the Board's decision to grant a reconsideration hearing to CLR.

HUGH BROWN, Applicant and UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Union and GROUP 5 SECURITY CORP., Employer

LRB File No. 161-98; December 3, 1998
Vice-Chairperson, James Seibel; Members: Hugh Wagner and Leo Lancaster

For the Applicant: Hugh Brown
For the Union: Corinne Jamieson

Decertification - Employer's application - Board dismisses employer's application for rescission - Board holds that certification Order attaches to business or undertaking, not to employer and fact that no employees in unit or that employer has ceased carrying on business not determinative of issue.

The Trade Union Act, ss. 3, 5(k), 37 and 38.

REASONS FOR DECISION

Background

James Seibel, Vice-Chairperson: United Food and Commercial Workers Union, Local 1400 (the "Union") was designated as the bargaining agent for a unit of employees of Group 5 Security Corp. (the "Employer") by a certification Order dated January 19, 1995.

Hugh Brown is the owner and principal of the Employer. Pursuant to s. 5(k) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). Mr. Brown applied for an order rescinding the certification Order on the grounds that at the present time, and since some time in 1996, there are no employees in the unit.

Mr. Brown advised the Board that the Employer had had a contract with Saskatchewan Power Corporation ("SaskPower") to provide its services at the Coronach generating station for some years. He said that changes were made to the tendering conditions and the employees, by voluntary agreement between the Employer and the Union, had been covered by a collective agreement since September 1, 1994. He said that the Union refused to agree to a site-specific certification and obtained a province-wide certification Order in 1995. He said that the Employer terminated the contract with SaskPower in 1996 for business reasons and has had no employees since.

Corinne Jamieson, counsel for the Union, urged the Board to dismiss the application on three grounds:

1. The application had been made by the Employer;

2. There are no employees in the bargaining unit who can make the determination to seek rescission of the certification order; and

3. The application was not made in the "open period" in relation to the certification Order; that is, the collective agreement, which pre-dates certification, was entered into on a voluntary basis and should not be used to determine the open period for the purposes of a rescission application.

Statutory Provisions

Among the provisions of the *Act* to be considered by the Board, are the following:

> *3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
>
> *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;*

> *37. 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.*
>
> *38. Where an employer has by an order of the board been required to bargain collectively, he shall, while the order remains in force continue to be subject to the order and to any collective bargaining agreement entered into pursuant thereto notwithstanding that after the making of the order and while a collective bargaining agreement remains in force he at any time or from time to time ceases to be an employer within the meaning of this Act and the collective bargaining agreement shall while it remains in force continue to apply at all times during which he is an employer within the meaning of this Act.*

Analysis

The issue as to whether an employer may obtain rescission of a certification Order when there are no longer any employees in the bargaining unit has most often been considered in the context of the construction industry, where an employer's workforce may fluctuate depending upon the contracts obtained, the work available and the completion of projects. In this context the general response of the Board (there have been exceptions) has been to deny such applications. The rationale for this was explained succinctly in *Prince Albert Comprehensive High School Board v. United Brotherhood of Carpenters and Joiners of America*, [1981] Sept. Sask. Labour Rep. 51, LRB File No. 144-81, as follows:

> *In the construction industry many employers employ employees only during periods when they are engaged in individual construction projects. As a result, many certification orders are dormant from time to time when the employer has no employees. The fact that there are such periods of time does not affect the validity of the certification orders and the obligation of the employer to bargain during such periods of time is beyond question: Regina ex rel Fluor Utah v. Saskatchewan Labour Relations Board (1974) 5 WWR 435, (1975) 4 WWR 100.*

> *This application raises the issue of whether or not an employer is entitled to have a certification order rescinded when there are no employees in the unit. The question must be answered in the negative. In the construction industry, to permit the decertification at the instance of an employer when there are no employees in a unit would require unions to apply for certification for each employer for each new construction project if an employer chose to decertify at the conclusion of each project. This would be an impossible task and would, in effect, destroy adequate union representation in the construction industry and disrupt collective bargaining as its exists in the construction industry.*

The situation in that case, however, was unique among cases dealing with the construction industry. The school board argued that it had engaged in construction on a single occasion only when it decided to act as its own contractor in the construction of a large school and that it did not intend to engage in construction in the future. The Board, however, declined to rescind the certification Order, not least among its reasons being that the existence of a dormant Order caused no hardship to the employer. The Board stated, at 51:

> *The Board must find that the employer, once having chosen to engage in the construction industry with the result that the certification order in question was issued remains bound by the certification order. The Board sees no real inconvenience to the employer. It receives an annual notice to bargain but no bargaining has taken place since it has ceased its engagement in the construction industry, and no unfair labour practices have arisen as a result thereof. The order simply means that if, in the future, the employer chooses to engage in the construction industry it will have to engage union carpenters.*

In *VicWest Steel Inc. v. Sheet Metal Workers International Association, Local 296*, [1988] Feb. Sask. Labour Rep. 55, LRB File No. 072-87, the employer applied for rescission of the certification Order on the grounds, in part, that it no longer engaged in the on-site installation of the products that it manufactured and for about two years had not directly hired any employees who might be in the bargaining unit. While the Board in that case found that there is nothing in the *Act* which specifically precludes an employer from applying for rescission, it did find, however, that such applications are antithetical to the fundamental rights of employees described in s. 3 of the *Act*, which the whole of the *Act* is intended to guard and protect. The Board explained the concept as follows, at 60:

> *Why, then, shouldn't the contractor be entitled to decertify the union after a project is done and the tradesmen have left? Because there is a basic contradiction between an employer application for decertification and the fundamental premise of The Trade Union Act. That premise, which is as applicable to contractors in the construction*

> *industry as it is to all other employers, is that it is the wishes of the employees, and only the wishes of the employees, that are to be considered in choosing and rejecting a bargaining agent. A certification order issued solely on the basis of the wishes of the employees can only be removed on the basis of the wishes of the employees unless there is some other criterion directed by the Act in a particular situation (as, for example, Section 16 of the Act which permits an employer application to rescind a certification order obtained by fraud). If there is to be a different set of rules for contractors, they must emanate not from the Board but from the legislature.*
>
> *Finally, Section 38 of The Trade Union Act provides:*
>
> > *38. Where an employer has by an order of the board been required to bargain collectively, he shall, while the order remains in force continue to be subject to the order and to any collective bargaining agreement entered into pursuant thereto notwithstanding that after the making of the order and while a collective bargaining agreement remains in force he at any time or from time to time ceases to be an employer within the meaning of this Act and the collective bargaining agreement shall while it remains in force continue to apply at all time during which he is an employer within the meaning of this Act.*
>
> *Although Section 38 is worded rather curiously, the legislative intention seems fairly clear: an employer remains subject to a certification order and a collective bargaining agreement even though from time to time he may not have any employees and, therefore, may not be an "employer" as defined by Section 2(g)(i) of the Act.*

The facts in the *VicWest* case, *supra*, are not on all fours with the present situation. In that case, the employer continued to perform the construction installation work through subcontractors, and that fact seems to have had a significant influence on the Board. However, the Board's review of the approach taken in other jurisdictions is instructive. It demonstrates that even in jurisdictions where the legislation specifically permits employers to make applications for decertification, applications by inactive employers whose businesses could be resumed have consistently been denied. In *VicWest*, *supra*, the Board in that case considered the decision by the Canada Labour Relations Board in *National Bank of Canada v. Retail Clerks International Union, Local 508*, (1986), 63 di 54; 12 CLRBR (NS) 300; 86 CLLC 16,029, in which the Canada Board decided that its discretion on such employer applications must be exercised concordantly with the purpose and intent of the *Canada Labour Code*, R.S.C. 1970, c. L-1 as a whole. In denying the application before it, the Board concluded, as had the Saskatchewan Board in *Prince Albert Comprehensive School Board*, *supra*, that such applications contradict the object and intent of the legislation to promote the access of employees to collective bargaining. The Canada Board stated, at CLLC, 14,319:

> *This being the case, relief through cancellation of a certification, a remedy that the Federal Court has decided is open to an employer under section 119, must be considered a departure from the general spirit of the Code which advocates the permanence of bargaining rights. It is also a departure from the letter of the code which excludes the employer from the revocation procedure in all but cases of fraud.*
>
> *We would not be exercising our discretion in a manner consistent with the objects of the Code if we cancelled a certification in a situation where this revocation was not the result of the free expression of the wishes of the majority of the employees in the unit covered by this certificate. Apart from cases of fraud, Parliament appears to have made certification and decertification subject to a single basic condition - the wishes of the employees in the unit concerned. If there are no employees in the unit and hence where a determination as to whether a union possesses the required representative character must be put on hold, the principle of the permanence of bargaining rights embodied in the Code should prevail.*
>
> *The question is not merely of academic interest, because an employer who has closed its business may very well resume its activities or transfer them. To approve the cancellation of a certification because of a hiatus in the operations of the certified unit might therefore allow an employer to rid itself of the bargaining rights that attach to its business. It is precisely this manoeuvre that Parliament prohibited by enacting section 144 of the Code.*
>
> *Since the certification attaches to the business, unless the employees decide to terminate it, its fate is tied to that of the business. Should the operations of the business be interrupted, as the result of a disaster or at the initiative of those who run it, the certification, like the business, will remain dormant until normal activities resume. What harm is there in this?*
>
> *If activities do not resume and the business dies, none of the parties will be harmed by the existence of the certification which will become a dead letter. Although the Board makes no such finding, it would undoubtedly, in such circumstances, agree to cancel a certificate without violating the principle of the permanence of bargaining rights embodied in the Code. However, it is doubtful whether either of the parties would feel the need to obtain this cancellation. In such circumstances, the facts would have to establish conclusively that the closing is final, and that the business cannot be resurrected or transferred.*

These reasons are essentially in accord with the general views expressed by this Board in *Prince Albert Comprehensive School Board, supra*. The Canada Board also held that the employer could not apply to rescind a certification Order under s. 119 of the *Canadian Labour Code* which grants the Board general remedial powers. It reads as follows:

> *119. The Board may review, rescind, amend alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.*

On this issue, the Canada Board held that the employer could not obtain a rescission Order indirectly under s. 119 of the *Canada Labour Code*, if it could not otherwise obtain it directly under ss. 137 and 138 of the *Canada Labour Code*. Section 5(k)(i) of the *Act*, like s. 119 of the *Canada Labour Code*, does not restrict the Board's authority to grant a rescission application made by an employer as noted by this Board in *Vic West*, *supra*, at 56. Indeed, as noted in that decision, this Board granted such applications in *Olynyk Construction Ltd.*, LRB File No. 025-68, Order dated June 4, 1968, and *Cameron Electric Co. Ltd.*, LRB File No. 037-72, Order dated July 5, 1972; but because both decisions were without written reasons it is unknown on what basis the applications were granted.

The employer in *National Bank*, *supra*, applied for judicial review. The Federal Court of Appeal granted the application in an unreported decision made September 8, 1986, File No. A-902-85, and referred the matter back to the Canada Board to be decided:

> *... on the assumption that under s. 119 of the Code, it had the power to grant an application to revoke a certificate of certification for a reason not mentioned in ss. 137 et seq.*

The Canada Board reconsidered the *National Bank* case, *supra*, as an application under s. 119 of the *Canada Labour Code*. The decision is reported at (1987) di 140, 17 CLRBR (NS) 375, 87 CLLC 16,041. And the Canada Board once again dismissed the application. While the Canada Board recognized that s. 119 of the *Canada Labour Code* was broad enough to allow an employer to apply to cancel a certification Order, it ruled that that did not change the fact that s. 119 of the *Canada Labour Code* must be interpreted in harmony with the purpose and objects of the Code as a whole. The Board stated at CLLC, 14,317:

> *This discretion [to revoke a certification Order] is far from absolute. It must be exercised not only without arbitrariness or bad faith, but also within the intent of the Code and its provisions in general.*
>
> > *For more than three centuries it has been accepted that discretionary power conferred upon public authorities is not absolute, even within its apparent boundaries, but is subject to general legal limitations. These limitations are expressed in a variety of different ways, as by saying that discretion must be exercised reasonably and in good faith, that relevant considerations only must be taken into account, that there must be no malversation of any kind, or that the decision must not be arbitrary or capricious. They can all be comprised by saying that discretion must be exercised in the manner intended by the empowering Act. ...*

> *(H.W.R. Wade, Administrative Law, 4th ed. (Oxford: Clarendon Press, 1977) pages 336-337; emphasis added)*
>
> *Thus, Britain's House of Lords set aside, in a number of well-known cases, the decisions of administrative tribunals that had not exercised their discretion in accordance with the objects of the legislation they were required to administer: Padfield v. Minister of Agriculture, Fisheries and Food, [1968] A.C. 997; Secretary of State for Education v. Tameside (MBC), [1977] A.C. 1014; Bromley LBC v. GLC, [1982] 2 W.L.R. 62.*

In dismissing the application, the Canada Board stated, at CLLC, 14,324, that "it is more in keeping with the intent of the Code to render a decision that does not undermine the principle of the permanence of bargaining rights." It reiterated that, apart from cases of fraud, an employer is excluded from obtaining revocation of a union's bargaining rights.

Accordingly, the fact that there are no employees in the bargaining unit or that the employer has ceased carrying on business is not determinative of the issue. This is entirely consonant with the opinion of the Supreme Court of Canada in *Canada Labour Relations Board v. Transair Limited, et al.*, [1977] 1 S.C.R. 722 (S.C.C.), where the late Chief Justice Laskin stated, at 744-745:

> *If there is any policy in the Canada Labour Code and comparable provincial legislation which is pre-eminent it is that it is the wishes of the employees, without intercession of the employer (apart from fraud), that are alone to be considered vis-a-vis a bargaining agent that seeks to represent them. The employer cannot invoke what is a jus tertii, especially when those whose position is asserted by the employer are not before the Court.*

We are in agreement with the authorities referred to above. Our review of more recent jurisprudence in other Canadian jurisdictions and of the National Labour Relations Board in the United States does not cause the Board to find that the fundamental principles espoused in the cases cited have changed in any significant way. The certification Order attaches to the business or undertaking, not just to the employer; for example, the successorship provisions of the *Act* clearly operate to cover the business regardless of who the owner or employer is.

Accordingly, the application by Mr. Brown for rescission of the certification Order is dismissed.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 226-2, Applicant and WESTERN CANADIAN BEEF PACKERS INC., Respondent

LRB File No. 026-98; December 7, 1998
Vice-Chairperson, James Seibel; Members: Gerry Caudle and Ken Hutchinson

For the Applicant: Sandra Mitchell
For the Respondent: Michael Mantyka and Ron Dumonceaux

Arbitration - Deferral to - Board declines to defer to arbitration where no evidence that matters before Board also subject of grievance and no evidence that arbitrator would have jurisdiction to grant complete and sufficient remedy.

Unfair labour practice - Refusal to permit authorized representative to negotiate - Board finds violation of s. 11(1)(d) of *The Trade Union Act* where employer refused to meet with authorized representative of union despite no finding of bad faith on part of employer.

Unfair labour practice - Duty to bargain in good faith - Refusal to bargain - Board reviews relationship between ss. 11(1)(c) and 11(1)(d) of *The Trade Union Act.*

***The Trade Union Act*, ss. 2(b), 3, 5(d), 5(e), 11(1)(a), 11(1)(c), 11(1)(d), 18 and 42.**

REASONS FOR DECISION

Background

James Seibel, Vice-Chairperson: United Food and Commercial Workers International Union, Local 226-2 (the "Union") represents a unit of employees at Western Canadian Beef Packers Inc. (the "Employer") at its packing plant in Moose Jaw, Saskatchewan. On February 18, 1998 the Union filed an application with the Board alleging that the Employer had engaged in an unfair labour practice. The essence of the allegation is that the Employer refused to negotiate with the Union's representative for the settlement of grievances of employees in violation of s. 11(1)(d) of *The Trade Union Act*, R.S.S. 1978, c. T-17.

The material portion of the application reads as follows:

The applicant alleges that an unfair labour practice has been, and/or is being, engaged in by the said employer by reason of the following facts:

> *On or about the 13th day of February, 1998 the production manager of the company, Gerald D. Third, refused to permit a duly authorized representative of the union, namely Mr. Paul Meinema, international representative, to negotiate with him during working hours for the settlement of grievances of employees covered by an agreement between the union and the company.*

In its reply, the Employer denied the allegations as follows:

3. With respect to the said application:

(1) The following statements are specifically admitted:

(a) No statements are specifically admitted.

(2) The following statements are specifically denied:

(a) The Respondent specifically denies that on or about the 13th day of February, 1998, the Production Manager of the company, Gerald D. Third, refused to permit a duly authorized representative of the Union, namely Paul Meinema, International Representative, to negotiate with him during working hours for the settlement of grievances of employees covered by an agreement between the Union and the company.

(b) The Respondent specifically denies that it has engaged in an unfair labour practice within the meaning of ss. 11(1)(d) of The Trade Union Act.

(3) The following statements are specifically commented on:

(a) With respect to paragraph 4a.) of the said Application, the Respondent submits that no meeting was scheduled for February 13, 1998 between the Production Manager of the company, Gerald D. Third, and an authorized representative of the Union, namely Paul Meinema.

(b) With respect to paragraph 4a.) of the said Application, the Respondent submits that at no time on February 13, 1998 was a duly authorized representative of the Union, namely Paul Meinema, denied entry or refused the opportunity to negotiate during working hours for the settlement of grievances of employees covered by an agreement between the Union and the company.

(4) The following is a concise statement of the material facts which are intended to be relied upon in support of this Reply:

(a) The Respondent submits that the grievances referred to in paragraph 4a.) of the said application were not subject to possible further negotiation within the framework of the collective agreement between the Union and the company. With respect to those grievances, the third stage of the grievance process had been completed and the arbitration process had been initiated.

Evidence

Paul Meinema

Paul Meinema, international staff representative of the Union, testified that part of his duties are to act as a representative of the Union assisting with collective bargaining and the processing of grievances.

Mr. Meinema said that in early February there were eight grievances filed with the Employer at Step 3 of the grievance procedure in the collective agreement between the Union and the Employer. Step 3 provides for a meeting between the Union's grievance committee, composed of Tim Connelly, Local President, Corey Cozart, Chief Steward, Carter Currie, Union committee member, and Mr. Meinema, and the Employer's committee composed of Doug Miller, General Plant Manager, Gerald Third, Production Manager, Dave McCannel, Human Resources Manager, and the superintendent of the appropriate department. After completion of Step 3 the Union must decide whether to refer a grievance to arbitration.

The committees had a Step 3 meeting with respect to the eight grievances in early February, 1998. Mr. Meinema received a telephone call from Mr. Cozart on February 12, 1998 advising him that Mr. Third wanted to meet again the next day with respect to seven of the grievances. However, Mr. Meinema was not available until the following week. Mr. Cozart subsequently advised Mr. Meinema that Mr. Third would not meet with the Union's delegation if it included Mr. Meinema. Mr. Meinema arrived in Moose Jaw on February 17, 1998, and was advised by Mr. Cozart that Mr. Third refused to meet with Mr. Meinema. Mr. Meinema said that the Union's committee decided not to agree to a meeting with the Employer under these conditions and agreed instead to file the present application with the Board.

In cross-examination, Mr. Meinema admitted that the early February meeting was a Step 3 meeting regarding the grievances, but said that it was not uncommon to "re-open" the third step and have additional meetings, particularly if new information came to light. He said that the Employer had not refused to additional meetings with the Union in the past two or three years that he had been involved with the local Union, and that some of these additional meetings had been arranged directly with himself.

Corey Cozart

Mr. Cozart is employed with the Employer and is a vice-president and chief steward of the local Union. He testified that in his Union capacities he is involved in the initial investigation and filing of grievances as well as all steps of the grievance procedure.

He stated that on Thursday, February 12, 1998 Mr. Third proposed a meeting for the following day to "re-hash" seven of the eight grievances discussed at the Step 3 meeting a few days before, and to discuss some other grievances at Step 2. Mr. Cozart checked with Mr. Meinema as to his availability for the following day and, because Mr. Meinema could not attend, Mr. Cozart restricted his discussion with Mr. Third at the meeting on February 13, 1998 to the grievances at Step 2. At that time, he also advised Mr. Third that, while he agreed that it would be beneficial to further discuss the grievances at Step 3, he could not re-open the discussion without the whole Union committee, and he proposed a meeting for February 18, 1998, so that Mr. Meinema could attend. Mr. Cozart related to the Board that Mr. Third became quite irate and said that he would meet with the other Union committee members but not with Mr. Meinema. He testified that Mr. Third made a statement to the effect that he would "go toe-to-toe with Paul [Meinema] but the rank and file would suffer." He said that Mr. Third would not agree to a meeting on February 18, 1998 meeting if it meant that Mr. Meinema would be in attendance. Mr. Cozart noted that after the Union filed the present application, the parties' respective committees, including Mr. Meinema, eventually did meet to further discuss the grievances.

Dave McCannell

Mr. McCannell has been employed with the Employer as human resources manager for about two years. He is involved in collective bargaining for the Employer and is a member of the Employer's committee for the discussion of grievances at Step 3 of the grievance procedure along with Mr. Third

and Mr. Miller. He also acts in an advisory capacity to the appropriate departmental superintendent at Step 1 and to the production manager at Step 2 of the procedure. He confirmed that Mr. Meinema was a member of the Union's committee for Step 3 grievance meetings in his capacity as business agent of the Union.

Mr. McCannell said that Step 3 discussions are usually arranged by communication between himself and either Mr. Cozart or Mr. Connelly. He believed that there had been what he called "off the record discussions" between the Union and the Employer from time to time to attempt to resolve grievances outside the formal process, but he had not been personally involved in any such discussions. Mr. McCannell said that while it was his understanding that after completion of Step 3 of the grievance procedure there was no obligation on either party to re-open discussion of a grievance, he was not aware that either party had ever refused the request of the other to re-open such discussions. He said that he was not aware of the allegations raised by the Union on this application until Mr. Meinema contacted the Employer to advise that an application would be filed with the Board.

Gerald Third

Mr. Third has been with the Employer almost three years as production manager with responsibility for all facets of plant production.

After describing the grievance procedure, he testified that he is personally involved from Step 2 onwards. He has often met with Mr. Meinema regarding grievance issues and policy issues arising out of contract negotiations.

With respect to the events in the present case, Mr. Third testified that during the meeting with Mr. Cozart on February 13, 1998, they agreed that it was generally constructive to have more, rather than less, discussion about matters that had been grieved. He said that he told Mr. Cozart that he wanted to discuss seven of the outstanding grievances that had recently been the subject of discussion at Step 3 of the grievance procedure. Mr. Cozart said that he was not opposed to re-open the Step 3 discussion. However, Mr. Third advised Mr. Cozart that he did not want to do that because they had already been referred to arbitration and Mr. Third was concerned that re-opening Step 3 would result in a delay. Mr. Third had a more informal process in mind. He testified that when Mr. Cozart asked whether Mr. Meinema could be present, Mr. Third said that he could not and that he would only meet with Mr.

Meinema "to the extent that [he] is legally required to do so." By way of explanation, Mr. Third said that his relationship with Mr. Meinema was deteriorating and, because Mr. Meinema had at some earlier time made what he described as "disparaging remarks," he did not want to meet with him. Mr. Third did not elaborate on the nature or context of the remarks in his evidence. He described both himself and Mr. Meinema as "hot tempered" and he did not think that anything could be gained by their meeting at that time.

Mr. Third said that he and Mr. Cozart discussed how his problem with Mr. Meinema might be resolved. He and Mr. Meinema have been involved together in Step 3 discussions since that time regarding other grievances.

Mr. Third noted that wide-ranging informal discussions, outside of the formal meetings of the parties' respective committees at Step 3, have often been fruitful in resolving all kinds of issues between the parties, not necessarily just grievances, but he said that they had never resolved a grievance after it had been through Step 3 by such an informal process.

In cross-examination, Mr. Third denied that he had ever agreed to re-open Step 3 after its completion. When counsel for the Union referred to a specific grievance where she suggested this had been done, Mr. Third suggested that it had merely been "revisited for clarification," but later agreed with counsel that this characterization was a distinction without a difference. However, with respect to the matters in this case, Mr. Third said that he did not want to formally re-open Step 3 because he thought it would delay the progress of the grievances to arbitration; his position was that the parties could simply continue discussions on an informal basis.

While Mr. Third specifically denied making the "toe-to-toe" remark referred to above, he did admit that he had refused to meet with Mr. Meinema regarding the seven grievances in issue.

Arguments

Ms. Mitchell, counsel for the Union, argued that the evidence disclosed a violation of s. 11(1)(d) of the *Act*, and probably of ss. 11(1)(a) and(c) of the *Act* as well, in that the Employer had clearly refused to bargain collectively regarding the grievances in question as that term is defined in section 2(b) of the

Act. She said that Mr. Third had proposed a meeting and Mr. Cozart made it clear to Mr. Third that the Union wanted to meet, suggesting a time for such a meeting, but that Mr Third refused to do so if it meant including Mr. Meinema.

Mr. Dumonceaux, counsel for the Employer, argued that the allegations in the present case are really allegations of violation of the collective agreement. He asked the Board to defer the arbitration process. He said each of the seven grievances that were referred to throughout the evidence have either been resolved or are set for hearing by arbitration, and that the Board should not deal with the present application pending disposition of the grievances by the arbitrator.

In the alternative, he argued that on February 13, 1998 Mr. Cozart made it clear that the Union would not agree to re-open Step 3 unless Mr. Meinema was present, the implication by counsel being that it was really Mr. Cozart who set a condition on the further discussion that the Employer did not have to accept. Counsel argued that the Employer had no obligation under the collective agreement to meet further with the Union after completion of Step 3 and so there was no unfair labour practice. He said that the Employer should be able to rely on what the parties have agreed to in the collective agreement in fulfillment of its obligations to negotiate grievances. He said that the Employer did not have to agree to re-open Step 3 of the grievance procedure just because the Union asked for it. In any event, he said, Mr. Third had made it clear that he was refusing to meet with an individual, Mr. Meinema, rather than refusing to meet with the Union.

Counsel for the Employer filed a written brief which the Board has considered along with the accompanying authorities.

Statutory Provisions

Among the provisions of the *Act* that the Board must consider are the following:

> *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;*

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.

5. The board may make orders:

> ...
>
> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
>
> *(e) requiring any person to do any of the following:*
>
> > *(i) refrain from violations of this Act or from engaging in any unfair labour practice;*
> >
> > *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*

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;*
>
> *(d) to refuse to permit a duly authorized representative of a trade union with which he has entered into a collective bargaining agreement or that represents the majority of employees in an appropriate unit of employees of the employer to negotiate with him during working hours for the settlement of disputes and grievances of*

> *employees covered by the agreement, or of employees in the appropriate unit, as the case may be, or to make any deductions from the wages of any such duly authorized representative of a trade union in respect of the time actually spent in negotiating for the settlement of such disputes and grievances;*
>
> *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.*
>
> *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

The parties did not join issue before the Board with respect to the Employer's assertion that it had fulfilled its obligations pursuant to the grievance procedure in the collective agreement made between them. Indeed, the collective agreement was not entered in evidence at the hearing before the Board. And, there was no evidence presented to the Board that the matters in issue on this application are the subject of a grievance. Accordingly, the Board dismisses the initial argument made by counsel for the Employer that the Board should defer to an arbitration process under the collective agreement regarding the issue whether the Employer had fulfilled its obligations under the collective agreement between the parties with respect to the negotiation of the grievances in question. Even if the identical matters have been grieved, there is no evidence that an arbitrator appointed under the parties' collective agreement has the remedial jurisdiction to grant complete and sufficient relief in the event that a grievance is upheld, such as the remedial relief that this Board is able to grant under s. 5 and 42 of the *Act*. There is simply no basis in law or in policy on which to accede to this request.

With respect to the allegation of an unfair labour practice, the board has often determined whether an employer is guilty of a failure to bargain collectively under s. 11(1)(c) of the *Act*, but has seldom considered the issue of a refusal to permit a representative of the union to negotiate for the settlement of disputes and grievances under s. 11(1)(d) of the *Act*.

The definition of "bargaining collectively" in s. 2(b) of the *Act* is broad in scope and refers not only to the negotiation of a collective agreement but, also, the negotiation for the settlement of disputes and grievances of employees covered by the agreement.

The scope of the obligation to bargain collectively was referred to by the Board in *International Brotherhood of Electrical Workers, Local 529 v. Bill's Electric City Ltd.* [1996] Sask. L.R.B.R. 399, LRB File No. 061-96, at 403:

> *In many decisions over the period of more than half a century, the Board has emphasized that the duty to bargain is one of the central features of The Trade Union Act. The objectives of the Act cannot be met entirely on the basis of allowing employees to organize, join and assist trade unions. The leverage which employees can exercise by this means depends on the imposition on the employer of a responsibility to deal with the trade union, and only with the trade union, in matters which concern the terms and conditions of employment of the employees.*
>
> *It is evident from the definition of s. 2(b) that the scope of this responsibility goes beyond being present at the bargaining table, though the term "bargaining" is often associated with the negotiation of a collective agreement. An employer is in fact obligated to enter into discussions with the trade union about any matters concerning the terms and conditions of employment of employees. These include questions of how the provisions of the collective agreement are to be applied or interpreted, and the use of the grievance procedure to resolve disputes arising out of these questions.*

The obligation to negotiate for the settlement of disputes and grievances exists under the *Act* quite apart from the obligations of an employer to process grievances pursuant to a procedure negotiated in a collective agreement: See, *United Steelworkers of America v. Bird Machine Co. of Canada Ltd.* [1980] May Sask. Labour Rep. 61, LRB File Nos. 009-80 to 013-80, and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Limited*, [1993] 4th Quarter Sask. Labour Rep. 216, LRB File Nos. 256-93 to 260-93, at 224.

The obligation of the Employer to recognize and negotiate with the Union's chosen representatives does not cease upon the signing of a collective agreement, and both the prohibitions in s. 11(1) and the freedoms and rights in s. 3 of the *Act* continue to apply.

In *Retail, Wholesale and Department Store Union, Local 454 v. Marshall Wells Co. Ltd.*, [1955] Vol. II Sask. L.R.B.D. 1, 55 CLLC 18,002, this Board considered the refusal by an employer to negotiate with the union's representatives on the grounds that they were employees of a competitor. While the Board

found that the employer had not acted in bad faith, it held that it had nevertheless committed an unfair labour practice under the then equivalent of the present s. 11(1)(c) of the *Act*. The decision was upheld on judicial review by the Supreme Court of Canada at (1956), 56 CLLC 15,264 (S.C.C.).

In *Retail Clerks Union, Local 401 v. Independent Trucking Limited*, [1978], 1 C.L.R.B.R. 541, LRB File No. 549-77, this Board considered the issue of a conflict between a term of a collective bargaining agreement and a provision of the *Act*. The Board held, at 544, that to the extent that there was a conflict, the collective agreement was invalid.

In *United Steelworkers of America, Local 4728 v. Willock Industries Ltd.*, [1980] May Sask. Labour Rep. 72, LRB File Nos. 315-79 to 317-79 & 001-80 to 003-80, the collective agreement between the parties provided that the union committee to deal with grievances would be composed of regular employees of the company. The local union president, who had been terminated by the employer, had retained his union office and was still a member of its grievance committee. The employer refused to allow him to attend grievance meetings. In finding the employer guilty of an unfair labour practice under s. 11(1)(d) of the *Act*, the Board reiterated the paramountcy of the *Act* where there is an apparent conflict with the collective agreement.

In a case with similar facts, *National Automobile Aerospace and Agricultural Implement Workers Union of Canada (CAW Canada) Local 1967 v. McDonnell Douglas Canada Limited*, [1988] OLRB Rep. May 498, the Ontario Labour Relations Board came to a similar conclusion, stating at 499-500:

> *As a general proposition, there can be little doubt that a union is entitled to be represented by the individuals of its choice in dealing with an employer. The scheme of collective bargaining set out in the Labour Relations Act contemplates an arm's length relationship between two contracting parties independent of one another ... The nature of both the employer and the union is that they are entities which can only act through individuals or agents. The selection of those individuals must be free from interference by the other party, or the basic structure of the collective bargaining relationship may be undermined. As a result, the Board has made it clear that a refusal by an employer to recognize a union's chosen representatives on a bargaining committee may result in a finding that the employer has failed to bargain in good faith. (See, for example Twin City Laundry Limited, [1965] OLRB Rep. Jan. 527; House of Braemore Upholstered Furniture, [1967] OLRB Rep. Jan. 815; No-Sag Spring Company Journal Publishing Company of Ottawa Limited, [1977] OLRB Rep. June 309; and Plastics CMP Limited, [1982] OLRB Rep. May 726.) In The Journal, supra, the Board also made these observations with respect to section 56 [now section 64]:*

> *This section protects a union from employer interference with not only the formation, selection or administration of a trade union, but also the representation of employees by a trade union. The structure and composition of the union's bargaining team cannot be determined by the employer. A refusal by an employer to negotiate until the composition of the union's bargaining team is altered, therefore, amounts to a breach of the duty to bargain in good faith - the essence of the wrong being the failure to recognize the union, as represented by its properly constituted bargaining team.*

The Board considered the relationship between ss. 11(1)(c) and 11(1)(d) of the *Act* in *Regina Exhibition Association Limited*, *supra*, where a collective agreement had not yet been negotiated and the employer refused to meet with representatives of the union to discuss the termination of an employee. The Board stated, at 224:

> *In our view, Section 11(1)(d) is intended to make clear that an employer cannot insist that discussions with employees who are chosen to represent their fellow employees for the purpose of resolving disputes or handling grievances take place outside working hours, or that wages be deducted for the time taken up by this process. The conduct of the Employer in this case is not therefore, in our opinion, a violation of Section 11(1)(d).*
>
> *It is our view, however, that this conduct may nonetheless have constituted an unfair labour practice under Section 11(1)(c). The general obligation to bargain which is imposed upon an employer by the certification order is not, as counsel acknowledged, limited to the negotiation or administration of a collective agreement. It embraces all aspects of the relationship between an employer and employees which may affect their terms and conditions of employment.*

In that case, no collective agreement was in place, and so, s. 11(1)(d) of the *Act* was inapplicable.

While we do not ascribe any finding of bad faith on the part of the Employer in Mr. Third's refusal to meet with Mr. Meinema, the ramifications of that failure may be subtle but serious: in preventing Mr. Meinema from carrying out the duties of his position the result may be an undermining of the authority of the Union and of the status of Mr. Meinema in the eyes of employees.

We are of the opinion that Mr. Third, acting on behalf of the Employer, was in violation of s. 11(1)(d) of the *Act* in refusing to meet with the Union's grievance committee including Mr. Meinema, a duly appointed representative of the Union. It is no answer for the Employer to say that the formal steps of the grievance procedure in the collective agreement had been duly fulfilled and that it was seeking to

engage in a more informal discussion process rather than to re-open the final step of the grievance procedure. Having made the overture to the Union in indicating that the Employer wanted to discuss the grievances further, and having obtained the response of the Union that it was agreeable to doing so, the Employer could not then seek to dictate who the Union's representatives in that discussion would be.

This is not to say that a party can unreasonably insist upon meetings and discussions for an illegitimate purpose under the guise of negotiating for settlement of grievances, but this was certainly not the situation in the present case. The Union in this case had every right to accept the Employer's offer of further negotiation free of any condition as to who its representatives could or could not be.

However, we were pleased to hear that, since this application was filed, Mr. Third has apparently resolved his differences with Mr. Meinema and negotiation for settlement of the grievances has continued. Accordingly, a simple cease and desist order shall issue.

TREVOR SARANCHUK, Applicant and UNITED STEELWORKERS OF AMERICA, Union and CAPITAL PONTIAC BUICK CADILLAC GMC LTD., Employer

LRB File No. 152-98; December 16, 1998
Chairperson, Gwen Gray; Members: Gloria Cymbalisty and Gordon Hamilton

For the Applicant: Trevor Saranchuk
For the Union: Angela Zborosky
For the Employer: Ray Lunn

Decertification - Interference - Applicant's rationale for applying for rescission is plausible - Board declines to draw an inference of employer interference.

Decertification - Interference - Board finds no suggestion that applicant's optimism regarding ability to retain employment benefits following rescission encouraged by employer - Fact that employer provided list of employees to applicant on applicant's request also not sufficient in this case to show employer interference.

Decertification - Practice and procedure - Board orders vote where evidence of majority support filed with application and no evidence on which to justify dismissal of application under s. 9 of *The Trade Union Act*.

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

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: Trevor Saranchuk applied during the open period to rescind the certification Order issued by the Board to the United Steelworkers of America ("USWA"). USWA was certified by the Board on August 4, 1992. USWA and Capital Pontiac Buick Cadillac GMC Ltd. ("Capital") are parties to a collective agreement with effective dates from September 1, 1995 to August 31, 1999 and the application for rescission was made on July 30, 1998.

This is the second rescission application made by Mr. Saranchuk. The first application was dismissed by the Board in Reasons for Decision issued April 14, 1998 ([1998] Sask. L.R.B.R. 286) on the basis that Mr. Saranchuk did not file majority support with the application.

Facts

Angela Zborosky, counsel for USWA, cross-examined Mr. Saranchuk on his application. Mr. Saranchuk testified that he was hired by Capital in November, 1996 and is the most junior painter in the autobody shop. Counsel attempted to have Mr. Saranchuk acknowledge that he was assigned more work than another more senior employee contrary to the collective agreement provision requiring the assignment of work by seniority. However, Mr. Saranchuk explained that the more senior employee performed different work than Mr. Saranchuk. Mr. Saranchuk testified that he typically received 200 or more hours of work a month. His income for the past year was approximately $35,000 gross.

Mr. Saranchuk was not aware that the workplace was unionized until his job interview. At that time, he had no feelings for or against USWA. He indicated that he was motivated to bring both applications for rescission because he was not happy with USWA. He testified that he did not feel that he received enough from USWA compared to what he was required to pay each year in union dues.

Mr. Saranchuk was familiar with the collective agreement and the provisions it made for unjust dismissal, grievances, wages and fair assignment of work, paid sick leave and other benefits that are over and above the conditions required by *The Labour Standards Act*, R.S.S. 1978, c. L-1. Mr. Saranchuk acknowledged that there were a number of benefits contained in the collective agreement that may not continue if the workplace is decertified. Nevertheless, he was not personally worried about losing work or losing the benefits in question. Mr. Saranchuk indicated that he did not tell any employees who signed the cards in support of his application for rescission that they would keep their current wage rates and benefits.

With respect to this application and his earlier application, Mr. Saranchuk testified that a co-worker had explained the "open period" for applying for rescission. The co-worker had brought a rescission application some years earlier. Mr. Saranchuk then phoned a couple of lawyers in the telephone book who directed him to Mr. LeBlanc. Mr. LeBlanc represented Mr. Saranchuk on the first application and assisted Mr. Saranchuk in filing the second application. He testified that he had no prior relationship with Mr. LeBlanc and was unaware until shortly before this hearing that Mr. LeBlanc's law firm had represented Capital on a previous application.

In the previous application for rescission, Mr. Saranchuk was personally responsible for the costs of legal representation which amounted to something over $200. This account was still owing and Mr. Saranchuk indicated that he was hopeful that other employees would assist him in paying the legal account once the application was successful.

Mr. Saranchuk testified that he was assisted in his attempt to obtain signatures for the rescission application by Budd Ryan, a mechanic in the service area. Mr. Saranchuk and Mr. Ryan approached employees in the parking area behind Capital's place of business after work hours and on public property. Mr. Saranchuk did not discuss the matter with anyone during work hours and he was not aware if management knew that a rescission campaign had commenced. Mr. Saranchuk thought that he was required to conduct the campaign away from Capital's property and on off-work time. He concluded this from reading the decertification package from the Labour Relations Board.

He did, however, obtain a list of names, addresses and phone numbers from Ray Lunn, Comptroller for Capital, on both rescission campaigns. Mr. Saranchuk testified that he asked Mr. Lunn to provide him with a list of names of employees. He was not asked to provide Mr. Lunn with a reason for requesting such a list.

Mr. Lunn explained under oath to the Board that Capital was obligated under the terms of the collective agreement to maintain a seniority list. During the last few months, USWA had not designated an employee to act as shop steward. In these circumstances, Mr. Lunn thought it was appropriate to provide the seniority list to any employee who requested it. The list contained the names, addresses, phone numbers and date of hire of employees. Mr. Lunn testified that he provided the list to both Mr. Saranchuk and Mr. Ryan. He acknowledged that he suspected the list was being used for the purpose of a rescission application when Mr. Saranchuk made his last request for it. He denied, however, having any direct knowledge of such a campaign.

Relevant Statutory Provisions

The Trade Union Act, R.S.S. 1978, c. T-17 (the *Act*) provisions dealing with rescission applications are 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*
> >
> > ...
>
> *notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court.*
>
> *6(1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board may, in its discretion, subject to subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.*
>
> *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.*

Arguments

Ms. Zborosky referred the Board to several previous decisions of the Board dealing with employer interference in applications for rescission. In particular, counsel referred to *Wells v. Remai Investment Corporation and United Food and Commercial Workers, Local 1400*, [1996] Sask. L.R.B.R. 194, LRB File No. 305-95; *Mandziak v. Remai Investment Co. Ltd. and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1987] Dec. Sask. Labour Rep. 35, LRB File 162-87; *Cook v. Shelter Industries Inc. and International Woodworkers of America, Local 1-184*, [1981] Mar. Sask. Labour Rep. 34, LRB File No. 368-80; *Pfefferle v. Ace Masonry Contractors Ltd. and Bricklayers and Masons International Union of America, Local 3,* [1984] Aug. Sask. Labour Rep. 45, LRB File No. 225-84; *Poberznek v. United Masonry Construction Ltd. and International Brotherhood of Bricklayers and Allied Craftsmen, Local Union #3*, [1984] Oct. Sask. Labour Rep. 35, LRB File No. 245-84; and

Wilson v. Remai Investment Co. Ltd. and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, [1990] Fall Sask. Labour Rep. 97, LRB File No. 088-90.

Counsel argued that the Board should dismiss Mr. Saranchuk's application because it has been tainted by employer influence. In the alternative, counsel asked that the Board direct a vote among the employees in the bargaining unit.

Counsel argued that employer influence could be inferred from the following evidence: (1) Mr. Saranchuk's lack of a plausible explanation for bringing the rescission applications; (2) the rehearsed nature of Mr. Saranchuk's evidence; (3) Mr. Saranchuk's lack of fear of losing work or benefits as a result of the rescission application; (4) the lack of knowledge shown by Mr. Saranchuk of USWA's dues structure; (6) the provision of employee lists by Capital containing more information than was requested by Mr. Saranchuk; and (7) the lack of a coherent explanation of why other employees support the rescission application. Counsel argued that employer interference is often subtle and difficult to detect by direct means. Counsel noted that the employees have been dealing with the uncertainty of union representation for some months. The first application was dismissed in April of 1998 for lack of support. Counsel asserts that Capital would have been aware of Mr. Saranchuk's organizing efforts, if not on the first round, at least with respect to the second attempt.

Counsel also noted Mr. Saranchuk's testimony with respect to the legal costs incurred on the first application. She asked the Board to conclude that Mr. Saranchuk's evidence with respect to the costs lacked credibility.

Mr. Lunn, for Capital, explained to the Board his role in providing Mr. Saranchuk copies of the seniority lists. He testified that he was obligated to maintain the list under the seniority provisions contained in the collective agreement. Because there was no elected shop steward, he interpreted the collective agreement as requiring him to provide the list to any member of USWA who requested it. He did not ask employees why they were requesting the list.

Mr. Saranchuk rested his arguments on the material filed with the Board in his application.

Analysis

In this instance, the Board finds that there is no direct evidence of employer interference in the making of the rescission application. The question then is whether or not there is any evidence from which the Board can draw an inference of employer interference. In three cases cited by counsel, *Ace Masonry Contractors Ltd., supra, United Masonry Construction Ltd., supra*, and *Remai Investment Co. Ltd. (Wilson), supra*, the Board reviewed the explanations given by applicants for rescission and drew inferences from that evidence, or lack thereof, relating to employer interference. In the *Ace Masonry Contractors Ltd.* case, the Board concluded as follows, at 46:

> *Although the applicant denies having discussed this application with the co-owners and the members of their family, the Board finds it difficult to accept that denial at face value since all of the employees work fairly closely with one another. Furthermore, the Board is not satisfied that the applicant has an honest belief, well founded or otherwise, that the union has failed to adequately carry out its responsibilities as his bargaining agent. He attempted but failed to advance any credible rationale for applying for rescission, and that, coupled with all of the other circumstances, leads the majority of the Board to conclude that the application has been made in whole or in part as a result of influence of the employer.*

The "other circumstances" alluded to by the Board in the above quotation included the presence of the owner's son, son-in-law and nephew in the bargaining unit.

In *United Masonry Construction Ltd., supra*, the Board reviewed the applicant's testimony and drew the following conclusions, at 36:

> *In the Board's opinion, the Applicant gave no plausible explanation for wishing to have the Certification Order rescinded. He testified that he was applying because "everyone else is", although according to him he had spoken to no one else about the matter except a friend who works in Alberta.*
>
> *According to the Applicant, he had made no inquiries about the state of negotiations between the employer and the union, he had no information about his future job prospects, and he had experienced no shortage of work except during the normal winter slow down in January. He denied discussing the application with his brother, with anyone in management, with any representative of the Union, or with any other tradesmen in Saskatchewan. Although he had no reason to believe that he would be laid off, he expressed concern that there would be a shortage of work because existing wage rates were too high.*

> *According to the Applicant, it was simply coincidence and good luck that he first consulted a lawyer during the 30 - 60 day "open period" for applying for rescission.*
>
> . . .
>
> *. . . [The Board] cannot accept the proposition that the Applicant acting spontaneously, alone, and at his own expense, with no knowledge of industrial relations between the employer and the union, and no idea of how the application might affect him personally, took it upon himself to retain a lawyer to apply for rescission at a time that happened to coincide with the available open period.*
>
> *Employer influence is rarely overt. Under the circumstances, the only inference the Board can draw is that this application was made in whole or in part on the advice or as a result of influence by the employer.*

In *Remai Investment Co. Ltd. (Wilson), supra*, the applicant's lack of a coherent rationale for opposing the union in the workplace was one of the factors leading the Board to conclude that the employer had influenced or interfered with the rescission application.

In the present case, Mr. Saranchuk rejects USWA because it costs him money and he is willing to forego the benefits of the collective agreement for himself and other employees in order to save the dues money. He is confident in his own abilities to keep his job and his current rate of pay and benefits. Although Mr. Saranchuk was unaware of the actual percentage used to determine his union dues, he was aware of the annual amount that he paid and the fact that union dues were calculated as a percentage of his income, not at a flat monthly rate.

The Board concludes that Mr. Saranchuk is somewhat typical of younger employees who are concerned more with immediate financial gain than they are with more long term needs such as health benefits, pensions and the like. Nevertheless, Mr. Saranchuk's explanation is a plausible one. As a result, the Board will not draw an inference of employer interference in this situation.

The Board did not find that Mr. Saranchuk's evidence was rehearsed in the sense that he had carefully anticipated and prepared answers to questions posed by counsel for the Union. He did read his opening remarks to the Board which we assume he had assistance in preparing from Mr. LeBlanc, whom he acknowledged he had talked to the day before the hearing. We are not convinced that this fact points to employer influence or interference when it is explained by Mr. Saranchuk's experience with the rescission process and his contact with an experienced labour lawyer.

There is no doubt that Mr. Saranchuk was confident in his ability to retain his job and his pay and benefits following the rescission application, even though he will not retain the benefit of the collective agreement if the application is successful. At that point, the terms and conditions of employment for the employees revert to the common law and to the minimum standards set out in *The Labour Standards Act*. There is no guarantee that the terms and conditions of work will remain the same, improve or worsen for employees once the certification Order is rescinded. In this regard, however, although Mr. Saranchuk may be overly optimistic in his own ability to retain the benefits he now enjoys, there is no suggestion in the evidence that his optimism has been encouraged or influenced by Capital.

USWA was also concerned that Capital influenced or interfered in the making of this application by providing Mr. Saranchuk with the list of employees, including occupations, addresses and telephone numbers. Mr. Saranchuk testified that he simply asked for a list without explaining why he needed a list of employees. Mr. Lunn testified that he thought it was proper to provide employees with the seniority list when there was no shop steward in the workplace. Mr. Lunn acknowledged, however, that he suspected the list was being used by Mr. Saranchuk to obtain support for the rescission application although he denied having any direct knowledge of the application. Mr. Saranchuk testified that the list was not totally up-to-date, in any event, as it contained the names of employees whom he knew had resigned their employment.

The Board does not conclude from this evidence that Capital improperly influenced or interfered with the application. Normally, the seniority list would be posted in the workplace and would be available on a bulletin board for employees to copy. Mr. Lunn concluded that, in the absence of a shop steward, he was required to provide the information to USWA members who requested it. In the absence of a shop steward, Mr. Lunn's conclusion does not appear to be unreasonable. There is no evidence that he was selective in choosing which employees he would assist by providing them with the seniority list. We would assume that USWA, on request, would be provided with the same information.

Mr. Saranchuk did not explain why other employees do not support USWA. He intimated that he did not have difficulty obtaining signatures supporting his application, but he obtained them without discussing the matter in detail with employees. He avoided contacting employees whom he knew from the last application supported USWA. The cause of the discontentment with USWA is unknown. The Board is not convinced that Mr. Saranchuk is unaware of the reasons for the movement to expel

USWA; he has organized two attempts to decertify USWA and has surely spoken to employees at some length about the pros and cons of belonging to USWA. There may be a variety of reasons why Mr. Saranchuk did not wish to disclose those discussions or reasons with the Board. However, this is not sufficient in our view to taint the application with an inference of employer interference or influence.

In conclusion, the Board finds that there is no evidence on which it can conclude that the application was influenced or interfered with by Capital so as to justify its dismissal under s. 9 of the *Act*. Mr. Saranchuk has filed majority support with the application. As a result, the Board will order a vote among employees in the bargaining unit who were employed on the date the application was filed with the Board and who remain employed on the date of the vote.

ALLAN WIONZEK, Applicant and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2067, Union and SASKPOWER, Employer

LRB File No. 101-98; December 16, 1998
Chairperson, Gwen Gray; Members: Mike Geravelis and Gord Hamilton

For the Applicant: Allan Wionzek
For the Union: Patrick Therrien
For the Employer: N/A

Duty of fair representation - Contract administration - Board finds that union conducted proper and fair investigation and assessment of grievance before deciding not to proceed - Union did not breach duty of fair representation.

Duty of fair representation - Scope of duty - Duty does not oblige union to grieve all matters brought to its attention by its members - Decision not to pursue grievance may only be attacked if arbitrary, discriminatory or in bad faith.

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

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: Allan Wionzek filed an application with the Board alleging that the International Brotherhood of Electrical Workers, Local 2067 (the "Union") failed to fairly represent him in a grievance against SaskPower. Mr. Wionzek works at SaskPower as a special equipment operator. He holds a Grade 12 certificate and an electronic communication technician certificate from the Saskatchewan Institute for Applied Science and Technology ("SIAST"). In early 1998, Mr. Wionzek applied for a position called metering technician. The job posting set the qualifications as follows:

> *Grade XII English, Algebra, Geometry-Trigonometry, and Physics. Diploma in Electrical, Electronic, or Instrumentation Engineering Technology from a recognized institute; or possess the Province of Saskatchewan or Interprovincial Journeyman Electrician Certificate and two years' post-Journeyman experience; or possess the SaskPower Journeyman Lineman Certificate. Journeymen linemen must have the Metering Conversancy Standing and two years' combined experience in any of the following: Assistant Service & Maintenance Operator, Service & Maintenance Operator, Assistant District Operator, District Operator, or Charge District Operator.*

It is clear from the evidence that Mr. Wionzek did not possess the qualifications set out in the job posting. SaskPower determined that there were no qualified in-house candidates and advertised the position in the *Leader-Post.* In the advertisement, the job qualifications were stated somewhat more broadly than what were set out in the internal job posting. The advertisement stated the job qualifications as follows:

> *Diploma in Electrical, Electronic or instrumentation Engineering Technology from a recognized institute; or Province of Saskatchewan or Interprovincial Journeyman Electrician Certificate and two years' post-Journeyman experience.*
>
> *A suitable combination of relevant education and experience may also be considered.*

After reading the advertisement, Mr. Wionzek approached his shop steward, Kirby Sanden, and asked the Union to grieve Mr. Wionzek's unsuccessful bid. Mr. Wionzek claimed that his certificate in electronic communication technology qualified him for the metering technician position because it gave him a "suitable combination of relevant education and experience" as required by the SaskPower advertisement.

Mr. Sanden advised Mr. Wionzek that no grievance could be filed against SaskPower because Mr. Wionzek did not possess the qualifications set out in the job posting. On April 5, 1998, Mr. Wionzek wrote the Union with his complaint and requested the reasons for SaskPower's refusal to appoint him to the position.

Gord Laverdiere, Assistant Business Agent for the Union, wrote SaskPower asking for the reasons for Mr. Wionzek's unsuccessful bid. Mr. Whitehead, Supervisor of Administration for SaskPower, responded by indicating that Mr. Wionzek's certificate in electronic communications conferred only a "technician" status, as opposed to the job qualification of diploma in electrical, electronic or instrumentation engineering technology which confers "technologist" status.

Mr. Laverdiere testified that he investigated Mr. Wionzek's grievance by obtaining the course outline for the technician program and by speaking to a SIAST instructor in that program. He also discussed the matter with the Union's grievance committee. The committee concluded that the technician program did not meet the qualifications set out in the job posting and there was no viable grievance as a result. Garth Ormiston, Business Manager, was assigned to discuss the Union's decision with Mr. Wionzek.

Mr. Laverdiere explained that the Union objected to SaskPower's reference in its job advertisement to "a suitable combination of relevant education and experience" and it advised SaskPower that if a candidate was hired without the posted qualifications, it would grieve the appointment. Since this occurrence, Mr. Laverdiere testified that SaskPower no longer refers to "a suitable combination of relevant education and experience" in its job advertisements.

Mr. Laverdiere and Patrick Therrien, both officers of the Union and members of the grievance committee at the relevant time, outlined the considerations given by the Union to filing a grievance and testified that Mr. Wionzek had been treated in the same manner as any other Union member who may have a grievance against SaskPower. Mr. Laverdiere testified that the Union did not have time to take grievances that it did not view as likely to be successful. Mr. Therrien explained that the Union must consider its duty to fairly represent employees, along with its view of the likely outcome of the grievance, the harm to labour relations if it were to file frivolous grievances and the cost of filing such grievances. He indicated that if the technician program was to be accepted by SaskPower as an appropriate job qualification that change would need to come about through discussions involving SaskPower, SIAST and the Union. Mr. Therrien testified that SaskPower has an entire department devoted to the setting of job qualifications and job training.

Mr. Wionzek made reference to a letter of understanding negotiated between the Union and SaskPower which is entitled "Conditions for the Waiver of Educational Requirements" and he claimed to be entitled to rely on the letter of understanding to obtain the position of metering technician without the required certificate so long as he did obtain the certificate within the two year time period set down in the letter of understanding.

Mr. Therrien explained in evidence that the letter of understanding permitted employees who possess the required trade certificates for a posted position, but who lack the general educational requirements such as Grade 12, to upgrade their educational status after successfully bidding on a posted position.

Gus Naqvi, Acting Program Head of the Electronic Communication Technician Program at SIAST, testified that most graduates of this program obtain jobs in the communication end of the electronics business. He did not know of any graduates, other than Mr. Wionzek, who worked for SaskPower. He was unable to say with certainty that graduates of this program would be able to perform the functions

of metering technician although he was certain that the general courses taught in basic electronics would be applicable to the metering technician position.

Relevant Statutory Provisions

The Board must consider s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), 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.*

Analysis

Section 25.1 of the *Act* requires the Union to act in a manner with respect to the grievance of an employee that is not arbitrary, discriminatory or in bad faith. In *Canadian Merchant Services Guild v. Gagnon*, [1984] 84 C.L.L.C. 14,043 (S.C.C.) the Supreme Court of Canada discussed the meaning of these terms as follows, 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 factors such as race or 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 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. (Rayonier Canada (B.C.) Ltd., (1975) 2 CLRBR 196 at 201-202).*

In the present case, there is no suggestion on the evidence that the Union was motivated by bad faith or that it treated Mr. Wionzek in a discriminatory fashion, favouring others over him for unjustified reasons. Mr. Wionzek's claim then falls to be evaluated under the heading of arbitrary treatment.

The Board finds that the Union conducted a proper investigation of Mr. Wionzek's grievance. Mr. Laverdiere investigated Mr. Wionzek's claim that his technician's certificate constituted equivalent

education and experience. He reported his findings to the grievance committee. Mr. Ormiston, in particular, was experienced with the requirements of the posted position and the collective agreement. After investigation and discussion, the committee concluded that the electronic communication technician program was not equivalent to the qualifications listed in the job posting. Based on this review of the merits of Mr. Wionzek's grievance, the committee decided not to proceed with a grievance on Mr. Wionzek's complaint.

In our view, the process undertaken by the Union was not perfunctory, unreasonable or lacking in thoughtfulness. The matter was explored in detail and a fair assessment of the grievance was made. The duty of fair representation set out in s. 25.1 of the *Act* does not oblige the Union to grieve all matters brought to its attention by its members. In addition, the Union's decision cannot be overturned by the Board simply because the employee is unhappy with the outcome. It can only be attacked if the manner in which the decision was reached violated one of the standards set out above.

In these circumstances, we find that the Union has not violated s. 25.1 of the *Act* and the application is hereby dismissed.

GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 75M, Applicant and STERLING NEWSPAPERS GROUP, A DIVISION OF HOLLINGER INC., Respondent

LRB File No. 174-98; December 24, 1998
Chairperson, Gwen Gray; Members: Hugh Wagner and Mike Carr

For the Applicant: Drew Plaxton
For the Respondent: Dennis Ball, Q.C.

Bargaining unit - Appropriate bargaining unit - Board policy - Board lists four situations where under-inclusive units will not be considered appropriate - Board then certifies under-inclusive unit in order to ensure that right of employees to organize is given primacy.

Bargaining unit - Appropriate bargaining unit - Community of interest - Board finds that press room employees are skilled and discrete group who are not regularly interchanged with employees in other departments and who are a viable unit in an industry which has been historically difficult to organize - Board finds press room employees are appropriate bargaining unit.

Bargaining unit - Appropriate bargaining unit - Board policy - Board distinguishes between situation where second union attempts to organize employees of an employer with an "all employee" certification Order in place and situation where second union attempts to organize employees of an employer with an under-inclusive certification Order in place - Board distinguishes situation before it from recent middle management decisions.

The Trade Union Act, ss. 2(a), 5(a), 5(b) and 5(c).

REASONS FOR DECISION

Background

Gwen Gray, Chairperson: On September 9, 1998, the Graphic Communications International Union, Local 75M ("GCIU") filed a certification application for all employees employed in the press room at the Leader-Post, a daily newspaper owned by Sterling Newspapers Group, a Division of Hollinger Inc. (the "Employer") in Regina. The Employer opposed the application on the basis that the unit applied for was not an appropriate bargaining unit.

On September 25, 1998, the Board received a copy of a letter addressed to GCIU from a group identified as "the pressmen - Leader-Post Regina." The letter indicated that it was copied to Bob Calvert, Vice President & Distributor of Sterling Newspaper Group, and to Greg McLean, General Manager of the Leader Post. The letter requested GCIU to abandon its attempt to represent the pressmen at the Employer. After receiving a copy of the letter, the Board took the extra step of posting a notice of hearing at the Employer's premises to advise the interested employees of the time and date of the hearing. However, no employees attended at the hearing to oppose the application.

At the outset of the hearing, GCIU and the Employer agreed to add the names of Kristine Jackson and Shana Stinson to the statement of employment.

Facts

The central issue in this application is whether the employees in the press room, who represent a small portion of the total workforce at the Employer, constitute an appropriate unit for the purpose of bargaining collectively with the Employer.

GCIU originated from five different craft unions in the printing trades: photoengravers, pressmen, stereotypers and electrotypers, bookbinders and lithographers. It currently represents employees at 35 newspapers in Canada under 56 separate collective agreements. The size of GCIU's bargaining units varies between 4 to over 200 employees. It tends to organize the production workers in newspapers while other unions, such as The Newspaper Guild ("TNG"), tend to represent the editorial and office employees, although they all apparently cross lines into each others jurisdictional turf. There are some "wall to wall" bargaining units within the newspaper industry such as the Communication Energy and Paperworkers bargaining unit at the Vancouver Sun.

Within the production end of the newspaper business, GCIU represents various configurations of employees. For instance, at the Toronto Star, GCIU holds separate certifications for mailers, platemakers, pressroom and paper handling, and engravers. In some locations, its multiple units may be represented by more than one local of GCIU. The representation patterns flow from the organizing that was carried out by the older craft unions, which eventually merged to form GCIU.

The Leader-Post employs approximately 240 full-time employees who work in different departments, including editorial, administration, pre-press, circulation, mailroom, advertising, pressroom, systems and maintenance. All employees work out of the same building. None of them are currently represented by a union, although TNG did apply to be certified for an "all employee" unit in 1996. TNG has recently made application to the Board seeking to represent editorial staff of the Employer.

Board records indicated that there have been a number of applications for certification filed with respect to employees at the Employer going back to the 1950's. The Typographical Union held a certification for its trade from February, 1951 to March 7, 1975, at which time a rescission application was granted. The Regina Newspaper Guild held a certification for the circulation department from June 9, 1981 to July 7, 1982.

Arguments

From GCIU'S point of view, employees in the pressroom have similar working conditions and craft skills. They do not intermingle with other groups of employees within a newspaper and they work in close physical proximity with other pressmen. According to GCIU, the pressmen are a "discrete" unit of skilled tradepersons.

Mr. Plaxton, counsel for GCIU, referred to *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Canadian Pioneer Management Group et al.*, [1978] May Sask. Labour Rep. 37, LRB File No. 661-77, for the proposition that the Board is entitled to certify "an" appropriate bargaining unit, as opposed to "the" appropriate bargaining unit. Counsel argued that where there is a strong community of interest, the unit is prima facie appropriate for collective bargaining.

Counsel also referred to *Hotel Employees and Restaurant Employees International Union, Local 676 v. Gene's Ltd.*, [1984] July Sask. Labour Rep. 37, LRB File No. 495-83, for the proposition that the onus is on the employer to establish that fragmentation of bargaining into more than one group will impair the collective bargaining process. Counsel pointed out that there was no evidence demonstrating that the proposed unit would result in an impaired ability to bargain collectively.

On the question of burden of proof, counsel also referred to the Board's decision in *University of Saskatchewan Faculty Association v. University of Saskatchewan*, [1995] 1st Quarter Sask. Labour Rep. 201, LRB File No. 127-94, at 209, where the Board placed the onus of proving additional facts relating to the existence of employees excluded from the bargaining unit proposed by the association on the employer. GCIU also relied on the Board's discussion in this case of the principles that assist in determining if a proposed bargaining unit is appropriate for collective bargaining. Counsel concluded from this case that the test for "appropriateness" under *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), is the viability of the bargaining unit.

Counsel also relied on *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. O.K. Economy Stores Ltd.*, [1990] Fall Sask. Labour Rep. 64, LRB File No. 264-89, which set out the factors for determining the appropriateness of a bargaining unit as including the following: whether the proposed unit will be able to carry on a viable collective bargaining relationship with the employer; the community of interest shared by the employees in the proposed unit; organizational difficulties in particular industries; the promotion of industrial stability; the wishes or agreement of the parties; the organizational structure of the employer and the effect that the proposed unit will have upon the employer's operations; and the historical patterns of organization in the industry.

Counsel for GCIU also referred to the following decisions where smaller bargaining units have been accepted in the printing and newspaper industry: *The Flyer Force, A Division of Southam Inc. v. International Typographical Union, Local No. 70 (Vancouver Mailers' Union)*, [1987] B.C.L.R.B.R. No. 50/87; *Graphic Communications International Union v. Southam Inc.*, 94 CLLC 16,034 (Alta. LRB); *The Ottawa Citizen, A Division of Southam Inc. and Ottawa Newspaper Guild, Local 205*, [1987] 18 CLRBR (NS) 104 (Ont. LRB); *Graphic Communications International Union, Local 34M v. Southam, Inc.*, unreported, Alberta LRB File No. CR-02427.

The Union argued that the Board should give primacy at this stage to the rights of the employees to organize in a trade union of their own choosing, which right is enshrined in s. 3 of the *Act*.

From the Employer's point of view, employees in the pressroom are not dissimilar from employees in the pre-press area or the mail room. As a stand alone unit, the press room employees have the ability to shut down the entire newspaper operation by shutting down the press. Relying on the experiences in other jurisdictions, Mr. Ball, Q.C., counsel for the Employer, argued that a bargaining unit comprising

only employees in the pressroom would be inappropriate. In particular, counsel argued against the establishment of departmental bargaining units that have the ability to disrupt the work of the entire enterprise during a collective bargaining dispute. Counsel noted that Labour Relations Boards in other provinces have taken steps to consolidate existing bargaining structures in the newspaper industry into one bargaining unit.

Counsel for the Employer cited *Hotel Employees & Restaurant Employees Union, Local 767 v. Regina Exhibition Association Ltd.*, [1986] Oct. Sask. Labour Rep. 43, LRB File No. 015-86, for the proposition that the Board will not design bargaining units based on the extent of the union's organizing. Such units must have a rational and defensible boundary. Counsel pointed out the relationship between s. 3 and ss. 5(a) and (b) of the *Act* and the conflicts that can arise in attempting to achieve both the goal of respecting employee choice and the goal of designing rational, functional bargaining units. Counsel also pointed out the Board's preference for large bargaining units and cited *PSAC v. Casino Regina*, [1996] Sask. L.R.B.R. 454, LRB File No. 068-96, and the cases cited therein in support of this preference.

Counsel also referred the Board to newspaper cases in other jurisdictions where the craft model of certification has been rejected in favour of an "all employee" model. In *The Spectator, A Division of Southam Inc.*, [1981] OLRB Rep. Aug. 1177, the Ontario Board referred to the decision of the National Labour Relations Board in *Leaf-Chronical Company* (1979), 244 NLRB 1104; 102 LRRM 1306. In that decision, the National Board concluded that two bargaining units were appropriate, one being a comprehensive unit including all mechanical department employees of the newspaper and the second being the newsroom and editorial employees. In *The Spectator* decision, *supra*, the Ontario Board gave notice that it may not in the future permit departmental, non-craft units in the printing and newspaper sector.

Counsel also referred the Board to *The Windsor Star, A Division of Southam Inc.*, [1995] OLRB Rep. May 714 where, on the application of the trade union, the Ontario Board combined a craft bargaining unit with a non-craft bargaining unit, indicating the trend in Ontario to move away from craft units and fragmented bargaining in the newspaper industry.

In this case, counsel argued that the proposed bargaining unit would result either in undue fragmentation of the bargaining units and bargaining agents, or in other employees being confined to representation by GCIU in future attempts to organize. This second consequence flows, according to the Employer, from the Board's recent decisions dealing with middle management bargaining units, including *Saskatchewan Government Employees' Union v. Saskatchewan Liquor and Gaming Authority*; *Saskatchewan Liquor Store Managers Association v. Saskatchewan Liquor and Gaming Authority*, [1997] Sask. L.R.B.R. 836; [1998] Sask. L.R.B.R. 512; LRB File Nos. 037-95 & 349-96. Counsel argued that once there is a union in a workplace, unless unrepresented employees can demonstrate an inherent conflict of interest with the in-scope employees, the unrepresented employees will also be represented by the original union.

On the question of undue fragmentation, counsel referred the Board to *Young Women's Christian Association v. Canadian Union of Public Employees, Local 1902-08 et al.* (1992), 17 C.L.R.B.R. (2d) 156; [1992] 4th Quarter Sask. Labour Rep. 71, LRB File No. 123-92 for the proposition that a determination of an appropriate bargaining unit entails a balancing of the community of interest shared by employees in the proposed unit against the industrial instability caused by excessive fragmentation of bargaining units. Counsel also noted the Board's policy of preferring large, inclusive bargaining units and referred the Board to *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. O.K. Economy Stores Ltd.*, [1990] Fall Sask. Labour Rep. 64, LRB File No. 264-89.

The Employer also referred the Board to *Pacific Press, A Division of Southam Inc. and Graphic Communications International Union Local 25-C et al.* (1997), 32 C.L.R.B.R. (2d) 256; BCLRB No. B146/96 and BCLRB No. B292/96 as an example of the long term problems of certifying small craft or departmental units in the newspaper industry. In the *Southam* case, *supra*, the British Columbia Labour Relations Board exercised its power to consolidate bargaining units to consolidate seven bargaining units representing 1,400 employees into a single unit.

Analysis

The Board considered the evidence and arguments of the parties and has concluded that a bargaining unit composed of all employees employed in the press room is an appropriate unit for the purpose of bargaining collectively. There are a number of factors that we rely on to reach this conclusion.

First, in assessing the viability of the proposed bargaining unit, we note that the employees are a discrete group who possess special skills and who are distinguishable from other employees in the newspaper. There is little interchange between the press room employees and other departments of the newspaper. Historically, press room employees have enjoyed a craft status. The unit is viable in terms of its ability to engage in effective collective bargaining with the Employer because the members of the bargaining unit control the printing process.

Second, although the Board generally prefers all employee bargaining units over small craft or departmental units, the Board will maintain a flexible approach to the establishment of bargaining units in industries which have proven difficult to organize. In this instance, an all employee bargaining unit was applied for by TNG in 1996 and was unsuccessful. The Employer has operated without any union representation since 1982. The longest period of union representation at the Employer was the Regina Typographical Union, Local 657 who held a certification from August 8, 1950 to March 7, 1975.

The Board is faced in this instance with choosing between the rights of employees to organize and the need for stable collective bargaining structures that will endure the test of time. It is clear from the decisions in other jurisdictions that the "most" appropriate bargaining units in this industry consist either of wall-to-wall units or two bargaining units, one consisting of the front end employees, including office, administration and editorial, and one consisting of the production workers, including pressmen. Such a configuration would likely result in stable and effective labour relations, in the sense that the Union would have a significant constituency within the workplace to bargain effectively with the Employer. The ultimate viability of smaller, less inclusive, bargaining units is, in our experience, and certainly in the past experience with this Employer, more tenuous over the long run. The proposed unit can be described in this sense as an under-inclusive unit.

The Board faced a similar dilemma in *Hotel Employees & Restaurant Employees Union Local 767 v. Regina Exhibition Association Ltd.*, [1986] Oct. Sask. Labour Rep. 43, LRB File No. 015-86, where the applicant, which had previously unsuccessfully applied to represent all employees in the food services department of the employer, applied a second time to represent only the concessions department of the food services department. On the second application, the Board held as follows, at 45:

> *The fundamental purpose of The Trade Union Act is to recognize and protect the right of employees to bargain collectively through a trade union of their choice, and an unbending policy in favour of larger units may not always be appropriate in industries*

> *where trade union representation is struggling to establish itself. It would make little sense for the Board to require optimum long term bargaining structures if the immediate effect is to completely prevent the organization of employees. In effect, the Board is compelled to choose between two competing policy objectives; the policy of facilitating collective bargaining, and the policy of nurturing industrial stability by avoiding a multiplicity of bargaining units. Where the Board is of the view that an all employee unit is beyond the organizational reach of the employees it is willing to relax its preference for all employee units and to approve a smaller unit.*
>
> *This does not mean, however, that the Board will certify proposed bargaining units based merely on the extent of organizing. Every unit must be viable for collective bargaining purposes and be one around which a rational and defensible boundary can be drawn.*

In the *Regina Exhibition Association Ltd.* case, *supra*, the Board found that the smaller bargaining unit comprised of concession workers was an appropriate bargaining unit.

Bargaining units that may be considered to be under-inclusive in their scope have been found by the Board to constitute appropriate units in a variety of sectors including the service sector (see *Regina Exhibition Association Ltd.*, *supra* and *Retail, Wholesale and Department Store Union v. Nelson Laundries Limited*, [1993] 1st Quarter Sask. Labour Rep. 242, LRB File No. 254-92); casinos (see *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd.*, [1992] 4th Quarter Sask. Labour Rep. 75, LRB File No. 182-92; restaurants (see *Hotel Employees and Restaurant Employees International Union, Local 767 v. Gene's Ltd.*, [1984] July Sask. Labour Rep. 37); financial sector (see *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Canadian Pioneer Management Group*, [1978] May Sask. Labour Rep. 37, LRB File No. 661-77); and non-profit sector (see *Construction and General Workers Union, Local 180 v. Saskatchewan Writers Guild,* [1998] Sask. L.R.B.R. 107, LRB File No. 361-97.

In some situations, however, the Board has refused to certify bargaining units that are composed of fewer employees than the total employee complement in the business. In *Hotel Employees and Restaurant Employees International Union, Local 767 v. Courtyard Inns Ltd.*, [1988] Winter Sask. Labour Rep. 51, LRB File No. 116-88, the Board found that a unit of maintenance employees in a hotel was not an appropriate unit for the following reasons, at 51:

> *. . . the historical pattern of organization of large hotels in Saskatchewan like the Regina Inn indicates that bargaining units significantly larger than the one applied for by the applicant in this case have been considered appropriate. There is no indication*

> *that a larger unit would unreasonably inhibit union organization, and there is no suggestion that maintenance employees possess a particular community of interest that would make it inappropriate to include them in a larger unit. The proposed bargaining unit comprises a numerically insignificant number of employees and the Board has serious doubts about its viability for collective bargaining purposes. The maintenance employees in question are not so highly skilled that they would be difficult to replace or that a withdrawal of their services would put much economic pressure on the employer. Finally, if the unit applied for in this case were appropriate, then other units of comparable size would also be appropriate which would lead to piecemeal certifications, a multiplicity of bargaining units and industrial instability.*

In *Canadian Union of Public Employees, Local 1902-08 v. Young Women's Christian Association et al.*, [1992] 4th Quarter Sask. Labour Rep. 71, LRB File No. 123-92, the Board refused to carve out a unit of daycare workers from an "all employee" bargaining unit. The Board commented as follows, at 73:

> *In determining whether a proposed unit of employees is an appropriate one for the purpose of bargaining collectively, this Board makes a decision which is of unique importance in terms of the implementation of the public policy objectives guiding the institution of collective bargaining. These policy objectives were outlined in a decision of the Ontario Labour Relations Board in International Federation of Professional and Technical Engineers v. Canadian General Electric Co. Ltd., [1979] OLRB Rep. Mar. 169, at 171:*
>
> > *In assessing the suitability of a proposed unit, the Board is generally guided by two counter-balancing concerns. Firstly, having regard to the proposed unit itself, the Board looks to whether the employees involved share a sufficient community of interest to constitute a cohesive group which will be able to bargain effectively together. Secondly, looking to the employer's operation as a whole, the Board assesses whether a proposed unit is sufficiently broad to avoid excessive fragmentation of the collective bargaining framework. A proliferation of bargaining units is not normally conducive to collective bargaining stability. Not only may it place significant strains on an employer who would be required to bargain with each group, but it may also hamper the employees' ability to bargain effectively with the employer. Under the umbrella of these two guiding principles, the Board seeks to give effect to an equally important concern: the freedom of association guaranteed to employees in section 3 of the [Ontario] Act.*
>
> *There is a range of factors, some of which were put forward for consideration at this hearing, which may affect the balance of these policy goals in any particular case; some of these were listed in the decision of the Board in Health Sciences Association v. South Saskatchewan Hospital Centre [1987] Apr. Sask. Labour Rep. 48, LRB File Nos. 421-85 & 422-85]. Counsel for the applicant Union suggested that the wishes of the employees to be represented by a particular bargaining agent must be given a high priority in this regard, and pointed as well to the community of interest of this cohesive group of employees.*

> *These factors are clearly important, and the Board must take seriously any indication of strong attachments of employees, to each other and to a particular bargaining agent. These factors are not determinative, however. Counsel for the applicant Union reminded us that the Board should be prepared to certify a unit which does not satisfy all requirements which the ideal bargaining unit might meet; as a general proposition, this is quite accurate. A situation in which the Board is asked to choose between two differently-constituted bargaining units is distinguishable, however, from a situation in which some less than ideal bargaining unit is contrasted with no collective bargaining at all.*
>
> *Where the choice is available, the Board will attempt to decide which is the more appropriate, if not most appropriate, bargaining unit. A case cited by counsel for the applicant Union, the South Saskatchewan Hospital Centre decision, supra, suggested that where such a choice is presented, the Board will choose the unit "most appropriate for the promotion of long-term industrial stability."*

Another example of the Board refusing to certify an under-inclusive bargaining unit is found in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Centre of the Arts*, [1995] 4th Quarter Sask. Labour Rep. 52, LRB File No. 175-95. In that case, the union applied to represent employees in four of seven departments of the employer's operations. The Board distinguished the factual situation in the *Centre of the Arts* case, *supra*, from the one dealt with previously in *The Regina Exhibition Association Ltd.* case, *supra*, as follows, at 59-60:

> *In our view, the situation of this Employer differs significantly from that of the Regina Exhibition Association Limited. Though there are large numbers of casual employees involved in both cases, the bargaining units proposed in the Regina Exhibition cases were based on small and distinct groupings of employees. Here, though the seven departments have been designated to serve particular administrative and accounting purposes, it is difficult to draw a line between them in terms of the workforce. There is little to differentiate the employees in different departments in terms of their skills or experience, and there is considerable and growing cross-over of employees from one department to another. Though it was possible to draw a rational boundary around the wheelers and dealers at the casino or the employees in the concessions in the Exhibition cases, it is more difficult to draw a line through the pool of employees in this case in any way which can be defended.*
>
> ...
>
> *In this case, we have concluded that any line drawn on the basis proposed by the Union would be essentially arbitrary. Though the departmental divisions have been made for certain purposes, the employees in the seven departments really constitute a pool of casual labour which is used without strict regard to these divisions. The inclusion of some of the departments and the exclusions of others could only, in our opinion, have a negative effect on the employees in terms of their ability to obtain more hours by working across departments, and create anomalies in terms and conditions as*

> *the cumulative impact of distinctions between those represented by the Union and those without representation began to make itself felt.*

In *Saskatchewan Government Employees' Union v. Gabriel Dumont Institute of Native Studies and Applied Research Inc.*, [1989] Winter Sask. Labour Rep. 68, LRB File No. 118-89, the Board declined to find a bargaining unit comprising employees of one division of the Institute as an appropriate bargaining unit. The Board intimated that there was insufficient evidence related to any difficulties in organizing on a broader basis within the Institute, at 71:

> *There was no evidence that a larger unit is beyond the organizational reach of the union, nor is there any other discernable labour relations reason that would compensate for the difficulties, actual and potential, for employees and employer alike, that the proposed unit would create.*

From this review of cases, it would appear to the Board that under-inclusive bargaining units will not be considered to be appropriate in the following circumstances: (1) there is no discrete skill or other boundary surrounding the unit that easily separates it from other employees; (2) there is intermingling between the proposed unit and other employees; (3) there is a lack of bargaining strength in the proposed unit; (4) there is a realistic ability on the part of the Union to organize a more inclusive unit; or (5) there exists a more inclusive choice of bargaining units.

Overall, the Board is satisfied in this application that the press room employees are a sufficiently skilled and discrete craft group to justify their separate certification. There is no evidence that the press room employees are regularly interchanged with employees in other departments. They obviously have a sufficient ability to bring the work of the newspaper to a halt and possess sufficient bargaining power to render them a viable collective bargaining unit. In addition, there is recent history establishing the difficulty of organizing on a more inclusive basis and a past history of lack of success in organizing in this sector in Saskatchewan. Finally, there is no existing bargaining unit that would be more suitable for the employees in question. For these reasons, and the reasons stated above, although the unit proposed is not the most appropriate bargaining unit, the Board is convinced that the proposed unit is, nevertheless, appropriate for collective bargaining.

This finding does signal that the Board is placing more emphasis in this instance on the rights of the employees in the press room to be represented by a union of their own choosing than we are with the long-term stability of the bargaining relationship. There is no doubt that the history of organizing in this industry throughout Canada has produced a fragmented maze of craft and industrial units resulting in jurisdictional disputes and prolonged labour disputes. The Employer's concern for the long term consequences of fragmented bargaining is justified in the overall context of what has occurred in the industry in other provinces.

In Saskatchewan, however, the industry has not been plagued by any problems related to multiple bargaining units because it has remained, by and large, unorganized. At this stage, we believe we are justified in permitting GCIU to certify on an under-inclusive basis in order to ensure that the right of employees to organize is given the primacy it is entitled to under s. 3 of the *Act*. At some point in the future, it may be necessary for the Board to rationalize bargaining units in this sector; however, as stated in *The Regina Exhibition Ltd.* case, *supra* at 45, "it would make little sense for the Board to require optimum long term bargaining structures if the immediate effect is to completely prevent the organization of employees."

Finally, we wish to make brief reference to the argument raised by the Employer suggesting that the certification of GCIU would automatically determine representation for other employees at the Employer. Counsel for the Employer referred to the Board's recent decisions involving middle management bargaining units where the Board has adopted a strict process for determining if a position falls within an "all employee" bargaining unit or a middle management bargaining unit. The Board has indicated that the test will be restricted to a labour relations purpose test that focuses on the labour relations conflicts that may arise if a position is placed in the "all employee" unit. In these cases, the Board was concerned that unions and employers be provided with clear guidelines for delineating between the two bargaining units where an interface of the two groups is impossible to avoid.

These cases, however, do not establish the principle that the first union to organize in a workplace is the preferred agent for all other employees. If an under-inclusive bargaining unit is sought, such as in the present case, there is no presumption that other bargaining agents will be prevented from organizing the remaining employees.

However, the situation will be different where the first union to organize in a workplace seeks an "all employee" bargaining unit, such as occurred in the *YWCA* case, *supra*. The second bargaining agent will be required to meet the tests set out in the middle management cases, if it applies for that group, or it will need to justify a carve out from the inclusive bargaining unit in a manner that is convincing to the Board.

We would add that we use the term "under-inclusive" as a method of describing a bargaining unit that includes only a portion of the employees of an employer in order to distinguish it from an "all employee" bargaining unit. The term is not intended to reflect on the appropriateness of the bargaining unit, but only to describe such units.

As GCIU filed sufficient evidence of support with its application, an Order will issue certifying GCIU as the bargaining agent for employees in the proposed bargaining unit.

Mr. Carr dissents from these Reasons and his written dissent will follow shortly.

DISSENT

Michael Carr, Board Member: I do not concur with the majority decision in the above noted matter.

I am in agreement with the oft stated policy of the Board which on the question of certification has expressed a desire for larger bargaining units over smaller bargaining units and which developed the test of appropriateness as being the viability of the bargaining unit created. I am also in agreement with the "factors" to determine "appropriateness" as cited in *R.W.D.S.U. v. O.K. Economy Stores Ltd.*, [1990] Fall Sask. Labour Rep. 64, LRB File No. 264-89. Craft units, outside of those which exist in the construction industry, are an anachronism in a modern competitive industrialized economy. The trend nationally is towards the amalgamation of bargaining units to achieve economies of scale, size, strength and stability in collective bargaining relationships within highly competitive industries.

In my view the certification of a unit representing 22 employees out of 370 employees, 240 of who are full-time, does not serve a useful labour relations purpose. While s. 5 of the *Act* suggests that an appropriate bargaining unit may be something less than all employees, it must certainly be more than a narrowly defined group of employees who happen to work in the Printing Department. Certifying a craft unit which is a subset or tag end representing less than six percent of the employees at a workplace is simply not sound from a labour relations perspective. Indeed it may well be a recipe for disaster. I am concerned that the result will inevitably be a difficult and fragmented collective bargaining process.

This decision rewards what appears to be the insufficient organizing efforts of the GCIU. It is dangerous in that it discounts the importance of placing the parties in a stable negotiating environment for the purpose of reaching a first collective agreement from which a long term relationship may emerge. From a practical perspective certifying 22 employees in the Press Department and empowering them to withdraw their services in the pursuit of collective bargaining goals, regardless of how legitimate those goals may be, exposes the majority of employees to the tyranny of a small minority. This offends the principles of workplace democracy and jeopardizes not

only the viability of the bargaining relationship but perhaps more importantly the viability of the business enterprise.

It is clear from the cases cited by the parties in this case that the Board has favoured all-employee units as preferred bargaining units in the issuance of certification orders. The certification of an under-inclusive bargaining unit would only be appropriate in the rarest of circumstances. The majority Reasons for Decision set out at [1998] Sask. L.R.B.R. 780, five circumstances in which "under-inclusive" bargaining units would not be considered to be appropriate: (1) there is no discrete skill or other boundary surrounding the unit that easily separates it from other employees; (2) there is intermingling between the proposed unit and other employees; (3) there is a lack of bargaining strength in the proposed unit; (4) there is a realistic ability on the part of the Union to organize a more inclusive unit; or (5) there exists a more inclusive choice of bargaining units.

While I agree with this analysis, I do not agree with the conclusions reached. On the evidence, I cannot distinguish between the community of interest which may exist in the Press Department at the Leader Post and the community of interest which may exist in the Pre-press Department or the Circulation Department or the Distribution Department or the Systems and Building Maintenance Department. There was no evidence before the Board that employees in the Press Department possess a unique skill set or set of collective bargaining objectives that distinguish them from their colleagues working in other departments at the Regina Leader Post. Indeed on the evidence before us, I cannot identify a distinct community of interest other than the community of interest which all employees of the Employer share, that is unless it can legitimately be argued that signing a joining card seeking membership in the GCIU constitutes a community of interest! The operation of the Regina Leader Post is housed under one roof, at a single geographic location, at which all employees of the Employer work, therefore a discrete boundary does not exist which sets employees in the Press Department apart from the employees in any other department.

There is evidence before us which suggests that intermingling between Distribution Department employees and Press Department employees occurs on occasion. The parties agreed that two Circulation Department employees, Kristine Jackson and Shana Stinson who were transferred into the Press Department at the time of the application should be included in the statement of employment. There is also the evidence of Duncan Brown, GCIU Organizing Co-ordinator, who

stated that people within the Press Department move to other job functions outside the Press Department "occasionally but not routinely."

Mr. Brown provided evidence regarding the impact of new technology upon the newspaper industry and in particular cited remote printing capabilities which are now in use. This capability contrasted with a small bargaining unit representing only employees in the Press Department does not constitute bargaining power or strength. Indeed it is difficult to imagine under what circumstances a small bargaining unit would wield any power to press its interests at a bargaining table since the price of a strike which stops the presses in Regina would likely result in the printing of the paper elsewhere and potentially the closure of the Press Department at the Regina Leader Post.

Mr. Brown also provided evidence as to the declining state of the newspaper industry in Canada. He provided useful testimony as to the number of mergers the GCIU has been involved in as the industry has adapted to market pressures. He provided compelling testimony of GCIU efforts to restructure and organize up to the "firewall" in various newspapers in Canada. The examples provided where the GCIU have organized all blue collar workers up to the "firewall" and the Canadian Newspaper Guild (CNG) have organized the white collar employees on the other side of the "firewall" are illustrative and lend credence to the proposition that the GCIU is capable of organizing and representing a more inclusive bargaining unit.

The Board's records indicate that unions have enjoyed some success in organizing craft unions of the Leader Post in the past. The fact that a sustained bargaining relationship has not endured should provide ample cause for caution by this Board. The challenge and indeed the duty we face is to ensure that any appropriate unit which we certify can develop a stable enduring bargaining relationship.

It is clear on the evidence that a more inclusive choice of bargaining units exists; namely all production related or blue collar employees employed in the production of the Leader Post Newspaper including all maintenance employees. The smallest appropriate unit for the purposes of collective bargaining in this case then would be all employees working on the production side of the "firewall" described by Mr. Brown.

The majority decision essentially grants the GCIU a beachhead from which to continue its organizing campaign. This ultimately will not serve the long term interests of the 22 individuals involved, nor will it serve the interests of the GCIU. It may well establish a precedent which will see an influx of hasty ill-advised certification applications and promote lazy organizing efforts. I fear it will do nothing to advance labour relations at the Leader Post or our system of collective bargaining in Saskatchewan.

For the reasons stated above I dissent from the decision of the majority of the Board in this matter.

DATED at Regina, Saskatchewan this **20th** day of **January, 1999.**